

## **OF ALIENS, MONEY AND POLITICS: SHOULD FOREIGN POLITICAL DONATIONS BE BANNED?**

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### **I. A COMPELLING CASE FOR BANNING FOREIGN POLITICAL DONATIONS?**

There is significant public disquiet, hostility even, towards foreign political donations. This is evident from some recent controversies, to name but a few, which occurred in 2016. In Canada, Prime Minister Justin Trudeau was criticized for providing ‘cash for access’ to wealthy Canadian-Chinese business communities said to have links to the Chinese Communist Party.<sup>1</sup> The 2016 American Presidential Election saw both sides caught up in controversies involving foreign donations with allegations that the Republican Trump campaign may have acted illegally by soliciting donations from politicians in Australia, Scotland and Iceland, among others,<sup>2</sup> and criticism of Democrat candidate, Hilary Clinton, for foreign donations that were received by the Clinton Foundation.<sup>3</sup> And in Australia, a prominent Australian Labor Party politician, Senator Sam Dastyari, resigned from the Opposition frontbench after it was revealed that he supported China’s position in the South China Sea dispute, in contradiction with his party’s policy, at an event involving an Australian-Chinese donor who had paid his legal bills.<sup>4</sup>

Alongside public disquiet towards foreign political donations is a growing consensus in favour of banning foreign political donations amongst governmental bodies. The OECD has called for contributions from ‘foreign interest’ to be banned.<sup>5</sup> The recommendation of the Committee of Ministers of the Council of Europe on

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<sup>1</sup> Robert Fife and Steven Chase, ‘Influential Chinese-Canadians paying to attend private fundraisers with Trudeau’ *The Globe and Mail* (Ottawa, 2 December 2016) <[www.theglobeandmail.com/news/politics/influential-chinese-canadians-paying-to-attend-private-fundraisers-with-trudeau/article33131597/](http://www.theglobeandmail.com/news/politics/influential-chinese-canadians-paying-to-attend-private-fundraisers-with-trudeau/article33131597/)>; Robert Fife and Steven Chase, ‘Trudeau attended cash-for-access fundraiser with Chinese billionaires’ *The Globe and Mail* (Ottawa, 22 November 2016) <[www.theglobeandmail.com/news/politics/trudeau-attended-cash-for-access-fundraiser-with-chinese-billionaires/article32971362/](http://www.theglobeandmail.com/news/politics/trudeau-attended-cash-for-access-fundraiser-with-chinese-billionaires/article32971362/)>.

<sup>2</sup> Lauren Gambino, ‘Trump campaign may have broken law by seeking foreign political donations’ *The Guardian* (30 June 2016) <<https://www.theguardian.com/us-news/2016/jun/29/trump-campaign-donations-foreign-politicians>>.

<sup>3</sup> Amy Chozick, ‘If Hilary Clinton Wins, Foundation will stop accepting foreign donations’ *New York Times* (18 August 2016).

<sup>4</sup> Fergus Hunter, ‘Sam Dastyari contradicted Labor policy, backed China’s position in sea dispute at event with donor’ *Sydney Morning Herald* (1 September 2016) <<http://www.smh.com.au/federal-politics/political-news/sam-dastyari-contradicted-labor-policy-backed-chinas-position-in-sea-dispute-at-event-with-donor-20160831-gr60hv.html>>.

<sup>5</sup> OECD, *Financing Democracy: Framework for supporting better policies and averting policy capture* (2014) 8; OECD, *Funding of Political Parties and Election Campaigns and the Risk of Policy Capture* (2016) 30.

*Common rules against corruption in the funding of political parties and electoral campaigns* stipulates that 'States should specifically limit, prohibit or otherwise regulate donations from foreign donors'.<sup>6</sup> The European Commission for Democracy Through Law (also known as the Venice Commission) has issued guidelines stating that '(c)ontributions from foreign States or enterprises must be prohibited'.<sup>7</sup> The *New Delhi Declaration 2015 on Political Finance Regulation in South Asia* provides that '(d)onations should not be allowed from foreign citizens and foreign entities'.<sup>8</sup> And the Global Commission on Elections, Democracy and Security considers it good practice to ban 'foreign donations'.<sup>9</sup>

Such an emerging consensus seems consistent with international practice. According to the global database on political finance laws compiled by International IDEA, 63% of countries ban political contributions from 'foreign interest' to political parties, while 49% ban such contributions to candidates.<sup>10</sup> The proportion increases with OECD countries, with 68% and 56% of these countries banning political contributions from 'foreign interest' respectively in relation to political parties and candidates.<sup>11</sup> Even the United States with its libertarian First Amendment jurisprudence has a ban on 'foreign' political contributions.<sup>12</sup>

All this seems to amount to a compelling case to ban foreign political donations.

This article argues otherwise, cautioning against efforts to ban foreign political donations. It, firstly, draws out the ambiguity concerning the meaning of 'foreign' and, consequently, the reasons for such a ban. In the section that follows, it draws out how the various meanings of 'foreign' in this context point to three different rationales for banning 'foreign' political donations - the broadest and most significant of which is that 'foreigners' are not members of the nation's political community, and therefore are not entitled to influence its political process, including through political donations.

The article proceeds to cast doubt on this rationale by providing a critique of its two key premises:

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<sup>6</sup> Council of Europe, Recommendation Rec (2003) 4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns, art 7.

