

Enhanced Disclosure as a Response to Increasing Out-of-State Spending in State and Local Elections

TYLER S. ROBERTS*

Over the past several years, states and localities have experienced increasing amounts of election spending flowing in from out of state. A number of states passed statutes limiting the amount candidates may accept from out-of-state donors, but most of these statutes have been struck down by lower courts. The Supreme Court's steady emphasis on the value of political speech — regardless of the source — makes it doubtful that the Court will overturn these decisions and permit states to limit contributions from out of state. This Note suggests that states enact disclosure requirements that require aggregate disclosure from out-of-state groups at the time of advertising. These disclosure requirements are likely constitutional and are also effective at informing voters about the sources of political speech.

I. INTRODUCTION

In May 2014, two South Dakota residents — Steve Hickey, a deeply religious Republican pastor, and Steve Hildebrand, a gay small business owner who worked on the Obama campaign — met at a Sioux Falls coffee shop to discuss their differences over same-sex marriage.¹ They left as partners committed to protect-

* Articles Editor, Colum. J.L. & Soc. Probs., 2016–2017. J.D. Candidate 2017, Columbia Law School. B.A. 2012, Hamilton College. The author would like to thank Professor Richard Briffault for his helpful advice and comments on this Note as well as the staff of the *Columbia Journal of Law & Social Problems* for their patience and hard work.

1. See Sean McElwee, *The Odd Couple Fighting Against Predatory Payday Lending*, ATLANTIC (Mar. 19, 2015), <http://www.theatlantic.com/politics/archive/2015/03/the-odd-couple-fighting-against-predatory-payday-lending/388093/#Correction> [https://perma.cc/9JL9-S5YF].

ing low-income South Dakota residents from predatory payday lenders and title-loan salesmen.² The two drafted a statewide ballot measure that would cap interest rates in South Dakota at 36%, significantly below the 652% average rate payday lenders currently charge in the state.³ The measure has bipartisan support⁴ and is extremely popular amongst voters, with 77% of South Dakotans over fifty stating that they “strongly agree” or “somewhat agree” with the proposal.⁵ As of November 4, 2016, Hickey and Hildebrand have raised \$57,160 in support of the measure,⁶ with most of the funds coming from South Dakota residents.⁷

Two groups have emerged to oppose the measure. The first, Give Us Credit South Dakota, has raised over \$1.1 million⁸ to “[o]ppose a cap being placed on the interest charged by lenders in

2. *Id.*

3. See Liz Farmer, *Like the Industry, Payday Loan Ballot Measures Mislead Voters*, GOVERNING (Aug. 24, 2016), <http://www.governing.com/topics/elections/gov-south-dakota-payday-lending-ballot-measures.html> [<https://perma.cc/6M7S-6KTP>] (“Annual interest rates on payday loans in South Dakota are among the highest in the nation — a whopping 652 percent on average.”).

4. See, e.g., Cory Heidelberger, *5 of 6 District 3 Candidates Endorse 36% Rate Cap on Payday Lending*, DAKOTA FREE PRESS (Sept. 25, 2016), <http://dakotafreepress.com/2016/09/25/5-of-6-district-3-candidates-endorse-36-rate-cap-on-payday-lending/> [<https://perma.cc/99T6-SRW5>] (“Asked for our positions on Initiated Measure 21, the real 36% rate cap on payday loans, Republicans Drew Dennert and Rep. Al Novstrup joined Democrats Nikki Bootz, Brooks Briscoe, and me in saying that we will vote Yes on 21 to rein in predatory lending.”).

5. 2015 AARP Poll: *South Dakotans Ages 50+ Want State to Cap Payday Loans and Auto Title Loans at 36%*, AARP, http://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2015/South-Dakota-Payday-Loan-Fact-Sheet.pdf [<https://perma.cc/6CLC-NJYW>] (last visited Nov. 3, 2016).

6. See *South Dakotans for Responsible Lending*, S.D. SEC’Y OF STATE, <https://sdcfr.sdsos.gov/Search/SearchResults.aspx?cid=226&rid=1361> Committee (including funds disclosed in Nov. 3, 2016 “Supplemental Disclosure Statement” (\$5000); Oct. 27, 2016 “Supplemental Disclosure Statement” (\$500); Oct. 26, 2016 “Pre-General” at 6 (\$23,465); May 27, 2016 “Pre-Primary” at 5 (\$4,373.83); and Feb. 1, 2016 “Year-End Disclosure Statement” at 10 (\$23,821.27), for a total of \$57,160.10). South Dakotans for Responsible Lending also received \$11,929.06 of in-kind contributions. See *supra* (including in-kind contributions disclosed in Feb. 1, 2016 “Year-End Disclosure Statement” at 6 showing \$699.50 of consulting with a South Dakota resident; \$1514 of postage, photocopies, and event support from Hickey’s church; \$3891 of website services from a South Dakota advertising company; and \$5824.56 of consulting services from the Center for Responsible Lending in North Carolina).

