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Of Constituents and Contributors

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OF CONSTITUENTS AND CONTRIBUTORS

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Richard Briffault*

Introduction

In the stirring conclusion to his plurality opinion in *McCutcheon v. FEC*, 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.” 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,” 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.”

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 could donate to a specific candidate in an election – the so-called “base limit” – but the aggregate amount an individual may donate to all federal candidates, political parties and political committees that donate to federal candidates in an election cycle, as well as, within the overall cap, the aggregate amount the individual may donate to all federal candidates in that cycle. A direct consequence of the aggregate cap is to limit the number of candidates a

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1 134 S.Ct. 1434 (2014).
2 Id. at 1461.
3 Id.
4 Id. at 1464.
5 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-
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 $1776 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. McCutcheon had already made substantial contributions – one at $5000, two at $2500, and the rest of $1776 – 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. As a result FECA’s aggregate contribution cap barred those 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 constituencies not their own 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 aggregate cap on candidate donations without contributing to candidates outside the donor’s own constituency, so that 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 can only give to more candidates (and political committees and parties that give to candidates). 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 more 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 his 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 contributions and the implications of the constituent-contributor relationship for campaign finance law and democratic self-government. Part I provides a brief overview 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 the House of Representatives and the United States Senate. 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 is 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 situations like races for Congress, where the results of

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, McCutcheon v. FEC, Oct. 8, 2013, at p. 29. See also id. at p. 28 (asking about to prevent the appearance of corruption “while at the same time allowing an individual to contribute to however many House candidates he wants to contribute to?”).
elections in some states or districts can affect the partisan control of the House 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 contribution representation is even greater when campaigns are funded by donor from outside the relevant jurisdiction. They belong to a different political community and are not directly regulated by the laws enacted and enforced by the voters or representative 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. 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 territorial constituencies – states, cities, and legislative districts – for the election of representatives and the processes of democratic self-government.

With outsider contributions posing a challenge to the focus of elected representatives on the concerns on 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. The case law dealing with state measures that would the limit 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 suggest, state and local public financing systems that make candidate eligibility for public funds contingent on raising a threshold number of small donations from constituents is a constitutional 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 emphasizes the speech and associational dimensions of

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campaign finance,\textsuperscript{10} likening efforts to limit campaign money to government censorship,\textsuperscript{11} and rejecting the argument that regulation may be used to prevent big money from distorting the electoral process.\textsuperscript{12} In the Court’s view, contributions and spending, even if unequal, play a valuable role in communicating views about electoral issues and expressing support for candidates.\textsuperscript{13} Only campaign contributions that pose the danger of quid pro quo corruption or its appearance may be limited. The 	extit{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.\textsuperscript{14} 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 more commonly a position taken by critics of the role of large campaign contributions in our system – who see contributions as distorting the relationship between representatives and the public -- not supporters. In campaign finance debates the rhetoric of self-government is more commonly invoked by reformers worried about the impact of private wealth on democracy than by defenders of the current system. Indeed, as I will suggest, not only does the Chief Justice’s contention that striking down the aggregation donation limits will promote accountability to a representative’s constituency fail to persuade, but it actually underscores exactly what many people find troubling about the current campaign finance system. Large donations make representatives less responsive to their actual constituents and more attentive to their donors, thereby undermining the very responsiveness to the people which 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 statement calls attention actually demonstrates the tension between the Court’s program of campaign finance deregulation and democratic self-government.

I. Contributors, Not Constituents

\textsuperscript{10} See, e.g., FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 481 (2007) (“[t]hese cases are about political speech”) (plurality opinion).
\textsuperscript{11} See id. at 482
\textsuperscript{12} Citizens United v. FEC, 558 U.S. 310, 130 S.Ct. 876, 904-05 (2010).
\textsuperscript{13} McCutcheon, supra, 134 S.Ct. at 1448.
\textsuperscript{14} 134 S.Ct. at 1448-62.
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 61.4% of their itemized individual contributions from donors outside their districts, that is, from non-constituents.\(^\text{15}\) The winners of Congressional races were even more dependent on out-of-district funding, obtaining on average 64.3% of their itemized individual campaign contributions from non-constituent donors.\(^\text{16}\) A total of 53 elected Representatives (or 12%) of the House received 90% or more of their campaign contributions from outside their districts; an additional 61 Representatives (14% of the House) received 80-89% of their itemized individual contributions from outside their districts.\(^\text{17}\) With an additional 39 Representatives obtaining 75-79% of their itemized individual contributions from outsiders,\(^\text{18}\) more than 35% of the members of the House of Representatives received 75% 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 at least 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.\(^\text{19}\) In 2004, 67% of the value of itemized individual contributions to candidates for the House of Representatives came from outside the candidate’s district. That year, in 18% of Congressional districts, one or more candidates received 90% or more of their itemized donations from non-constituents. Fewer than twenty percent of the House candidates that year raised even a majority

