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## THE DEATH OF NON-RESIDENT CONTRIBUTION LIMIT BANS AND THE BIRTH OF THE NEW SMALL, SWING STATE

George J. Somi\*

### INTRODUCTION

New Hampshire's 1st Congressional District race in 2018 featured an eye-popping number: 96.7.<sup>1</sup> That figure represents the percentage of candidate Maura Sullivan's individual contributions derived from out-of-state, non-New Hampshire donors.<sup>2</sup> In August 2018, of the \$1.37 million USD of individual contributions that Sullivan had raised, only 3.3%—\$46,648 USD—originated from in-state contributors.<sup>3</sup> Sullivan had received individual donations amounting to \$497,405 USD from Boston, \$216,359 USD from New York City, \$101,562 USD from the Washington, D.C. metropolitan area, and \$92,371 USD from San Francisco.<sup>4</sup>

In nearby Maine, campaign finance reports filed on October 15, 2019, with the Federal Election Commission (FEC) indicate that the Pine Tree State's 2020 Senate race will be a national battleground.<sup>5</sup> According to the independent regulatory agency, out-of-state donors to the campaigns of Republican Senator Susan Collins and Democrat Sara Gideon constitute the majority of contributions of \$200 USD or more between July 2019 and September 2019.<sup>6</sup> So far, Maine residents have made up only 7% and 18.5% of all \$200-plus individual contributions to Collins and Gideon, respectively.<sup>7</sup> The largest percentage of individual donations exceeding the \$200 USD

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<sup>1</sup> See Rick Green, *Sullivan Gets More than 96 Percent of Individual Contributions from Out of State*, LACONIA DAILY SUN (Aug. 23, 2018), [https://www.laconiadailysun.com/news/local/sullivan-gets-more-than-percent-of-individual-contributions-from-out/article\\_4a38b3da-a622-11e8-bec6-4f05ffb3a1aa.html](https://www.laconiadailysun.com/news/local/sullivan-gets-more-than-percent-of-individual-contributions-from-out/article_4a38b3da-a622-11e8-bec6-4f05ffb3a1aa.html) [https://perma.cc/NR7X-9589].

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

<sup>3</sup> *Id.*

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

<sup>5</sup> See Kevin Miller, *Out-of-State Donors Flood Maine's Closely Watched U.S. Senate Race*, PORTLAND PRESS HERALD (Oct. 27, 2019), <https://www.pressherald.com/2019/10/27/money-from-away-piles-up-in-u-s-senate-race/> [https://perma.cc/D2BW-PQUE].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

reporting threshold to both campaigns stem from California and New York.<sup>8</sup> While both candidates are seeking big-dollar donors nationally,<sup>9</sup> smaller-donor, online donations are becoming increasingly common and crucial in close, pivotal races like this.

Approximately one thousand miles westward, in Wisconsin, incumbent Governor Scott Walker had raised \$11.5 million USD from out-of-state donors through early October 2018.<sup>10</sup> He was one of three 2018 gubernatorial candidates—in Wisconsin, Pennsylvania, and New York—who raised at least \$5.5 million USD from across state lines.<sup>11</sup> While non-resident campaign contributions constituted up to 10% of direct gubernatorial fundraising across the United States as a whole, these three aforementioned gubernatorial candidates raised between 18% and 50% of their campaign funds from out-of-state contributions.<sup>12</sup> These figures cannot be ignored because state legislatures and governors not only establish laws and policies impacting their local constituencies, but also draw up the very congressional maps that have massive repercussions for national politics.<sup>13</sup>

While both Sullivan and Walker ultimately lost their races, their campaigns demonstrate that political engagement across state lines has become a noteworthy development in pivotal federal elections like Maine's 2020 U.S. Senate race, state-level races, and campaign finance law as a whole.<sup>14</sup> Today, despite various efforts by states to legislate restrictions on out-of-state campaign contributions, only Hawaii maintains such laws.<sup>15</sup> This Article, therefore, seeks to analyze the latest developments in campaign finance laws pertaining to state residency-based limits, especially in

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<sup>8</sup> *Id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See* Rui Kaneya & Joe Yerardi, *Out-of-State Donors Pour Cash into Democrats' State Races*, CTR. FOR PUB. INTEGRITY (Oct. 10, 2018, 12:00 PM), <https://publicintegrity.org/state-politics/out-of-state-donors-pour-cash-into-democrats-state-races/> [<https://perma.cc/H8NP-2W34>].

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

<sup>12</sup> *See id.*

<sup>13</sup> *See* Ella Nilsen, *Republicans Dominate State Legislatures. That Decides Political Power in America.*, VOX (July 5, 2019, 7:00 AM), <https://www.vox.com/policy-and-politics/2019/7/5/20680124/state-legislatures-gerrymandering-redistricting> [<https://perma.cc/FC3L-FTKX>]. In Virginia, Democrats raised millions of dollars more than Republicans in out-of-state cash en route to flipping the historically Republican-controlled state legislature on November 5, 2019. *See* Patricia Cason, *Virginia Democrats Outraise Republicans in Out-of-State Donations*, WHSV (Oct. 28, 2019, 11:52 AM), <https://www.wHSV.com/content/news/Virginia-Democrats-outraise-Republicans-in-out-of-state-donations-563981081.html> [<https://perma.cc/F4AC-PL3S>]. Democrats' success in these state races has opened the possibility that Virginia will be the thirty-eighth and final state needed to ratify the Equal Rights Amendment, which has been dormant for decades. *See* Russell Berman, *The Equal Rights Amendment Is an Artifact No More*, ATLANTIC (Nov. 8, 2019), <https://www.theatlantic.com/politics/archive/2019/11/virginia-equal-rights-amendment-women-constitution/601609/> [<https://perma.cc/4GV5-CCJD>].

<sup>14</sup> *See* Miller, *supra* note 5; *see also* Kaneya & Yerardi, *supra* note 10.

<sup>15</sup> *See infra* Section II.D.

swing states. It posits that while smaller, swing states may disproportionately impact the national political landscape, the prospect of increased out-of-state fundraising could allow citizens of larger, inelastic<sup>16</sup> states to heavily impact those races and guide the disproportionate influence of citizens in those smaller states.

Part I of this Article will provide a brief history of individual contribution limits in federal campaign finance law, starting with the Federal Election Campaign Act of 1971. It will analyze the impact of Supreme Court cases like *Buckley v. Valeo*, *Citizens United v. FEC*, and *McCutcheon v. FEC* on this nation's campaign finance jurisprudence, particularly with respect to individual contributions.<sup>17</sup> Part II will lay out a case study of the four states that have dared to pass laws limiting individual out-of-state contributions—Alaska, Hawaii, Oregon, and Vermont.<sup>18</sup> It will analyze the arguments and holdings of influential Second and Ninth Circuit cases, including *VanNatta v. Keisling*, *Landell v. Sorrell*, and most recently, *Thompson v. Hebdon*.<sup>19</sup> Part III will explore a chief argument raised in favor of limiting out-of-state campaign contributions—the protection of republicanism. It proceeds to explore the confusion of defining an elected official's "constituent"—a challenge that complicates any recognition of an interest to preserve separate, state-specific political communities in the campaign finance law context. This Part also explores the surrogate representation that a non-resident donor may seek and how this impacts politics outside the constituent's home state. Finally, Part IV will adopt statistician Nate Silver's notion of "elasticity" to demonstrate a basic example of how a concerted effort by out-of-state individual donors could one day be strategically directed to states that have transformed into platforms for national political struggles.<sup>20</sup>

This Article does not pretend to ignore the unprecedented flow of money from political action committees (PACs) and super PACs, which may trump individual out-of-state contributions.<sup>21</sup> Nevertheless, it is still a worthwhile exercise to examine the rising influence of these individual contributions, especially if reforms curbing or eliminating the influence of PACs and super PACs are enacted in the future.

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<sup>16</sup> For a discussion on state elasticity in the context of elections, see *infra* Section IV.B.

<sup>17</sup> See *infra* Part I.

<sup>18</sup> See *infra* Part II.

<sup>19</sup> See *infra* Part II.

<sup>20</sup> See *infra* Part IV.

<sup>21</sup> For more on the rising concern pertaining to the influence of PACs and Super PACs' influence in elections, see generally R. SAM GARRETT, CONG. RESEARCH SERV. R42042, SUPER PACS IN FEDERAL ELECTIONS: OVERVIEWS AND ISSUES FOR CONGRESS (2016); Albert W. Alschuler et al., *Why Limits on Contributions to Super PACs Should Survive* *Citizens United*, 86 FORDHAM L. REV. 2299 (2018); Michael D. Gilbert & Samir Sheth, *Super PACs and the Market for Data*, HARV. L. REV. BLOG (Nov. 2, 2018), <https://blog.harvardlawreview.org/super-pacs-and-the-market-for-data/> [<https://perma.cc/7ZMF-4Q2Z>]. For a defense of Super PACs, see generally Joel M. Gora, *In Defense of "Super PACs" and of the First Amendment*, 43 SETON HALL L. REV. 1185 (2013).

### I. A BRIEF HISTORY OF CONTRIBUTION LIMITS IN FEDERAL CAMPAIGN FINANCE LAW

The genesis of modern campaign finance reform requires an understanding of the Federal Election Campaign Act of 1971 (FECA).<sup>22</sup> The United States Congress passed FECA—the first comprehensive attempt to address federal campaign spending—to stop the rising costs of federal election campaigns.<sup>23</sup> In 1974, in the aftermath of the Watergate scandal, Congress passed amendments to FECA that represented the toughest campaign-measure regulations legislated by Congress.<sup>24</sup> The 1974 FECA amendments limited the amount of money that individuals, political committees, and political parties could directly give to candidates running for federal office<sup>25</sup> (these are referred to as contributions limits).<sup>26</sup> In addition, the new provisions limited expenditures, or “*spending money on behalf of a [particular] candidate.*”<sup>27</sup> The FECA amendments placed limits on personal spending by candidates; enacted ceilings on overall spending for federal offices; limited what groups not affiliated with a campaign or candidate could independently spend; and set up the FEC to enforce and administer public financing for presidential candidates.<sup>28</sup>

In 1976, the Supreme Court reviewed the constitutionality of FECA, particularly under the lens of the First Amendment,<sup>29</sup> in *Buckley v. Valeo*.<sup>30</sup> In *Buckley*, the Court upheld FECA’s limits on contributions, while overturning the Act’s independent expenditure ceiling.<sup>31</sup> *Buckley* addresses the government interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections” when addressing FECA’s expenditure ceiling.<sup>32</sup> The Court held:

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<sup>22</sup> Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 26 and 52 U.S.C.).

