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## Of Constituents and Contributors

Richard Briffault  
*Columbia Law School*, [brfflt@law.columbia.edu](mailto:brfflt@law.columbia.edu)

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# Of Constituents and Contributors

*Richard Briffault*<sup>†</sup>

## INTRODUCTION

In the stirring conclusion to his plurality opinion in *McCutcheon v. Federal Election Commission*,<sup>1</sup> Chief Justice Roberts pointed to the close connection between campaign contributions and what he called the “political responsiveness at the heart of the democratic process.”<sup>2</sup> Quoting Edmund Burke’s statement in his famous Speech to the Electors of Bristol that a representative’s judgment should be informed by “the closest correspondence, and the most unreserved communication with his constituents,”<sup>3</sup> the Chief Justice eloquently declaimed that “[c]onstituents have the right to support candidates who share their views and concerns. Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the concept of self-governance.”<sup>4</sup>

The Chief Justice’s emphasis on protecting the representative–constituent relationship was more than a bit jarring, however, as *McCutcheon* addressed the desire of an individual to contribute to candidates in states and congressional districts in which he was *not* a constituent. At issue in *McCutcheon* were the aggregate contribution limits the Federal Election Campaign Act (“FECA”) imposes on individual campaign contributions. FECA caps not only the amount of money an individual may donate to a specific candidate in an election—the so-called “base limit”—but also the aggregate

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<sup>†</sup> Joseph P. Chamberlain Professor of Legislation, Columbia University School of Law.

<sup>1</sup> 134 S. Ct. 1434 (2014).

<sup>2</sup> *Id.* at 1461.

<sup>3</sup> *Id.* (quoting THE SPEECHES OF THE RIGHT HON. EDMUND BURKE 129–30 (J. Burke ed. 1867)).

<sup>4</sup> *Id.* at 1462.

amount an individual may donate to all federal candidates, political parties, and political committees that donate to federal candidates in an election cycle. Under the overall cap, FECA also specifically limits the aggregate amount an individual may donate just to federal candidates in that cycle.<sup>5</sup> A direct consequence of the aggregate cap is to limit the number of candidates a donor may support and, thus, the number of different election campaigns in which the donor may participate financially.

In 2012, Shaun McCutcheon, a resident of Alabama, wanted to contribute \$1,776 apiece to candidates for the United States Senate in Connecticut and Minnesota, and to candidates for the House of Representatives running in districts in Colorado, Connecticut, Hawaii, Florida (two different districts), Utah, Washington, and Wisconsin.<sup>6</sup> McCutcheon had already made substantial contributions—one of \$5,000, two of \$2,500, and the rest of \$1,776—to fifteen other candidates around the country, including Senate candidates in Ohio and Georgia, and candidates in different House districts in California (three), Maryland, North Carolina, Ohio, Oklahoma, Texas (three), and Virginia, as well as to candidates in two different congressional districts in his home state of Alabama.<sup>7</sup> As a result, FECA's aggregate contribution cap barred the additional contributions.

By invalidating the aggregate contribution limits, the *McCutcheon* decision permits Shaun McCutcheon and other individuals with comparable wealth and political commitments to give to as many candidates in as many different constituencies as they want. Indeed, the very essence of the *McCutcheon* decision is the facilitation of out-of-district and out-of-state donations. A donor would not have reached the

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<sup>5</sup> At the time of the *McCutcheon* litigation, FECA imposed four distinct aggregate limits—a limit on the total an individual could give to all federal candidates (\$48,000 in the 2013–14 election cycle); a limit on the total an individual could give to non-candidate federal political committees (\$74,600); a sublimit within the political committee limit on the total amount that could be donated to state or local party committees and political action committees (PACs) of \$48,600 in 2013–14, and a total limit on all donations to federal candidates and non-candidate committees, which was \$123,200 in 2013–24. *Id.* at 1442–43. The base limits on individual donations in the 2013–14 election cycle were \$2,600 per candidate (\$5,200 for an election cycle consisting of both a primary and a general election); \$32,400 per year to a national party committee; \$10,000 per year to a state or local party committee; and \$5,000 to a PAC. *Id.* at 1442.

<sup>6</sup> See Complaint at 11–12, *McCutcheon v. Fed. Elections Comm'n*, 893 F. Supp. 2d 133 (D.D.C. 2012) (No. 1:12-cv-01034-JEB).

<sup>7</sup> *Id.* at 10–11.

aggregate cap on candidate donations without contributing to candidates outside the donor's own constituency, so by limiting the number of candidates to whom a donor could give, the law curbed out-of-district and out-of-state donations. By preserving the base limits while striking down the aggregate limits, *McCutcheon* enables an individual to give much more money—but not any more money to any one candidate. The donor who wants to take advantage of *McCutcheon* has to give to more candidates (and to political committees and parties that give to candidates).<sup>8</sup> Unless the donor wants to give money to many more candidates campaigning against each other in the same electoral contest—which seems unlikely—the donor will give to more candidates in many different states and districts. By striking down the aggregate limits, *McCutcheon* directly promotes contributions by non-constituents.

The Chief Justice is surely right that campaign contributions are one way an individual can seek to make officeholders “responsive” to their concerns. But as Shaun McCutcheon’s donations and intended donations to candidates seeking to represent more than two dozen different constituencies demonstrate, constituents and contributors are not the same people. Making elected representatives more responsive to McCutcheon’s concerns will not make them more responsive to their constituents. To the contrary, contributors—particularly non-constituent contributors—may have very different interests than non-contributor constituents. Increased responsiveness to contributors may very well be in tension with responsiveness to constituents.

This article explores some aspects of the distinction between constituents and contributors and the implications of the constituent-contributor relationship for campaign finance law and democratic self-government. Part I provides a brief overview

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<sup>8</sup> Chief Justice Roberts was well aware of this. See *McCutcheon*, 134 S. Ct. at 1448 (“[T]he aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates.”). Similarly, during the *McCutcheon* oral argument the Chief Justice repeatedly pressed Solicitor General Donald B. Verrilli, Jr., who was defending the aggregate contribution limits, on the constitutional problem posed by “limiting how many candidates an individual can support within the limits that Congress has said don’t present any danger of corruption.” Transcript of Oral Argument at 29, *McCutcheon v. Fed. Elections Comm’n*, 134 S. Ct. 1434 (2014) (No. 12-536). See also *id.* at 28 (asking about preventing the appearance of corruption “while at the same time allowing an individual to contribute to however many House candidates he wants to contribute to”).

of the role of non-constituent donors in financing contemporary election campaigns. It finds that non-constituents provide the bulk of itemized individual contributions—that is, donations of \$200 or more—to candidates for Congress. The data concerning non-constituent donations in state and local elections is more anecdotal than systematic, but there is considerable evidence that non-constituent, particularly out-of-state, money plays a large part in financing state and local elections too. At all levels of government, there is a significant disconnect between the categories of contributor and constituent.

Part II considers the implications of substantial non-constituent contributions for the American system of territorially-based representation and democratic self-government. Given the potential for officeholder responsiveness to donors celebrated by the Chief Justice, contributors, in effect, have become another constituency that elected representatives represent. There may be some value to this, particularly in races for Congress, where the results of elections in some states or districts can affect the partisan control of the House of Representatives or Senate and, thus, have nationwide implications. Even here, though, non-constituent financing can have an impact on how representatives represent their actual constituents. The tension between constituent and contributor representation is even greater when campaigns are funded by donors from outside the relevant jurisdiction. That occurs, for example, when out-of-state residents contribute to candidates for state office. They belong to a different political community than the elected representatives and they are not directly regulated by the laws enacted and enforced by the voters or representatives of that community. To be sure, with the growing nationalization and partisanship of elections, outsiders may have a strong subjective interest in a state or local race in a distant jurisdiction even if, objectively, they are not governed by the results.<sup>9</sup> But the emergence of a substantial non-constituent constituency poses a significant challenge to our system of representation which is based almost entirely on the use of

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<sup>9</sup> See, e.g., Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1136 (2014); Todd E. Pettys, *Campaign Finance, Federalism, and the Case of the Long-Armed Donor*, 81 U. CHI. L. REV. DIALOGUE 77, 87–88 (2014); James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 43 (2013).

territorial constituencies—states, cities, and legislative districts—for the election of representatives and the processes of democratic self-government.

With outsider contributions potentially shifting the focus of elected representatives away from the concerns of their voting constituency, a handful of jurisdictions—all of them relatively small states—have sought to reduce the role of outside money in state and local elections. Part III reviews these campaign finance measures and the court decisions that have considered challenges to them. Limits on the contributions a candidate for state office may accept from outsiders have been generally, albeit not uniformly, struck down. Such restrictions on outside contributions are almost certainly unconstitutional, but, as I will indicate, state and local public financing systems that make candidate eligibility for public funds contingent on raising a threshold number of small donations from constituents are a constitutional and potentially useful means of ameliorating the impact of outside money by reducing its importance.

Part IV concludes by considering what the Chief Justice's invocation of constituency and the concept of self-government says about the state of contemporary campaign finance doctrine. The Roberts Court has consistently emphasized the speech and associational dimensions of campaign finance.<sup>10</sup> A five-justice majority of the Court has likened efforts to limit campaign money to government censorship,<sup>11</sup> and has rejected the argument that regulation may be used to prevent big money from distorting the electoral process.<sup>12</sup> In their view, contributions and spending, even if unequal, play a valuable role in communicating positions on electoral issues and expressing support for candidates.<sup>13</sup> Only campaign contributions that pose the danger of quid pro quo corruption or its appearance may be limited. The *McCutcheon* result, which maintains the base limits on donations to candidates, is easily defended on such free speech grounds, as much of the plurality opinion demonstrates.<sup>14</sup>

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<sup>10</sup> See, e.g., *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481 (2007) (noting that "[t]hese cases are about political speech") (plurality opinion).

<sup>11</sup> See *id.* at 482.

<sup>12</sup> See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 349–53 (2010).

<sup>13</sup> See *McCutcheon*, 134 S. Ct. at 1448.

<sup>14</sup> *Id.* at 1448–62.

What is striking about the Chief Justice's peroration is that it goes beyond the free speech argument—the right of Shaun McCutcheon to use money to express his views to a range of candidates—and makes the case for contributions in terms of promoting the responsiveness of elected officials to donors. That is a position more commonly taken by *critics* of the role of large campaign contributions in our system—who see large private contributions as threatening to distort the relationship between representatives and the public—not by opponents of regulation. Campaign finance reformers have drawn on the language of democratic self-government to parry the free speech argument used by defenders of the current system. The Chief Justice's rhetoric, thus, represents a bold move to turn campaign finance reform's theory against reform.

But, as I will suggest, the Chief Justice's contention that striking down the aggregate donation cap will promote the accountability of representatives to their constituents not only fails to persuade, but also underscores exactly what many people find troubling about the current campaign finance system. Large donors are often not constituents. Large donations are likely to make representatives less responsive to their actual constituents and more attentive to their donors, thereby undermining the very responsiveness to the people that the Chief Justice rightly celebrates as “key to the concept of self-governance.” The Chief Justice's rhetoric tries to add democratic self-government to free speech in making the case against campaign finance regulation, but an examination of the constituency–contribution relationship to which his claim calls attention actually demonstrates the tension between the Roberts Court majority's program of campaign finance deregulation and the working of democratic self-government.

## I. CONTRIBUTORS, NOT CONSTITUENTS

In congressional elections, most contributors are not constituents. The Center for Responsive Politics reports that in the 2013–14 election cycle, candidates for the House of Representatives received on average 61.3 percent of their itemized individual contributions from donors *outside* their districts, that is, from non-constituents.<sup>15</sup> The winners of

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<sup>15</sup> The Ctr. For Responsive Politics, *2014 Overview: In-District vs Out-of-District*.

congressional races were even more dependent on out-of-district funding, obtaining on average 64.3 percent of their itemized individual campaign contributions from non-constituent donors.<sup>16</sup> A total of fifty-three elected Representatives (or 12 percent of the House) received 90 percent or more of their campaign contributions from outside their districts; an additional sixty-three Representatives (14 percent of the House) received 80–89 percent of their itemized individual contributions from outside their districts.<sup>17</sup> With an additional thirty-nine Representatives obtaining 75–79 percent of their itemized individual contributions from outsiders,<sup>18</sup> more than 35 percent of the members of the House of Representatives received 75 percent or more of their campaign funds from non-constituents.