<sup>7</sup> CDL-INF(2001)008 – *Guidelines and Report on the Financing of Political Parties adopted by the Venice Commission at its 46<sup>th</sup> Plenary Meeting* (Venice, 9-10 March 2001) para 10.

<sup>8</sup> *New Delhi 2015 Declaration on Political Finance Regulation in South Asia*, para B2.iii <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=133512>>.

<sup>9</sup> Global Commission on Elections, Democracy and Security, *Deepening Democracy: A Strategy for Improving the Integrity of Elections Worldwide* (2012) 36.

<sup>10</sup> Figures from <<http://www.oldsite.idea.int/political-finance/index.cfm>>.

<sup>11</sup> OECD, *Financing Democracy* (n 5) 17.

<sup>12</sup> *Bluman v. Federal Election Com'n*, 132 S.Ct. 1097 (Mem, 2012).

- 1) Members of the (national) political community do not include ‘foreigners’, such as those who are not citizens or permanent residents and those without an entitlement to vote;
- 2) Only members of the (national) political community should be able to influence the domestic political process.

Against premise 1), I argue that non-citizenship and the inability to vote are not sufficient grounds for exclusion from the political community. Against premise 2), I point to other bases for residents of a country being able to legitimately influence its political process (even when not members of its political community): human rights, in particular the rights of political expression and association, and being subject to the laws of the country. I also argue that the ‘foreignness’ of corporate political donations does not pose any additional danger to democracy unless the corporation is an agent for a foreign government.

The article concludes that there is just cause for banning political donations from foreign governments and those being sourced from overseas, but any further measures in relation to ‘foreign’ political donations should be approached cautiously. Rather than focus on the ‘foreignness’ of the political donations, the article concludes that the underlying risks stem more from the ‘corporateness’ of these donations, pointing to general measures to deal with large political donations rather than specific regulation of ‘foreign’ political donations.

## II. WHAT EXACTLY IS ‘FOREIGN’ ABOUT FOREIGN POLITICAL DONATIONS?

The main justification for such a ban is, as International IDEA puts it – the principle of self-determination.<sup>13</sup> An Australian parliamentary inquiry which recommended a ban on ‘foreign’ political donations has similarly rested its decision on the ‘the principle of national sovereignty, that is, only Australians should have the power to influence Australian politics and elections’.<sup>14</sup> The OECD has also said that ‘(p)olitical parties and candidates need to be responsive to their constituents and not influenced by

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<sup>13</sup> International IDEA, *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance* (2014) 21. See also Ingrid van Biezen, *Financing political parties and election campaigns – guidelines* (2003) 27.

<sup>14</sup> Joint Standing Committee on Electoral Matters, Parliament of the Commonwealth of Australia, *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations* (2017) ix. See also *ibid* 19.

foreign interests’<sup>15</sup> – ‘(t)oo much foreign interference in elections is a danger to a country’s sovereignty’.<sup>16</sup>

This justification implicitly counter-poses the ‘domestic’ constituents with the ‘foreigners’, the ‘self’ with ‘other’. It raises the question: what exactly is ‘foreign’ about foreign political donations? It is of singular note that all but one of the international standards recommending a ban on ‘foreign’ political donations provides a definition of ‘foreign’.<sup>17</sup> In fact, the current bans on ‘foreign’ political donations are based on different meanings of ‘foreign’ – meanings that point to three different rationales for restricting such donations.

There are, firstly, political donations that are considered ‘foreign’ because of their geographical source. An example are the provisions in the Australian State of Queensland which bans ‘gifts of foreign property’; that is gifts from property outside of Australia.<sup>18</sup> This approach – based on geographical source - is also reflected in the recommendation of the Parliamentary Assembly of the Council of Europe on *Financing of Political Parties*, which calls for ‘a ban on donations from companies domiciliated in offshore centres’.<sup>19</sup>

The principal reason for restricting foreign-sourced donations relates to compliance: enforcing domestic laws overseas is extremely difficult, if impossible, in most situations. The concern then is that foreign-sourced donations will easily act as an avenue for evading political finance regulation with domestically-sourced donations being transferred outside the country and then transferred back in again, with the actual identity of donors concealed through this process of laundering. Insofar as foreign-sourced donations threaten self-determination and sovereignty in this way, it does so only in the limited sense of undermining the efficacy of political finance laws.

A more potent threat to self-determination and sovereignty, however, emerges from the other two rationales for banning ‘foreign’ political donations. In both cases, political donations are ‘foreign’ because of the status of the donor. The narrower rationale understands ‘foreign’ to specifically mean foreign governments. It is these governments that are the principal target of the US Foreign Agent Registration Act, which has since 1938 imposed disclosure requirements on agents of ‘foreign

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<sup>15</sup> OECD, *Financing Democracy: Funding of Political Parties and the Risk of Policy Capture* (2016) 50.

<sup>16</sup> *ibid.*

<sup>17</sup> The one exception is the Council of Europe Parliamentary Assembly, *Financing of political parties: Recommendation 1516* (2001) para 8)a)v)b).

<sup>18</sup> Electoral Act 1992 (Qld) ss 267-270.