\(^\text{15}\) See Center for Responsive Politics, “2014 Overview: In-District vs Out-of-District,” \(\text{https://}\text{www.opensecrets.org/overview/district.php?cycle=2014\&display=B}\). The finding that only 61.4% 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 58.2%. See \(\text{https://www.opensecrets.org/overview/district.php?cycle=2014\&display=A}\).


\(^\text{17}\) Id.

\(^\text{18}\) Id.

of their itemized individual donations from within their districts. Moreover, most of the non-constituent money came not from an adjacent district but from far away.

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% of their itemized donations from out-of-staters, including Republican leader Mitch McConnell who collected 78.5% of his itemized individual funds from outside his home state of Kentucky. Senator McConnell’s unsuccessful Democratic opponent Alison Lundergran Grimes was not far behind in her dependence on out-of-state funds—72% of her itemized individual contributions came from outside Kentucky. Both McConnell and Grimes collected significantly more money 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), and Joni Ernst (R-Iowa) obtained most of their funds from out-of-state. 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

20 Id. at 377-78.
21 Id.
metropolitan Anchorage. Altogether, 22 of the 36 Senate winners last year received more than half their individual itemized donations from out-of-state. Six of the winners collected 75% 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 PAC 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 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 last fall while the 2014 campaigns were underway, focused on the 34 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 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% of the money for “Put Alaska First PAC,” 99% of donations to the “Alaska Salmon PAC,” 95% of the money for “Kentuckians for Strong Leadership,” 67% of the contributions to “Mississippi Conservatives,” 58% of donations to the “Virginia Progress PAC,” and 100% of the donations to “New Hampshire Priorities” came from outside the state whose name was in the PAC’s name. 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 in Washington, D.C.

Of course, it could reasonably be argued that there is a broad national stake in the outcome of specific state and district Congressional elections. As the Supreme Court put it in

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27 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.
28 Senators Cotton (R-Ark), Franken (D-MN), McConnell (R-Ky), Risch (R-Ida), Shaheen (D-NH), and Sullivan (R-Ak).
“U.S. Term Limits, Inc. v. Thornton,” 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” – 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 interests . . . but . . . a deliberative assembly of one nation, with one interest, that of the whole.” All members of Congress in some sense represent all Americans so that non-constituents join constituents in having a stake in the outcome of a 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 may present a different issue. 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, state gubernatorial

32 Edmund Burke, Speech to the Electors of Bristol.
recall, state attorney general, state secretary of state, state judicial and judicial retention, state ballot proposition, state legislative, state legislative recall, and even mayor and council elections in cities big -- like Boston and Chicago -- and small, Coralville, Iowa. This out-of-


state participation in state and local elections is increasingly systematic, with national party groups -- like the Republican and Democratic Governors’ Associations, the Republican State Leadership Committee, and the Democratic Legislative Campaign Committee – 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 and redistribute the funds to state parties, Super PACs or candidates in competitive elections in recipient states where the money may be more useful in advancing the group’s partisan or ideological objectives, or where the legal restrictions of the donor state on the size of donations or the use of money from certain sources in state elections do not apply. Some of this outside money is contributed to 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, for want of a better term, the partisanship of our elections 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

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47 See Confessore, supra.
49 See Confessore, supra.
50 See Gimpel, Eiler, and Person-Merkowitz, supra, at 389-92.
role of the states as “sites for political identification,” enabling them to better “serve as counterweights to the federal government” and as sites for political identification.”