The 2014 elections were not an outlier in terms of the heavy dependence of members of the House on non-constituent donations. Since the late 1970s, out-of-district donations have consistently accounted for roughly half the itemized individual donations to House candidates, and since the late 1990s that number has regularly been in the three-fifths to two-thirds range.<sup>19</sup> In 2004, 67 percent of the value of itemized individual contributions to candidates for the House of Representatives came from outside the candidate's district.<sup>20</sup> That year, in 18 percent of congressional districts, one or more candidates received 90 percent or more of their itemized donations from non-constituents.<sup>21</sup> Fewer than twenty percent of the House

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*Least In-District*, OPENSECRETS.ORG, available at <https://www.opensecrets.org/overview/district.php?cycle=2014&display=B>, archived at <http://perma.cc/9NBD-UAEW>. The finding that only 61.3 percent of donations came from constituents applied only to candidates who received a minimum of \$50,000 in itemized contributions, that is contributions greater than or equal to \$200. Federal law requires the reporting of the information that makes it possible to determine the residence of the donor only for donations of \$200 or more. For all House candidates, including those who obtained less than \$50,000 in itemized donations, the out-of-district share dropped modestly to 57.8%. See The Ctr. For Responsive Politics, *In-District vs Out-of-District: All House Candidates*, OPENSECRETS.ORG, available at <https://www.opensecrets.org/overview/district.php?cycle=2014&display=A>, archived at <http://perma.cc/75DV-S2QW>.

<sup>16</sup> The Ctr. For Responsive Politics, *2014 Overview: In-District vs Out-of-District: All Current Representatives*, OPENSECRETS.ORG, available at <https://www.opensecrets.org/overview/district.php?cycle=2014&display=M>, archived at <http://perma.cc/G88E-WS59>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See James G. Gimpel et al., *The Check Is in the Mail: Interdistrict Funding Flows in Congressional Elections*, 52 AM. J. POL. SCI. 373, 377–78 (2008).

<sup>20</sup> *Id.* at 378.

<sup>21</sup> *Id.*



candidates that year raised even a majority of their itemized individual donations from within their districts.<sup>22</sup> Moreover, most of the non-constituent money came not from an adjacent district, but from further away.<sup>23</sup>

Last year's Senate candidates were also heavily dependent on out-of-state funds. Nineteen of the twenty-eight incumbent Senators who sought reelection in 2014 drew more than 50 percent of their itemized donations from out-of-staters, including Republican leader Mitch McConnell who collected 78.5 percent of his itemized individual funds from outside his home state of Kentucky.<sup>24</sup> Senator McConnell's unsuccessful Democratic opponent, Alison Lundergran Grimes, was not far behind in her dependence on out-of-state funds—72 percent of her itemized

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<sup>22</sup> *Id.*

<sup>23</sup> *See id.* at 378-79.

<sup>24</sup> The Ctr. For Responsive Politics, *2014 Overview: Candidates: Top In-State vs Top Out-of-State*, OPENSECRETS.ORG, available at <https://www.opensecrets.org/overview/instvout.php>, archived at <http://perma.cc/YXE5-87HE>. In addition to the ten incumbents listed in the "Top In-State vs Top Out-of-State" chart, incumbent senators running for reelection who received more than half their itemized individual contributions from out-of-state included Sen. Chris Coons (D-Del.) (69% from out-of-state), The Ctr. For Responsive Politics, *Delaware Senate Race*, OPENSECRETS.ORG, available at <http://www.opensecrets.org/races/geog.php?cycle=2014&id=DES2&spec=N>, archived at <http://perma.cc/7PUS-WFAA>; James Risch (R-Idaho) (78% from out-of-state), The Ctr. For Responsive Politics, *Idaho Senate Race*, OPENSECRETS.ORG, available at <http://www.opensecrets.org/races/geog.php?cycle=2014&id=IDS1&spec=N>, archived at <http://perma.cc/MM7H-SYXR>; Pat Roberts (R-Kansas) (58% from out-of-state), The Ctr. For Responsive Politics, *Kansas Senate Race*, OPENSECRETS.ORG, available at <http://www.opensecrets.org/races/geog.php?cycle=2014&id=KSS1&spec=N>, archived at <http://perma.cc/3NJR-LK4P>; Susan Collins (R-Me) (68% from out-of-state) The Ctr. For Responsive Politics, *Maine Senate Race*, OPENSECRETS.ORG, available at <http://www.opensecrets.org/races/geog.php?cycle=2014&id=MES2&spec=N>, archived at <http://perma.cc/3XPK-VCHS>; Jeanne Shaheen (D-NH) (80% from out-of-state) The Ctr. For Responsive Politics, *New Hampshire Senate Race*, OPENSECRETS.ORG, available at <http://www.opensecrets.org/races/geog.php?cycle=2014&id=NHS2&spec=N>, archived at <http://perma.cc/5D6T-8TUE>; Tom Udall (D-NM) (53% from out-of-state), The Ctr. For Responsive Politics, *New Mexico Senate Race*, OPENSECRETS.ORG, available at <http://www.opensecrets.org/races/geog.php?cycle=2014&id=NMS2&spec=N>, archived at <http://perma.cc/HM5F-H69H>; Jack Reed (D-RI) (59% from out-of-state), The Ctr. For Responsive Politics, *Rhode Island Senate Race*, OPENSECRETS.ORG, available at <http://www.opensecrets.org/races/geog.php?cycle=2014&id=RIS2&spec=N>, archived at <http://perma.cc/ZF3K-DT47>; Tim Scott (R-SC) (67% from out-of-state), The Ctr. For Responsive Politics, *South Carolina Senate Race*, OPENSECRETS.ORG, available at <http://www.opensecrets.org/races/geog.php?cycle=2014&id=SCS1&spec=N>, archived at <http://perma.cc/ZHJ9-NYJS>; Mike Enzi (R-Wyo) (72% from out-of-state), The Ctr. For Responsive Politics, *Wyoming Senate Race*, OPENSECRETS.ORG, available at <http://www.opensecrets.org/races/geog.php?cycle=2014&id=WYS2&spec=N>, archived at <http://perma.cc/48H8-7UA3>.

individual contributions came from outside Kentucky.<sup>25</sup> Both McConnell and Grimes collected significantly more money from donors living in metropolitan New York than from residents of metropolitan Louisville. Successful Senate challengers or open-seat candidates like Tom Cotton (R-Ark.), Shelley Moore Capito (R-WV), Steven Daines (R-MT),<sup>26</sup> and Joni Ernst (R-Iowa)<sup>27</sup> obtained most of their funds from out-of-state donors. The top zip code for itemized individual donations to successful Alaska Republican challenger Dan Sullivan was in Palm Beach, Florida, and he received more itemized individual contributions from the New York metropolitan area than from metropolitan Anchorage.<sup>28</sup> Altogether, twenty-two of the thirty-six Senate winners last year received more than half their individual itemized donations from out-of-state contributors.<sup>29</sup> Six of the winners<sup>30</sup> collected 75 percent or more of these funds from out-of-state.

These numbers address only the contributions made by individuals directly to candidates and do not reflect either the sources of political party committee and political action committee ("PAC")<sup>31</sup> contributions to candidates, or the home states or districts of donors to Super PACs and 501(c) committees that spent independently in support of or in

<sup>25</sup> The Ctr. For Responsive Politics, *Kentucky Senate Race*, OPENSECRETS.ORG, available at <http://www.opensecrets.org/races/geog.php?cycle=2014&id=KYS1&spec=N>, archived at <http://perma.cc/72FQ-487A>; See also Scott Bland, *Leading Senate Recruits Reliant on Out-of-State Money*, NAT'L J., (Feb. 20, 2014), available at <http://www.nationaljournal.com/hotline-on-call/leading-senate-recruits-reliant-on-out-of-state-money-20140220>, archived at <http://perma.cc/L2GX-6MAE>.

<sup>26</sup> See 2014 Overview: Candidates, *supra* note 24.

<sup>27</sup> The Ctr. For Responsive Politics, *Iowa Senate Race*, OPENSECRETS.ORG, available at <https://www.opensecrets.org/races/geog.php?cycle=2014&id=IAS2&spec=N>, archived at <http://perma.cc/VSF7-YMQX>.

<sup>28</sup> The Ctr. For Responsive Politics, *Sen. Dan Sullivan*, OPENSECRETS.ORG, available at <https://www.opensecrets.org/politicians/geog.php?cycle=2014&cid=N00035774&newMem=Y&type=I>, archived at <http://perma.cc/4UMN-RJ3N>.

<sup>29</sup> There were 36 races because of special elections to fill the remaining portions of terms of senators who had died or resigned during their terms in Hawaii, Oklahoma, and South Carolina. The calculation in this and the next footnote is based on the author's review of the data on the "geography" button of each 2014 Senate Race page on the Center for Responsive Politics website.

<sup>30</sup> Senators Cotton (R-Ark), Franken (D-MN), McConnell (R-Ky), Risch (R-Ida), Shaheen (D-NH), and Sullivan (R-Ak).

<sup>31</sup> The term "political action committee" is a colloquial reference to a political committee that solicits and receives contributions and then makes contributions to, or engages in independent spending with respect to, a candidate. See 52 U.S.C. § 30101(4).

opposition to federal candidates. The evidence here is more anecdotal than comprehensive, but one study of donations to Super PACs is revealing. That study, conducted while the 2014 campaigns were underway, focused on the thirty-four federal Super PACs with a state or regional reference in their name, such as the “Put Alaska First PAC,” “Kentuckians for Strong Leadership,” the “Virginia Progress PAC,” and “New Hampshire Priorities.” Half of these groups received more than half of their itemized contributions from out-of-state donors, and nearly all the money for some of these PACs came from outside the state the PAC claimed to represent. Thus, 98 percent of the money for “Put Alaska First PAC,” 99 percent of donations to the “Alaska Salmon PAC,” 95 percent of the money for “Kentuckians for Strong Leadership,” 67 percent of the contributions to “Mississippi Conservatives,” 58 percent of donations to the “Virginia Progress PAC,” and 100 percent of the donations to “New Hampshire Priorities” came from outside the state indicated in the PAC’s name.<sup>32</sup> Indeed, many of these state-focused PACs were not even registered in their putative home states: “Empower Nebraska” was based in Tampa, Florida, while the “American Heartland PAC,” which spent exclusively on the Iowa Senate race, was based far from the heartland in Washington, D.C.<sup>33</sup>

Of course, it could reasonably be argued there is a broad national stake in the outcome of specific Senate and Congressional district elections. As the Supreme Court put it in *U.S. Term Limits, Inc. v. Thornton*,<sup>34</sup> Congress “is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people”<sup>35</sup>—one people. Indeed, Edmund Burke made a similar point—about Parliament, of course—in the very letter Chief Justice Roberts quoted in *McCutcheon* when Burke declared that “Parliament is not a congress of ambassadors from different and hostile

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<sup>32</sup> Lalita Clozel, *Super PAC(ked) With Out-of-State Money*, OPENSECRETS.ORG, (Oct. 3, 2014), available at <http://www.opensecrets.org/news/2014/10/super-packed-with-out-of-state-money/>, archived at <http://perma.cc/32LJ-QBQ3>.

<sup>33</sup> *Id.* See also The Ctr. For Responsive Politics, *American Heartland PAC*, OPENSECRETS.ORG, available at <https://www.opensecrets.org/outsidespending/detail.php?cmte=C00548867&cycle=2014>, archived at <http://perma.cc/WQF9-D4U7>.

<sup>34</sup> 514 U.S. 779 (1995).

<sup>35</sup> *Id.* at 821.

interests . . . but . . . a deliberative assembly of one nation, with one interest, that of the whole.”<sup>36</sup> All members of Congress in some sense represent all Americans so that non-constituents as well as constituents have a stake in the outcome of a Senate race or House district election. Particularly when, as in 2014, the partisan control of a legislative chamber is up for grabs, residents of New York, California, and Texas have as direct and objective a concern in the outcome of closely contested Senate races in Alaska, Arkansas, and Iowa as the residents of those states. There may be a tension between representing the interests of constituents and non-constituents, but that is built into the structure of Congress.

The growing role of out-of-state and out-of-district contributions in state and local elections presents a different issue.<sup>37</sup> Although I have not seen any comprehensive studies, media surveys and scholarly accounts of particular elections over the last several years chronicle the large and growing role of non-constituent money in state governorship,<sup>38</sup> state

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<sup>36</sup> Edmund Burke, *Speech to the Electors of Bristol*, Nov. 3, 1774, in *THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE* 392 (Henry G. Bohn ed., 1854–56) available at [http://press-pubs.uchicago.edu/founders/print\\_documents/v1ch13s7.html](http://press-pubs.uchicago.edu/founders/print_documents/v1ch13s7.html), archived at <http://perma.cc/6KDF-P82U> (emphasis omitted).

<sup>37</sup> See, e.g., Mary Jo Pitzi & Rob O'Dell, *Outside money played huge role in Arizona elections*, THE ARIZONA REPUBLIC (Nov. 8, 2014, 10:27 PM), available at <http://www.azcentral.com/story/news/arizona/politics/2014/11/09/election-outside-money-campaign-funding/18751133/>, archived at <http://perma.cc/HSE2-8MRf>; Chris Kardish, *Outsiders Add Money and Negativity to State and Local Elections*, GOVERNING (Oct. 2014), available at <http://www.governing.com/topics/elections/gov-outside-spending-state-local-elections.html>, archived at <http://perma.cc/7TT4-B68V>.