<sup>19</sup> Council of Europe Parliamentary Assembly, *Financing of political parties: Recommendation 1516* (2001) para 8)a)v)b)

principals', including 'a government of a foreign country'.<sup>20</sup> The aim of such regulation was to prevent the efforts of foreign government 'to influence the external and internal policies of (the United States), thereby violating both the letter and spirit of international law, as well as the democratic basis of . . . American institutions of government'.<sup>21</sup>

There is, however, a broader rationale to banning 'foreign' political contributions, grounded in understandings of political community. Such a rationale is found in the Neill Committee report on *The Funding of Political Parties in the United Kingdom*, where the Committee laid down the principle that:

those who live, work and carry on business in the United Kingdom should be the persons exclusively entitled to support financially the operation of the political process here.<sup>22</sup>

A similar principle has been articulated by the Canadian Royal Commission on Electoral Reform and Party Financing:

Participation in Canadian elections should be restricted to people and organizations that have a legitimate interest and stake in the future of the country.<sup>23</sup>

In terms of translating this rationale into restrictions on 'foreign' political donations, some countries such as Canada and the United Kingdom identify who is permitted to donate (by implication, prohibiting donations from those not so identified) whereas others like New Zealand and the United States identify those prohibited from donations. Three criteria in particular are used in terms of these restrictions: migrant status; the legal right to vote; and business connection.

An example of a ban on 'foreign' political contributions based on migrant status is section 363 of the Canada Elections Act, which only allows Canadian citizens and permanent residents to make contributions to registered political parties, registered associations, nomination contestants, candidates and leadership candidates. Implicit in this ban is an understanding of the (Canadian) political community that is restricted to its citizens and permanent residents.

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<sup>20</sup> 22 USC § 611.

<sup>21</sup> H. R. Rep. No 75-1381, at 1-3 (1937).

<sup>22</sup> Committee on Standards in Public Life (Chairman: Lord Neill of Bladen, QC), *The Funding of Political Parties in the United Kingdom: Volume 1: Report* (Fifth Report of the Committee on Standards in Public Life, 1998) [5.16].

<sup>23</sup> Royal Commission on Electoral Reform and Party Financing (chair: Pierre Lortie), *Reforming Electoral Democracy: Volume 1: Final Report* (1991) 451.

Voter-based understandings of political community, on the other hand, are reflected in bans based on the legal right to vote. A 'pure' example is the ban enacted in the Australian State of New South Wales, which restricted the ability to donate to those on the electoral rolls.<sup>24</sup> The justification for this ban was put in the following terms by the New South Wales Premier, Barry O'Farrell:

the only way that you can ensure that the public is going to have confidence about our electoral system is to limit [donations] to the individuals who are on the electoral roll. It must be limited to those Australian citizens who are enrolled, not overseas citizens and non-residents, because of course those people do not get the vote. They do not have a stake in the system and they should not be able to influence the system – nor should unions, third party interest groups and corporations . . .<sup>25</sup>

Similar sentiments were expressed by US Senator Lloyd Bentsen, the architect of the US ban on 'foreign' political donations. When introducing the relevant amendments, the Senator said:

(foreign nationals) cannot vote in our elections so why should we allow them to finance our elections? Their loyalties lie elsewhere; they lie with their own countries and their own governments.<sup>26</sup>

Restricting 'foreign' political donations based on migrant status and the legal right to vote would invariably exclude legal entities as these artificial persons cannot possess migrant status and do not (tend) to have the right to vote.<sup>27</sup> Therein lies the importance of the third criteria based on business connection with a number of bans on 'foreign' political donations adopting a combination of criteria including that based on business connection.

The American ban turns on geographical source, migrant status and business connection. Its ban on political contributions from 'foreign nationals' extends to: foreign governments, foreign political parties, persons outside the United States and *legal entities whose principal place of business is other than the United States* with

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<sup>24</sup> Repealed section 96D of the Election Funding, Expenditure and Disclosures Act 1981 (NSW).

<sup>25</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011, 5432 (Barry O'Farrell, Premier).

<sup>26</sup> 120 Cong. Rec. 8783 (1974).

<sup>27</sup> An exception in the Australian context concerns local government franchise, see Yee Fui Ng et al, 'Democratic representation and the property franchise in Australian local government' (2016) *Australian Journal of Public Administration* 1.

exceptions for citizens and permanent residents of the United States.<sup>28</sup> A similar approach is taken in relation to the Canadian ban on 'foreign' political contributions to third parties for election advertising purposes.<sup>29</sup>

The UK ban, on the other hand, is based on the legal right to vote and business connection, albeit understood differently. 'Permissible donors' under the Political Parties, Elections and Referendum Act 2000 (UK) are individuals registered in an electoral register and legal entities that are *either registered under the relevant UK statute and/or carry on business in the United Kingdom*.<sup>30</sup> Crossing to the Southern Hemisphere, New Zealand electoral laws restrict political donations from 'overseas persons' to NZ\$1500 per annum. This restriction turns on: geographical source, migrant status, legal right to vote and business connection with 'overseas person' defined by section 207K(1) of *Electoral Act 1993* (NZ) as:

- (a) an individual who—
  - (i) resides outside New Zealand; and
  - (ii) is not a New Zealand citizen or registered as an elector; or
- (b) a body corporate incorporated outside New Zealand; or
- (c) an unincorporated body that has its head office or principal place of business outside New Zealand.<sup>31</sup>

To sum up, different meanings of 'foreign' political donations point to different rationales for banning such donations. When 'foreign' political donations are understood as foreign-sourced, the concern is with evasion of political finance laws; when referring specifically to foreign governments, the aim of such bans is to prevent undue influence of domestic politics by such governments; when 'foreigners' are more broadly understood to mean those not members of the (national) political community, the goal seems to be to prevent any political influence by 'foreigners'.