<sup>23</sup> *See id.*; Jon Simon Stefanuca, *The Fall of the Federal Election Campaign Act of 1971: A Public Choice Explanation*, 19 U. FLA. J.L. & PUB. POL’Y 237, 238 (2008).

<sup>24</sup> *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1055 (1996); *see also* R. SAM GARRETT, CONG. RESEARCH SERV., R41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 2–4 (2018) (summarizing the history of FECA).

<sup>25</sup> *See* Smith, *supra* note 24, at 1055.

<sup>26</sup> *See id.*

<sup>27</sup> Ben Wallace, *A Vote Against State Nonresident Contribution Limits*, 78 LA. L. REV. 597, 602 (2018).

<sup>28</sup> *See* Smith, *supra* note 24, at 1055.

<sup>29</sup> *See* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

<sup>30</sup> *See generally* 424 U.S. 1 (1976) (per curiam).

<sup>31</sup> *See id.* at 58.

<sup>32</sup> *Id.* at 48.

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’” and “‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”<sup>33</sup>

*Buckley* opposes the restriction of free speech rights of some so as to create a more level playing field between different voices.<sup>34</sup> Therefore, enforcing a system that undercuts some people’s ability to engage in political expression is a violation of the First Amendment.<sup>35</sup>

In addition, in *Buckley*, the Supreme Court states that “limit[ing] the actuality and appearances of corruption resulting from large individual financial contributions” is the “primary purpose” of FECA.<sup>36</sup> According to the Court, “To the extent that large contributions are given to secure a political *quid pro quo* . . . the integrity of our system of representative democracy is undermined.”<sup>37</sup> Of almost equal concern to the Court is the avoidance of the appearance of corruption, as it “is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.”<sup>38</sup> Therefore, *Buckley* not only justifies FECA’s limitations on contribution, but it also qualifies an interest against corruption as a goal.<sup>39</sup>

Decades later, in *Citizens United v. FEC*, the Court reviewed federal laws barring corporations and unions from making independent expenditures.<sup>40</sup> In this case, the Court embraces political speech as “indispensable to decisionmaking in a democracy” regardless of “the identity of its source, whether corporation, association, union, or individual.”<sup>41</sup> *Citizens United* rejects the anti-distortion rationale,<sup>42</sup> holding that

<sup>33</sup> *Id.* at 48–49 (first quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266–69 (1964); then quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

<sup>34</sup> *Id.* at 49 n.55 (“Neither the voting rights cases nor the . . . fairness doctrine [case] lends support to [the] position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society.”).

<sup>35</sup> *See, e.g.*, *Whitmore v. FEC*, 68 F.3d 1212, 1216 (9th Cir. 1995) (“Such management of the system of political expression [where an injunction is issued to prohibit congressional candidates from accepting out-of-state contributions by individuals] may violate the rights of the out-of-state contributors.”).

<sup>36</sup> *Buckley*, 424 U.S. at 26.

<sup>37</sup> *Id.* at 26–27.

<sup>38</sup> *Id.* at 27 (quoting *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

<sup>39</sup> *See id.* at 26–27.

<sup>40</sup> *See generally* 558 U.S. 310 (2010).

<sup>41</sup> *Id.* at 349 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)).

<sup>42</sup> “[T]he antidistortion rationale [is] a means to prevent [individuals or entities like]

“[t]he First Amendment’s protections do not depend on the speaker’s ‘financial ability to engage in public discussion.’”<sup>43</sup> Instead, the Supreme Court, while harkening back to *Buckley*, declared that the only “‘sufficiently important’ governmental interest” was quid pro quo corruption.<sup>44</sup> Furthermore, just because a contributor or voter has influence or access to an elected official does not meet the definition of quid pro quo corruption.<sup>45</sup>

Four years later, in *McCutcheon v. FEC*, the Supreme Court held that FECA’s aggregate limits on individual campaign contributions do little to further the government’s interest in preventing quid pro quo corruption or the appearance of corruption and violate the First Amendment.<sup>46</sup> According to the late Justice John Paul Stevens, the *McCutcheon* case fails to clearly “tell the reader that the petitioner was only complaining about his inability to influence elections in which he had no right to participate.”<sup>47</sup> Stevens succinctly summarized the petitioner’s complaint in *McCutcheon*:

[The petitioner, Shaun McCutcheon], makes it clear that his objection to the federal statute was based entirely on its impairment of his ability to influence the election of political leaders for whom he had no right to vote. He is an Alabama citizen; in the 2012 election cycle he made equal contributions to 15 different candidates, only two of whom were from Alabama. The other thirteen were campaigning in California, Ohio, Indiana, Maryland, North Carolina, Oklahoma, Texas, and Virginia. Of primary significance is the fact that his only complaint about the federal statute was its prohibition against his making contributions in

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corporations from obtaining ‘an unfair advantage in the political marketplace’ by using ‘resources amassed in the economic marketplace.’” *Id.* at 350 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990)).

<sup>43</sup> *Id.* (quoting *Buckley*, 424 U.S. at 49).

<sup>44</sup> *Id.* at 359.

<sup>45</sup> *Id.* In *Citizens United*, the Supreme Court quotes Justice Anthony Kennedy’s opinion from *McConnell v. FEC*:

Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

*Id.* (alteration in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003)).

<sup>46</sup> See 572 U.S. 185, 193 (2014) (plurality opinion).

<sup>47</sup> J. John Paul Stevens (Ret.), Harold Leventhal Lecture at the Administrative Law Section of the D.C. Bar (Sept. 12, 2014), [https://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech\(DC\)\\_09-12-2014.pdf](https://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech(DC)_09-12-2014.pdf) [<https://perma.cc/2JBS-RQVS>].



2014 to candidates in twelve other non-Alabama elections—Colorado, Connecticut, Florida, Georgia, Hawaii, Minnesota, Utah, Washington, and Wisconsin.<sup>48</sup>

Having contributed \$33,088 USD to sixteen different federal candidates, McCutcheon had wished to donate money to twelve additional out-of-state candidates, but was unable to legally do so.<sup>49</sup>

The *McCutcheon* plurality crystallized the prevailing position that any campaign finance regulation must be narrowly tailored to address the compelling government interest of fighting quid pro quo corruption<sup>50</sup> or its appearance.<sup>51</sup> Any restriction pursuing “other objectives . . . impermissibly inject the Government ‘into the debate over who should govern.’ And those who govern should be the *last* people to help decide who *should* govern.”<sup>52</sup> Campaign finance restrictions cannot target “[i]ngratiation and access” enjoyed by a candidate’s supporters or the candidate’s “general gratitude” to those supporters.<sup>53</sup> Even if the line between general influence and quid pro quo corruption can be blurred or vague at times, the Court asserts that “the distinction must be respected in order to safeguard basic First Amendment rights. . . . ‘[I]n drawing that line, the First Amendment requires [the Court] to err on the side of protecting political speech rather than suppressing it.’”<sup>54</sup>

The Court exalts out-of-state campaign contributions as an important expression of the First Amendment.<sup>55</sup> First, *McCutcheon* states “[t]here is no right more basic

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<sup>48</sup> *Id.*

<sup>49</sup> *McCutcheon*, 572 U.S. at 194–95.

<sup>50</sup> According to the Court, the Latin phrase, quid pro quo, “captures the notion of a direct exchange of an official act for money.” *Id.* at 192. The Court continues, “The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.” *Id.* (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)).

For instance, a specific act like a bribe would constitute a basic form of quid pro quo corruption. *See McDonnell v. United States*, 136 S. Ct. 2355, 2365 (2016) (“[T]he federal bribery statute, 18 U.S.C. § 201. . . . makes it a crime for a public official or person selected to be a public official, directly or indirectly, corruptly to demand, seek, receive, accept, or agree to receive or accept anything of value in return for being influenced in the performance of any official act. An official act is defined as any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” (internal quotes omitted)).

<sup>51</sup> *See McCutcheon*, 572 U.S. at 192.

<sup>52</sup> *Id.* (citation omitted) (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011)); *see also Lair v. Bullock*, 798 F.3d 736, 740 (“[T]he prevention of quid pro quo corruption, or its appearance, is the *only* sufficiently important state interest to justify limits on campaign contributions.”).

<sup>53</sup> *McCutcheon*, 572 U.S. at 192.

<sup>54</sup> *Id.* at 209.

<sup>55</sup> *See id.*



in our democracy” than civil participation in electing the nation’s political leaders, and individual campaign contributions constitute one way of exercising that right.<sup>56</sup> An individual campaign contribution to a candidate running for political office in another state is an exercise of the individual’s First Amendment “right to participate in the public debate through political expression and political association.”<sup>57</sup> Second, *McCutcheon* indicates that “[i]t is no answer to say that the individual can simply contribute less money to more people.”<sup>58</sup> It is safe to say that the Court’s stance would be the same should the same individual have to contribute less money to the *same number of or less* outside candidates.<sup>59</sup> Third, the Court states that the obligation to uphold the First Amendment “is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies.”<sup>60</sup> Therefore, the campaign contribution rights of out-of-state donors like the *McCutcheon* petitioner are afforded protection precisely because they have few other readily available means to support their policies and candidates.<sup>61</sup>

## II. THE FOUR STATES THAT DARE(D)

In the aftermath of the above-mentioned cases, political engagement across state lines has been a noteworthy development in campaign finance development. Yet, in the United States, only four states have tried to create out-of-state contribution limits: Alaska, Hawaii, Oregon, and Vermont.<sup>62</sup> With the November 2018 overturn

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<sup>56</sup> *Id.* at 191. *But see* *FEC v. Beaumont*, 539 U.S. 146, 161 (“[C]ontributions lie closer to the edges than to the core of political expression.”).

<sup>57</sup> *McCutcheon*, 572 U.S. at 203. The Court continues, “The contribution ‘serves as a general expression of support for the candidate and his views’ and ‘serves to affiliate a person with a candidate.’” *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 21–22 (1976) (per curiam)).

<sup>58</sup> *Id.* at 204.

<sup>59</sup> *See id.* at 204–05.

<sup>60</sup> *Id.* at 205.