<sup>38</sup> See, e.g., Steve Contorno, *Terry McAuliffe gets 78% of campaign cash from outside Virginia*, WASHINGTON EXAMINER (Apr. 23, 2013, 12:00 AM), available at <http://www.washingtonexaminer.com/terry-mcauliffe-gets-78-of-campaign-cash-from-outside-virginia/article/2527992>, archived at <http://perma.cc/5N5X-AVL9>; Matea Gold & Ben Pershing, *Groups flush with out-of-state cash flock to Virginia governor's race as testing ground*, WASHINGTON POST (Sept. 22, 2013), available at [http://www.washingtonpost.com/politics/groups-flush-with-out-of-state-cash-flock-to-virginia-governors-race-as-testing-ground/2013/09/22/1209aeb8-2221-11e3-966c-9c4293c47e-be\\_story.html](http://www.washingtonpost.com/politics/groups-flush-with-out-of-state-cash-flock-to-virginia-governors-race-as-testing-ground/2013/09/22/1209aeb8-2221-11e3-966c-9c4293c47e-be_story.html), archived at <http://perma.cc/773N-VB5V>; Bill Lueders, *Scott Walker tops Mary Burke in major and out-of-state donations*, WISCONSINWATCH.ORG, (July 23, 2014), available at <http://wisconsinwatch.org/2014/07/scott-walker-tops-mary-burke-in-major-and-out-of-state-donations/>, archived at <http://perma.cc/9E3Z-J5FY>; Mal Leary, *Analysis Indicates Big Increase in Out-of-State Money Pouring into Maine Governor's Race*, MAINE PUBLIC BROADCASTING (Sept. 24, 2014), available at <http://news.mpbnet.net/post/analysis-indicates-big-increase-out-state-money-pouring-maine-governors-race>, archived at <http://perma.cc/EKR8-UX6H>; Derrick DePledge, *Mainland super PACs help shape gov's race*, HONOLULU STAR-ADVERTISER (Oct. 28, 2014, 1:30 AM) available at [http://www.staradvertiser.com/elections/20141028\\_campaign\\_spending\\_Mainland\\_super\\_PACs\\_help\\_shape\\_govs\\_race\\_.html?id=280619322](http://www.staradvertiser.com/elections/20141028_campaign_spending_Mainland_super_PACs_help_shape_govs_race_.html?id=280619322), archived at <http://perma.cc/Y3NX-E39J>.

gubernatorial recall,<sup>39</sup> state attorney general,<sup>40</sup> state secretary of state,<sup>41</sup> state judicial<sup>42</sup> and judicial retention,<sup>43</sup> state ballot proposition,<sup>44</sup> state legislative,<sup>45</sup> state legislative recall,<sup>46</sup> and

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<sup>39</sup> See Walker's Unprecedented Out-of-state Contributions Alarming, ONE WISCONSIN NOW (Dec. 16, 2011), available at <http://www.onewisconsinnow.org/press/walkers-unprecedented-out-of-state-contributions-alarming.html>, archived at <http://perma.cc/Q4XD-RBEW>; Tom Kertscher, Behind the rhetoric: The in-state, out-of-state campaign money debate, POLITIFACT.COM (May 22, 2012, 6:00 PM), available at <http://www.politifact.com/wisconsin/article/2012/may/22/behind-rhetoric-state-out-state-money-debate/>, archived at <http://perma.cc/J9FP-76J8>.

<sup>40</sup> See, e.g., Caroline Bleakley, Race for attorney general's seat turns dirty, 8 NEWS NOW (Oct. 27, 2014, 10:07 AM), available at <http://www.8newsnow.com/story/27053464/race-for-attorney-generals-seat-turns-dirty>, archived at <http://perma.cc/QL5Z-MZ7A>; Ben Wieder, Big Money Comes to State Attorney-General Races, THE ATLANTIC (May 8, 2014), available at <http://www.theatlantic.com/politics/archive/2014/05/us-chamber-targets-dems-in-state-attorney-general-races/361874/>, archived at <http://perma.cc/39LE-R6CG>; Luke Broadwater, Out-of-state groups pump money into attorney general's race, BALTIMORE SUN (June 20, 2014), available at [http://articles.baltimoresun.com/2014-06-22/news/bs-md-attorney-general-funds-20140620\\_1\\_jon-cardin-attorney-general-frosh](http://articles.baltimoresun.com/2014-06-22/news/bs-md-attorney-general-funds-20140620_1_jon-cardin-attorney-general-frosh), archived at <http://perma.cc/RU37-D8HS>; Paul Hammel, Outside money in GOP attorney general race raises concerns, OMAHA WORLD-HERALD (May 9, 2014, 12:00 AM), available at [http://www.omaha.com/news/outside-money-in-gop-attorney-general-race-raises-concerns/article\\_7487c807-8fef-53d2-b93e-823dc82f9c47.html](http://www.omaha.com/news/outside-money-in-gop-attorney-general-race-raises-concerns/article_7487c807-8fef-53d2-b93e-823dc82f9c47.html), archived at <http://perma.cc/DKR3-SH48>.

<sup>41</sup> See, e.g., Phil Keisling & Sam Reed, The Troubling Partisanization of Elections for Secretary of State, GOVERNING (Dec. 10, 2014), available at <http://www.governing.com/columns/smart-mgmt/col-troubling-partisanization-elections-secretary-state.html>, archived at <http://perma.cc/FG4T-BW6B>; Joe Vardon, et. al., Capitol Insider: GOP Attacks Dem over out-of-state money, COLUMBUS DISPATCH (Aug. 31, 2014, 6:48 AM), available at <http://www.dispatch.com/content/stories/local/2014/08/31/gop-attacks-dem-over-out-of-state-money.html>, archived at <http://perma.cc/X7HM-RP8F> (Ohio Secretary of State election).

<sup>42</sup> See, e.g., Alan Suderman & Ben Wieder, D.C.-based groups bombarded state high court races with ads, THE CENTER FOR PUBLIC INTEGRITY (June 14, 2102, 8:21 PM), available at <http://www.publicintegrity.org/2013/06/13/12793/dc-based-groups-bombarded-state-high-court-races-ads>, archived at <http://perma.cc/XW29-5YHH>; Erik Eckholm, Outside Spending Enters Arena of Judicial Races, N.Y. TIMES (May 5, 2014), available at [http://www.nytimes.com/2014/05/06/us/politics/outside-spending-transforms-supreme-court-election-in-north-carolina.html?\\_r=0](http://www.nytimes.com/2014/05/06/us/politics/outside-spending-transforms-supreme-court-election-in-north-carolina.html?_r=0), archived at <http://perma.cc/2JZD-FPAZ>; Joe Palazzolo, Judges Step Up Electioneering as Outside Money Pours Into Races, WALL ST. J. (Oct. 13, 2014), available at <http://www.wsj.com/articles/judges-step-up-electioneering-as-outside-money-pours-into-races-1413149643> (last visited Oct. 1, 2015); Erik Thueson, Van Dyke too influenced by out-of-state money, HELENA INDEPENDENT RECORD (Oct. 15, 2014, 10:00 AM), available at [http://helenair.com/news/opinion/vandyke-too-influenced-by-out-of-state-money/article\\_5e981fea-5b76-5d5b-a54b-78ac6609074c.html](http://helenair.com/news/opinion/vandyke-too-influenced-by-out-of-state-money/article_5e981fea-5b76-5d5b-a54b-78ac6609074c.html), archived at <https://perma.cc/CBS3-ZD7D?type=source> (Montana supreme court election).

<sup>43</sup> See, e.g., Linda Casey, Independent Expenditure Campaigns in Iowa Topple Three High Court Justices, NAT'L INST. ON MONEY IN STATE POLITICS (Jan. 10, 2011), available at <http://classic.followthemoney.org/press/ReportView.phtml?r=440>, archived at <http://perma.cc/3H7Y-QFC7>.

<sup>44</sup> See, e.g., Patrick M. Garry et al., Raising the Question of Whether Out-of-State Political Contributions May Affect a Small State's Political Autonomy: A Case Study of

even mayor and council elections in cities big—such as Boston<sup>47</sup> and Chicago<sup>48</sup>—and small—such as Coralville, Iowa.<sup>49</sup> This out-of-state participation in state and local elections is increasingly systematic, with national party groups—including the Republican and Democratic Governors’ Associations,<sup>50</sup> the Republican State Leadership Committee, and the Democratic Legislative Campaign Committee<sup>51</sup>—and major Super PACs playing leading roles in state elections. These organizations pull money from state parties, wealthy individuals, businesses, trade associations, unions, and other organizations in “donor” states

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*the South Dakota Voter Referendum on Abortion*, 55 S.D. L. REV. 35 (2010); Monica Youn, *Proposition 8 and the Mormon Church: A Case Study in Donor Disclosure*, 81 GEO. WASH. L. REV. 2108 (2013); Nigel Jaquiss, *Dupont Pioneer Shatters Record for Largest Oregon Political Donation*, WILLAMETTE WEEK (Oct. 24, 2014, 12:34 PM), available at [http://www.wweek.com/portland/blog-32369-dupont\\_pioneer\\_shatters\\_record\\_for\\_largest\\_oregon\\_political\\_contribution.html](http://www.wweek.com/portland/blog-32369-dupont_pioneer_shatters_record_for_largest_oregon_political_contribution.html), archived at <http://perma.cc/K4WA-Z7EL> (\$4.46 million given by Iowa-based business to affect Oregon ballot proposition).

<sup>45</sup> See, e.g., Joseph O’Sullivan, *How a California billionaire gets his money into a Washington Senate campaign*, SEATTLE TIMES (Oct. 14, 2014, 6:20 PM), available at <http://blogs.seattletimes.com/politicsnorthwest/2014/10/14/how-a-california-billionaire-gets-his-money-into-one-state-senate-campaign>, archived at <http://perma.cc/6KLM-GUMU>; Jeff Horsemann, *DECISION 2014: \$2M in outside money flows into state Senate race*, PRESS-ENTERPRISE (Oct. 14, 2014, 3:39 PM) available at <http://www.pe.com/articles/money-751927-outside-race.html>, archived at <http://perma.cc/LBV4-FD83> (California’s Senate Dist. #28).

<sup>46</sup> Nancy Watzman, *Out of state money pouring into Colorado gun recall races*, SUNLIGHT FOUND. BLOG (Sept. 4, 2013, 9:49 AM), available at <http://sunlightfoundation.com/blog/2013/09/04/colorado-guns/>, archived at <http://perma.cc/MVU8-PPBE>.

<sup>47</sup> See Katharine Q. Seelye, *Outside Money at Issue in Boston Mayor’s Race as Labor Unions Weigh In*, N.Y. TIMES (Nov. 3, 2013), available at <http://www.nytimes.com/2013/11/04/us/politics/outside-money-at-issue-in-boston-mayors-race-as-labor-unions-weigh-in.html>.

<sup>48</sup> See Bill Ruthhart, *With contribution limits off, Emanuel reels in more cash*, CHICAGO TRIBUNE (Nov. 28, 2014, 7:46 AM), available at <http://www.chicagotribune.com/news/ct-rahm-emanuel-fundraising-caps-20141127-story.html>, archived at <http://perma.cc/PP7Z-A2FF>.

<sup>49</sup> John Eligon, *Koch Group Has Ambitions in Small Races*, N.Y. TIMES (Nov. 3, 2013), available at <http://www.nytimes.com/2013/11/04/us/politics/koch-group-has-ambitions-in-small-races.html?pagewanted=all> (last visited June 16, 2015).

<sup>50</sup> See generally Ciara Torres-Spelliscy, *The \$500 Million Question: Are the Democratic and Republican Governors Associations Really State PACs under Buckley’s Major Purpose Test?* 15 N.Y.U. J. LEGIS. & PUB. POL’Y 485 (2012); Paul McMorrow, *GOP Super PAC money swamps governor’s race*, COMMONWEALTH (Nov. 3, 2014), available at <http://www.commonwealthmagazine.org/News-and-Features/Online-exclusives/2014/Fall/020-GOP-super-PAC-money-swamps-governors-race.aspx#.VLAeRNEtCUk>, archived at <http://perma.cc/634U-Q8HZ>.

<sup>51</sup> See generally, Nicholas Confessore, *A National Strategy Funds State Political Monopolies*, N.Y. TIMES (Jan. 11, 2014), available at <http://www.nytimes.com/2014/01/12/us/politics/a-national-strategy-funds-state-political-monopolies.html> (last visited June 16, 2015).

and redistribute the funds to state parties, Super PACs,<sup>52</sup> or candidates in competitive elections in “recipient” states where the money may be more useful in advancing the group’s partisan or ideological objectives. The interstate flow of campaign funds may also reflect differences in state campaign finance laws. Donors whose home states restrict the size or sources of campaign funds in state elections can send money to recipient states where those limits do not apply.<sup>53</sup> Some of this outside money is contributed to a candidate and some is used for independent spending. Through both routes, outside groups and wealthy outside individuals have become major players in statewide elections, legislative district races, and ballot proposition contests.