The first two rationales are compelling. With the first, it is clear that securing compliance with political finance laws is a major challenge for regulating money in politics.<sup>32</sup> Careful design of the laws is essential to meeting this challenge, in particular, ensuring that there are as few as possible avenues for laundering political funds. Allowing foreign-sourced political donations when there is no practical ability to ensure that these donations comply with political finance regulation clearly provides such an avenue.

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<sup>28</sup> 52 USC § 30121.

<sup>29</sup> Canada Elections Act (SC 2000, c 9) s 358.

<sup>30</sup> Political Parties, Elections and Referendum Act 2000 (UK).

<sup>31</sup> See Andrew Geddis, *Electoral Law in New Zealand: Practice and Policy* (LexisNexis 2014) 159-163.

<sup>32</sup> International IDEA (n13) 4.

As to the second rationale, which directs ban on ‘foreign’ political donations to foreign governments, the underlying principle seems to be that nation-states are – should be – oriented towards the distinct interests of their own political communities. Crucial to this orientation towards the ‘national interest’ are the processes of forming government, specifically elections. The essential point here is that respect for national sovereignty and self-determination by nation-states implies non-interference in their electoral processes. The point is not that foreign governments should have no influence over domestic political processes, they clearly do in foreign relations. Such influence, however, occurs in the context of interactions *between governments* – and after governments are formed.

The risk of interference by foreign governments in electoral processes of other countries is not merely theoretical with American intelligence agencies concluding that the Russian government was behind the hacking of the email server of the Democratic Party,<sup>33</sup> and the Federal Bureau of Investigation currently examining whether there was collusion between the Russian government and the Trump campaign team on this count.<sup>34</sup> It is the fear of such interference that also seems to underlie the controversies concerning Chinese political donations, in particular, the focus on the relationships between the donors and the Chinese Communist Party.<sup>35</sup> But of course, the Russian and Chinese governments are not the only governments said to have sought to influence the electoral processes of other countries. During the Cold War, both the Soviet Union and the United States were reported to have also undertaken such efforts.<sup>36</sup>

While the first two rationales have compelling force, the last rationale is much more problematic. Two normative premises would seem to underpin this rationale:

- 1) Members of the (national) political community do not include ‘foreigners’ (non-citizens, non-voters, individuals who are not permanent residents and entities without a sufficient business connection); and

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<sup>33</sup> ‘U.S. Intelligence Report Identified Russians Who Gave DNC Emails to Wikileaks’ *Time* (6 January 2017) <<http://time.com/4625301/cia-russia-wikileaks-dnc-hacking/>>.

<sup>34</sup> David S. Cloud, ‘FBI director confirms investigation of possible collusion between Trump campaign and Russia’ *Los Angeles Times* (Washington, 20 March 2017) <<http://www.latimes.com/politics/washington/la-na-comey-testimony-htmstory.html>>

<sup>35</sup> Note also allegations of cyber-attacks by Chinese and Russian governments in relation to Brexit referendum: Public Administration and Constitutional Affairs Committee, *Lessons learned from the EU Referendum* (2016-2017, HC 496).

<sup>36</sup> See Ingrid van Biezen, *Financing political parties and election campaigns – guidelines* (Council of Europe Publishing 2003) 27.

- 2) Only members of the (national) political community should be able to influence the domestic political process, including through political contributions.

From these premises then follows the conclusion that ‘foreigners’ should not be able to make political donations. Both premises – it will be argued below – are doubtful.

### III. THE QUESTION OF MEMBERSHIP

An argument in support for the proposition that members of the (national) political community do not include ‘foreigners’ may be that each State has the power to constitute its own political community. Philosopher Michael Walzer, for instance, has argued for such a power – that ‘members of a political community have a collective right to shape the resident population’.<sup>37</sup>

Further support might be drawn here from the judgment of the United States District Court in *Bluman v Federal Election Commission*, which upheld the validity of the United States ban on ‘foreign’ political donations,<sup>38</sup> a judgment affirmed by the United States Supreme Court (without a statement of reasons).<sup>39</sup> The key principle of District Court’s judgment is as follows:

It 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. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.<sup>40</sup>

The ban on ‘foreign’ donations was then upheld after finding that campaign activities (including campaign funding) are ‘part of the overall process of democratic self-government’.<sup>41</sup>

The difficulty with relying upon the power of a nation-state to constitute its own political community for the proposition that members of the (national) political community do not include ‘foreigners’, is that the existence of a (constitutional) power does not translate to the desirability of its exercise. Put differently,

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<sup>37</sup> Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983) 52.

<sup>38</sup> *Bluman v Federal Election Commission* 800 F.Supp.2d 281 (D.D.C., 2011).

<sup>39</sup> *Bluman v Federal Election Commission* 132 S.Ct. 1087 (Mem, 2012).

<sup>40</sup> *Bluman v Federal Election Commission* 800 F.Supp.2d 281, 288 (D.D.C., 2011).