7. See *id.* (\$18,500 from out-of-state, with most of the out-of-state funds coming from the Center for Responsible Lending in North Carolina).

8. See *Give Us Credit South Dakota*, S.D. SEC’Y OF STATE, <https://sdcfr.sdsos.gov/Search/SearchResults.aspx?cid=243&rid=555> (including funds disclosed in Nov. 1, 2016 “Supplemental Disclosure Statement” (\$400,000); “Pre-General” (\$139,475.09); “Pre-Primary” (\$191,127.13); and Feb. 1, 2016 “Year-End Disclosure Statement” (\$455,000), for a total of \$1,185,602.22).

South Dakota.”⁹ The second group, South Dakotans for Fair Lending (SDFL), drafted its own ballot measure, which appears to be intentionally designed to confuse voters.¹⁰ As an initial matter, the group’s name, “South Dakotans for Fair Lending,” is strikingly similar to the name of Hildebrand and Hickey’s group: “South Dakotans for Responsible Lending.” Next, the substance of the group’s proposal is also likely to confuse voters. SDFL has proposed a constitutional amendment that purports to cap interest rates at 18% in South Dakota.¹¹ In the South Dakota Voters’ Guide, the group describes the measure as “a strict 18% cap on interest rates [that] is far more stringent than other measures being proposed”¹²

However, voters who read the text of the measure would learn that the amendment does not limit interest rates for the overwhelming majority of lenders and, in fact, insulates those lenders from further regulation. The rate cap applies only to oral agreements and exempts all written contracts.¹³ If a written contract is signed, there is no limit on the amount of interest a lender may charge.¹⁴ Since payday lenders require virtually all of their customers to sign written agreements, the amendment is unlikely to cap the industry’s interest rates at all. Furthermore, the meas-

9. Give us Credit S.D., *S.D. Statement of Organization: Candidates, Political Action, or Ballot Question Committees*, S.D. SEC’Y OF STATE (June 24, 2015), <https://sdefr.sdsos.gov/Document.aspx?DocumentID=930&type=img> [https://perma.cc/7V85-VXCS].

10. See James Nord, *Supporters of payday rate cap campaign fear voter confusion*, MCLATCHY D.C. (Nov. 2, 2016), <http://www.mcclatchydc.com/news/politics-government/national-politics/article112115212.html> [https://perma.cc/RRY4-J6ST] (“Seeing the two measures confused 59-year-old Anne Sirovy, who ended up voting in favor of both while recently casting an absentee ballot in Sioux Falls. The Renner resident favored the 36 percent rate cap, and even signed a petition to get it on the ballot. But, in the end, Sirovy [voted for both measures]. ‘They really both should not have been on there because it is confusing,’ Sirovy said.”).

11. See *Constitutional Amendment U*, S.D. SEC’Y OF STATE, <https://sdsos.gov/elections-voting/assets/2016FullTextoftheBallotQuestionProposals.pdf> [https://perma.cc/GZR4-WYRY] (last visited Oct. 31, 2016) (“No lender may charge interest for the loan or use of money in excess of eighteen per cent per annum . . .”).

12. See Lisa Furlong, *Pro-Constitutional Amendment U*, in S.D. SEC’Y OF STATE, S.D. 2016 BALLOT QUESTION PAMPHLET 6, available at <https://sdsos.gov/elections-voting/assets/2016%20BQ%20PamphletCover.pdf> [https://perma.cc/7QP3-2G59] (last visited Oct. 31, 2016).

13. See *Constitutional Amendment U*, *supra* note 11 (“No lender may charge interest for the loan or use of money in excess of eighteen per cent per annum *unless* the borrower agrees to another rate in writing.” (emphasis added)).