Non-constituent contributions are, thus, an increasingly significant fact of life in American elections, of widespread importance not just in those elections where the outsider–donor is directly governed by the outcome, but in races where the outsider is truly an outsider, not part of the political community that is choosing its elected leadership. The growth of non-constituent contributions reflects and reinforces the growing nationalization and partisan and ideological polarization of our elections<sup>54</sup> at federal, state, and local levels, and in executive, legislative, judicial, and ballot proposition contests. Some scholarly observers have praised this development. My Columbia colleague Jessica Bulman-Pozen contends that such non-constituent engagement in another state’s elections strengthens federalism by enhancing the role of the states as “sites of political identification” and enabling them to better “serve as counterweights to the federal government.”<sup>55</sup> She also suggests that non-constituent participation in state elections allows individuals who feel “alienated from their own state government to affiliate with another state government.”<sup>56</sup> In more traditional First Amendment language Professor E. Todd

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<sup>52</sup> See, e.g., Fredreka Schouten & Christopher Schnaars, *Mega-influence: These 42 dominate super Pac donations*, USA TODAY (Oct. 29, 2014, 12:40 PM), available at <http://www.usatoday.com/story/news/politics/2014/10/28/top-super-pac-donors-of-the-mid-terms-steyer-bloomer-singer-merc/18060219/>, archived at <http://perma.cc/8YMF-YSQ6>.

<sup>53</sup> See Confessore, *supra* note 51.

<sup>54</sup> See Gimpel et al., *supra* note 19, at 389–92.

<sup>55</sup> Bulman-Pozen, *supra* note 9, at 1082.

<sup>56</sup> *Id.* at 1140.

Pettys defends what he nicely refers to as “long-armed” donations as a form of political association between candidates and outsiders.<sup>57</sup>

Certainly outsiders have an interest—whether subjective or objective—in state, local, and congressional district elections. And yet there are nagging doubts about the outsider campaign – financing role. Virtually all the newspaper articles on out-of-state or out-of-district donations I have cited view the growing significance of non-constituent contributors with alarm, voicing the concern that outsiders are taking over the state’s or locality’s political process. Candidates typically try to make their rivals’ dependence on campaign money a campaign issue, although the role of outside money in financing both competitors can make it difficult for voters to act on that concern. The title of an in-depth study of the role of outside money in South Dakota’s abortion referendum asked the “Question of Whether Out-of-State Political Contributions May Affect a Small State’s Political Autonomy.”<sup>58</sup> Professor Anthony Johnstone’s recent article on “Outside Influence” begins with the accusatory “By what rights do outsiders influence state or local politics?”<sup>59</sup> And retired Supreme Court Justice John Paul Stevens, in his fall 2014 Harold Leventhal Lecture, treated the *McCutcheon* Court’s “failure to discuss” the distinction between donations by in-staters versus donations from non-constituents ineligible to vote in the relevant election as such an egregious oversight that he concluded the *McCutcheon* decision ought to be dismissed with no more than a derisive “Oops!”<sup>60</sup>

The implication of outside money for self-government is, thus, a contested one, not resolved by the fact of outsider interest in the outcome of a state, local, or district election. For better or worse, outside donors have become a new constituency, albeit one quite different from the usual meaning of the term.

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<sup>57</sup> Pettys, *supra* note 9, at 90.

<sup>58</sup> Garry et al., *supra* note 44, at 35.

<sup>59</sup> Anthony Johnstone, *Outside Influence*, 13 ELECTION L.J. 117, 117 (2014).

<sup>60</sup> Justice John P. Stevens (Ret.), 2014 Harold Leventhal Lecture: Oops!, (Sept. 12, 2014), available at <http://www.dcbbar.org/sections/administrative-law-and-agency-practice/Harold-Levanthal-Talk-Justice-Stevens-Address.cfm>, archived at <http://perma.cc/S5YP-MDHX>.



## II. NON-CONSTITUENT CONTRIBUTORS AS A CONSTITUENCY

“Constituent” has a well-established meaning as one of a group of citizens who elect a representative to a legislature or other public body.<sup>61</sup> “Constituent” is derived from the Latin root *stare*—“to stand”—so that a constituent is someone who “appoints another as agent,” presumably to stand for the constituent.<sup>62</sup> According to the dictionary, a constituent is “a person who authorizes another to act on his or her behalf, as a voter in a district represented by an elected official.”<sup>63</sup> Moreover, the role of the constituency is not simply to define the units for the election of representatives, but to determine to whom the representative is to be accountable. As political scientist Andrew Rehfield has explained, “representatives should presumably be accountable to those who authorized them to act.”<sup>64</sup> In the American context—indeed, in most Western democracies—constituencies are typically defined geographically, with the constituents the individuals who are residents of the territory of the constituency.<sup>65</sup> Shaun McCutcheon of Alabama was surely not “one of the people who live and vote”<sup>66</sup> in the many constituencies in other states that voted on the candidates to whom he gave and wanted to give money.

Of course, electoral constituents are not the only people who, in some sense, may be represented by an officeholder. In a legislative body, a representative from one district may also

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<sup>61</sup> See, e.g., ANDREW REHFIELD, *THE CONCEPT OF CONSTITUENCY: POLITICAL REPRESENTATION, DEMOCRATIC LEGITIMACY, AND INSTITUTIONAL DESIGN* 35–39 (Cambridge Univ. Press 2005).

<sup>62</sup> *Id.* See also *Constituent*, MERRIAM-WEBSTER.COM, available at <http://www.merriam-webster.com/dictionary/constituent>, archived at <http://perma.cc/FE2W-4YZV> (A constituent is “any one of the people who live and vote in an area: a member of a constituency.”); *Constituent*, DICTIONARY.COM, available at <http://dictionary.reference.com/browse/constituent>, archived at <http://perma.cc/HFS9-Q3Y9>.

<sup>63</sup> See *Constituent*, DICTIONARY.COM, available at <http://dictionary.reference.com/browse/constituent>, archived at <http://perma.cc/HFS9-Q3Y9>; *Constituent*, THEFREEDICTIONARY.COM, available at <http://www.thefreedictionary.com/constituent>, archived at <http://perma.cc/ZA53-3L5P> (The second definition of “constituent” as a noun. The first is the not very helpful: “a constituent element, material, etc.; component.”).

<sup>64</sup> REHFIELD, *supra* note 61, at 186–87.

<sup>65</sup> *Id.* at xii, 36. See also NANCY L. SCHWARTZ, *THE BLUE GUITAR: POLITICAL REPRESENTATION AND COMMUNITY* 12, 74–75 (Univ. Chi. Press 1988).

<sup>66</sup> See *Constituent*, DICTIONARY.COM, available at <http://dictionary.reference.com/browse/constituent>, archived at <http://perma.cc/HFS9-Q3Y9>; *Constituent*, THEFREEDICTIONARY.COM, available at <http://www.thefreedictionary.com/constituent>, archived at <http://perma.cc/ZA53-3L5P>.

represent the interests of individuals or groups from other districts. This may be a matter of demographics: an African-American or female representative may be more representative of the interests of African-Americans or women in districts whose elected representatives are white or male than the representatives actually elected from those districts. Similarly, party may be a basis for non-constituent representation, with elected Democrats representing the interests of Democrats living in Republican-controlled districts and elected Republicans similarly representing the interests of Republicans residents in Democratic districts. So, too, non-constituent representation may grow out of ideology, as elected environmentalists, Tea Party members, pro-life or pro-choice advocates, hawks, or doves may speak on behalf of people with similar views throughout the nation, not just their state or district voting constituencies. As political scientist Jane Mansbridge, who dubbed this phenomenon “surrogate representation,” has explained, such representation “plays the normatively critical role of providing representation to voters who lose in their own district” and thus adds democratic legitimacy to the electoral system.<sup>67</sup> Such surrogate representation can offset the lack of proportional representation for certain groups and add perspectives to legislative deliberation.<sup>68</sup>

Jessica Bulman-Pozen has taken Mansbridge’s argument one step further, applying it not just to out-of-district representation within a legislature but to the cross-border interest of residents of one state in the political processes of other states. She argues that the decisions of what I will call the target state can have an impact on the politics of the non-constituent’s home state by “creat[ing] momentum for a particular policy or political party, [or] . . . build[ing] a real-life example to inform national debate.”<sup>69</sup> In her view, cross-border political engagement also has psychological benefits to out-of-staters who can “take comfort in knowing that their preferences are actual policy—and their partisan group is in control—

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<sup>67</sup> Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 523 (2003).

<sup>68</sup> *Id.*

<sup>69</sup> Bulman-Pozen, *supra* note 9, at 1136.

somewhere.”<sup>70</sup> Bulman-Pozen’s normative point is that cross-border political activity confirms the role of states as “platforms for national political struggle”<sup>71</sup> and, thus, strengthens their significance within the federal system. To that extent, she believes it is good for federalism. But she has less to say about the impact of cross-border political activity—particularly the effect of outside campaign contributions—on the extent to which state elected officials represent their actual residents and voting constituents. The evidence on that question is more troubling.

To begin with, only a small fraction of Americans—perhaps 4 percent in the hotly contested 2008 elections—make any campaign contributions at all.<sup>72</sup> And a tiny fraction of that already very small group actually provides most of the money. In the 2013–14 federal elections, fewer than 700,000 people—less than  $\frac{1}{4}$  of 1 percent of the total population and less than  $\frac{1}{3}$  of 1 percent of the adult population—donated the itemized \$200+ contributions which together account for 66.7 percent of all individual contributions to federal candidates, parties, and PACs.<sup>73</sup> And just 18 percent of that already very small group—the donors who gave \$2,600+—accounted for 73 percent of the itemized donations and 49 percent of total donations.<sup>74</sup> At the very top, in 2012 (before *McCutcheon* lifted the federal aggregate contribution limit) a mere  $\frac{1}{100}$ th of 1 percent of the population (a little more than 31,000 people) contributed 28 percent of all itemized federal contributions.<sup>75</sup> The minimum amount contributed that qualified a donor for membership in the elite 1 percent of the 1 percent of donors was \$12,950, and the median within the group was \$26,584.<sup>76</sup> Of course, the contributions of

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<sup>70</sup> *Id.* See also Pettys, *supra* note 9, at 87–88 (noting “social-psychological incentives” to cross-border political activity).

<sup>71</sup> Bulman-Pozen, *supra* note 9, at 1133.

<sup>72</sup> *Money in Politics: Who Gives?*, AMERICANS FOR CAMPAIGN REFORM, available at <http://www.accreform.org/research/money-in-politics-who-gives/>, archived at <http://perma.cc/8GZL-GT82>.

<sup>73</sup> Center for Responsive Politics, *2014 Overview: Donor Demographics*, OPENSECRETS.ORG, available at <https://www.opensecrets.org/overview/donordemographics.php>, archived at <http://perma.cc/J55Z-C8QK>.

<sup>74</sup> *Id.*

<sup>75</sup> Lee Drutman, *The Political 1% of the 1% in 2012*, SUNLIGHT FOUND. BLOG (June 24, 2013, 9:00 AM), available at [http://sunlightfoundation.com/blog/2013/06/24/1pct\\_of\\_the\\_1pct/](http://sunlightfoundation.com/blog/2013/06/24/1pct_of_the_1pct/). This does not count donations to so-called “dark money” organizations, that is, electorally active 501(c) organizations that do not have to disclose their donors.

<sup>76</sup> *Id.*

some donors in this group were in the millions of dollars. As a result, candidates, political parties, and the political committees that give to candidates and parties or spend independently to support them are heavily dependent on a relatively small number of very big givers.

These campaign financiers “come from a narrow stratum of American society”<sup>77</sup> that is demographically different from the rest of the population. They are, on average, older, better educated, more likely to be white, more likely to be male, more affluent,<sup>78</sup> more likely to be in business or the professions, and more partisan or ideologically extreme than the average voter, with the differences between donors and voters widening for larger donors.<sup>79</sup> The very largest donors tend to be business owners, chief executive officers, or Fortune 500 or Forbes 400 board members whose fortunes are based in finance, lobbying, or technology.<sup>80</sup> They work at Goldman Sachs, Blackstone, Kirkland & Ellis, Morgan Stanley, Comcast, Google, and similar firms.<sup>81</sup> The leading donors who provide a disproportionate share of campaign funds are also typically “habitual” donors who give year in and year out and support multiple candidates in each election cycle.<sup>82</sup> These donors are more likely to be asked for donations, to solicit further donations from their business or social networks, to bundle the donations of others,<sup>83</sup> and to serve on or head candidates’ finance committees.<sup>84</sup> The donors give to influence elections, affect public policy, and obtain material benefits for themselves or their businesses.<sup>85</sup>

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<sup>77</sup> PETER L. FRANCIA ET AL., *THE FINANCIERS OF CONGRESSIONAL ELECTIONS* 40 (Colum. U. Press 2003).

<sup>78</sup> *Id.* at 27–41.

<sup>79</sup> See, e.g., Raymond J. La Raja & David L. Wiltse, *Don’t Blame Donors for the Ideological Polarization of Political Parties: Ideological Change and Stability Among Political Contributors, 1972–2008*, 40 AM. POL. RES. 501, 506, 519 (2012).