She also suggests that non-constituent participation in state elections allows individuals who feel “alienated from their own state governments to affiliate with another state government.” In more traditional First Amendment language Professor E. Todd Pettys defends what he nicely refers to as “long-armed” donations as a form of political association between candidates and outsiders.

Certainly outsiders have an interest – whether subjective or objective – in state, local, and Congressional districts. 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 impact 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 makes it difficult for voters to act on that concern. The title of the 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.”

Professor Anthony Johnstone’s recent article on “Outside Influence” begins with the accusatory “By what rights do outsiders influence state or local politics?”

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 non-constituents ineligible to vote in the election affected by the contribution as such an egregious oversight that the McCutcheon decision ought to be dismissed with no more than a derisive “Oops!”

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. In

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51 Bulman-Pozen, supra, 127 Harv. L. Rev. at 1133.
52 Id. at 1140.
53 Pettys, supra, 81 U. Chi. L. Rev. Dialogue at 90.
54 See Garry, Nelsen, and Spurlin, supra, 55 S.D. L. Rev. at 35.
sense, outside donors have become a new constituency albeit one quite different from the usual meaning of the term.

II. The Non-Constiuent Contributor 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.57 “Constituent” is derived from the Latin root stare – “to stand” – so that a constituent someone who “appoints another as agent” presumably to stand for the constituent.”58 According to the dictionary, a constituent is “a person who authorizes another to act in his or her behalf, as a voter in a district represented by an elected official.”59 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. “Representatives should presumably be accountable to those who authorized them to act.”60 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.61 Shaun McCutcheon of Alabama was surely not “one of the people who live and vote” 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 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 that district. Similarly, party may be a basis for non-constituent representation, with elected Democrats representing the interests of

60 Rehfield, supra, at 186.
61 Id. at xii, 36. See also Nancy L. Schwartz, The Blue Guitar: Political Representation and Community 12, 74-75 (U. Chi. Press 1980)
Democrats living in Republican-controlled districts and elected Republicans similarly representing the interests of Republicans resident in Democratic ideas. So, too, non-constituent representation may grow out of ideology, as elected environmentalists, Tea Party members, pro-life or pro-choice advocates, or 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 districts” and thus adds democratic legitimacy to the electoral system.\textsuperscript{62} Such surrogate representation can offset the lack of proportional representation for certain groups and add perspectives to legislative deliberation.\textsuperscript{63}

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 “crea[t]ing momentum for a particular policy or political party, [or] . . . build[ing] a real-lie example to inform national debate.”\textsuperscript{64} 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 in control – somewhere.”\textsuperscript{65} Bulman-Pozen’s normative point is that cross-border political activity confirms the role of states as “platforms for national political struggle”\textsuperscript{66} 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.

\textsuperscript{63} Id.
\textsuperscript{64} Bulman-Pozen, supra, 127 Harv. L. Rev. at 1136.
\textsuperscript{65} Id. See also Pettys, supra, Long-Armed Donor. 77 U. Chi. L. Rev. Dialogue at 87-88 (noting “social-psychological incentives” to cross-border political activity).
\textsuperscript{66} 127 Harv. L. Rev. at 1082, 1140.
To begin with, only a small fraction of Americans – perhaps 4% in the hotly contested 2008 elections – make any campaign contributions at all.\(^{67}\) 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 ¼ of 1% of the total population and less than 1/3 of 1% of the adult population donated the itemized $200+ contributions which together account for 66.7% of all individual contributions to federal candidates, parties, and PACs.\(^{68}\) And just 18% of that already very small group – the donors who gave $2600+ -- accounted for 73% of the itemized donations and 49% of total donations.\(^{69}\) At the very top, in 2012 (before McCutcheon lifted the federal aggregate contribution limit) a mere 1/100\(^{th}\) of 1% of the population (a little over 31,000 people) contributed 28% of all itemized federal contributions.\(^{70}\) The minimum amount contributed that qualified a donor for membership in the elite 1% of the 1% of donors was $12,950, and the median within the group was $26,584.\(^{71}\) Of course, the contributions of some donors in this group were in the millions of dollars. As a result, candidates, political parties, and the political committees which 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”\(^{72}\) 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,\(^{73}\) 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 the larger donors.\(^{74}\) The very largest donors tend to be business owners, chief executive officers, Fortune 500 or Forbes 400 board

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\(^{69}\) Id.