<sup>61</sup> *See id.*

<sup>62</sup> Elsewhere, in 1998, the voters of Akron, Ohio, passed a ballot initiative that placed a limit on out-of-state contributions for local elections. *See Frank v. City of Akron*, 95 F. Supp. 2d 707, 707 (N.D. Ohio 1999). The U.S. District Court for the Northern District of Ohio not only deemed this provision of the measure “so clearly unconstitutional,” but the defendants did not even contest the court’s granting partial judgment on the provision’s violation of the First Amendment. *Id.* at 708 n.3. The District Court reasoned that “[t]he section limiting the percentage of a candidate’s funds that could be raised from contributors outside the Akron city limits . . . would have the effect of absolutely prohibiting certain individuals, who might work in the City of Akron but reside elsewhere, from contributing to the candidate of their choice.” *Id.* The Sixth Circuit eventually reversed this decision in part on other grounds, and did not address Akron’s out-of-state contribution limits. *See Frank v. City of Akron*, 290 F.3d 813, 815, 819 (6th Cir. 2002).

While Arizona has not legislated a limit on out-of-state contributions, in 2007, the Ninth Circuit struck down a pro se complaint alleging that “Arizona’s congressional candidates

of Alaska's regulations ceilings on non-resident contribution limits, Hawaii remains the last state standing.<sup>63</sup> All the other aforementioned states' interests in preventing the spread of outsized, out-of-state influence in state elections have been struck down on First Amendment grounds.<sup>64</sup> This Part seeks to provide an overview of the campaign finance developments in each of these four states, as well as an analysis of the cases that ultimately shaped these states' laws on non-resident contributions.

### A. Vermont

In the mid-2000s, legal challenges arose regarding Vermont's bipartisan limit on out-of-state contributions<sup>65</sup>: "A candidate, political party or political committee shall not accept, in any two-year general election cycle, more than 25% of total contributions from contributors who are not residents of the state of Vermont or from political committees or parties not organized in the state of Vermont."<sup>66</sup> In particular, one of the areas in which opposition to the Vermont law focused on was the state's 25% limitations on all out-of-state contributions to its candidates.<sup>67</sup>

The Second Circuit, in *Landell v. Sorrell*, found no "sufficiently important governmental interest" to support this aforementioned provision in the Vermont law, raising First Amendment reservations.<sup>68</sup> According to the court, the impact of the out-of-state contribution limit was to isolate one group of people—non-residents.<sup>69</sup> The law denied non-residents the same First Amendment rights that Vermont residents were enjoying, so the Second Circuit affirmed the district court's decision and struck down the provision as unconstitutional.<sup>70</sup>

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have a legal duty to represent only the interests of their constituents and that by receiving campaign contributions from residents of other states or election districts, the candidates violate the constitutional rights of . . . Arizona voters." *Solig v. McCain*, 224 F. App'x 563, 564 (9th Cir. 2007).

In 2004, the D.C. District Court explained that a minority party candidate for a U.S. Senate seat in Alaska was "unable to establish that the disparity in campaign [finance] resources caused by out-of-state contributions constitutes an injury in fact sufficient for standing." *Sykes v. FEC*, 335 F. Supp. 2d 84, 90 (D.D.C. 2004). The court reasoned that "political free trade does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *Id.* (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) (internal quotations omitted)).

<sup>63</sup> See *infra* Section II.D.

<sup>64</sup> See *infra* Sections II.A–C.

<sup>65</sup> The 1997 Vermont Finance Reform Act received strong bipartisan support. See *Landell v. Sorrell (Landell I)*, 118 F. Supp. 2d. 459, 467 (D. Vt. 2000).

<sup>66</sup> VT. STAT. ANN. tit. 17, § 2805(c) (2012).

<sup>67</sup> *Landell v. Sorrell (Landell II)*, 382 F.3d 91, 146 (2d Cir. 2004).

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

<sup>69</sup> See *id.* at 148–49.

<sup>70</sup> *Id.* In *Landell v. Sorrell*, the Vermont District Court struck down the state's out-of-state contribution limits. The district court observed:

The Second Circuit observed that Vermont's law was simultaneously overbroad and underinclusive as it pertained to its professed interest in preventing corruption.<sup>71</sup> The court turned to the Ninth Circuit decision, *VanNatta v. Keisling*, whereby the court cited an Oregon statute's overbreadth, which "stemmed from the fact that it prevented all non-resident contributions once the 10 percent threshold had been reached, even those too small to have any corruptive influence."<sup>72</sup> At the same time, the Oregon provision suffered from underbreadth since it took no tangible steps to prevent large, corruptive resident contributions from Oregon residents.<sup>73</sup> Stated more simply: "the non-resident cap was not closely drawn to advance the goal of preventing corruption."<sup>74</sup>

Similarly, the Second Circuit held the Vermont provision was overbroad because even though non-resident contributions were no more likely to pose corruption than contributions by in-state residents, it nevertheless prohibited small, out-of-state contributions once the 25% threshold—more than double Oregon's rate—was reached.<sup>75</sup> Consequently, the court concluded that any such law would need an alternative explanation further distinguishing out-of-state and in-state contribution limits and more explanation as to what Vermont's significant interest in eliminating only non-residents' small donations is.<sup>76</sup>

At the time, the Second Circuit afforded the Supreme Court of Alaska some credit in articulating an explanation for its state's interest in capping out-of-state contributions.<sup>77</sup> *State v. Alaska Civil Liberties Union* had upheld an Alaska law that capped non-resident contributions at a lower percentage than the limit in Vermont's

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Firstly, most if not all of the examples of allegedly suspicious out of state contributions enumerated by Defendants—and especially those targeted by the press—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. Secondly, the proffered justification does not account for the fact 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.

*Landell I*, 118 F. Supp. 2d. 470, 484 (D. Vt. 2000).

<sup>71</sup> *Landell II*, 382 F.3d at 147.

<sup>72</sup> *Id.* (citing *VanNatta v. Keisling (VanNatta II)*, 151 F.3d 1215, 1221 (9th Cir. 1998)).

<sup>73</sup> *Id.* (citing *VanNatta II*, 151 F.3d at 1221) (explaining the *VanNatta* court's decision regarding the Oregon statute).

<sup>74</sup> *Id.* (quoting *VanNatta II*, 151 F.3d at 1221) (internal quotations omitted).

<sup>75</sup> *See id.* According to the court, "Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors." *Id.* Furthermore, "[t]here are only vague references to the danger of out-of-state contributions, and all refer to the danger of excessively large (not cumulatively great) contributions." *Id.*

<sup>76</sup> *See id.*

<sup>77</sup> *Id.*

provision because of the fear that candidates would become too subservient and dependent to the wishes of large out-of-state contributors.<sup>78</sup>

Nevertheless, the Second Circuit's respect for the Supreme Court of Alaska's attempt at rationalizing its out-of-state contribution limits stops short of an endorsement.<sup>79</sup> In fact, the *Landell* court reiterated that even if political candidates could become exposed and attracted to large out-of-state contributions from non-residents, such problems are not the exclusive domain of nonstate residents.<sup>80</sup> The Supreme Court of Alaska's distinctions, therefore, were meaningless.<sup>81</sup>

Therefore, the Second Circuit has explicitly disregarded a state's governmental interest to "permit[] state governments to preserve their systems from the influence, exercised only through speech-related activities, of non-residents."<sup>82</sup> While the U.S. Supreme Court would eventually grant certiorari and overturn much of *Landell*, the Court did not address, nor reverse, the out-of-state contribution limits stricken by the Second Circuit.<sup>83</sup>

### B. Alaska

Most recently, in November 2018, the Ninth Circuit curbed Alaska's nonconforming streak and overturned the state's campaign finance laws.<sup>84</sup> This limited candidates running for the state's office of state representative, state senate, municipal office, lieutenant governor and any other positions other than the governorship from accepting more than \$3,000 USD from out-of-state residents since: (1) the laws directly violated the First Amendment; (2) they did not advance Alaska's purported state interest to reduce or prevent quid pro quo corruption; and (3) the laws perceived unjustifiable influence out of non-resident campaign contributors.<sup>85</sup>

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<sup>78</sup> *Id.* at 147–48 (citing *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 617 (Alaska 1999)).

<sup>79</sup> *See id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See id.* at 148.

<sup>82</sup> *Id.*

<sup>83</sup> *See generally* *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>84</sup> *See* ALASKA STAT. § 15.13.072(a)(3) (2019) ("A candidate or an individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 may not solicit or accept a contribution from . . . a group organized under the laws of another state, resident in another state, or whose participants are not residents of this state at the time the contribution is made . . ."); *id.* § 15.13.072(e)(3) ("A candidate or an individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 may solicit or accept contributions from an individual who is not a resident of the state at the time the contribution is made if the amounts contributed by individuals who are not residents do not exceed . . . \$3,000 a calendar year, if the candidate or individual is seeking the office of state representative or municipal or other office."); *id.* § 15.13.072(f) ("[Contributions from] individuals who are not residents may not exceed 10 percent of total contributions made to . . . group[s] or political part[ies] during the calendar or group year in which the contributions are received.").

<sup>85</sup> *Thompson v. Hebdon*, 909 F.3d 1027, 1040–43 (9th Cir. 2018).

The case, *Thompson v. Hebdon*, unequivocally overturns the Supreme Court of Alaska's 1999 holding in *Alaska Civil Liberties Union* that the "potential for distortion" deriving from out-of-state contributors in Alaskan elections is a "sufficiently compelling state interest" to uphold non-resident contribution restrictions.<sup>86</sup> *Alaska Civil Liberties Union* may have tried to distinguish itself from the Ninth Circuit's decision in *VanNatta* when it did not cite quid pro quo corruption or its appearance as a compelling state interest to uphold Alaska's non-resident contribution restrictions.<sup>87</sup> The Supreme Court of Alaska, however, did find that fighting "purchased or coerced influence which is grossly disproportionate"—in other words, corruption—is a compelling state interest.<sup>88</sup>

*Thompson v. Dauphinais* wrestles with the Alaska District Court's holding<sup>89</sup> that out-of-state aggregate limits served an anti-corruption purpose because of the state's unusual vulnerability to "exploitation by outside industry and interests," who "can and do exert pressure on their employees to make contributions to state and municipal candidates" in Alaska.<sup>90</sup> Citing *Citizens United* and *McCutcheon*, the court held

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<sup>86</sup> State v. Alaska Civil Liberties Union, 978 P.2d 597, 617 (Alaska 1999). The Supreme Court of Alaska distinguished its ruling from that of *VanNatta*, reasoning that Alaska's restrictions on contributions only applied to non-residents—not other Alaska residents regardless of what district they resided in. *Id.* at 616 (citing *VanNatta II*, 151 F.3d 1215, 1217 (9th Cir. 1998)). Furthermore, Alaska—unlike Oregon—is not contiguous to another state. *Id.*

<sup>87</sup> *Id.* at 615.