<sup>80</sup> Adam Bonica et al., *Why Hasn’t Democracy Slowed Rising Inequality?*, 27 J. ECON. PERSP. 103, 111–16 (2013); Drutman, *supra* note 75; Kenneth P. Vogel, *Big money breaks out: Top 100 donors give almost as much as 4.75 million small donors combined*, POLITICO (Dec. 29, 2014, 5:32 AM), available at <http://www.politico.com/story/2014/12/top-political-donors-113833.html>, archived at <http://perma.cc/RCM9-ND6G>.

<sup>81</sup> Drutman, *supra* note 75.

<sup>82</sup> Francia et al., *supra* note 77, at 19–22.

<sup>83</sup> See, e.g., Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51, 54 (2013).

<sup>84</sup> Francia et al., *supra* note 77, at 95.

<sup>85</sup> *Id.* at 42–49.

Large and repeat donors have distinctive political views across the span of economic and social issues,<sup>86</sup> and, not surprisingly, their views appear to be well represented in the actions of the officials they have helped to elect. Compared with other Americans, they are more likely to want to balance the budget through spending cuts than tax increases, to worry about inflation rather than unemployment, and to favor cutting social welfare programs.<sup>87</sup> A number of recent studies have shown that these donors appear to have succeeded in their goals, with the views and voting records of members of Congress far more often in sync with the views of their affluent donors than with the views of their voters.<sup>88</sup> A survey of several thousand state legislators recently found that the legislators were quite willing to acknowledge that the passage of bills in their chamber was influenced by the financial contributions of individuals and groups to candidates and parties.<sup>89</sup> More generally, there is considerable evidence that a wide range of public policies are more reflective of the views of the affluent than of middle-income or low-income Americans, with campaign contributions playing at least some role in influencing this class-based differential representation.<sup>90</sup>

In effect, donors have become a distinctive constituency of their own, influencing both candidate success and government decision-making. They serve as “gatekeepers” of the electoral process,<sup>91</sup> helping to determine which candidates are able to effectively compete for election, constraining the policy space in

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<sup>86</sup> *Id.* at 60–65.

<sup>87</sup> Page et al., *supra* note 83, at 55–67.

<sup>88</sup> See, e.g., Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 289 (2014) (“[T]he voting records of representatives are about six times more reflective of the views of affluent contributors than they are of the opinions of the median-income constituent.”); Brittany H. Bramlett et al., *The Political Ecology of Opinion in Big-Donor Neighborhoods*, 33 POL. BEHAV. 565, 589–90 (2011); Joseph Bafumi & Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 AM. POL. SCI. REV. 519 (2010).

<sup>89</sup> LYNDA W. POWELL, *THE INFLUENCE OF CAMPAIGN CONTRIBUTIONS IN STATE LEGISLATURES: THE EFFECTS OF INSTITUTIONS AND POLITICS* 21–24 (U. Mich. Press 2012).

<sup>90</sup> See, e.g., Stephanopoulos, *supra* note 88, at 341–42; Christopher Ellis, *Understanding Economic Biases in Representation: Income, Resources, and Policy Representation in the 110<sup>th</sup> House*, 65 POL. RES. Q. 938, 948 (2012); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 239–52 (Princeton Univ. Press 2012); LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 252–82 (Princeton Univ. Press 2008).

<sup>91</sup> La Raja & Wiltse, *supra* note 79, at 506; Drutman, *supra* note 75.

which elected officials operate, and shaping the agenda for government action.<sup>92</sup> For some elected officials, “knowing the interests of their financial constituents is just as important as knowing the opinions of their voting constituents.”<sup>93</sup> These financial constituents are likely to have different concerns than non-donor voters and prefer different policy alternatives than non-donor constituents.<sup>94</sup> As Senator Chris Murphy (D—Conn.) nicely put it, “I talked a lot more about carried interest” (that is, the tax treatment of the profits that private equity and hedge fund managers earn on investments) in calls to donors “than I did in the supermarket.”<sup>95</sup> Moreover, financial constituents are more likely to seek direct access to elected officials (including legislators from districts other than their own)<sup>96</sup> to present their views and to get that access when they want it.<sup>97</sup>

This effect of large campaign contributions on the representation of non-donor voters is compounded by the donations of non-constituent contributors. Non-constituent donors, particularly those who contribute in multiple campaigns, are even more affluent, better educated, more partisan, and more ideological than donors generally.<sup>98</sup> They tend to live with people like themselves in distinctive high-wealth neighborhoods within cosmopolitan areas, and to have little or no connection to or interest in the people of the states or districts to which they send their campaign dollars—other than seeking to influence the outcome of their elections.<sup>99</sup> The communities whose residents have the greatest propensity to give are high wealth and politically-connected enclaves, including the most affluent suburbs in major metropolitan areas. In 2012, the places with the highest rates of donations included Chevy Chase, Maryland, Bloomfield Hills, Michigan, Palm Beach, Florida, and

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<sup>92</sup> Bramlett et al., *supra* note 88, at 590.

<sup>93</sup> Francia et al., *supra* note 77, at 162.

<sup>94</sup> Page et al., *supra* note 83, at 55–68.

<sup>95</sup> Drutman, *supra* note 75.

<sup>96</sup> See Francia et al., *supra* note 77, at 122–26; Page et al., *supra* note 83, at 54.

<sup>97</sup> See Joshua L. Kalla & David E. Broockman, *Congressional Officials Grant Access Due to Campaign Contributions: A Randomized Field Experiment*, AM. J. POL. SCI. (forthcoming), available at [https://www.ocf.berkeley.edu/~broockma/kalla\\_broockman\\_donor\\_access\\_field\\_experiment.pdf](https://www.ocf.berkeley.edu/~broockma/kalla_broockman_donor_access_field_experiment.pdf).

<sup>98</sup> Francia et al., *supra* note 77, at 90; Gimpel et al., *supra* note 19, at 374, 379, 389–92; La Raja & Wiltse, *supra* note 79, at 506.

<sup>99</sup> Gimpel et al., *supra* note 19, at 374, 379, 389–90.

Greenwich, Connecticut.<sup>100</sup> So, too, in absolute dollars, most federal campaign contributions come from relatively few places. In the 2005–06 election cycle, 77 percent of all itemized individual federal campaign contributions came from 5 percent of all zip codes.<sup>101</sup> Another study focused on a slightly earlier period found that 20 percent of Congressional districts provided a majority of the itemized individual campaign funds.<sup>102</sup> In the 2013–14 federal elections, itemized individual donations were disproportionately from the Washington, D.C., New York, and San Francisco metropolitan areas—in other words, from lobbyists, Wall Street, and Silicon Valley.<sup>103</sup> Indeed, ten zip codes (all in New York, Washington, San Francisco, and Chicago) generated more than \$233 million in itemized campaign contributions, or roughly the same amount as the total sum provided by the bottom 25 states (ranked by the amount of their campaign donations).<sup>104</sup> Washington, D.C.—which elects no senators and has a single non-voting representative in the House of Representatives—provided as much money in itemized individual elections in the last federal election cycle as the residents of 29 states.<sup>105</sup> It appears that the slogan embraced by the District of Columbia’s distinctive “Taxation without Representation” license plate<sup>106</sup> is mistaken, as the District is exceedingly well-represented through its campaign donations in federal elections. The role of the Washington area, in particular, is likely to grow in the post-*McCutcheon* era as “K Street’s familiar refrain to candidates’ pleas for campaign cash—‘I’ve maxed out’—was no longer

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<sup>100</sup> Drutman, *supra* note 75.

<sup>101</sup> Bramlett et al., *supra* note 88, at 566.

<sup>102</sup> Gimpel et al., *supra* note 19, at 382.

<sup>103</sup> The Ctr. For Responsive Politics, *2014 Overview: Top Metro Areas*, OPENSECRETS.ORG, available at <https://www.opensecrets.org/overview/topmetro.php>, archived at <http://perma.cc/9JMC-BMSX>.

<sup>104</sup> Compare The Ctr. For Responsive Politics *2014 Overview: Top Zip Codes*, OPENSECRETS.ORG, available at <https://www.opensecrets.org/overview/topzips.php>, archived at <http://perma.cc/8MTU-FPWA>, with The Ctr. For Responsive Politics, *2014 Overview: Contributions by State*, OPENSECRETS.ORG, available at <https://www.opensecrets.org/overview/statetotals.php>, archived at <http://perma.cc/NT93-8VK2>.

<sup>105</sup> The Ctr. For Responsive Politics, *2014 Overview: Contributions by State*, OPENSECRETS.ORG, available at <https://www.opensecrets.org/overview/statetotals.php>, archived at <http://perma.cc/8L89-RY73>.

<sup>106</sup> See *Taxation Without Representation – Vehicle Tags*, D.C. DEP’T OF MOTOR VEHICLES, available at <http://dmv.dc.gov/service/taxation-without-representation-vehicle-tags>, archived at <http://perma.cc/9HFJ-YH5M>.

operative.”<sup>107</sup> It is perhaps ironic that if cross-border donations are strengthening the political role of the states, so much money is coming from a place that is not a state at all.

In the system of representative government, voting constituencies use elections to select the representatives who will act for them, to empower those representatives, and through the grant or denial of reelection, to make those representatives accountable for their actions and responsive to constituent concerns. The design of constituencies both expresses the political values of a society<sup>108</sup> and shapes the kinds of policies and programs representatives will pursue.<sup>109</sup> Our campaign finance system gives our elected representatives a second constituency—a contributor constituency frequently composed of non-members of the voting constituency. The contributor constituency often has no right to vote for the representatives but by contributing or threatening to withhold money (or threatening to give to an opponent) it can help determine which candidates will be able to campaign effectively to the voting constituency and who can seek re-election. They may not determine who wins elections but they are often crucial to making election possible. Elected officials, in turn, are influenced to act in ways that maintain the flow of campaign dollars. In so doing, they represent constituencies that do not elect them, as well as those that do. Not only does the contributor constituency have a very different relationship to the elected representatives than the voting constituency, but contributor constituents often have different political concerns and goals that have may have little relationship to, and may in fact be at odds with, the concerns and goals of the residents of the voting constituency. The campaign finance system may promote accountability to constituents, but it is accountability to the contributor constituency, not the voting constituency that nominally empowers the representatives to act and that legitimates their authority.

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<sup>107</sup> Kevin Bogardus, *Meet the New Super Donors*, CAMPAIGNS & ELECTIONS (Nov. 24, 2014), available at <http://www.campaignsandelections.com/magazine/2367/meet-the-new-super-donors>, archived at <http://perma.cc/TN8H-QELH>.

<sup>108</sup> See Schwartz, *supra* note 65, at 19.

<sup>109</sup> See Rehfield, *supra* note 61, at 147.



### III. NON-CONSTITUENT CONTRIBUTIONS AND CAMPAIGN FINANCE LAW

In his Harold Leventhal Lecture, Justice Stevens pointed out that the Supreme Court has never explicitly addressed the question of whether a citizen of one state has a constitutionally protected interest in giving money to a candidate running for office in another state. He argues that the right to contribute can, like the right to vote itself, be limited to residents of the jurisdiction holding the election.<sup>110</sup> Although the Supreme Court itself has never directly considered the question,<sup>111</sup> the issue has come up in a handful of state and lower federal court cases and has generally, albeit not consistently, been resolved in favor of the non-constituent contributor. As I explain in this Part, that is very likely how the current Supreme Court would resolve the issue. States and localities may—and do—adopt measures to stimulate constituent contributions, but there is probably nothing they can do to stem the flow of non-constituent donations.

The case for limiting non-constituent contributions builds on the Supreme Court's statement in *Holt Civic Club v. City of Tuscaloosa*<sup>112</sup> that "our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders."<sup>113</sup> Although *Holt Civic Club* dealt only with the right to vote in local elections, it may be said to stand for a broader principle of democratic self-government in which the representative institutions of a political community like a city or state are controlled by the members of that community, which is to say, its residents. The residency principle is incorporated in

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<sup>110</sup> Justice John P. Stevens (Ret.), *supra* note 60.

<sup>111</sup> As noted earlier in this article, the Court was surely aware that the thrust of Shaun McCutcheon's lawsuit was to enable him to make contributions in out-of-state elections. In other campaign finance cases, the Court also dealt with claims by out-of-state parties. For example, in *American Tradition Partnership v. Bullock*, 132 S. Ct. 2490 (2012), in which the Court invalidated Montana's law banning corporate campaign expenditures, the lead plaintiff was incorporated under the laws of Colorado. See *Western Tradition Partnership v. Attorney General*, 271 P.3d 1, 4 (Mont. 2011), *rev'd*, 132 S. Ct. 2490 (2012).

<sup>112</sup> 439 U.S. 60 (1978).