14. See S.D. SEC’Y OF STATE, *supra* note 12, at 6 (“Under this constitutional amendment, there is no limit on the amount of interest a lender may charge for a loan of money if the interest rate is agreed to in writing by the borrower.”).

ure insulates the lending industry from future regulation by invalidating all statutes limiting interest rates in South Dakota and prohibiting the legislature from enacting others in the future.¹⁵

Despite the local names, neither Give Us Credit South Dakota nor South Dakotans for Fair Lending has received a single contribution from a South Dakota resident.¹⁶ Instead, they are funded entirely by an out-of-state title-lending company: Georgia-based Select Management Resources.¹⁷ The company accounts for 100% of the groups' funds and has spent more than \$3 million dollars — over 50 times more than Hildebrand and Hickey were able to raise — opposing the interest rate cap.¹⁸ Ironically, Select Management Resources has urged voters to enact the constitutional amendment to “send a clear message to lobbyists and special interests that in South Dakota, we stand up for those who cannot stand up for themselves.”¹⁹

South Dakota is not alone. Out-of-state spending affects every level of state and local government — from gubernatorial, attorney general, and state supreme court elections, to county council races, local school board elections, and ballot measures. Political actors have contributed over \$135 million dollars²⁰ directly to candidates running in other states' elections during the 2016 cy-

15. See *Constitutional Amendment U*, *supra* note 11 (“No law fixing an annual percentage rate of interest for the loan or use of money is valid *unless* the law provides borrowers the right to contract at interest rates as may be agreed to by the parties.” (emphasis added)).

16. See *supra* note 8; see also *South Dakotans for Fair Lending*, S.D. SEC'Y OF STATE, <https://sdefr.sdsos.gov/Search/SearchResults.aspx?cid=245&rid=578> [https://perma.cc/LS7H-53FG] (listing funds disclosed in “Pre-General Disclosure Statement” (\$98,010); “Pre-Primary Disclosure Statement” (\$46,170); and Feb. 1, 2016 “Year-End Disclosure Statement” (\$1,735,442.61) for a total of \$1,879,622.61 as all coming from Select Management Resources).

17. *Id.*

18. *Id.* (showing as of Nov. 4, 2016, South Dakotans for Fair Lending had received \$1,879,622.61 from Select Management Resources, while Give Us Credit South Dakota had received \$1,185,602.22, for a total of \$3,065,229.83).

19. Furlong, *supra* note 12.

20. See *Contributions to State Level Candidates by Office in 2016*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?y=2016&f-core=1&f-fc=2#{1|gro=d-ins,c-r-ot> (data on file with author) (last visited Nov. 5, 2016) (listing out-of-state contributions by office — gubernatorial: \$47,372,143; state house: \$44,382,071; state senate: \$29,591,259; other statewide (e.g., Attorney General, Secretary of State, etc.): \$12,868,716; state supreme court: \$776,699; and state appellate court: \$119,171).

cle, accounting for over 14% of the total funds raised.²¹ In 2012, when these same seats were last up for election, out-of-state contributions exceeded \$159 million dollars.²²

Contributions to campaigns represent only a portion of total out-of-state spending. In addition to donating, political actors pay for their own advertisements in an attempt to influence other states' elections. Expenditures that are not coordinated with a campaign — such as these donor-produced advertisements — are referred to as “independent expenditures” and have become increasingly popular over the past several years.²³ While most states limit campaign contributions,²⁴ the United States Supreme Court has held that any attempt to limit independent expenditures by individuals, corporations, and other groups is unconstitutional.²⁵ As a result, independent expenditures are attractive to donors who wish to spend more than state contribution thresholds allow. Candidates may also prefer that politically unpalatable donors make independent expenditures rather than contributing directly to the campaigns. Since independent expenditures

21. See *id.* (The sum of the out-of-state spending in note 20, *supra*, is \$135,110,059 out of \$934,459,206 of total contributions in state and local elections in 2016.).

22. See *Contributions to State Level Candidates by Office in 2012*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?y=2012&f-core=1&f-fc=2#{1|gro=d-ins,c-r-ot> (data on file with author) (last visited Oct. 29, 2016).