<sup>41</sup> *ibid.*

constitutional propriety does not equal moral legitimacy. So much seems to have been acknowledged in the treatment of the District Court of the exception in relation to permanent residents from the ban. Whilst its key principle clearly provided for the exclusion of permanent residents (who are not citizens) from the activities of self-government, it rejected the submission that the exception in relation to these individuals made the ban under-inclusive. According to the District Court, '(l)awful permanent residents have a long-term stake in flourishing of American society'.<sup>42</sup> Therefore, 'Congress may reasonably conclude that lawful permanent residents of the United States stand in a different relationship to the American political community than other foreign citizens do'.<sup>43</sup>

Put differently, allowing US permanent residents to make political donations reflects the understanding of Congress as to the meaning of the American political community. This shows how a power to constitute the membership of a political community is at the very least constrained by understandings as to political membership and community internal to the community itself. Even Walzer has conceded that the collective right of a political community to shape its resident population is subject to the 'control' of 'the meaning of membership to current members'.<sup>44</sup>

A question still remains: is non-citizenship a sufficient basis for exclusion from the political process? The District Court in *Bluman* is clearly not alone in emphasizing citizenship as the basis of membership of political community. The Australian High Court has similarly advanced a citizenship-based understanding of political community in key decisions dealing with the franchise.<sup>45</sup> Three judges in *Roach v Australian Electoral Commissioner* said that 'the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic'.<sup>46</sup> Chief Justice Gleeson in that same judgment said that:

the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.<sup>47</sup>

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<sup>42</sup> *ibid* 291.

<sup>43</sup> *ibid* 290-291.

<sup>44</sup> Walzer (n 37) 52.

<sup>45</sup> See *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174-175 (Gleeson CJ), 199 (Gummow, Kirby and Crennan JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 20 (French CJ), 49 (Gummow and Bell JJ), 126-127 (Kiefel J); *Murphy v Electoral Commissioner* [2016] HCA 36 [206] (Keane J).

<sup>46</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199 (Gummow, Kirby and Crennan JJ).

<sup>47</sup> *ibid* 174 (Gleeson CJ).

The Chief Justice went on to state that '(c)itizenship, itself, could be a basis for discriminating between those who will and those who will not be permitted to vote'.<sup>48</sup>

These statements might also be seen as consistent with Article 25 of the International Covenant on Civil and Political Rights, which provides that:

Every *citizen* shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country. (emphasis added).

Article 25 and the dicta of the Australian High Court speak to an important moral truth – citizenship is a compelling basis for inclusion into the political community. They, however, have much less force in characterizing non-citizenship as a necessary basis for exclusion from the political community. It is fallacious to treat the *inclusionary* and *exclusionary* effects of citizenship as symmetrical. Notably, Article 25 guarantees particular political rights to citizens, but it does not deny these rights to non-citizens. As the UN Human Rights Committee has recognized in its General Comment on Article 25, permanent residents may very compatibly with that provision be provided political rights.<sup>49</sup> Indeed, Article 21(3) of the Universal Declaration of Human Rights points to an understanding of political community broader than ones based on citizenship. It provides that:

The will of *the people* shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. (emphasis added).

That 'the people' extends beyond citizens is illustrated by the Australian Constitution. According to the Australian Constitution, the number of seats in the lower house, the House of Representatives, is to be determined according to 'the

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<sup>48</sup> *ibid* 174-175 (Gleeson CJ).

<sup>49</sup> Human Rights Committee, *General Comment 25(57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510<sup>th</sup> meeting*, UN Doc CCPR/C/21/Rev.1/Add.7 (1996) para 3.

number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth'.<sup>50</sup> The Australian Bureau of Statistics (ABS), in turn, determines the population of Australia by reference to the concept of 'usual residence' based on the 12-month rule (a person is considered to have Australia as its 'usual residence' if s/he has stayed in Australia for at least 12 months or intends to do so).<sup>51</sup>

The key point to be made here is that those considered 'people of the Commonwealth' under this approach extends beyond Australian citizens (or electors). As the ABS puts it, the estimated population based on this method 'refers to all people, *regardless of nationality or citizenship*, who usually live in Australia' and captures 'permanent residents and long-term visitors from overseas (including students)'.<sup>52</sup> The approach adopted by the ABS is, in fact, aligned to the principles stated by the UK Neill Committee and the Canadian Royal Commission on Electoral Reform and Party Financing in terms of persons having a stake in the country being entitled to participate in the political process<sup>53</sup> - those having such a stake are not restricted to citizens.

Whatever the problems with viewing non-citizens necessarily as 'foreign' to the body politic, the difficulties are even more acute with characterizing those without the legal right to vote as 'foreign'. They stem from the breach of the inclusionary aspect of citizenship – that citizenship is a compelling basis for inclusion into the political community. Characterising those without the legal right to vote as 'foreign' will exclude many citizens from the political process.

This will include those eligible to vote but not entitled to vote because they are not on the relevant electoral roll or register. This is illustrated by the UK Supreme Court decision in *R (Electoral Commission) v UKIP*.<sup>54</sup> This case, Alan Bown, the main donor to the United Kingdom Independence Party during the relevant period who inadvertently ceased to be on any electoral register for over a year.<sup>55</sup> As a result,

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<sup>50</sup> *Australian Constitution* s 24.

<sup>51</sup> See B. Pink, *Information Paper: Population Concepts* (Australian Bureau of Statistics, 2008) cat. no. 3107.0.55.006; P. Harper, *Population Estimates: Concepts, Sources and Methods* (Australian Bureau of Statistics, 2009) cat. no. 3228.0.55.001.

<sup>52</sup> Pink (n 51). See also A. Reilly and T. Torresi, 'Voting Rights of Permanent Residents' (2016) 39(1) *University of New South Wales Law Journal* 401.

<sup>53</sup> See text above accompanying nn 22-23.