\(^{70}\) Lee Drutman, “The Political 1% of the 1% in 2012,” http://sunlightfoundation.com/blog/2013/06/24/where-the-1-of-the-1-money-goes/. 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.

\(^{71}\) Id.

\(^{72}\) Peter L. Francia, John C. Green, Paul S. Herrnson, Lynda W. Powell, and Clyde Wilcox, The Financiers of Congressional Elections 40 (Columbia Univ. Press 2003).

\(^{73}\) Id. at 27-41.

members whose fortunes are based in finance, lobbying, or technology. They work at Goldman Sachs, Blackstone, Kirkland & Ellis, Morgan Stanley, Comcast, Google, and similar firms. 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. 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, and to serve on or head candidates finance committees. They donors give to influence elections, affect public policy, and obtain material benefits for themselves or their businesses.

Large and repeat donors have distinctive political views across the span of economic and social issues, and, not surprisingly, their views appear to be well-represented in the actions of their officials they have helped to elect. They are more likely to want to balance the budget through spending cuts than tax increases, to worry more about inflation than unemployment, and to favor cutting social welfare programs than do other Americans. A number recent studies have shown that donors appear to have succeeded in their goals, with the views and voting records of members of Congress far often more in sync with the views of their affluent donors than their voters. 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. More generally,

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76 Drutman, supra.
77 Francia et al, supra, at 19-22.
79 Francia, et al, supra,. at 91.
80 Id. at 42-49.
81 Id. at 60-65
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.\textsuperscript{85}

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,\textsuperscript{86} helping to determine which candidates are able to effectively compete for election, constraining the policy space in which elected officials operate and shaping the agenda for government action.\textsuperscript{87} For some elected officials, “knowing the interests of their financial constituents is just as important as knowing the opinions of their voting constituents.”\textsuperscript{88} These financial constituents are likely to have different concerns than non-donor voters and prefer different policy alternatives than non-donor constituents.\textsuperscript{89} 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.”\textsuperscript{90} Moreover, financial constituents are both more likely to seek direct access to elected officials (including legislators from districts other than their own)\textsuperscript{91} to present their views and to get that access when they want it.\textsuperscript{92}

This effect of large campaign contributions on the representation of non-donor voters is compounded by non-constituent contributors. Non-constituent donors, particularly those who contribute in multiple campaigns, are even more affluent, better educated, more partisan, and


\textsuperscript{86} LaRaja & Wiltse, supra, at 506;40 Am. Pol. Res. at 506; Drutman, supra

\textsuperscript{87} Bramlett, et al, supra, at 590.

\textsuperscript{88} Francia et al, supra, at 162.

\textsuperscript{89} Page, et al, supra, at 54-68.

\textsuperscript{90} Drutman, supra.

\textsuperscript{91} See, Francia, et al, supra, at 122-26; Page, et al, supra, at 54

\textsuperscript{92} See Joshua L. Kalla and David E. Broockman, “Congressional Officials Grant Access Due to Campaign Contributions: A Randomized Field Experiment, https://www.ocf.berkeley.edu/~broockma/kalla_broockman_donor_access_field_experiment.pdf.
more ideological than donors generally. 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 that election. 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 rate of donations included Chevy Chase, Maryland, Bloomfield Hills, Michigan, Palm Beach, Florida, and Greenwich, Connecticut. So, too, in absolute dollars, most federal campaign contributions come from relatively few places. In the 2005-06 election cycle, 77% of all itemized individual federal campaign contributions came from 5% of all zip codes. Another study focused on a slightly earlier period found that twenty percent of Congressional districts provided a majority of the itemized individual campaign funds. 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. 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 amount provided by the bottom 25 states. 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. It appears that the slogan embraced by the District of Columbia’s distinctive “Taxation without Representation” license plate 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’ please for campaign cash – ‘I’ve maxed out’ – is no longer operative.”

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 and shapes the kinds of policies and programs representatives will pursue. 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 no 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 did 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 which nominally empowers the representatives to act and legitimizes their authority.