23. See Robert Maguire, *STUDY: Outside groups, secret money far more prominent than ever before*, CTR. FOR RESPONSIVE POLITICS: OPENSECRETS BLOG (Aug. 24, 2016), <http://www.opensecrets.org/news/2016/08/study-outside-groups-secret-money-far-more-prominent-than-ever-before/> [<https://perma.cc/D52X-3KUJ>] (“Outside groups that can raise and spend unlimited money — sometimes without disclosing the sources of their funds — make up a larger portion of [federal] election spending than at any point in the last 16 years, by far.”); *Behind the Candidates: Campaign Committees and Outside Groups*, CTR. FOR RESPONSIVE POLITICS: OPENSECRETS BLOG, https://www.opensecrets.org/pres16/raised_summ.php [<https://perma.cc/E4QQ-UJ64>] (noting as of Oct. 31, 2016, all 24 Presidential candidates raised a combined \$1.31 billion, while Super PACs (independent expenditure only committees) supporting specific candidates have raised \$594 million); DANIEL I. WEINER, BRENNAN CTR. FOR JUSTICE, *CITIZENS UNITED FIVE YEARS LATER 4* (2015), available at http://www.brennancenter.org/sites/default/files/analysis/Citizens_United_%20Five_Years_Later.pdf [<https://perma.cc/A9RG-7DPN>] (finding non-candidate spending in four competitive gubernatorial elections was between 4 and 20 times higher in 2014 than it was in 2010).

24. See NAT'L CONFERENCE OF STATE LEGISLATURES, *STATE LIMITS ON CONTRIBUTIONS TO CANDIDATES 2015–2016 ELECTION CYCLE* (last updated Oct. 2015), available at <http://www.ncsl.org/Portals/1/documents/legismgt/elect/ContributionLimitstoCandidates2015-2016.pdf> [<https://perma.cc/B2BA-QGWH>] (noting as of October 2015, 38 states limited campaign contributions.).

25. See *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (holding individual independent expenditures cannot be limited); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (holding corporate and union independent expenditures cannot be limited).

are technically independent, candidates can publicly distance themselves from controversial donors or advertisements. In practice, however, candidates are well aware of independent spenders and often work closely with them. In 2011, for example, Utah Attorney General candidate John Swallow solicited donations from the payday loan industry, but did not want to “make [the election] a payday race” so he instructed the donors to give to a Super PAC supporting Swallow rather than directly to the campaign.²⁶

Several states responded to the growing influence of out-of-state money by limiting or prohibiting out-of-state spending in elections.²⁷ These laws were quickly challenged by political candidates and their donors.²⁸ Although several judges have been receptive to the restrictions, most have been struck down by divided courts and the Supreme Court has yet to weigh in.²⁹ Given the uncertainty about the permissibility of limiting out-of-state spending in elections, states should adopt enhanced disclosure requirements that specifically aim to reveal out-of-state spenders. Disclosure is extremely popular with voters³⁰ and research suggests that knowing a candidate or a ballot measure’s funders helps voters make more informed decisions.³¹ Furthermore, targeted disclosure requirements are likely constitutional.³² Compelled disclosure has been almost uniformly endorsed by the Supreme Court over the past forty years, including by the Roberts Court, which has been skeptical of campaign finance regulation generally.³³

26. *Investigation into John Swallow’s Campaign for Attorney General: Timeline of Documents*, UTAH STATE LEGISLATURE, http://le.utah.gov/investigative/timeline/swallow_ag.html [<https://perma.cc/VE2A-FBAR>] (last visited on Oct. 29, 2016) [hereinafter Swallow Timeline] (Swallow wrote in a June 29, 2011, email, “[t]he non-payday money needs to go to the ‘Protect Utah PAC.’ The Payday money needs to go to the ‘Utah Prosperity Foundation.’”).

27. *See infra* Part IV.A.2–A.4.

28. *See infra* Part IV.A.

29. *See id.*

30. *See, e.g.*, ASSOCIATED PRESS: NORC CTR. FOR PUB. AFFAIRS RESEARCH, AMERICANS’ VIEWS ON MONEY IN POLITICS 7 (2015), available at http://www.apnorc.org/PDFs/PoliticsMoney/November_Omnibus_Topline_FINAL.pdf [<https://perma.cc/2CPK-54NQ>] (finding 76% of voters agreed that groups spending during political campaigns should be required to disclose their donors).

31. *See infra* Part V.A.

32. *See infra* Part IV.C.

33. *See id.*

While the precise details of an effective disclosure regime are best left to each individual state, this Note offers four suggestions for states seeking to inform voters about out-of-state money flowing into their elections. First, states should impose the same disclosure requirements on out-of-state spenders who make independent expenditures as they do on out-of-state contributors. Second, states should “pierce the veil” by requiring disclosure of multiple levels of groups until the initial source of funds is revealed. Third, states should focus on aggregate disclosure, which is more helpful to voters than details about individual donors. Finally, states should require aggregate donor disclosure on advertisements themselves, in addition to in campaign finance reports on the Secretary of State’s website. For example, instead of “Paid for by Californians Against Out-of-Control Taxes and Spending” at the bottom of an advertisement, the advertisement would read “Paid for by Californians Against Out-of-Control Taxes and Spending, which receives 97% of its funding from outside of California.”