<sup>54</sup> *R (on the application of the Electoral Commission) (Respondent) v City of Westminster Magistrates Court (Respondent) and The United Kingdom Independence Party (Appellant)* [2010] UKSC 40. For commentary, see Lucy Colter, 'The Supreme Court Considers Donations to Political Parties: *R (Electoral Commission) v UKIP*' (2011) 16(2) *Judicial Review* 163.

<sup>55</sup> *R (on the application of the Electoral Commission) (Respondent) v City of Westminster Magistrates Court (Respondent) and The United Kingdom Independence Party (Appellant)* [2010] UKSC 40 [3].

donations from Bown breached the UK ban on 'foreign' political donations as he was not a 'permissible donor'.<sup>56</sup>

The numbers of citizens considered 'foreign' in this way (eligible but not entitled to vote because not enrolled) are not necessarily trivial. For example, the Australian Electoral Commission estimates that 816 000 eligible Australians are not enrolled - constituting around 5% of enrolled voters - with young people (18-24 years old) representing nearly a third of those eligible but not enrolled.<sup>57</sup>

Other citizens considered 'foreign' under this approach are citizens who have yet to reach the age necessary for eligibility to vote. The New South Wales ban on 'foreign' political donations, which restricted the ability to donate to those on the electoral rolls, for example, prohibited those under the age of 18 years who are members of political parties from paying membership fees (which were deemed to be 'political donations').<sup>58</sup> Citizens who are caught by prisoner disenfranchisement provisions are also treated as 'foreign' under this approach.<sup>59</sup> The statements of Gummow, Kirby and Bell JJ in the Australian High Court decision in *Roach* are worth bearing in mind in this regard:

Prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration.<sup>60</sup>

These examples highlight a deeper difficulty with voter-based understandings of political community as well as those based on citizenship – they treat the existing regimes of voting and citizenship rights as a given. The assumption seems to be that those who ought to be conferred voting and citizenship rights do, in fact, enjoy these rights. This is a highly dubious assumption for the simple reason that existing regimes of voting and citizenship rights often fall short of what is normatively ideal. The case of long-term temporary migrant workers is illustrative. Whilst there are strong grounds for including these workers as members of the political community

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<sup>56</sup> *ibid* [8]. The majority of the Supreme Court, however, concluded that section 58 of the Political Parties, Elections and Referendums Act 2000 (UK) did not mandate automatic forfeiture of the amounts made in breach of the ban: *ibid* [47]-[49], [51] (Lord Phillips with whom Lord Clarke agrees) [99], [103] (Lord Mance), [118] (Lord Kerr); contra [64] (Lord Rodger), [95] (Lord Brown) [72] (Lord Walker). For criticism of the judgment, see *Ending Big Donor Culture*.

<sup>57</sup> Australian Electoral Commission, '2016 federal election Key facts and figures' (11 August 2016) <[http://www.aec.gov.au/Elections/Federal\\_Elections/2016/key-facts.htm](http://www.aec.gov.au/Elections/Federal_Elections/2016/key-facts.htm)>.

<sup>58</sup> Joo-Cheong Tham, *Establishing a Sustainable Framework for Election Funding and Spending Laws in New South Wales* (2012) 136.

<sup>59</sup> Graeme Orr, 'Ballotless and Behind Bars: The Denial of the Franchise to Prisoners' (1998) 26 *Federal Law Review* 55.

<sup>60</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199 (Gummow, Kirby and Crennan JJ).

of their host country<sup>61</sup> and, therefore, conferring upon them – including undocumented workers<sup>62</sup> - both voting and citizenship rights, countries across the world typically do not do so.

#### IV. THE QUESTION OF POLITICAL INFLUENCE

The second normative proposition underlying bans on ‘foreign’ political contributions based on membership of political community stipulates that:

Only members of the (national) political community should be able to influence the domestic political process, including through political contributions.

This proposition makes too much of political membership in terms of the ability to exercise influence over the political process - key aspects of the ability to exercise political influence do *not* depend upon political membership. Freedom of expression and association under the International Covenant of Civil and Political Rights is guaranteed to ‘(e)veryone’ - not just members of the political community, let alone citizens.<sup>63</sup> Specifically, as the General Comment of the UN Human Rights Committee on *The Position of Aliens Under the Covenant* note, aliens (non-citizens) ‘have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them’ and ‘receive the benefit of the right of peaceful assembly and of freedom of association’ in their host countries.<sup>64</sup> This has clear consequences for banning ‘foreign’ political donations as the making and receiving of political contributions will often implicate these freedoms.<sup>65</sup>

And while non-citizens are not guaranteed rights under Article 25 of the Covenant, there is a strong argument that they are entitled to protection under Article 26 against discriminatory laws affecting their ability to participate in the political process, regardless of whether they are considered members of the political community.<sup>66</sup> This article provides that:

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<sup>61</sup> Walzer (above n 37) 60-62.

<sup>62</sup> Joseph Carens, *Immigrants and the Right to Stay* (The MIT Press 2010).

<sup>63</sup> International Covenant on Civil and Political Rights, art 19(2) (freedom of expression); art 22(1) (freedom of association).

<sup>64</sup> Human Rights Commission, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, adopted at 27<sup>th</sup> sess (11 April 1986) para 7.

<sup>65</sup> See Keith Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart Publishing 2007) 38-41; Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (Cambridge University Press 2010) ch 2; Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (UNSW Press 2010) 15-20.