<sup>113</sup> *Id.* at 68–69 (citing *Dunn v. Blumstein*, 405 U.S. 330, 343–44 (1972); *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 625 (1969); *Carrington v. Rash*, 380 U.S. 89, 91 (1965); *Pope v. Williams*, 193 U.S. 621 (1904)).

the many state laws that require a candidate to be a resident of the jurisdiction he or she seeks to represent<sup>114</sup> and that count only state residents in determining whether a petition has enough signatures to qualify a candidate or proposition for a place on the ballot,<sup>115</sup> and, more contentedly, that require that petition circulators also be state residents.<sup>116</sup>

Campaign finance doctrine, by contrast, has been framed in terms of the First Amendment freedoms of speech and association. It involves campaigning, not casting ballots or placing candidates or issues on ballots. The Supreme Court has

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<sup>114</sup> See e.g., Michael J. Pitts, *Against Residency Requirements*, 2015 U. CHI L. FORUM 341 (2015). Cf. U.S. CONST. art. I, §2, cl. 2 (requiring a member of the House of Representatives “when elected” to be an “inhabitant of that state in which he shall be chosen”); art. I, §3, cl. 3 (same for a United States Senator). The principal controversies concerning candidate residency rules have turned on state *durational* residency requirements as well as the determination of what constitutes residency.

<sup>115</sup> See *Johnstone*, *supra* note 59, at 129 (“Excluding outsiders from signing petitions is uncontroversial.”).

<sup>116</sup> See *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 197 (1999) (assuming, without deciding, that a petition circulator residency requirement would be upheld, while striking down the requirement that circulators be registered voters); *id.* at 211 (noting that a state has a “compelling” interest in requiring petition circulators to be residents) (Thomas, J., concurring); *id.* at 217–18 (suggesting that the Court would uphold the more restrictive requirement that petition circulators be registered voters in the state) (O’Connor, J., joined by Breyer, J., concurring in part and dissenting in part); *id.* at 226–32 (suggesting that the Court would uphold the more restrictive requirement that petition circulators be registered voters in the state) (Rehnquist, C.J., dissenting). Nineteen states and the District of Columbia have adopted a residency requirement for petition circulators. See *Johnstone*, *supra* note 59, at 130. See also *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001). But see *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) (invalidating state residency requirement for circulating petition to place independent presidential candidate on the ballot). Some lower courts have invalidated more restrictive rules requiring that candidate ballot petition circulators be registered voters of the relevant political subdivision in which the candidate seeks to run, see, e.g., *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000), or that a signature witness be a resident of the political subdivision. See, e.g., *Lerman v. Bd. of Elections of the City of New York*, 232 F.3d 135 (2d Cir. 2000), *Molinari v. Powers*, 82 F.Supp.2d 57 (E.D.N.Y. 2000); *Morrill v. Weaver*, 224 F.Supp.2d 882 (E.D. Pa. 2002); *Frami v. Ponto*, 255 F.Supp.2d 962 (W.D. Wis. 2003). Much of the debate over residency requirements for petition circulators and witnesses has focused on ballot integrity, specifically the concern that if questions are raised about the validity of signatures it may be difficult to find and bring to court non-resident circulators or witnesses in the time-constrained period necessary to resolve the questions. See, e.g., *Buckley*, 525 U.S. at 196–97; *Jaeger*, 241 F.3d at 616. Several courts have found that there are means less restrictive than residency, such as requiring circulators to give advance consent to state court jurisdiction and detailed personal and residency information, addressing this issue. See, e.g., *Libertarian Party of Virginia v. Judd*, 718 F.3d 308 (4th Cir. 2013); *Citizens in Charge v. Gale*, 810 F. Supp. 2d 916 (D. Neb. 2011). See also *Voting for America, Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (rejecting First Amendment challenge to a Texas law requiring that volunteer deputy voter registrars be Texas residents).

protected the rights of minors too young to vote to make contributions to candidates and political parties,<sup>117</sup> as well as the rights of corporations ineligible to vote to make campaign expenditures.<sup>118</sup> The only interests the Supreme Court has recognized as justifying restrictions on contributions are the prevention of corruption and the appearance of corruption,<sup>119</sup> and the prevention of the circumvention of valid anti-corruption restrictions.<sup>120</sup> As *McCutcheon* indicates, anti-corruption does not easily justify restrictions on dollar-limited non-constituent donations.

Challengers to laws permitting non-constituent donations and defenders of laws limiting them have sought to break this distinction between campaigning and voting by claiming that the right to give money can be tied to the right to vote. They have sought to invoke the concept of the “republican form of government,” with the assertion that outside money threatens the voter control of government at the heart of self-government. Although the argument has had some traction in court, it has generally failed.

On two occasions, third-party candidates for Congress and their supporters challenged FECA’s “authorization” of—in reality, its failure to limit or bar—out-of-state or out-of-district contributions in congressional campaigns. In the first case, in 1995 the United States Court of Appeals for the Ninth Circuit summarily rejected the claim. The court found that the plaintiffs lacked standing because an invalidation of FECA’s contribution provisions would not provide them the remedy of curtailing outsider contributions, and it dismissed plaintiffs’ request to bar competing candidates from accepting out-of-state donations as “frivolous.”<sup>121</sup> The court noted plaintiffs’ contention, growing out of the republican form of government guarantee, that “the Constitution entitles them to representation by someone not beholden to any citizen of another state” and acknowledged “it can be argued that pure localism affords better

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<sup>117</sup> *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 231–32 (2003).

<sup>118</sup> *Citizens United*, 558 U.S. at 310.

<sup>119</sup> *Buckley*, 424 U.S. at 26–29.

<sup>120</sup> See, e.g., *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 159 (2003); *Fed. Election Comm’n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 446–47, 456, n. 18 (2001).

<sup>121</sup> *Whitmore v. Fed. Election Comm’n*, 68 F.3d 1212, 1214–16 (9th Cir. 1995), *cert. den.* 517 U.S. 1155 (1996).

representation.”<sup>122</sup> But the court also made the opposite point that “one could argue to the contrary that a Representative acts on matters affecting the interests of all Americans, so all Americans should have the right to express themselves on who ought to be a Representative.”<sup>123</sup> Without actually determining which is the better argument, the court observed that limits on out-of-state donations “*may* violate the rights of out-of-state contributors,” noted that “[n]o statute or precedent supports plaintiffs’ claims,” and concluded that as the Guarantee Clause is not judicially enforceable, the claims must be dismissed.<sup>124</sup>

The federal district court for the District of Columbia reached the same result in a very similar case nine years later. Again, the court found plaintiffs lacked standing as invalidating FECA’s contribution provisions would not redress their “grievance” concerning the flow of out-of-state money to their major party opponents.<sup>125</sup> This court was also somewhat clearer in acknowledging that non-constituents have a right to contribute in federal elections, observing that barring out-of-state money from a United States Senate race would be an “unprecedented limitation on constitutional freedom.”<sup>126</sup>

These challenges to FECA sought to compel courts to impose restrictions on out-of-state or out-of-district contributions but did not consider the constitutionality of laws actually targeting non-constituent campaign donations. That issue has come up in cases from three states that restricted outsider money, with the courts divided concerning both the analysis and the results.

In 1994, Oregon voters passed Ballot Measure 6, which amended the state constitution to bar state candidates from using or directing any contributions other than those given by “individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate.”<sup>127</sup> A second section of the amendment implicitly permitted state candidates to take up to ten percent of their funds from non-constituent donors but then provided that any

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<sup>122</sup> *Id.* at 1216.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* (emphasis added).

<sup>125</sup> *Sykes v. Fed. Election Comm’n*, 335 F. Supp. 2d 84, 90–93 (D.D.C. 2004).

<sup>126</sup> *Id.* at 93.

<sup>127</sup> *VanNatta v. Keisling*, 899 F. Supp. 488, 491 (D. Ore. 1995).

candidate who is more than ten percent non-constituent-funded would forfeit his or her office if the candidate won the election, and it barred both elected and defeated candidates who violated the limit on outside funds from holding an elected public office for twice the term of the office sought.<sup>128</sup> In *VanNatta v. Keisling*,<sup>129</sup> the Oregon federal district court held Measure 6 unconstitutional. Following *Buckley v. Valeo*,<sup>130</sup> the court found that contributions are political speech protected by the First Amendment and that the restriction burdened the speech and associational rights of out-of-district donors by limiting the amount of their donations that may be used by candidates.<sup>131</sup> Although the court struck down the entire measure, its analysis focused exclusively on the effect of the law on out-of-district rather than out-of-state donors. The court emphasized that “[e]lected officials in state offices impact all state residents, not just the candidate’s constituents within his election district. Therefore, the Measure impairs out-of-district residents from associating with a candidate for state office who, if elected, will have a real and direct impact on those persons.”<sup>132</sup> Turning to the public interests *Buckley* determined would justify contribution restrictions—the prevention of corruption and its appearance—the court held that the Measure was not properly tailored to address these anti-corruption concerns as it would permit both large out-of-district donations if they did not exceed ten percent of a candidate’s total expenditures and large in-district contributions.<sup>133</sup>

A divided Ninth Circuit panel affirmed.<sup>134</sup> All three judges agreed that contributions to political campaigns are protected by the First Amendment, that the Measure burdened the right to contribute, and that the standard of review of contribution restrictions is “rigorous” but not strict scrutiny.<sup>135</sup> The panel unanimously concluded that the restriction on out-of-district

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<sup>128</sup> *Id.*

<sup>129</sup> 899 F. Supp. 488 (D. Ore. 1995).

<sup>130</sup> 424 U.S. 1 (1976).

<sup>131</sup> *VanNatta*, 899 F. Supp. at 496.

<sup>132</sup> *Id.* at 497.

<sup>133</sup> *Id.* The law imposed no dollar limits on in-district contributions.

<sup>134</sup> *VanNatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998), *cert. den. sub nom. Miller v. VanNatta*, 525 U.S. 1104 (1999).

<sup>135</sup> *VanNatta*, 151 F.3d at 1220–21. The district court had erroneously applied strict scrutiny. *VanNatta*, 899 F. Supp. at 496.

contributions could not be justified by *Buckley's* anti-corruption concerns because the Amendment applied to all such contributions "regardless of size or any other factor that would tend to indicate corruption" and there was no "evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in *Buckley*."<sup>136</sup>

The panel, however, divided over the question whether the restrictions could be justified by the state's interest in preserving its republican form of government. Citing to Supreme Court cases dealing with the right to vote and upholding laws limiting access to a state's public schools to the state's residents, Judge Brunetti's dissent emphasized the state's "strong interest in ensuring that elected officials represent those who elect them" and in "ensuring that only those who are constituents participate in the electoral process."<sup>137</sup> Measure 6's differentiation between constituents and non-constituents for purposes of making campaign contributions was comparable to "residency requirements for voting."<sup>138</sup> Invoking *Austin v. Michigan Chamber of Commerce*<sup>139</sup>—at that time still good law—he situated the restriction on non-constituent donations within *Austin's* determination that a state could limit the role of corporate treasury funds in elections to be sure that "expenditures reflect actual public support for the political ideas espoused by corporations."<sup>140</sup> In his view, the relevant "actual public support" in the context of protecting elections from unfair influences . . . is by definition limited to those who are eligible to vote, i.e. district residents."<sup>141</sup> He found Measure 6 to be a "manifestation of the state of Oregon's judgment that out-of-district donations have the potential for undue influence"—a judgment which, under *Austin*, he concluded deserved "considerable deference."<sup>142</sup> Noting that Measure 6 did not restrict independent expenditures by outsiders, Judge Brunetti concluded that the burden on First Amendment rights was

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<sup>136</sup> *VanNatta*, 151 F.3d at 1221.

<sup>137</sup> *Id.* at 1222, 1224.

<sup>138</sup> *Id.* at 1225.

<sup>139</sup> 494 U.S. 652 (1990).

<sup>140</sup> *Id.* at 660.

<sup>141</sup> *VanNatta*, 151 F.3d at 1222.

<sup>142</sup> *Id.* at 1224.

modest and justified by the state's interest in "ensur[ing] the integrity of political structures and processes."<sup>143</sup>

The majority, however, voted to invalidate the Measure. The majority dismissed the relevance of the right-to-vote case law to "the right to First Amendment speech" and, in a sentence, summarily concluded that Measure 6 "is not saved by the argument that it protects the republican form of government."<sup>144</sup>

The following year a unanimous Alaska Supreme Court in *State v. Alaska Civil Liberties Union*<sup>145</sup> upheld against a First Amendment challenge an Alaska law limiting the aggregate amounts of contributions that state candidates, political parties, or political committees can receive from non-Alaska residents. Candidates for governor and lieutenant governor could receive no more than \$20,000 in the aggregate from all nonresident individuals; a candidate for the state senate could accept no more than a total of \$5,000 from out-of-staters; candidates for state representative or municipal office could take only \$3,000 from non-Alaskans; and contributions from out-of-state individuals could amount to no more than 10 percent of the total contributions accepted each year by state political parties and other political groups.<sup>146</sup> As the Alaska court noted, the Alaska measure was less restrictive than Oregon's in that it limited only out-of-state donations and did not attempt to restrict inter-district contributions within the state, so that all Alaskans could contribute to candidates for state office.<sup>147</sup>

Without expressly invoking the republican form of government concept, the court implicitly relied on it in finding, as Judge Brunetti had, that the state had an interest—akin to the anti-distortion one recognized by the Supreme Court in *Austin*—in controlling the "corrupting influence" of "cumulatively vast out-of-state contributions . . . from drowning out the voices of Alaska residents."<sup>148</sup> Recognizing that the caps

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<sup>143</sup> *Id.* at 1225.