<sup>88</sup> *Id.* at 617.

<sup>89</sup> See *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1037 (D. Alaska 2016). The Alaska District Court had disagreed with the plaintiffs' argument that the defendants "presented no evidence of a nexus between residency and quid pro quo corruption or its appearance, and that Alaska's non-resident aggregate contribution limit is unconstitutional under *McCutcheon* and *VanNatta*." *Id.* (internal quotations omitted). Moreover, the District Court disregarded the Ninth Circuit's decision in *Whitmore* in deliberating on the constitutionality of non-resident contribution limits because it considered *Whitmore* to not have been "on point." *Id.* at 1037–38 n.53.

<sup>90</sup> *Thompson*, 909 F.3d at 1040–41 (quoting *Dauphinais*, 217 F. Supp. 3d at 1039) (internal quotations omitted). The Alaska District Court had reasoned that the out-of-state campaign contribution limit accomplishes the following:

[It] furthers Alaska's sufficiently important interest in preventing quid pro quo corruption or its appearance in two ways. First, . . . [it] furthers the State's anticorruption interest directly by avoiding large amounts of out-of-state money from being contributed to a single candidate, thus reducing the appearance that the candidate feels obligated to outside interests over those of his constituents. Second, the nonresident aggregate limit discourages circumvention of the \$500 base limit and other game-playing by outside interests, particularly given [the Alaska Public Offices Commission's] limited ability and jurisdiction to investigate and prosecute out-of-state violations of Alaska's campaign finance laws.

*Dauphinais*, 217 F. Supp. 3d at 1039.

Note that the anti-corruption argument made in *Dauphinais* marked a remarkable departure from the approach used by the state in arguing *Alaska Civil Liberties Union* seventeen years

that restraining the “undue influence” of non-resident contributors—an objective of the District Court—was no longer a valid state interest.<sup>91</sup> While the lower court’s ruling sided with Alaska’s argument that the out-of-state contribution limit “reduces the appearance that a candidate will be obligated to outside interests rather than constituents,” in practice, the limit “says nothing about corruption.”<sup>92</sup> The court ruled out Alaska’s demonstration that exploitation of the state’s natural resources by out-of-state firms posed an anti-corruption interest.<sup>93</sup>

Furthermore, the Ninth Circuit has held that Alaskan law’s out-of-state aggregate limit is not a fitting solution to the problem of anti-corruption interests, putting the court at odds with dissimilar conclusions in *Alaska Civil Liberties Union*,<sup>94</sup> *Dauphinais*,<sup>95</sup> and Chief Judge Sidney Thomas’s dissent.<sup>96</sup> The state’s law, *Thompson* holds, is what the Supreme Court in *McCutcheon*<sup>97</sup> would have deemed a poor fit in addressing

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earlier: “The State refers us to no specific evidence of corruption or the appearance of corruption caused by out-of-state contributions, and does not contend that quid pro quo corruption justifies these restraints.” *Alaska Civil Liberties Union*, 978 P.2d at 615.

<sup>91</sup> *Thompson*, 909 F.3d at 1034 (first citing *Citizens United v. FEC*, 558 U.S. 310, 359–60 (2010); then citing *McCutcheon v. FEC*, 572 U.S. 185, 206–07 (2014)).

<sup>92</sup> *Id.* at 1041 (emphasis omitted).

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

<sup>94</sup> See *Alaska Civil Liberties Union*, 978 P.2d at 615 (“Former Governor Walter Hickel stated that ‘whenever a candidate has to seek donations from outside the state, the candidate is buying a potential conflict of interest.’ Former Governor Jay Hammond has stated that ‘[t]he necessity of having to raise substantial sums of money from non-Alaska resident contributors discourages many qualified Alaskans from becoming candidates. And it taints those who do.’” (alteration in original)).

<sup>95</sup> See *Dauphinais*, 217 F. Supp. 3d at 1029 (“[J]ust ten votes can stop a legislative action such as an oil or gas tax increase from becoming law. Consequently, the incentive to buy a vote, and the chances of successfully doing so, are therefore higher in Alaska than in states with larger legislative bodies. A second factor is Alaska’s almost complete reliance on one industry for a majority of its revenues.”).

<sup>96</sup> See *Thompson*, 909 F.3d at 1045 (Thomas, C.J., dissenting in part) (“[W]hile 85 to 92% of Alaska’s budget derives from the oil and gas industry, that industry is not responsible for more than 50% of any other state’s budget. . . . Today, not only does the State depend on the industry to fund its services, but . . . ‘the petroleum industry supports one-third of all Alaska jobs.’ . . . The interests of out-of-state oil companies are often at odds with the interests of some Alaska residents. . . . [Approximately] 17 percent of all Alaskans—or 120,000 people—live in rural areas, where 95 percent of households use fish and 86 percent use game for subsistence purposes. . . . Resource extraction has the potential to cause irremediable damage to Alaskan lands and culture . . .”).

<sup>97</sup> See *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014) (“The difficulty is that once the aggregate limits kick in, they ban all contributions of *any* amount. But Congress’s selection of a \$5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption. If there is no corruption concern in giving nine candidates up to \$5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given \$1,801, and all others corruptible if given a dime. And if there is no risk that additional candidates will be corrupted by donations of up to \$5,200, then the Government



corruption or its appearance because the state is unable to explain how earlier contributions by a non-resident are less corrupting than the amounts given to other candidates after that aggregate limit has been surpassed.<sup>98</sup> Specifically, the *Thompson* court is puzzled as to how “a contribution made after the candidate has already amassed \$3,000 [USD] in out-of-state funds—is corrupting” or how “an out-of-state contribution of \$500 [USD] is inherently more corrupting than a like in-state contribution.”<sup>99</sup>

*Thompson* also attempts to clarify what appropriately constitutes “self-governance.”<sup>100</sup> First, the court contends that “self-governance” is a legitimate state interest in the context of limiting “who may exercise official, legislative powers”—an interest in controlling who governs.<sup>101</sup> By contrast, while the majority opinion in *Thompson* asserts that its definition of “self-governance” concerns *limiting who governs*, the state and the court’s dissenting opinion perceive “self-governance” as *limiting contributions to those who would govern*.<sup>102</sup> Moreover, the majority opinion also opines that the dissent’s contention that states should be allowed to restrict who may “directly influence the outcome of an election” through contributions is a moot point since it has been settled by the Supreme Court in *McCutcheon* and *Citizens United*.<sup>103</sup>

Second, assuming that Alaska has defined more appropriately a state interest in “self-governance,” the Supreme Court’s ruling in *McCutcheon* only articulates one narrowly defined, legitimate state interest in limiting contributions to campaigns: “preventing *quid pro quo* corruption or its appearance.”<sup>104</sup> The majority opinion disregards the dissent’s suggestion that “self-governance” could be accepted as a new important state interest and instead subscribes to a narrow adherence to the Supreme Court precedent.<sup>105</sup>

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must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits.”).

<sup>98</sup> *Thompson*, 909 F.3d at 1041.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1042.

<sup>101</sup> *Id.* (quoting *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 531 (9th Cir. 2015) (en banc)).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*; see also *McCutcheon v. FEC*, 572 U.S. 185, 208 (2014) (“Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner influence over or access to elected officials or political parties.” (internal quotations omitted)).

<sup>104</sup> *Thompson*, 909 F.3d at 1043 (quoting *McCutcheon*, 572 U.S. at 206–07). Otherwise, “[c]ampaign finance restrictions that pursue other objectives . . . impermissibly inject the Government ‘into the debate over who should govern.’” *Id.* (alteration in original) (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011)).

<sup>105</sup> *Id.* (“Our decisions must comport with the reasoning or theory, not just the holding, of Supreme Court decisions [even if it is contrary to Ninth Circuit precedent].” (internal quotations omitted)). *But see id.* at 1046 (Thomas, C.J., dissenting in part) (“[T]he proof at trial was more than theoretical. . . . Particularly in the aftermath of the VECO scandal, the



Finally, acknowledging that the Supreme Court has not conclusively restricted the possibility of other, new alternative state interests arising in the future, *Thompson* rejects the notion that self-governance is an important state interest to begin with.<sup>106</sup> It does, however, pay some lip service to the “self-governance” argument, perplexingly concluding that “[s]tates have an important interest in preserving the integrity of their political institutions,” and a “vital method of doing so is by curbing large monetary contributions, which can corrode the public’s faith in its government’s responsiveness to the popular will.”<sup>107</sup>

### C. Oregon

In 1994, Oregon voters were the first to install residency-based restrictions campaign contributions through a ballot initiative.<sup>108</sup> The measure barred candidates from collecting more than 10% of their campaign contributions from out-of-state and out-of-district donors.<sup>109</sup> The measure, “entitled the Freedom From Special Interests initiative,” sought to “prevent out-of-district individuals and organizations from buying influence in elections, thus allowing ordinary people [to] secure their rightful control of their own government.”<sup>110</sup> Therefore, whereas Alaska and Vermont’s restrictions on contributions pertained to out-of-state donors, Oregon’s law additionally

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nonresident aggregate contribution furthers Alaska’s interest in preventing the appearance of corruption, thereby increasing ‘[c]onfidence in the integrity of [Alaska’s] electoral processes,’ a value ‘essential to the functioning of our participatory democracy.’” (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (per curiam)).

<sup>106</sup> *Id.* at 1043.

<sup>107</sup> *Id.* at 1044.

<sup>108</sup> See Wallace, *supra* note 27, at 607. The ballot initiative, entitled “Measure 6,” consisted of four sections:

- (1) Section 1 allows candidates to “use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate \* \* \*;”
- (2) where more than ten percent of a candidate’s total campaign funding is in violation of Section 1, Section 2 punishes the candidate by either (a) forcing the *elected official* to forfeit the office and to not hold a subsequent elected public office for a period equal to twice the tenure of the office sought, or (b) forbidding the *unelected candidate* from holding an elected public office for a period equal to twice the tenure of the office sought;
- (3) Section 3 prohibits “qualified donors” (*i.e.*, in-district residents) from contributing funds to a candidate on behalf of an out-of-district resident;
- (4) Section 4 labels a violation of Section 3 as an “unclassified felony.”