<sup>66</sup> See generally Olivier De Schutter, *International Human Rights Law* (2010) 605-610. See also Stephen Schwebel, ‘The treatment of human rights and of aliens in the International Court of Justice’

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Whilst nationality is not considered 'race',<sup>67</sup> the UN Human Rights Committee has considered it to fall within 'other status'.<sup>68</sup> Whilst Article 26 does not prohibit all differentiation based on nationality, any such differentiation must be based on 'reasonable and objective criteria' to be compatible with the provision.<sup>69</sup> Whilst not definitively resolved,<sup>70</sup> this principle would likely apply even when the subject-matter of Article 25 in relation to political participation is involved – that is, Article 25 does not exclude the application of Article 26. This position would not only treat Article 25 as a floor and not a ceiling, but also fully respect Article 26 as a separate provision.

Aside from situations where human rights are implicated, individuals might be entitled to influence the political process because they are affected by its outcomes. In *Unions NSW v NSW*, a decision of the Australian High Court which struck down the New South Wales ban on 'foreign' political donations, the Court stated that:

Political communication may be undertaken legitimately to influence others to a political viewpoint. It is not simply a two-way affair between electors and government or candidates. *There are many in the community who are not electors but who are governed and are affected by decisions of government*

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in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 2007); Abdulrhim Vijapur, 'The Principle of Non-Discrimination in International Human Rights Law: The Meaning and Scope of the Concept' (1993) *India Quarterly* 70.

<sup>67</sup> See International Convention on the Elimination of All Forms of Racial Discrimination, art 1(2).

<sup>68</sup> *Ibrahim Gueye et al. v. France*, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989) [9.4].

<sup>69</sup> Human Rights Committee, *Broeks v The Netherlands* (Communication 172/1984); *Zwaan-de Vries v the Netherlands* (Communication No. 182/1984) (adopted by the Committee on 9 April 1987); *Ibrahima Gueye et al. v. France*, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989) [9.4]; Human Rights Committee, *Sprenger v The Netherlands* (Communication 395/1990); Human Rights Committee, *Simunek v the Czech Republic* (Communication No. 516/1992) (adopted by the Committee on 19 July 1995) [11.5]; Human Rights Committee, *van Oord v the Netherlands* (Communication No. 658/1995) (adopted by the Committee on 23 July 1997) [9.5]; Human Rights Committee, *Kavanagh v Ireland* (819/1998); Human Rights Committee, *Karakurt v Austria* (Communication No. 965/2000) (adopted by the Committee on 4 April 2002) [8.3].

<sup>70</sup> See argument made at para 8.2 of Human Rights Committee, *Karakurt v Austria* (Communication No. 965/2000) (adopted by the Committee on 4 April 2002).

....

it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy.

The point to be made is that they, as well as electors, may seek to influence the ultimate choice of the people as to who should govern.<sup>71</sup>

Put more generally, it is not just *electoral constituents* who are entitled to participate in the political process, but also *moral constituents* who do not (legitimately) possess the right to vote but are nevertheless affected by the political process<sup>72</sup> - moral constituents are not restricted to members of the political community.

The argument here is that human rights and being subject to the laws of a country provide a legitimate basis for residents of a country to influence its political process, even when they are not members of its political community. To be clear, the argument is not that such non-member residents have a right to political influence equal to those of members – to argue for political equality in this way would hollow out the meaning of political membership. There can rightly be differentiation between members and non-members in terms of their political rights. Such differentiation must, however, respect the right to political influence enjoyed by non-member residents: it cannot proceed on the basis that they have no such right (as many calls for banning ‘foreign’ political donations assume); it should, as required by international human rights law, be based on reasonable and objective criteria; and it should still allow non-member residents a meaningful ability to exercise political influence.

## V. FOREIGN CORPORATE POLITICAL DONATIONS

After the US Supreme Court handed down its decision in *Citizens United*, then United States President Barack Obama in a State of Union address said that:

With all due deference to the separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – *including foreign corporations* – to spend without limit in

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<sup>71</sup> *Unions NSW v NSW* (2013) 252 CLR 530, 551-552 (emphasis added).

<sup>72</sup> For this distinction, see Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press of Harvard University Press 1996) 144-145.

our elections. I don't think American elections should be bankrolled by America's most powerful interests, *or worse, by foreign entities*.<sup>73</sup>

The italicized words clearly show the particular concern with foreign corporate interests.

It is, of course, well accepted that political donations by corporate interests pose democratic risks in terms of corruption and undue influence as well as to political equality.<sup>74</sup> But what additional danger is posed by the fact that these commercial corporations are 'foreign'?

The implicit argument would seem to be analogous to that made in relation to foreign governments – that foreign commercial corporations owe their allegiance to other countries (political communities). But if so, it is difficult to discern the processes that produce such allegiance. Unlike foreign governments, foreign commercial corporations are not subject to the political processes that may yield such an allegiance. Rather, the governing processes are those of the market where the profit motive rules.