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

103 See Schwartz, supra, at 19.
104 See Rehfield, supra, at 147.
that the right to contribute can, like the right to vote itself, be limited to residents of the jurisdiction holding the election. Although the Supreme Court itself has never directly considered the question, 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. It is more than likely that’s how the current Supreme Court would resolve the issue today. 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* 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.” 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 the many state laws that require a candidate to be a resident of the jurisdiction he or she seeks to represent, the laws that count only state residents in determining whether a petition has enough signatures to qualify a candidate or proposition for a place on the

106 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 (2011).
109 See e.g., Michael J. Pitts, “Against Residency Requirements,” at ___ (collecting cases). 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. See Pitts, supra.
ballot, and, more contestedly, in laws that require that petition circulators also be state residents.

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

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110 See Johnstone, Outside Influence, supra, at 129 (“[e]xcluding outsiders from signing petitions is uncontroversial”).
111 See Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 197 (assuming without deciding that a petition circulator residency requirement would be upheld, while striking down the requirement that circulators be registered voters), 211 (Thomas, J., concurring, assumes that a state has a “compelling” interest in requiring petition circulators to be residents); 217-18 (O’Connor, J., joined by Breyer, J., concurring in part and dissenting in part, would uphold the more restrictive requirement that petition circulators be registered voters in the state); 226-32 (Rehnquist, C.J., dissenting, would uphold the more restrictive requirement that petition circulators be registered voters in the state). Nineteen states and the District of Columbia have adopted a residency requirement for petition circulators. See Johnstone, supra, 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. Board of Elections, 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 v. ACLF, supra, at 196-97; Jaeger, supra, 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. 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 Texas law requiring that volunteer deputy voter registrars must be Texas residents).
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, the United States Court of Appeals for the Ninth Circuit in 1995 summarily rejected the claim. The court found that the plaintiffs lacked standing because 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.” 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 representation.” 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.” Without actually determining which is the better argument, the court observed that limits on out-of-state donations “may violate the rights 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.

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” resulting from the flow of out-of-state money to their major party opponents. This court was also somewhat clearer in suggesting that non-constituents have a right to contribute in federal elections, observing that

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116 Whitmore v. FEC, 68 F.3d 1212, 1214-16 (9th Cir. 1995), cert. den. 517 U.S. 1155 (1996)
117 Id. (emphasis supplied).
barring out-of-state money from a United States Senate race would be an “unprecedented limitation on constitutional freedom.”\textsuperscript{119}

These challenges to FECA sought only 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 three states that restricted outsider money, with the courts that considered the issue 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 “us[ing] or direct[ing] 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.”\textsuperscript{120} 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 candidate who is more than ten percent non-constituent-funded would forfeit his or her office if the candidate won the election and barred both elected and defeated candidates from holding an elected public office for twice the period of the office sought.\textsuperscript{121} In \textit{Vannatta v. Keisling}, the Oregon federal district court held Measure 6 unconstitutional. Following \textit{Buckley v. Valeo}, 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.\textsuperscript{122} 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 impacts 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.”\textsuperscript{123} Turning to the public interests \textit{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

\textsuperscript{119} Id. at 93.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 496.
\textsuperscript{123} Id. at 497.
they did not exceed ten percent of a candidate’s total expenditures and large in-district contributions.\textsuperscript{124}

A divided Ninth Circuit panel affirmed.\textsuperscript{125} 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.\textsuperscript{126} The panel unanimously concluded that the restriction on out-of-district 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.” \textsuperscript{127} 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.”\textsuperscript{128} Measure 6’s differentiation between constituents and non-constituents for purposes of making campaign contributions was comparable to “residency requirements for voting.”\textsuperscript{129} Invoking \textit{Austin v. Michigan Chamber of Commerce}\textsuperscript{130} -- at that time still good law -- he situated the restriction on non-constituent donations within \textit{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.”\textsuperscript{131} 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.”\textsuperscript{132} 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