*VanNatta v. Keisling* (*VanNatta I*), 899 F. Supp. 488, 491 (D. Or. 1995) (alteration in original). The measure limited the amount of contributions that Oregon candidates could accept from out-of-state and out-of-district donors. *Id.*

<sup>109</sup> Wallace, *supra* note 27, at 607; see also OR. CONST. art. II, § 22.

<sup>110</sup> *VanNatta I*, 899 F. Supp. at 491 (internal quotations omitted).

applied to out-of-district residents living within the state.<sup>111</sup> In addition, while the measure passed by Oregon's voters did not explicitly limit its application to state elections, Oregon's Constitution limited it to only state elections.<sup>112</sup>

In *VanNatta*, the appellants argued that under the Oregon law, state election candidates could receive unlimited contributions from out-of-district donors as long as they did not "use or direct" them.<sup>113</sup> They relied on *Buckley*, in which the Supreme Court upheld contribution limits, to explain that "the free speech value of contributing lay in the *symbolic expression of support*," rather than the total contribution amount.<sup>114</sup> The Ninth Circuit, however, rejected the appellants' argument, explaining that in actuality, "campaigns will have no incentive to accept money which they cannot legally spend," implicating contributors' First Amendment rights to see their donations being used by candidates.<sup>115</sup>

The district court had employed strict scrutiny in determining that the Oregon law was "not narrowly tailored to prevent corruption because it prevented non-corrupt out-of-district contributions, failed to thwart in-district corruption, and failed to prevent large out-of-district contributions so long as they do not exceed 10% of the total."<sup>116</sup> The Ninth Circuit, however, applies a "less-than-strict, rigorous scrutiny."<sup>117</sup>

As previously discussed, *VanNatta* held that the Oregon law restricting out-of-state and out-of-district campaign contributions violates the First Amendment because it is not closely drawn to prevent corruption.<sup>118</sup> Interestingly, up to this point, the court is unanimous.<sup>119</sup> Judge Melvin Brunetti dissents, however, regarding the appellant's portrayal of the state's interest as being about the prevention of corruption.<sup>120</sup> He asserts that the appellant's state interest was "a sufficiently important interest in protecting [Oregon's] republican form of government."<sup>121</sup> The dissent acknowledges that while none of the cases it cites "are directly on point," when analyzed together, they establish a strong state interest in maintaining "the integrity

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<sup>111</sup> Wallace, *supra* note 27, at 607.

<sup>112</sup> *VanNatta II*, 151 F.3d 1215, 1219 (9th Cir. 1998) ("Although Measure 6 does not expressly limit its application to state races, it amends Article II of the state constitution which governs state elections. The parties do not argue Measure 6 applies to federal elections and to the extent it attempted to do so, it would be preempted by the Federal Election Campaign Act.").

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1219–20 (emphasis added) (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam)).

<sup>115</sup> *Id.* at 1220.

<sup>116</sup> *Id.* at 1219.

<sup>117</sup> *Id.* at 1220; *see also* *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259–60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.").

<sup>118</sup> *See* discussion *supra* Section II.A.

<sup>119</sup> *VanNatta II*, 151 F.3d at 1222.

<sup>120</sup> *Id.* (Brunetti, J., dissenting).

<sup>121</sup> *Id.*

of electoral district lines.”<sup>122</sup> For example, the court in *VanNatta* cites to *Holt Civic Club v. City of Tuscaloosa*, and notes that, in that case, the Supreme Court emphasized cities and states’ right “to reserve their political processes and resources for their own residents.”<sup>123</sup> By contrast, the *VanNatta* majority rejected this idea that non-resident contribution restrictions are justifiable because they prevent “a distortion of the republican form of government.”<sup>124</sup> Later, the Supreme Court did not grant certiorari in *VanNatta*, essentially upholding the majority’s decision.<sup>125</sup>

#### D. Hawaii

Soon after the Second Circuit’s ruling in *Landell*, Hawaii enacted what is now the last surviving foray into out-of-state contribution limits.<sup>126</sup> The original statute has since been repealed, as the 2010 amendments to Hawaii’s campaign finance laws increased the permissible amount of total contributions state candidates could collect from non-residents from 20% to 30% of total contributions.<sup>127</sup> While Hawaii raised the threshold for non-resident contribution limits, its law is not a dramatic departure from the overturned laws of Vermont, Alaska, and Oregon because like the other states, its restrictions create ceilings on out-of-state contributions instead of more overtly and directly regulating non-resident contributors.<sup>128</sup> Therefore, the prospect that the Supreme Court could grant certiorari in *Thompson* could have immense ramifications on whether Hawaii’s law will survive to be a model for other states’ campaign finance laws or fail to muster First Amendment challenges.<sup>129</sup>

### III. A QUEST TO PRESERVE REPRESENTATIVE DEMOCRACY

This Part explores the various arguments to protect republicanism—an issue that has yet to garner explicit support by the Supreme Court as an important state interest in the context of campaign finance contributions. It proceeds to explore the confusion of defining an elected official’s “constituent”—a challenge that complicates any recognition of an interest to preserve separate, state-specific political communities in the campaign finance law context. Finally, this Part explores the surrogate representation that a non-resident donor may seek and how it impacts politics outside the constituent’s home state.

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<sup>122</sup> *Id.* at 1223.

<sup>123</sup> *Id.* at 1222; *see Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 81 (1978) (holding that “[a] government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders”).

<sup>124</sup> *VanNatta II*, 151 F.3d at 1216.

<sup>125</sup> *See Miller v. VanNatta*, 525 U.S. 1104, 1104 (1999).

<sup>126</sup> *See* H.R. 1747, 23d Leg., Reg. Sess. (Haw. 2005), [https://www.capitol.hawaii.gov/session2005/bills/HB1747\\_cd1\\_.htm](https://www.capitol.hawaii.gov/session2005/bills/HB1747_cd1_.htm) [<https://perma.cc/NVE6-ZR4V>].

<sup>127</sup> *See* HAW. REV. STAT. § 11-204.5 (2010) (repealed 2010).

<sup>128</sup> *See* H.B. 2003, 25th Leg., Reg. Sess. (Haw. 2010).

<sup>129</sup> *See Thompson v. Hebdon*, 909 F.3d 1027, 1027 (9th Cir. 2018).

*A. State Interest to Protect Republicanism?*

In both *Thompson* and *VanNatta*, the dissenting judges pose republicanism as an important state interest justifying the restriction of out-of-state campaign contributions.<sup>130</sup> The majority opinion in *Thompson* has unequivocally rejected this stance, stating that “[s]ince *Citizens United* and *McCutcheon*, preventing ‘undue influence’ is no longer a legitimate basis for restricting contributions under the First Amendment.”<sup>131</sup> Nevertheless, it is arguable that limiting the government’s only important interest to quid pro quo corruption or the appearance of corruption could be considered dicta, especially in a post–Roberts Court era.<sup>132</sup> *Citizens United* and *McCutcheon*—both cases decided by the Roberts Court—do not involve precisely the same kind of non-resident limits or arguments pertaining to the undermining of states’ political representation that could be at issue should the Supreme Court grant certiorari to *Thompson*.<sup>133</sup>

A state interest to protect republicanism may coincide with an important interest to tackle corruption.<sup>134</sup> In her dissenting opinion to the Supreme Court’s 5–4 decision in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, Justice Elena Kagan contends that “the First Amendment’s core purpose is to foster a healthy, vibrant political system full of robust discussion and debate.”<sup>135</sup> Justice Kagan states in defense of the First Amendment, over the past century, campaign finance regulations and public financing programs have been passed to prevent elected officials from acting for the benefit of wealthy donors, rather than on behalf of all their constituents:

Campaign finance reform over the last century has focused on one key question: how to prevent massive pools of private money from corrupting our political system. If an officeholder owes his election to wealthy contributors, he may act for their benefit alone, rather than on behalf of all the people. As we recognized in *Buckley* . . . , our seminal campaign finance case, large private contributions may result in “political *quid pro quo*[s],” which undermine the integrity of our democracy. And even if these contributions are not converted into corrupt bargains, they still may weaken confidence in our political system because the public perceives “the opportunities for abuse[s].” To prevent both corruption and the appearance of corruption—and so to protect our

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<sup>130</sup> See discussion *supra* Sections II.B–C.

<sup>131</sup> *Thompson*, 909 F.3d at 1044.

<sup>132</sup> See *id.* at 1034.

<sup>133</sup> See *id.* at 1044.

<sup>134</sup> See *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 756 (2011) (Kagan, J., dissenting).

<sup>135</sup> *Id.*

democratic system of governance—citizens have implemented reforms designed to curb the power of special interests.<sup>136</sup>

Justice Kagan recounts this history in the context of addressing the constitutionality of an Arizona campaign finance initiative voted for by Arizona’s citizens.<sup>137</sup> Arizona’s campaign contribution limits had been passed directly as a result of “AzScam”—a scandal in which almost 10% of Arizona’s legislators were “caught accepting campaign contributions or bribes in exchange for supporting a piece of legislation.”<sup>138</sup> Therefore, Justice Kagan linked her interpretation of the First Amendment to an understanding that elected public servants should be accountable, first and foremost, to all their constituents—not a small minority of wealthy contributors.<sup>139</sup>

In her article, *The Narrowing Government Interest in Campaign Finance Regulations: Republic Lost?*, Deborah Roy argues that preserving a representative democracy should be a government interest recognized by the Supreme Court when campaign finance regulations are analyzed.<sup>140</sup> She argues that by taking “a nearly absolutist view of the First Amendment protection of money as political speech,” the Roberts Court has fundamentally failed to consider the need to preserve a representative democracy.<sup>141</sup> Roy contends that a jurisprudence that utilizes the First Amendment to undermine representative democracy betrays the spirit of the Constitution.<sup>142</sup> Therefore, she argues, the Supreme Court should take a more balanced approach to weighing the interest of preserving representative democracy against a First Amendment right to campaign contributions.<sup>143</sup> This balance could be an aspiration raised in *McCutcheon* that has not been fully realized: “Such responsiveness [of representatives to their constituents’ concerns] is key to the very concept of self-governance through elected officials.”<sup>144</sup>

In *McCutcheon*, Professor Lawrence Lessig of Harvard Law School filed an amicus brief in support of the appellee, analyzing the Founding Fathers’ conception of corruption.<sup>145</sup> In his brief, he argues that the residency requirement of Congress “was a response to the fear that wealthy non-residents would purchase elected office.”<sup>146</sup> His rationale is best articulated by the Constitutional Convention delegate, George

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<sup>136</sup> *Id.* (internal citations omitted).