<sup>144</sup> *Id.* at 1218.

<sup>145</sup> *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), *cert. den.*, 120 S. Ct. 1156 (2000).

<sup>146</sup> *Id.* at 614–15, n. 110. The law also prohibited state candidates from accepting contributions from a group organized under the laws of another state, resident in another state, or whose participants were not residents of Alaska when the contribution was made. *See id.* at n. 111.

<sup>147</sup> *Id.* at 616.

<sup>148</sup> *Id.* at 616–17.

would preclude even small donations once the statutory ceilings were reached, the Court emphasized that:

nonresident contributions may be individually modest, but can cumulatively overwhelm Alaskans' political contributions. Without restraints, Alaska's elected officials can be subjected to purchased or coerced influence which is grossly disproportionate to the support nonresidents' views have among the Alaska electorate, Alaska's contributors, and those most intimately affected by elections, Alaska residents.<sup>149</sup>

Blending anti-corruption and republican self-government concerns together, the court concluded that although "[o]utside influence plays a legitimate part in Alaska politics" nonresident contributions may be limited "to prevent elected officials from becoming beholden to those influences."<sup>150</sup>

Three years later, however, the federal district court for Vermont in *Landell v. Sorrell*<sup>151</sup> reached a very different result. *Landell* invalidated Vermont's law imposing a 25 percent cap on the percentage of funds state candidates, political parties, and PACs could accept from out-of-staters.<sup>152</sup> The court found that the law burdened First Amendment rights because it would bar some potential donors from contributing to state candidates, and that it was not justified by anti-corruption concerns. "[M]ost if not all of the examples of allegedly suspicious out-of-state contributions" presented by the state to justify the law "also happened to be large and often from special interest groups that are viewed by the public stereotypically as the source of suspicious campaign money. There was no evidence that the fact that the money came from out-of-state is necessarily the root of the problem."<sup>153</sup> The court also implicitly rejected the republican self-government concern when it found that "many people outside of Vermont have legitimate stakes in Vermont politics, and therefore have a right to participate in Vermont elections. Individuals from outside Vermont who are nevertheless

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<sup>149</sup> *Id.* at 617.

<sup>150</sup> *Id.*

<sup>151</sup> 118 F. Supp. 2d 459 (D. Vt. 2000).

<sup>152</sup> *Id.* at 484.

<sup>153</sup> *Id.*



influenced by Vermont law must have some access to the political process here.”<sup>154</sup>

A Second Circuit panel unanimously affirmed.<sup>155</sup> Like the district court, the appellate judges framed the question entirely in First Amendment terms, limited the justifications for restricting campaign contributions to the prevention of corruption, and found no evidence that out-of-state donors raise a particular danger of corruption.<sup>156</sup> Indeed, in the court’s view, the state’s drawing of an in-state/out-of-state distinction smacked of viewpoint discrimination: “the government does not have a permissible interest in disproportionately curtailing the voices of some, while giving others free rein, because it questions the value of what they have to say.”<sup>157</sup> The Alaska Supreme Court’s recognition of a state’s interest in shaping its electoral system to be more accountable to state residents was summarily dismissed by the Second Circuit, which concluded “we are unpersuaded that the First Amendment permits state governments to preserve their systems from the influence, exercised only through speech-related activities, of non-residents.”<sup>158</sup>

With the results in the cases directly considering challenges to non-constituent contributions somewhat mixed, it may be that the most significant case is one that did not actually address the issue but that still articulated powerful arguments for both sides of the question. In *Bluman v. Federal Election Commission*,<sup>159</sup> a three-judge panel of the United States District Court for the District of Columbia upheld the federal law<sup>160</sup> banning foreigners, other than lawful permanent residents, from donating money to candidates in federal or state elections, contributing to the national political parties and other political committees, or making independent expenditures or electioneering communications in federal elections. In an

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<sup>154</sup> *Id.*

<sup>155</sup> *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2002), *rev’d on other issues sub. nom. Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>156</sup> *Landell*, 382 F.3d at 146–48.

<sup>157</sup> *Id.* at 148.

<sup>158</sup> *Id.* at 148.

<sup>159</sup> 800 F.Supp.2d 281 (D.D.C. 2011), *aff’d mem.* 132 S. Ct. 1087 (2012).

<sup>160</sup> 52 U.S.C. § 30121. At the time of the *Bluman* decision, the provision at issue was 2 U.S.C. § 441e(a). The election law provisions of the U.S. Code have since been reorganized and recodified.

opinion by Judge Kavanaugh, the court determined 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.”<sup>161</sup> More to the point, campaign contributions and expenditures “constitute part of the process of democratic self-government” because they “are an integral aspect of the process by which Americans elect officials to federal, state, and local government offices.”<sup>162</sup> The campaign activities financed by contributions and expenditures—including advertisements, speeches, rallies, and get-out-the-vote drives—“are part of the overall process of democratic self-government.”<sup>163</sup> Indeed, “[s]pending money to contribute to a candidate or party or to expressly advocate for or against the election of a political candidate is participating in the process of democratic self-government.”<sup>164</sup> Not only can the government bar foreigners from voting and holding elected office but “[i]t follows” that the government may also bar foreign citizens who are not lawful permanent residents “from participating in the campaign process that seeks to influence how voters will cast their ballots in the election.”<sup>165</sup>

If the court had stopped there then *Bluman* would provide powerful rhetorical and logical support for laws constraining non-constituent donations generally. The same nexus linking membership in the political community to participation in the processes of democratic self-government and the finding that the giving and spending of campaign money is as “integral” a part of those processes as voting and running for office ought to apply to all donors from outside the constituency, not just non-Americans. However, the opinion did not stop there. Rather Judge Kavanaugh went on to indicate that the relevant distinction is not between members of specific political communities—such as constituents of a state, city, or legislative district—and nonconstituents, but between members of the American political community writ large and non-Americans. “[C]itizens of other states and municipalities are all members of

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<sup>161</sup> *Bluman*, 800 F. Supp. 2d at 288.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 289–90.

<sup>165</sup> *Id.* at 288.

the American political community.”<sup>166</sup> As a result “[t]he compelling interest that justifies Congress in restraining foreign nationals’ participation in American elections—namely, preventing foreign influence over the U.S. government—does not apply equally to . . . citizens of other states and municipalities.”<sup>167</sup>

In other words, the music of *Bluman*—its treatment of campaign finance as integral to democratic self-government, its association of campaign money with voting and candidacy, and its assumption that participation in self-government can be limited to political community members—makes the case for the authority to restrict non-constituent contributions, but the specific words—which treat “the American political community” as the relevant political community for campaign finance purposes—constitute a powerful rejection of the possibility of curbing non-constituent donations. Although technically dicta, *Bluman*’s language undermines the argument for tying the right to make campaign contributions to eligibility to vote or hold office within a constituency.

It is virtually certain that the Supreme Court would invalidate laws that target contributions by non-constituents, including those that limit the amount or percentage of total donations a candidate or political committee may accept from non-constituents as well as laws that ban non-constituent donations outright. Contribution restrictions burden the speech and associational rights of would-be donors, are subject to exacting judicial review, and must be closely tailored to advancing the public interest in preventing corruption and its appearance. The current Court has emphasized that corruption means simply “quid pro quo” corruption and not the influence on or access to government that big spenders and donors may obtain.<sup>168</sup> As both the Ninth and Second Circuits have noted, there is no reason to believe that a donation from a non-constituent presents a greater danger of corruption than a donation of comparable size from a constituent. *Citizen United*’s rejection of *Austin*’s theory of distortion corruption<sup>169</sup> fatally undercuts the position of the Ninth Circuit dissent and the

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<sup>166</sup> *Id.* at 290.

<sup>167</sup> *Id.*

<sup>168</sup> *McCutcheon*, 134 S. Ct. at 1450–59.

<sup>169</sup> *Citizens United*, 558 U.S. at 349–51.

Alaska Supreme Court that a state can protect its elections from campaign money that is not reflective of the views of voters within a state or district. The democratic self-government argument which supports the authority of a political community to limit voting, candidacy, and the signing of ballot petitions to constituency members is unlikely to provide support for a community's claim to be able to limit campaign finance participation to community members.

With the rights of non-voting minors to make contributions and of corporations and unions to make independent expenditures previously established, campaign finance has already been separated from voting. Campaign finance involves efforts to influence voters, or to provide candidates, parties, and political committees with the resources to do so. Although, as *Bluman* acknowledges, influencing and funding the influencing of voter decisions are intimately connected with the electoral process, they do not actually entail the formal acts of voting or placing candidates and propositions on the ballot. The latter may be reserved for community residents, but as a matter of First Amendment jurisprudence, the former are rights available to members of the American political community as a whole.

To be sure, Alaska's restrictions on out-of-state donations remain on the books, and at least one other state—Hawaii—also places an aggregate cap on the percentage of total contributions a state candidate may receive from non-residents.<sup>170</sup> It is revealing that all the states that have sought to control the electoral impact of out-of-state money—Alaska, Hawaii, Oregon, Vermont—have relatively small populations and, thus, perhaps well-founded fears of the potential power of out-of-state money to influence state government decision-making. But at this point the Alaska and Hawaii laws appear to be legal outliers, ripe for constitutional challenge, rather than precedents for or harbingers of efforts to control outside influence.

In one aspect of campaign finance law, however, a preference for in-state or in-district donors over outsiders is well-established: public funding. States and localities that provide candidates with public funds typically condition the eligibility for funding on the candidates collecting a certain

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<sup>170</sup> HAW. REV. STAT. §11-362 (2010). The cap is 30 percent of all donations for each election period, with an exemption for donations from a member of the candidate's immediate family.

number or dollar value of small qualifying contributions. Most go further<sup>171</sup> and require that the qualifying contributions be provided entirely or primarily by “qualified elector[s],”<sup>172</sup> “registered voters,”<sup>173</sup> “individuals eligible to vote,”<sup>174</sup> or residents of the state or constituency.<sup>175</sup> Public funding

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<sup>171</sup> But not all. Some jurisdictions link the availability of public funds to candidates who have raised a certain number of small donations from individuals without further requiring that the individuals be state or district residents or voters. *See, e.g.*, MD. CODE ANN., ELEC. LAW § 15-102 (d) (West 2015) (“eligible private contribution” is contribution from an individual, up to \$250); MASS. GEN. LAWS ANN. 55C § 1 (West 2015) (qualifying contribution is “any contribution made by an individual” under \$250); N.J. STAT. ANN. § 19:44A-33 (West 2015); R.I. GEN. LAWS ANN. § 17-25-20 (West 2014).

<sup>172</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-946(B)(1) (West 2014).

<sup>173</sup> *See, e.g.*, ME. REV. STAT. ANN. tit. 21-A, § 1125 (3) (2014) (qualifying contributions for candidates for governor must come from “registered voters of this State;” for candidates for the state senate and state house of representatives, the qualifying contributions must come from “registered voters from the candidate’s electoral division;” N.M. STAT. ANN. § 1-19A-2(H)(1) (West 2014) (qualifying contribution must be “made by a registered voter who is eligible to vote for the covered office that the applicant candidate is seeking;”); W. VA. CODE ANN. § 3-12-3(14) (West 2014) (“qualifying contribution” enabling candidate to participate in pilot public financing program for the West Virginia Supreme Court of Appeals can be provided only by a “West Virginia registered voter”).

<sup>174</sup> *See, e.g.*, MINN. STAT. ANN. § 10A.323(a)(1) (West 2015) (“individuals eligible to vote in this state”).