\textsuperscript{124} Id. The law imposed no dollar limits on in-district contributions.
\textsuperscript{126} Id. at 1220-21. The district court had erroneously applied strict scrutiny. See 899 F.Supp.2d at 496.
\textsuperscript{127} 151 F.3d at 1221.
\textsuperscript{128} Id. at 1222, 1224.
\textsuperscript{129} Id. at 1225.
\textsuperscript{130} 494 U.S. 652 (1990).
\textsuperscript{131} Id. at 668.
\textsuperscript{132} 151 F.3d 1222.
which, under *Austin*, he concluded deserved “considerable deference.”\(^\text{133}\) Noting that Measure 6 did not restrict independent expenditures by outsiders, Judge Brunetti concluded that the burden on First Amendment rights was modest and justified by the state’s interest in “ensur[ing] the integrity of political structures and processes.”\(^\text{134}\) 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.”\(^\text{135}\)

The following year a unanimous Alaska Supreme Court in *State v. Alaska Civil Liberties Union*\(^\text{136}\) 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 for all nonresident individuals; a candidate for the state senate could accept no more than a total of $5000 from out-of-staters; candidates for state representative or municipal office could take only $3000 from non-Alaskans; and contributions from out-of-state individuals could amount to no more than 10% of the total contributions each year by state political parties and other political groups.\(^\text{137}\) 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.\(^\text{138}\) Without expressly invoking the republican form of government, 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.”\(^\text{139}\) Recognizing that the caps would preclude even small donations once the statutory ceilings were reached, the Court emphasized that “nonresident contributions may be individually modest, but can cumulatively

\(^{133}\) Id. at 1224.
\(^{134}\) Id. at 1225.
\(^{135}\) Id. at 1218.
\(^{136}\) *State v. Alaska Civil Liberties Union*, 978 P2d 597 (AK. 1999), cert. den. 120 S.Ct. 1156 (2000)
\(^{137}\) Id. at 614-15 & n. 110. The law also prohibited state candidates from accepting contributions organized under the laws of another state, resident of another state, or whose participants were not residents of Alaska when the contribution is made. See id. at n. 111.
\(^{138}\) Id. at 616.
\(^{139}\) Id. at 616-17.
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 contributors, and those most intimately affected by elections, Alaska residents.”

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.”

Three years later, however, the federal district court for Vermont in Landell v. Sorrell reached a very different result. Landell invalidated Vermont’s law imposing a 25% cap on the percentage of funds state candidates, political parties, and PACs could accept from out-of-staters. Applying the rigorous scrutiny normally applicable to contribution limits, 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 were from special interest 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.” 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 influenced by Vermont law must have some access to the political process here.”

A Second Circuit panel unanimously affirmed. 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

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140 Id. at 617.
141 Id.
143 Id.
144 Id.
out-of-state donors raise a particular danger of corruption. 146 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.” 147 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.” 148

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 still articulated powerful arguments for both sides of the question. In Bluman v. FEC, 149 a three-judge panel of the United States District Court for the District of Columbia upheld the provision of federal campaign finance law 150 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, and making express advocacy expenditures for or against candidates in United States. In an opinion by Judge Kavanaugh, the court determined that the United States “has a compelling interest for purposes of the First Amendment in limiting the participation of foreign citizens in activities of American democratic self-government.” 151 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.” 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.” 152 Indeed, “[s]pending money to contribute to a candidate or party

146 Id. at 146-48.
147 Id. at 147.
148 Id. at 148.
150 52 U.S.C. § 30121. At the time of the Bluman decision, the provision at issue was 2 U.S.C. § 441c(a). The election law provisions of U.S. Code have since been reorganized and recodified.
151 800 F.Supp.2d at 288.
152 Id.
or to expressly advocate for or against the election of a political candidate is participating in the process of democratic self-government.” 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.

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 states, local governments, and possibly electoral constituencies within legislative bodies, too. However, the opinion did not stop there. Rather Judge Kavanaugh went on to indicate that the relevant distinction is not between specific political community members – such as constituents of a state, city, or legislative district – and nonconstituents but between members in the American political community more broadly and non-Americans. “[C]itizens of other states and municipalities are all members of the American political community.” As a result “[t]he compelling interest that justifies Congress in restraining foreign nationals’ participating in American elections – namely, preventing foreign influence over the U.S. government – does not apply equally to . . . citizens of other states and municipalities.”