<sup>137</sup> *Id.* at 760.

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

<sup>139</sup> *Id.* at 784.

<sup>140</sup> See Deborah A. Roy, *The Narrowing Government Interest in Campaign Finance Regulations: Republic Lost?*, 46 U. MEM. L. REV. 1, 1–2 (2015). Roy is a trial attorney in the Antitrust Division of the United States Department of Justice. *Id.* at 2.

<sup>141</sup> *Id.* at 2–3.

<sup>142</sup> *Id.* at 3.

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

<sup>144</sup> *McCutcheon v. FEC*, 572 U.S. 185, 227 (2014).

<sup>145</sup> Brief *Amicus Curiae* of Professor Lawrence Lessig et al. in Support of Appellee at 2, *McCutcheon v. FEC*, 572 U.S. 185 (2014) (No. 12-536).

<sup>146</sup> *Id.* at 14.

Mason, who explained, “If residence be not required, Rich men of neighbouring States, may employ with success the means of corruption in some particular district and thereby get into the public Councils after having failed in their own State.”<sup>147</sup> Such measures as this were implemented by the Constitution’s Framers as “broad prophylactic measures . . . sufficiently important to include in our Nation’s charter” despite lacking “any direct evidence of corruption.”<sup>148</sup> Thus, unlike the *McCutcheon* plurality, Lessig indicates that generally, residency is a critical consideration in a representative democracy.<sup>149</sup>

In addition, the late Justice Stevens not only suggested that residency is a critical consideration in a representative democracy,<sup>150</sup> but argued that rules restricting contributions and expenditures “should recognize the distinction between money provided by their constituents and money provided by non-voters, such as corporations and people living in other jurisdictions.”<sup>151</sup> Testifying before the Senate Committee on Rules and Administration in 2014, Justice Stevens asserted that the jurisprudence of the Supreme Court “has been incorrectly predicated on the assumption of [quid pro quo] corruption or the appearance of corruption” is the government’s only justified interest for regulating campaign finance laws.<sup>152</sup> He pointed to *Bluman v. FEC*—a 2011 D.C. Circuit opinion penned by now-Justice Brett Kavanaugh—to show that the interest in protecting speech about general issues is more important than protecting the campaign speech by non-voters.<sup>153</sup>

While *Bluman* held “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>154</sup> this case may not be enough

<sup>147</sup> *Id.* (quoting 2 FARRAND’S RECORDS 218 (Farrand ed., 1911)).

<sup>148</sup> *Id.* at 15.

<sup>149</sup> See Roy, *supra* note 140, at 41.

<sup>150</sup> See also *Printz v. United States*, 521 U.S. 898, 920 (1997) (“[The Constitution’s] great innovation . . . was that ‘our citizens would have two political capacities, one state and one federal, each protected from incursion by the other’—‘a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.’ The Constitution thus contemplates that a State’s government will represent and remain accountable to its own citizens.” (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring))).

<sup>151</sup> See *Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond: Hearing Before the Senate Committee on Rules and Administration*, 113th Cong. (2014) (statement of J. John Paul Stevens (Ret.)) [hereinafter *Dollars and Sense*].

<sup>152</sup> *Id.* In addition, Justice Stevens argued that “while money is used to finance speech, money is not speech. . . . [F]inancial activities should not receive the same constitutional protection as speech itself. After all, campaign funds were used to finance the Watergate burglaries—actions that clearly were not protected by the First Amendment.” *Id.*

<sup>153</sup> 800 F. Supp. 2d 281 (D.D.C. 2011); *Dollars and Sense*, *supra* note 151.

<sup>154</sup> *Bluman*, 800 F. Supp. 2d at 288 (emphasis added).



to muster a sufficient constitutional challenge to the constitutionality of out-of-state contribution limits.<sup>155</sup> *Bluman*'s rationale for barring foreign contributions is that it is "fundamental to the definition of our national political community" that non-U.S. citizens are prevented from having outside influence over the American political process; foreign citizens lack the constitutional right to participate in democratic self-government in the United States.<sup>156</sup> *Bluman*, however, does not equate the relationship of American citizens to different U.S. states and the relationship of non-U.S. foreign nationals to the United States.<sup>157</sup> Rather, Kavanaugh explicitly writes, "The 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>158</sup> This rejection to extend the parallel between foreign nationals and out-of-state citizens stems in part from the fact that "citizens of other states and municipalities are all members of the American political community,"<sup>159</sup> whereas "[a]liens are by definition those outside of this community" altogether.<sup>160</sup> Therefore, *Bluman* stops short of distinguishing between an American political community and various, state-specific political communities.<sup>161</sup>

While *Bluman* explores the American political community vis-à-vis foreign nationals, the *Holt Civic Club* case explores the concept of local political communities, albeit within the context of the right to vote in local elections.<sup>162</sup> In *Holt Civic Club*, the Supreme Court held that it has never

extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, 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>163</sup>

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<sup>155</sup> See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1141–42 (2014) ("[P]artisan federalism is more consistent with cross-border participation than with its prohibition."); Todd E. Pettys, *Campaign Finance, Federalism, and the Case of the Long-Armed Donor*, 81 U. CHI. L. REV. ONLINE 77, 89 (2014) ("There are strong reasons to doubt that the Court would find that restrictions on out-of-state campaign spending can be justified by sufficiently powerfully governmental interests.").

<sup>156</sup> *Bluman*, 800 F. Supp. 2d at 288.

<sup>157</sup> See *id.* (making no comparison between the two groups).

<sup>158</sup> *Id.* at 290.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* (quoting *Cabell v. Chavez-Salido*, 454 U.S. 432, 439–40 (1982)).

<sup>161</sup> *Id.* at 290–91.

<sup>162</sup> See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68–69 (1978).

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



Therefore, this case broadly promotes a general idea of democratic self-government, in which publicly elected representatives on the state or local level are to be controlled only by their residents.<sup>164</sup>

Finally, in his amicus brief in support of the appellees in *Thompson*, Professor David Fontana of George Washington University Law School furthers the push for republicanism by describing what would constitute a state-specific political community.<sup>165</sup> First, Fontana asserts that state governments are intended to be “more sensitive to the diverse needs’ of their populations.”<sup>166</sup> In order to accomplish this, state governments have to reflect their distinctive political communities’ preferences and opinions.<sup>167</sup> Second, Fontana argues that state governments can constitute “laboratories for devising solutions to difficult legal problems,”<sup>168</sup> effectively producing “different policy outcomes because of different political inputs.”<sup>169</sup> Third, what James Madison deemed in *The Federalist No. 51* as the “distinct and separate departments” comprised by the states constitutes the checks on governmental power in the U.S. system of federalism.<sup>170</sup> Finally, states compose their own unique political communities because they are self-governing and, therefore, restrict key activities of self-government, such as voting, to constituents within their political communities.<sup>171</sup>

### B. What Is a Constituent?

One of the difficulties in recognizing an interest to preserve separate, state-specific political communities within the context of campaign finance law is the

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<sup>164</sup> See Richard Briffault, *Of Constituents and Contributors*, 2015 U. CHI. LEGAL F. 29, 52 (2015); see also *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 631 (1969) (holding New York statute restricting the right to vote in school district elections to only those “subjectively concerned” violates the Equal Protection Clause because everyone in the community is benefitted by better public education).

<sup>165</sup> Brief of Free Speech for People & Professor David Fontana as Amici Curiae Supporting Appellees & in Support of Affirmance of the Judgment Below, *Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018) (No. 17-35019) [hereinafter Fontana Brief]. In his amicus brief, Fontana states that the Supreme Court has recognized, for a long time “that the state’s interest in democratic self-government includes definition of the scope of the political community.” *Id.* at 8; see also *Sugarman v. Dougall*, 413 U.S. 634, 642–43 (1973) (“We recognize a State’s interest in establishing its own form of government, and in limiting participation in that government to those who are within the basic conception of a political community. We recognize, too, the State’s broad power to define its political community.” (internal quotations and citations omitted)).

<sup>166</sup> Fontana Brief, *supra* note 165, at 7 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

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

<sup>168</sup> *Id.* (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>169</sup> Fontana Brief, *supra* note 165, at 8.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 10–11.

confusion as to who constitutes an elected official's constituents. For instance, neither the United States Constitution, nor the Supreme Court have defined who exactly is a constituent of a United States senator.<sup>172</sup>

The meaning of "constituent" found relevance recently in the federal corruption case against New Jersey Senator Robert Menendez.<sup>173</sup> Menendez had been charged with using his senatorial powers to do favors for a wealthy, Dominican-American donor living in Florida in exchange for political contributions, gifts, and vacations.<sup>174</sup> The question was whether members of Congress exclusively serve the citizens of their home state, or whether they represent broader national interests.<sup>175</sup> For example, the defendant's brief, submitted by Menendez's attorney, raises Menendez's "attention to cultural minorities and under-represented communities, particularly Hispanic-Americans, as well as immigration issues generally" as exemplifying "his focus on ethnic constituencies and issue constituencies whose members are not limited to New Jersey residents."<sup>176</sup> In other words, Menendez and other elected public servants in Congress are tasked with legislating policy that considers the welfare of both their state's residents and of Americans living across the nation.<sup>177</sup> In fact, Menendez's defense referenced *Buckley* in asserting that "[t]he Constitution does not distinguish between electoral constituents and non-constituents when guaranteeing private citizens . . . the [First Amendment] freedom to express their support of candidates and causes through political contributions."<sup>178</sup> Ultimately, since "constituency" lacks a fixed legal definition, Menendez argues that it would be improper to construct a single definition and to instruct the jury about its meaning; rather, "the word's meaning and significance is a factual question for the jury" since this word could implicate Menendez's state of mind.<sup>179</sup>

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<sup>172</sup> Nick Corasaniti, *At Menendez Trial, Legal Wrestling over Definition of 'Constituent,'* N.Y. TIMES (Sept. 20, 2017), <https://www.nytimes.com/2017/09/20/nyregion/senator-robert-menendez-definition-of-constituent.html> [<https://nyti.ms/2jMbydd>].