Indeed, it is the distinction between the political and market spheres that gives rise to the well-established democratic risks of corporate political donations.<sup>75</sup> This highlights the oddity of presuming that foreign corporate interests will owe their allegiance to their home country: if corporate political money can subvert democracy when coming from domestic sources, why shouldn't this also be the case when foreign commercial corporations are in their own country (when they are domestic corporations)? These difficulties are even more acute if the 'home' country of commercial corporations is determined by the place of incorporation or registration (as is the case in part with the NZ and UK ban on foreign political donations) which might not be the principal place of business.<sup>76</sup>

It might well be, of course, with some commercial corporations that their market interests become strongly aligned with the interests of the nation in which they are based, for example, because its share-holders, workers and consumers are principally based in that country. But this is far less the case in the age of 'flexible

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<sup>73</sup> President Barack Obama, State of the Union Address (27 January 2010) <<http://www.presidency.ucsb.edu/ws/index.php?pid=87433>>.

<sup>74</sup> See Ewing (n 65); Rowbottom (n 65); Tham (n 65); Timothy Kuhner, *Capitalism vs Democracy: Money in Politics and the Free-Market Constitution* (Stanford University Press 2014); Richard Hasen, *Plutocrats United: Campaign Money, the Supreme Court and the Distortion of American Elections* (Yale University Press 2016).

<sup>75</sup> Charles Lindblom, *Politics and Markets: The World's Political Economic Systems* (Basic Books 1977).

<sup>76</sup> See text above nn 30-31.

accumulation' where ownership, labour supply and consumer demand is increasingly globalized.<sup>77</sup> This point applies forcefully to multi-national corporations – and foreign commercial corporations are, by definition, multi-national. As the OECD has noted:

**Globalisation** shifts this debate as well. Many multinational corporations have become part of the economy of hosting countries, creating a large number of local employments. The question of whose money, and thus whose political preferences, should influence a country's elections and political parties is becoming more complex.<sup>78</sup>

It remains to address situations where foreign commercial corporations are said to be agents of foreign governments. This concern is evident in the controversies surrounding Canadian Prime Minister Justin Trudeau as well as that which concerned Australian Senator Sam Dastyari.<sup>79</sup> The key point here is that this is a specific concern with the influence of foreign governments and not a broader fear in relation to foreign corporate money.

The other point to be made is that these controversies sometimes carry a risk of conclusions being drawn on insinuations, sometimes with a racist tinge. Take, for example, the Australian controversies concerning 'Chinese' political donations. In the reportage, 'Chinese' political donations – and 'Chinese' donors and companies – had at least five different meanings:

1. People of Chinese ancestry, regardless of their country of origin and whether they are permanent residents or citizens of Australia.
2. People who were born in the People's Republic of China (PRC) regardless of whether they are permanent residents or citizens of Australia.
3. People who have continuing connections with the PRC.
4. People who have links with the Communist Party of China in the sense of having an association with officials of the party or holding a continuing appointment in a PRC government entity.
5. A subset of 4, people who act as agents for the Communist Party of China.

The real concern here is that the 'Chinese' donor is acting as an agent for the Communist Party of China (meaning 5). At times, however, such an inference is being loosely drawn from the other meanings of 'Chinese'. Take, for example, a 'Chinese' donor to Australian Senator Sam Dastyari, Minshen Zhu. He migrated to Australia

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<sup>77</sup> David Harvey, *The Condition of Postmodernity: An Enquiry into the origins of cultural change* (Blackwell 1992) ch 9.

<sup>78</sup> OECD, *Financing Democracy* (n 5) 6 (emphasis original).

<sup>79</sup> See text above accompanying n 4.

from the PRC and operates an Australian-based business (meanings 1 and 2). He is also a delegate to the Chinese People's Political Consultative Conference (meanings 3 and 4). In many cases, these meanings of 'Chinese' then slip seamlessly to meaning 5.<sup>80</sup>

It is not fanciful to suggest that a strand of scarcely veiled Sinophobia, with old fears of the 'yellow peril' seems to run through some debates over donations from Chinese companies. This occurs quite subtly: firstly through the racialisation of donations from those of Chinese ancestry or those who were born in the PRC (why is ancestry or country of birth presumed to be significance among "Chinese" political donors but not among others?). This racialisation then trades on the dark ambiguity of the label, 'Chinese', with an implication of interference by the Chinese government in Australian politics.

## VI. CONCLUDING THOUGHTS

Two problematic premises seem to underlie the push to ban 'foreign' political donations: 1) 'foreigners' are not members of the political community; 2) 'foreigners' have no right of political influence. Both can reflect and exacerbate xenophobia – hostility towards 'foreigners'. While xenophobia is clearly not new, there is a heightened risk of such prejudice with the rise of populism that sees 'the other' as the enemy, a risk that should be keenly borne in mind in any debate over whether 'foreign' political donations should be banned.

At the same time, the charge of xenophobia should not issue in a blanket condemnation of any measure to regulate 'foreign' political donations. To do so will be to succumb to the extremist politics that characterizes xenophobia. As this article has emphasized, there are (still) strong reasons in principle to distinguish between those members and non-members of a political community, and cogent reasons to ban political donations from overseas and those from foreign governments. And to be clear, a limited regulatory stance in relation to 'foreign' political donations – as argued in this article – does not signal a general opposition towards regulation of political funding. On the contrary, as the penultimate section drew out, the concerns with 'foreign' commercial corporations are less to do with their 'foreignness' but rather their 'corporateness'. This gestures towards broader measures such as caps on political donations and election spending.

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<sup>80</sup> Fergus Hunter, 'Minshen Zhu: is this Australia's most connected Chinese political donor?', *Sydney Morning Herald* (1 September 2016) <<http://www.smh.com.au/federal-politics/political-news/minshen-zhu-is-this-australias-most-connected-chinese-political-donor-20160901-gr6a1f.html>>.