In other words, although the music of Bluman – its treatment of campaign finance as an integral part of democratic self-government, its association of campaign money with voting and candidacy, and its assumption that participation in self-government can be linked to political community members – makes the case for restricting non-constituent contributions, the specific words -- which insist that at least for campaign finance there is only one relevant political community, “the American political community” – constitute a powerful rejection of the argument. Although technically dicta, the decision ultimately undermines the argument based on

153 Id. at 289-90.
154 Id. at 288.
155 Id. at 290.
156 Id.
the association of campaign contributions with eligibility to vote or hold office for members of the American political community.

It is extremely likely that laws restricting non-constituent contributions – whether by barring them outright or limiting the amount or percentage of total donations a candidate or political committee may accept from non-constituents – would be held unconstitutional. 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 interests in preventing corruption and the appearance of corruption, with the current Court emphasizing that corruption means “quid pro quo” corruption and does not a broader concern about the influence on or access to government that big spenders and donors may obtain.\(^{157}\) 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 anti-distortion corruption\(^ {158}\) fatally undercuts the position of the Ninth Circuit dissent and the 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 the community to limit campaign finance participation to community members. Indeed, with the rights of non-voting minors to make contributions and of corporation 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 broadly available to members of the American political community as a whole.

\(^{157}\) *McCutcheon*, supra, 134 S.Ct. at 1450-59.

\(^{158}\) 130 S.Ct. at 904-05.
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.\textsuperscript{159} 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. 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, 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 candidate’s collecting a certain number or dollar value of small qualifying contributions. Most go further\textsuperscript{160} and require that the qualifying contributions be provided entirely or primarily by “qualified electors,”\textsuperscript{161} “registered voters,”\textsuperscript{162} “individuals eligible to vote,”\textsuperscript{163} or residents of the state or constituency.\textsuperscript{164}

\textsuperscript{159}Haw. Rev. Stat. § 11-362. The cap is 30% of all donations for each election period, with an exemption for donations from a member of the candidate’s immediate family.

\textsuperscript{160}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. Elec. Code § 15-102 (d) ("eligible private contribution" is contribution from an individual, up to $250); Mass. Gen L. Ann., Title VIII, Chap 55C, § 1 (qualifying contribution is "any contribution made by an individual" under $250); N.J. Stat. Ann. § 19:25.15.3; Gen L. R.I. § 17-25-20.

\textsuperscript{161}See, e.g., Ariz. Rev. Stat. § 16-946.B(1)

\textsuperscript{162}See, e.g., Me. Rev. Stat. Ann. § 21-1125 (3) (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) (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 § 3-12-3 ("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.")

\textsuperscript{163}See, e.g., Minn. Stat. Ann. § 10A.323(a)(1) ("individuals eligible to vote in the state").

\textsuperscript{164}See, e.g., Conn. Gen. Stat. Ann., § 9-704(a). Under Connecticut’s Citizens’ Election 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% 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 part” in the relevant senate district, and a candidate for the assembly must obtain $5000, including contributions from at least 150 individuals, “residing in municipalities included in whole or part, in the district counting no more than $100 per donor. See also Fla. Stat. Ann. § 106-33 (2)(b) ("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. Ann. § 11-429(a) (qualifying contributions for public funding program for candidates for
funding programs that provide eligible candidates with matching grants based on the number and value of small private contributions the candidate obtains – as distinguished from public funding programs that provide a qualifying candidate with a substantial flat grant upon qualification for funding – may also limit the public fund match to donations from the same category of constituents, such as residents, whose donations were also necessary to qualify the candidate for public funding.  

Can a state or city favor its own voters or residents by limiting a candidate’s eligibility for public funds to donations from voters or residents and then providing matching funds only to such constituent contributions? 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.” The Court linked public funding to democratic self-governance, 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.” 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. As the Court noted, “Congress’ interest in not funding hopeless governors, lieutenant governors, county mayors or prosecuting attorneys must come from “individual residents of Hawaii”); Mich. Comp. L. Ann. § 169.212 (qualifying contribution for public funding program for candidates for governor “does not include a contribution by an individual who resides outside the state”); Consol. Ls. N.Y. Ann., Election Law § 14-204 (2) (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. § 17-2984 (c). 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. Mun. Code, § 49.7.23.C..1(d) (starting in 2015, qualifying contributions must come from “individuals residing in the City, and for City Council candidates there must also be 200 contributions of at least $5 each 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). See, e.g., Fla. Stat. Ann. § 106.35(2)(b); N.Y.C. Admin Code §§ 3-702(3); L.A. Mun. Code, § 49.7.27A.