<sup>175</sup> *See, e.g.*, CONN. GEN. STAT. ANN. § 9-704(a) (West 2015). Under Connecticut’s Citizens’ Election Fund Program, to qualify for public funds, a candidate for governor must collect \$250,000 in contributions from individuals, counting only \$100 from any individual, with \$225,000 (90% of the total) provided by “individuals residing in the state.” Similarly, candidates for statewide office must collect \$75,000 from individuals, with 90 percent of the total (\$67,500) coming from individuals residing in the state. Candidates for state senate must collect \$15,000, counting no more than \$100 per donation from at least 300 individuals “residing in municipalities included, in whole or in part” in the relevant senate district, and a candidate for the assembly must obtain \$5,000, including contributions from at least 150 individuals, “residing in municipalities included, in whole or in part, in the district” counting no more than \$100 per donor. *See also* FLA. STAT. ANN. § 106-33 (2)(b) (West 2014) (“contributions from individuals who at the time of contributing are not state residents may not be used to meet the threshold amounts” in public funding program for candidates for statewide office; HAW. REV. STAT. § 11-429(a) (West 2014) (qualifying contributions for public funding program for candidates for governor, lieutenant governor, county mayor, or prosecuting attorney must come from “individual residents of Hawaii”); MICH. COMP. LAWS ANN. § 169.212 (West 2014) (qualifying contribution for public funding program for candidates for governor “does not include a contribution by an individual who resides outside of this state”); N.Y. ELEC. LAW § 14-204(2) (McKinney 2014) (threshold for eligibility for public funding for candidates for state comptroller can be met only with contributions from “residents of New York state”); VT. STAT. ANN. tit. 17 § 2984(b) (West 2014); N.Y.C. ADMIN. CODE §§ 3-702(3), 3-703(2) (defining “matchable contribution” as contribution from “a natural person resident in the city of New York” and then setting threshold amounts of matchable contributions to be eligible for public funding in elections for city-wide office and city council); L.A., CAL., MUN. CODE § 49.7.23(C)(1)(d) (2013) (starting in 2015, qualifying contributions must come from “individuals residing within the City,” and for City Council candidates there must also be 200 contributions of at least \$5 each

programs that provide eligible candidates with matching grants based on the number and value of small private contributions to the candidate may also limit the public fund match to donations from the same category of constituents, such as residents, whose donations were necessary to qualify the candidate for public funding.<sup>176</sup>

Can a state or city favor its own voters or residents by conditioning a candidate's eligibility for public funds on raising a threshold number or amount of donations just from the jurisdiction's voters or residents, and can it limit a matching funds program to matching only donations from those constituents? Almost certainly, the answer is "yes." In *Buckley v. Valeo*, the Supreme Court upheld the federal program of providing public funds to presidential candidates, finding that the public financing of candidates advances three important goals: reducing "the deleterious influence of large contributions on our political process," "facilitat[ing] communication by candidates with the electorate," and "free[ing] candidates from the rigors of fundraising."<sup>177</sup> The Court linked public funding to democratic self-government, determining Congress "use[d] public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."<sup>178</sup> The Court also upheld the provisions of the presidential primary public funding program tying eligibility for public funds to raising a threshold amount of private money in smaller donations and then providing public funds on a matching funds basis.<sup>179</sup> As the Court noted, "Congress' interest in not funding hopeless candidacies with large sums of public money . . . necessarily justifies the withholding of public assistance from candidates without significant public support."<sup>180</sup>

*Buckley* supports the position that a state or city may make eligibility to participate in its public funding program contingent on a showing "of significant public support" from the state or

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from individuals residing in the council district for which election is sought, out of the \$25,000 total council candidates need to raise in qualifying contributions).

<sup>176</sup> See, e.g., FLA. STAT. ANN. § 106.35(2)(b) (West 2014); N.Y.C. ADMIN. CODE § 3-702(3); L.A., CAL., MUN. CODE § 49.7.27(A) (2013).

<sup>177</sup> *Buckley*, 424 U.S. at 91.

<sup>178</sup> *Id.* at 92–93.

<sup>179</sup> *Id.* at 106–08.

<sup>180</sup> *Id.* at 96.

local public. That conserves the use of scarce taxpayer dollars and reserves public funds for those candidates who, because they already have a track record of constituent support, are more likely to be serious contenders. Although campaign contributions have been treated as a form of speech and association, the contributions that qualify a candidate for public financing and determine how much public funds a candidate will receive are formal steps to establish eligibility for and the extent of support from a state— or city— created, —regulated and —funded program. To that extent, qualifying and matchable contributions closely resemble the petition signatures required to place the name of a candidate or a proposition on the ballot. Like ballot access petitions, a state or city “may legitimately require ‘some preliminary showing of a significant modicum of support.’”<sup>181</sup> As a state or city can make placement of a candidate, a political party, or an initiative or referendum on its ballot contingent on the signatures of an appropriate number of state or local community members,<sup>182</sup> it should be able to make eligibility for a grant of state or local public funds similarly contingent on constituent support.

To be sure, as the Court’s decision in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*<sup>183</sup> demonstrates, the provisions of a public funding program are subject to First Amendment review. *Arizona Free Enterprise* determined that providing a publicly-funded candidate with additional public funds because of the high level of spending of a privately-funded opponent or substantial independent spending against the publicly-funded candidate operates to burden the speech of the privately-funded candidate and independent committee.<sup>184</sup> But *Arizona Free Enterprise* is not relevant to state or local laws conditioning public funding on constituent donations. Such laws certainly do not burden the spending of privately-funded candidates or independent groups; if anything, they benefit non-participants in the public funding program by making it harder

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<sup>181</sup> *Buckley*, 424 U.S. at 96 (citing and quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). *Accord*, *Lubin v. Panish*, 415 U.S. 709, 718–19 (1974) (noting that petition signature requirement is typical way of testing “seriousness” of candidacy).

<sup>182</sup> *See, e.g.*, *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182 (1999); *Lerman v. Bd. Of Elections*, 232 F.3d 135, 151 (2d Cir. 2000); *Frami v. Ponto*, 255 F. Supp. 2d 962, 968 (W.D. Wis. 2003).

<sup>183</sup> 131 S. Ct. 2806 (2011).

<sup>184</sup> *Id.* at 2818–19.

for candidates to qualify. They do not burden potential non-constituent contributors who remain free to contribute to non-participating candidates, political parties, and independent committees in the state, and even to the publicly-funded candidate to the extent that the public funding program does not fully finance the publicly-funded candidate's campaign. Even if the candidate is fully publicly-funded or is required to accept a spending cap which limits the candidate's ability to accept additional donations, the non-constituent donor is no worse off than in-constituency donors who are also so limited. The only "burden," if there is one, on the would-be non-constituent donor is that her donation will not qualify a candidate for public funds or be matchable and so is to that extent worth less to the candidate. That does not bar the would-be donor from giving to the candidate and so does not actually limit the donor's First Amendment rights of speech or association, although it may make the candidate less eager to solicit that contribution or to associate with the would-be donor.

Arguably a constituent qualifying contribution requirement burdens those candidates who enjoy greater financial support from outside the jurisdiction relative to those who enjoy broader in-constituency financial support. That should operate as an incentive to the candidate to increase in-constituency support. But in any event that "burden" is no more than the flipside of the state or local public interest in linking taxpayer campaign subsidies to the fact and extent of constituent backing. The modest First Amendment burden—if there is a burden at all—on outside contributors and inside candidates dependent on outside financial support is justified by the important government interest in assuring sufficient constituent support as a condition for access to scarce taxpayer dollars, much as constituent support in the form of petition signatures may be required as a condition for placing a candidate or voter initiative on the ballot.

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In short, despite the challenge to the accountability of representatives to their constituents posed by significant non-constituent campaign financing, there is not much a state, city, or legislative district can do to curb the role of outside campaign money provided by Americans. Outside money almost surely cannot be barred or subject to aggregate dollar or percentage caps. Outside money is just as protected by the First



Amendment as constituent money and is unlikely to be seen as posing a greater threat of quid pro quo corruption than constituent contributions. Even if non-constituent contributions distort the priorities or influence the policies that elected representatives pursue or make them less attentive to the concerns of their constituents, those are not arguments the Supreme Court will credit as a basis for limiting contributions. Public funding, however, can provide a means of buffering the impact of non-constituent funding. By providing candidates with a greater incentive to solicit financial support for constituents and leveraging that support with additional matching funds, public funding can increase the value of internal financial support. Public funding has long been supported as a constitutionally acceptable way of limiting the impacts of private wealth on elections and of campaign contributions on governance generally. As this discussion suggests, it can also be a means of curbing the impact of outside money.

#### IV. CAMPAIGN FINANCE AND THE CONCEPT OF SELF-GOVERNANCE

Our decades-long debate about campaign finance regulation has been shaped by what might be called the democracy-free speech divide. Since *Buckley v. Valeo*, the Supreme Court's campaign finance doctrine has been largely framed by First Amendment concerns. But much of campaign finance regulation has been driven by the belief that campaign finance, like elections, is part of the project of democratic self-government. Although *Bluman* is not precisely a reform opinion, the framing of campaign finance within election law is nicely captured by *Bluman's* statement that "spending money to influence voters and finance campaigns is . . . closely related to democratic self-government," as these "[p]olitical contributions and express-advocacy expenditures are an integral aspect of the process by which Americans elect officials to federal, state, and local government."<sup>185</sup> Campaign finance reformers have sought to make campaign finance law more like the law of democratic elections by making it more egalitarian. The expansion of the franchise towards universal adult citizen suffrage, the invalidation of poll taxes and wealth tests for voting and

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<sup>185</sup> *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281, 288–89 (D.D.C. 2011).

candidacy, and the adoption of the one person, one vote rule for legislative apportionment reflect a commitment to providing all members of the community with an equal opportunity to participate in the electoral process and, to that extent, a relatively equal opportunity to influence government decision-making. Analogizing campaign money to voting, reformers would extend the political equality norm at the heart of our theory of democratic self-government to the financing of campaigns by curbing the role of unequal private wealth in fueling the campaign finance system. Doctrinally, the high water marks of this vision of campaign finance as part of the law of democratic self-government were the Court's decisions in *Austin* in 1990 and *McConnell v. Federal Election Commission*<sup>186</sup> in 2003. *Austin* sustained a state ban on corporate independent spending because of concern about the impact on elections of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."<sup>187</sup> *McConnell* rejected a constitutional challenge to the Bipartisan Campaign Reform Act's ban on soft money contributions, with the Court determining the ban was justified by Congress's interest in ending the preferential access soft-money donors enjoyed, and the resulting improper influence they wielded on government decision-making.<sup>188</sup>

However, over the last decade, since Chief Justice Roberts and Justice Alito joined the Court, campaign finance doctrine has moved sharply away from the democratic self-government framework and has, instead, doubled down on the First Amendment perspective by emphasizing the speech and associational dimensions of campaign finance. The Court has overruled *Austin*, and its anti-distortion doctrine;<sup>189</sup> repeatedly rejected equality as a justification for campaign laws, including not just those that limit spending but those that would "level the playing field" up by providing assistance to those with less access to campaign resources;<sup>190</sup> and repudiated *McConnell*'s

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<sup>186</sup> 540 U.S. 93 (2003).

<sup>187</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

<sup>188</sup> *McConnell*, 540 U.S. 93, 142–71 (2003).

<sup>189</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 350–53 (2010).

<sup>190</sup> See, e.g., *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1450 (2014);

determination that contribution–purchased access to lawmakers and the resulting influence on government policy–making is a form of corruption.<sup>191</sup> Indeed, the anti-reform bloc on the Court has likened efforts to limit campaign money to government censorship.<sup>192</sup> In the Court’s current view, contributions and spending—even if unequal—play a valued role in enabling candidates, parties, and interest groups to communicate their views to voters, who are free to decide how to cast their votes. Contributions are also a means by which donors can associate with candidates and other donors with similar views and express their support to candidates. Only campaign contributions that directly pose the danger of quid pro quo corruption or its appearance may be limited.

What is startling about the Chief Justice’s *McCutcheon* peroration is that it attempts to go beyond the First Amendment argument—that Shaun McCutcheon ought to be free to use his money to express his views and associate with as many candidates as he can afford—and to make the case for the right to contribute to an unlimited number of candidates in terms of the value of the responsiveness of government officials to donors. This is an extraordinary move. It is one thing to say, as the Court has been saying consistently since *Citizens United*, that government responsiveness to big donors and independent spenders is not a constitutionally sufficient basis for limiting campaign money. It is something else again to say that elected officials actually ought to be “cognizant of and responsive” to their donors.<sup>193</sup> Like campaign finance reformers, the Chief Justice appears to believe that how we finance our campaigns affects the nature and quality of the representation that elected officials provide. Unlike reformers, however, the Chief Justice also appears to find that responsiveness to donors serves, rather than distorts, the democratic representation elections are supposed to promote.

The Chief Justice appears to assume, despite the facts of the *McCutcheon* case, that contributors are constituents, so that

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Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2825–26 (2011); Davis v. Fed. Elections Comm’n, 554 U.S. 741 (2008).

<sup>191</sup> *McCutcheon*, 134 S. Ct. at 1450–51.

<sup>192</sup> *Citizens United*, 558 U.S. at 354–55; Fed. Election Comm’n v. Wis. Right to Life, Inc., 551 U.S. at 482.

<sup>193</sup> *McCutcheon*, 134 S. Ct. at 1462.

responsiveness to contributors is consistent with accountability to constituents generally. I believe I have shown that this is frequently not the case. Rather, constituents and contributors are often very different people with different interests and concerns who may want different things from government and have different views about the policies government ought to pursue. Indeed, not only does the Chief Justice's contention that striking down the aggregate donation limits will promote accountability to a representative's constituency fail to persuade, but by validating the influence of contributors it actually underscores exactly what many people find troubling about the current campaign finance system.

The Chief Justice's rhetoric tries to bridge the divide between the democratic self-governance and free speech visions of campaign finance law by making the case against campaign finance regulation in terms not only of free speech but also of the accountability of representatives to the people. But reflection on the constituency-contribution relationship to which his statement calls attention actually demonstrates just how wide that divide is. Contributors, not constituents, drive the campaign finance system. Large donations make representatives more attentive to their donors and potentially less responsive to their actual constituents. This undermines the very responsiveness to the people that the Chief Justice rightly celebrates as the "key to the concept of self-governance."<sup>194</sup>

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<sup>194</sup> *Id.*