<sup>173</sup> *Id.* See generally *United States v. Menendez*, 291 F. Supp. 3d 606 (D.N.J. 2018).

<sup>174</sup> See Corasaniti, *supra* note 172.

<sup>175</sup> *Id.*

<sup>176</sup> Defendants' Trial Brief Regarding the Meaning and Significance of the Term "Constituent," *Menendez*, 291 F. Supp. 3d 606 (No. 2:15-cr-00155) [hereinafter *Menendez Trial Brief*]; see also Briffault, *supra* note 164, at 44 (arguing that while constituencies are often defined geographically, "electoral constituents are not the only people who . . . may be represented by an officeholder"). An elected public official may represent the interests of distinct individuals or groups, such as ethnic communities. *Id.* at 45. Party and ideology may also be a grounds for non-constituent representation. *Id.*

<sup>177</sup> See *Menendez Trial Brief*, *supra* note 176, at 7–8.

<sup>178</sup> *Id.* at 4; see also *Schiaffo v. Helstoski*, 492 F.2d 413, 429 (3d Cir. 1974) ("Although frequently when the franking privilege is discussed, reference is made to mailings to constituents, *mailings to nonconstituents are nonetheless a necessary part of a congressman's legislative business too.*" (emphasis added)).

<sup>179</sup> *Menendez Trial Brief*, *supra* note 176, at 1. Menendez's defense attorney compares instructing a jury about the meaning of "constituent" to proving it with a single meaning of an endlessly defined word like "friendship." *Id.*

By contrast, a more traditional definition of “constituent” narrowly describes “one of a group of citizens who elect a representative to a legislature or other public body.”<sup>180</sup> A constituent functions as a voter to authorize an elected official to act on his or her behalf.<sup>181</sup> In addition, a constituency, which is typically defined geographically, “determine[s] to whom the representative is to be accountable.”<sup>182</sup>

Professor Jessica Bulman-Pozen of Columbia Law School has persuasively argued that an individual who engages in cross-border political activity and channels money towards other states “[embraces] the kind of surrogate representation” that impacts politics outside the constituent’s home state.<sup>183</sup> Such an individual may not benefit directly from out-of-state political engagement, yet he or she tries “to create momentum for a particular policy or political party, to build a real-life example to inform national debate, or simply to take comfort in knowing that their preferences are actually policy—and their partisan group is in control—somewhere.”<sup>184</sup> Bulman-Pozen contends that such an individual’s out-of-state political engagement reveals that “states regularly act not as separate polities[,] but [rather] as platforms for national political struggle.”<sup>185</sup> Consequently, this cross-state political engagement “demonstrates states’ importance as sites of governance and identification, not their lack thereof.”<sup>186</sup> Therefore, while an individual operating under this framework may not conform to a traditional notion of a geographically based constituent, the centrality of the state as a political entity does not become diminished; it merely takes a new form.<sup>187</sup>

#### IV. A REIMAGINING OF STATES’ POWER

In lieu of the Ninth Circuit’s recent ruling in *Thompson*, it is unclear whether the Supreme Court will step in and conclusively decide, once and for all, whether out-of-state contribution restrictions are constitutional.<sup>188</sup> While a state interest to preserve republicanism may eventually emerge, it is undeniable—for the time

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<sup>180</sup> See Briffault, *supra* note 164, at 44; see also James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of “Representation?”*, 7 MICH. J. RACE & L. 357, 387 (“The basic premise for ‘relational representation’ rests on consent defined by service to constituents: voters agree to elect a representative, in exchange for a reciprocal agreement by that representative to address their individual and collective needs. Historically, this form of representation was tied closely to geography because an agent of the people was believed to represent the interests of individual voters at the same time that agent was responding to the demands of the community.”).

<sup>181</sup> See Briffault, *supra* note 164, at 44.

<sup>182</sup> *Id.*

<sup>183</sup> See Bulman-Pozen, *supra* note 155, at 1136–37.

<sup>184</sup> *Id.* at 1136.

<sup>185</sup> *Id.* at 1133.

<sup>186</sup> *Id.* at 1142.

<sup>187</sup> *Id.*

<sup>188</sup> See *Thompson v. Hebdon*, 909 F.3d 1027, 1043–44 (9th Cir. 2018).

being—that the campaign finance jurisprudence of the Court is predicated on the assumption of quid pro quo corruption or the appearance of corruption.<sup>189</sup> Therefore, acknowledging the proliferation of out-of-state contributions, this Article adopts Bulman-Pozen’s observation that while states may be acting less as “separate polities,” they are increasingly becoming “platforms for national political struggle.”<sup>190</sup> In doing so, this Article posits that while small or swing states may disproportionately impact the national political landscape, the prospect of increased, concerted out-of-state fundraising could allow individual citizens of larger, inelastic states to heavily impact those races and guide the disproportionate influence of citizens in those smaller states. While those target states may be vulnerable to non-resident individuals’ contributions and influence, they can remain crucially relevant as platforms for national political struggle.

#### *A. The Rivalry Between Larger, Partisan States and Smaller, Swing States*

In the United States, small states are said to enjoy outsized influence in bodies like the Senate and House of Representatives, as well as in the Electoral College.<sup>191</sup> For instance, Wyoming’s three electors in the Electoral College represent 187,923 residents each, whereas California’s 55 electors represent an average of 677,355 residents each.<sup>192</sup> More simply stated, each vote for the presidential race cast in Wyoming is worth 3.6 times as much as such a vote in California.<sup>193</sup> If one compared the average voting power of residents living in the ten most populous states to the power of the votes of residents living in the ten least populous states, the ratio is 1 to 2.5.<sup>194</sup> Moreover, smaller states’ power is growing—a phenomenon that

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<sup>189</sup> *See id.*

<sup>190</sup> *See* Bulman-Pozen, *supra* note 155, at 1133; *see also supra* Section III.B.

<sup>191</sup> *See generally* Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, N.Y. TIMES (Mar. 10, 2013), [http://archive.nytimes.com/www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html?\\_r%25E2%2580%25B0=%25E2%2580%25B00](http://archive.nytimes.com/www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html?_r%25E2%2580%25B0=%25E2%2580%25B00) [<https://perma.cc/5KMT-ME94>]; *see also* Editorial, *America Needs a Bigger House*, N.Y. TIMES (Nov. 11, 2018), <https://www.nytimes.com/interactive/2018/11/09/opinion/expanded-house-representatives-size.html> [<https://nyti.ms/32uZ2BV>] (showing (1) “representatives of larger districts are more likely to take political positions at odds with what a majority of their constituents want”; (2) “the cap on the number of House members leads to districts with wildly varying populations. . . . violat[ing] the basic constitutional principle of one-person-one-vote”; and (3) “[s]tates that are already underrepresented in Congress have a weaker voice in choosing the president”); Paul Krugman, *Real America Versus Senate America*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/midterms-senate-rural-urban.html> [<https://nyti.ms/2Dc6rLt>].

<sup>192</sup> *See* William Petrocelli, *Voters in Wyoming Have 3.6 Times the Voting Power that I Have. It’s Time to End the Electoral College.*, HUFFINGTON POST (Nov. 11, 2017), [https://www.huffingtonpost.com/william-petrocelli/its-time-to-end-the-electoral-college\\_b\\_12891764.html](https://www.huffingtonpost.com/william-petrocelli/its-time-to-end-the-electoral-college_b_12891764.html) [<https://perma.cc/CBH5-XP2H>].

<sup>193</sup> *Id.*

<sup>194</sup> *See* Katy Collin, *The Electoral College Badly Distorts the Vote. And It’s Going to Get*

political scientists consider a notable exception to the “one person, one vote” principle of democracy.<sup>195</sup>

Smaller states are becoming more powerful in elections largely due to shifting demographics.<sup>196</sup> Between 2000 and 2010, the U.S. urban population increased 12%, and cities are growing in the biggest states, where each individual vote is arguably least influential.<sup>197</sup> Furthermore, while larger states like New York, California, North Carolina, and Illinois are becoming more urban, they are also becoming more liberal.<sup>198</sup> Smaller states, however, are becoming more conservative while remaining rural.<sup>199</sup>

Swing states may be even more disproportionately important in government races.<sup>200</sup> Consider, for example, that New Hampshire—a swing state—hosted almost one thousand presidential-campaign events in 2008, 2012, and 2016.<sup>201</sup> By contrast, thirteen states and Washington, D.C., which have three or four electoral votes, hosted only fifty-two total presidential-campaign events combined.<sup>202</sup> While the other states are solidly Democratic or Republican, New Hampshire stands out in that group as the only swing state.<sup>203</sup>

### *B. An Opportunity to Restructure the Influence of Political Power*

Given smaller states’ and swing states’ increasingly disproportionate electoral power and influence on the national, federal government stage, the federal courts’ rulings barring restrictions on out-of-state contributions provide a loophole allowing

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*Worse.*, WASH. POST (Nov. 17, 2016, 9:00 AM), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/17/the-electoral-college-badly-distorts-the-vote-and-its-going-to-get-worse/?noredirect=on&utm\\_term=.a65de5c4578e](https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/17/the-electoral-college-badly-distorts-the-vote-and-its-going-to-get-worse/?noredirect=on&utm_term=.a65de5c4578e) [<https://perma.cc/9G88-Y5X5>].

For further perspective, consider analysis by the Yale political scientist, Robert A. Dahl, who has calculated the difference between local government units with the most voting power and those that have the least voting power. *See* Liptak, *supra* note 191. Dahl’s findings show that the country with the smallest ratio is Austria (1.5 to 1), while the ratio is never higher than 21 to 1 in Western democracies like Australia, Belgium, Germany, and Spain. *Id.* By contrast, the ratio between Wyoming and California’s representation is 66 to 1, trailing only Argentina, Brazil, and Russia in terms of having the least democratic chambers. *Id.* In addition, analyses by Professor David Samuels of the University of Minnesota and Professor Richard Snyder of Brown University similarly indicate that “geographically large countries with federal systems tend to overrepresent sparsely populated areas.” *Id.*

<sup>195</sup> *See* Liptak, *supra* note 191.

<sup>196</sup> *See* Collin, *supra* note 194.

<sup>197</sup> *Id.*

<sup>198</sup> *See* Liptak, *supra* note 191.

<sup>199</sup> *Id.*

<sup>200</sup> *See* Parker Richards, *The Electoral College Conundrum*, ATLANTIC (Nov. 23, 2018), <https://www.theatlantic.com/politics/archive/2018/11/electoral-college-gives-trump-and-gop-boost/576448/> [<https://perma.cc/GS8W-8YLN>].