165 424 U.S. at 91.
166 Id. at 92-93.
167 Id. at 106-08.
candidacies with large sums of public money . . . necessarily justifies the withholding of public assistance from candidates without significant public support.”\textsuperscript{169}

\textit{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 local public. That conserves the use of its scarce taxpayer dollars and reserves public funds for candidates, 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 participation in 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 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.’”\textsuperscript{170} Much as a state or city can make placement of a candidate’s name, a political party, or an initiative or referendum on its ballot contingent on the signatures of an appropriate number state or local community members,\textsuperscript{171} 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 \textit{Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett}\textsuperscript{172} demonstrates, the provisions of a public funding program are subject to First Amendment review. \textit{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.\textsuperscript{173} But \textit{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

\textsuperscript{169} Id. at 96.
\textsuperscript{172} 131 S.Ct. 2806 (2011)
\textsuperscript{173} Id. at 2818-19.
candidates or independent groups; if anything, they benefit non-participants in the public funding program by making it harder 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 fund 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 it 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 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. Of course, that should operate as an incentive to the candidate to increase her internal financial 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. 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 as 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 of elections and of campaign contributions on governance generally. As this discussion suggests, it can be a means of curbing the impact of outside money, as well.

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. Although since Buckley v. Valeo, the Supreme Court’s campaign finance doctrine has been largely framed by First Amendment concerns, 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 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” “constitute part of the process of democratic self-government . . . an integral aspect of the process by which Americans elect officials to federal, state, and local government offices.”174 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 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 relative 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,

174 800 F.Supp.2d at 288-89.
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 sustaining 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 forms and that have little or no correlation to the public’s support for the corporation’s political ideas;”\(^{175}\) and the 2003 decision in *McConnell v FEC*, sustaining the Bipartisan Campaign Reform Act of 2002’s ban on soft money contributions because of the preferential access to members of Congress soft-money donors enjoyed, and the resulting improper influence on government decision-making.\(^{176}\)

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 the anti-distortion doctrine;\(^{177}\) repeatedly rejected equality as a justification for campaign laws, including not just that limit spending but those that would level up the underfunded;\(^{178}\) and repudiated McConnell’s determination that contribution-purchased access to lawmakers and the resulting influence of government policy-making is a form of corruption.\(^{179}\) Instead, the Court has likened efforts to limit campaign money to government censorship.\(^{180}\) In the current Court’s view, contributions and spending, even if unequal, play a value role in enabling candidates, parties and interested groups to communicate their views to the 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 pose of the danger of quid pro quo corruption or its appearance may be limited. The *McCutcheon* result, which maintains the quid pro quo-preventing base limits on

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177 *Citizens United*, supra., 130 S.Ct. at 905-05.
179 *McCutcheon*, supra, 134 S.Ct. at 1450-51.
180 *Citizens United*, supra, 130 S.Ct. at 907; *FEC v. Wisconsin Right to Life, Inc.*, supra, 551 U.S. at 482.
donations to candidates, is easily defended on free speech grounds, as the plurality opinion demonstrates.\textsuperscript{181}

What is startling about the Chief Justice’s 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 to 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 responsiveness of government officials to him. This is an extraordinary move. It is one thing to say, as the Court has been saying consistently since \textit{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. 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 provide.

The Chief Justice appears to assume, despite the facts of the \textit{McCutcheon} case, that contributors are congruent with constituents, so that responsiveness to contributors is consistent with accountability to constituents generally. I believe I have shown that this frequently not the case. Rather, constituents and contributors are usually very different people with different interests and concerns who may want different things from government. Indeed, not only does the Chief Justice’s contention that striking down the aggregation donation limits will promote accountability to a representative’s constituency fail to persuade, but 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 elections and free speech approaches to campaign finance doctrine by making the case against campaign finance regulation in terms of not only free speech but government accountability to the public. 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

\textsuperscript{181} 134 S.Ct. at 1448-62.
campaign finance system. Large donations make representatives less responsive to their actual constituents and more attentive to their donors, thereby undermining the very responsiveness to the people which the Chief Justice rightly celebrates as the “key to the concept of self-governance.”