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

non-resident voters from larger and more partisan states to reshape the balance of political power.<sup>204</sup> This very vulnerability of states to out-of-state individual donors is what has precisely stoked fear in less heavily populated states like Alaska, Hawaii, Oregon, and Vermont,<sup>205</sup> which are respectively ranked 49th, 48th, 40th, and 27th in population among the fifty U.S. states.<sup>206</sup>

If individual voters are organized—outside the framework of political parties, political action committees, corporations, and labor unions—to make a concerted, tailored effort to contribute the maximum individual campaign funds to out-of-state races, those targeted states will have transformed into platforms for national political struggle.<sup>207</sup> The most efficient way to enact this impact would be for out-of-state contributors to prioritize and divert their individual contributions to swing states that demonstrate the highest elasticity.<sup>208</sup> By elasticity, this Article adopts the definition coined by the statistician, Nate Silver: “[A]n elastic state . . . [is] one that is relatively sensitive or responsive to changes in political conditions, such as a change in the national economic mood.”<sup>209</sup> For example, if a series of strong job reports are issued this quarter, and President Donald Trump’s standing in nationwide polling improves by 4%, his standing is expected to improve by more than four points in an elastic state, whereas in an inelastic state, his polling numbers might only improve by one point. Conversely, if a series of negative job reports are issued this quarter and President Trump’s standing in nationwide polling declines by 4%, he would experience an even bigger plummet than four points in an elastic state. In an inelastic state, his polling numbers might only dip by two points.

According to Silver’s formulation, “Elastic states are those which have a lot of swing voters—that is, voters who could plausibly vote for either party’s candidate.”<sup>210</sup> First, he characterizes swing voters as very likely being independent voters, rather than registered Democrats or Republicans, because more than 90% of registered voters from either major political party will vote along party lines in most presidential elections.<sup>211</sup> Second, Silver posits that swing voters are “also likely to be devoid of other

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<sup>204</sup> See *supra* Part II.

<sup>205</sup> See *supra* Part II.

<sup>206</sup> U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2018, tbl.1 (2017), <https://www2.census.gov/programs-surveys/popest/tables/2010-2017/state/totals/nst-est2017-01.xlsx> [<https://perma.cc/XL5V-LPQJ>]. Note that Vermont trails Washington, D.C., which has no Senators or Congressional Representatives, in population. *Id.* The combined population of Vermont, Alaska, and Hawaii trails that of Puerto Rico, whose residents are citizens of the United States that neither have representation in the U.S. Congress, nor representation in the Electoral College. *Id.*

<sup>207</sup> See *supra* Part II.

<sup>208</sup> See *supra* Part II.

<sup>209</sup> Nate Silver, *Swing Voters and Elastic States*, FIVETHIRTYEIGHT (May 21, 2012), <https://fivethirtyeight.com/features/swing-voters-and-elastic-states/> [<https://perma.cc/PE5Z-S6AU>].

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*



characteristics that are very strong predictors of voting behavior.”<sup>212</sup> For example, a swing voter will statistically tend not be a southern evangelical Christian, which is a trait that very strongly predicts Republican voting in recent years.<sup>213</sup> Similarly, a swing voter is also statistically unlikely to be African American—a trait that strongly predicts Democratic voting.<sup>214</sup>

Table 1 identifies the states that are prime targets for non-resident campaign contributors, should they seek to make a concerted, organized effort to influence federal or state races in those jurisdictions. The identification of these states reflects a two-step process. First, this author has identified the ten closest Presidential races in 2012 and in 2016, and entered the states that were closely decided in either race: Arizona, Colorado, Florida, Iowa, Maine, Michigan, Minnesota, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin.<sup>215</sup> Second, these swing states have been arranged in three tiers: Tier 1 states are highly elastic; Tier 2 states have average elasticity; and Tier 3 states are inelastic.<sup>216</sup> The elasticity scores<sup>217</sup> are derived from Silver’s data, which relies on the 2016 version of the Cooperative Congressional Election Study—a survey by Harvard University and YouGov of 60,000-plus people.<sup>218</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> See David Catanese, *The 10 Closest States in the 2016 Election*, U.S. NEWS & WORLD REP. (Nov. 14, 2016), <https://www.usnews.com/news/the-run-2016/articles/2016-11-14/the-10-closest-states-in-the-2016-election> [<https://perma.cc/HJ7Z-AJKR>]; Chris Cillizza & Aaron Blake, *The 10 Closest States in Election 2012*, WASH. POST (Nov. 8, 2012, 6:30 AM), [https://www.washingtonpost.com/news/the-fix/wp/2012/11/08/the-10-closest-states-in-election-2012/?noredirect=on&utm\\_term=.723ee3705af6](https://www.washingtonpost.com/news/the-fix/wp/2012/11/08/the-10-closest-states-in-election-2012/?noredirect=on&utm_term=.723ee3705af6) [<https://perma.cc/K98B-5FF8>].

<sup>216</sup> See *infra* Table 1.

<sup>217</sup> Silver explains the elasticity scores in the following way: “If a state has an elasticity of (for example) 1.1 points, . . . that means a one-percentage-point change in the national numbers would be expected to change the . . . [state’s] numbers by 1.1 points. Or, likewise, a five-point change in the national numbers would change that state’s voting preferences by 5.5 points.” See Silver, *supra* note 209.

<sup>218</sup> See Nathaniel Rakich & Nate Silver, *Election Update: The Most (And Least) Elastic States and Districts*, FIVETHIRTYEIGHT (Sept. 6, 2018, 2:22 PM), <https://fivethirtyeight.com/features/election-update-the-house-districts-that-swing-the-most-and-least-with-the-national-mood/> [<https://perma.cc/SGB9-PQ98>]. Silver describes his methodology for computing states’ elasticity scores:

The scores work by modeling the likelihood of an individual voter having voted Democratic or Republican for Congress, based on a series of characteristics related to their demographic (race, religion, etc.) and political (Democrat, Republican, independent, liberal, conservative, etc.) identity. We then estimate how much that probability would change based on a shift in the national political environment. The principle is that voters at the extreme end of the spectrum—those who have close to a 0 percent or a 100 percent chance of voting for one of the parties, based on our analysis—don’t swing as much as those in the middle.

*Id.*



The three tiers are based on the top, middle, and bottom tertile scores for elasticity.<sup>219</sup>

**Table 1: Swing States that Non-resident Donors Could Target**

<b>Tier 1: Highly Elastic Swing States</b>	<b>Tier 2: Swing States with Average Elasticity</b>	<b>Tier 3: Inelastic Swing States</b>
New Hampshire (1.15)	Florida (1.03)	North Carolina (0.98)
Maine (1.13)	Minnesota (1.03)	Virginia (0.94)
Nevada (1.08)	Ohio (1.02)	
Iowa (1.08)	Pennsylvania (1.00)	
Wisconsin (1.07)		
Colorado (1.07)		
Michigan (1.07)		
Arizona (1.05)		

Table 1 demonstrates that states in Tier 1, such as New Hampshire, Maine, and Nevada, have a fluid electorate. The citizens in these states are most likely to be swayed by outside phenomena and circumstances.<sup>220</sup> Non-resident donors' individual contributions to political candidates in these states stand the chance of being the most impactful, assuming that the targeted candidates successfully optimize their campaign contributions.<sup>221</sup> Tier 1 states stand the best chance of transforming from "separate polities" into "platforms for national political struggle."<sup>222</sup> Non-resident campaign contributors from states like California and New York will be able to shape federal government races, state governor and attorney general races that impact redistricting and judicial advocacy on pertinent issues.<sup>223</sup> At the same time, while these states will lose some of their traditional traits of republicanism, their importance and relevance in the national scheme will remain, albeit more at the mercy of outside interests.<sup>224</sup>

On the opposite side of the pendulum, in Tier 3, North Carolina and Virginia—both large states—represent electorates that are turnout-battle states; in other words, they lack swing voters, so success in those states is dependent on voter turnout.<sup>225</sup> Because there are fewer swing voters in North Carolina and Virginia, the politicians in these states are probably more keen on motivating partisans to vote and less likely

<sup>219</sup> Seventeen states compose each of the first two tertiles, while sixteen states and Washington, D.C., compose the third tertile. *See* Silver, *supra* note 209.

<sup>220</sup> *See* Rakich & Silver, *supra* note 218.

<sup>221</sup> *See* Silver, *supra* note 209.

<sup>222</sup> *See supra* Section III.B; *see also* Bulman-Pozen, *supra* note 155, at 1133.

<sup>223</sup> *See* Silver, *supra* note 209.

<sup>224</sup> *See id.*

<sup>225</sup> *See id.*

able to be influenced by outside individual contributors.<sup>226</sup> These swing states will resist straying away from being “separate polities” as long as the Supreme Court upholds the current protection of out-of-state campaign contributions.<sup>227</sup>

#### CONCLUSION

In the aftermath of *Thompson* and the proliferation of campaign contributions by out-of-state donors in recent federal and state elections, smaller swing states in the United States are at a crossroads.<sup>228</sup> They can remain, in Jessica Bulman-Pozen’s words, “separate polities,” or continue to transform into “platforms for national political struggle” for out-of-state residents.<sup>229</sup> If the Supreme Court upholds the ruling of *Thompson*, *Landell*, and *VanNatta*, or refuses to grant certiorari to *Thompson*, states’ fight for traditional republicanism could be altered forever.<sup>230</sup> Currently, smaller, swing states may disproportionately impact the national political landscape, but the prospect of increased out-of-state fundraising could allow citizens of larger, inelastic states to heavily impact the political races and guide the disproportionate influence of citizens in those smaller swing states.<sup>231</sup> Through data analysis and an adoption of the concept of state elasticity, a concerted effort by out-of-state individual donors can maximize political objectives across state lines.<sup>232</sup>

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<sup>226</sup> *See id.*

<sup>227</sup> *See* Briffault, *supra* note 164, at 69–70.

<sup>228</sup> *See* *Thompson v. Hebdon*, 909 F.3d 1027, 1043–44 (9th Cir. 2018).

<sup>229</sup> *See supra* Section III.B; *see also* Bulman-Pozen, *supra* note 155, at 1133.

<sup>230</sup> *See supra* Part II.

<sup>231</sup> *See supra* Section IV.B.

<sup>232</sup> *See supra* Section IV.B.