Cross-border spending is common in elections for federal office, but this Note focuses on state and local elections for two reasons. First, federal officials count both in-state and out-of-state citizens as constituents, so the justification for treating out-of-state spenders differently from in-state spenders is weaker.³⁴ For example, Richard Shelby, a Republican from Alabama, who is currently the Chair of the U.S. Senate Banking, Housing, and Urban Affairs Committee, must consider the interests of citizens across the nation in his decision-making, not just the residents of Alabama.³⁵ In fact, citizens who work in the financial services industry may have a stronger interest in the decisions of Senator Shelby’s committee than in the votes of their home-state Senators. Next, state and local elections tend to be significantly less expensive than federal elections,³⁶ meaning that even relatively

34. For a discussion of whether contributions from out-of-state donors to federal congressional candidates raise similar federalism concerns, see Todd E. Pettys, *Campaign Finance, Federalism, and the Case of the Long-Armed Donor*, 81 U. CHI. L. REV. DIALOGUE 77, 77–82 (2015).

35. *Membership*, U.S. S. COMM. ON BANKING, HOUSING, AND URB. AFF., <http://www.banking.senate.gov/public/index.cfm/membership> [https://perma.cc/U6JZ-RGHT] (last visited Oct. 31, 2016).

36. See Andy Kroll, *The Super-PAC Steamroller: Coming to a Town Near You!*, MOTHER JONES (Apr. 25, 2012), <http://www.motherjones.com/politics/2012/04/super-pac-state-local-james-bopp> [https://perma.cc/QX5A-CJVG] (“According to a Pew Center on the States analysis, in the mid-2000s the average cost of a winning state Senate campaign

modest undisclosed spending from out of state can have a significant impact.

This Note is organized into five parts. Part II documents out-of-state spending in state and local elections. Part III then raises three concerns about rising out-of-state spending. First, out-of-state spending may drown out the voices of state residents who are likely to be most directly affected by election outcomes. Second, out-of-state spending may cause elected officials to favor their out-of-state funders over their in-state constituents. Finally, out-of-state spending by a limited number of wealthy donors may result in increasingly homogenized policy choices by the states, leading the nation to lose out on the benefits of state-by-state experimentation. Part IV details states' attempts to restrict out-of-state spending and explains why these attempts have been struck down by the courts. It then examines the Supreme Court's campaign finance jurisprudence and concludes that it is likely unconstitutional for states to restrict out-of-state spending in their elections. Part V suggests that states should impose enhanced disclosure requirements on out-of-state spenders in order to better inform voters about out-of-state interests spending in elections while minimizing the impact on in-state contributors. Part V first examines empirical evidence about the effects of disclosure and then offers specific features states implementing a enhanced disclosure regime should adopt. It then argues that enhanced disclosure requirements are likely constitutional.

II. POLITICAL ACTORS ARE SPENDING IN ELECTIONS IN OTHER STATES

Out-of-state spending plays a significant role in state and local elections. As of November 4, 2016, political actors have given over \$135 million dollars directly to candidates running in other states' elections, accounting for over 14% of the total funds raised.³⁷ In addition to donating to candidates, out-of-state do-

was anywhere from \$5713 (North Dakota) to \$938,522 (California). In Arizona it was \$36,696; in Wisconsin, \$140,287; in North Carolina, \$234,031. By contrast, the average cost of a US Senate seat in 2010 was \$9.2 million.”)

37. See *supra* note 20 and accompanying text.

nors have spent over \$166 million on other states' ballot measures.³⁸

Out-of-state spending is not new. From 2007–2014, out-of-state contributions accounted for an average of 23% of all funds donated directly to gubernatorial candidates, with a high of 49% in 2013.³⁹ Some races have attracted substantially higher sums. In 2013, Democrat Terry McAuliffe was elected as Virginia's Governor with the help of over \$25 million dollars in out-of-state money, accounting for 68% of his total funds raised for that election.⁴⁰ Similarly, in 2012, Republican Scott Walker survived a Wisconsin recall election with the aid of \$22 million dollars of out-of-state money, accounting for nearly 60% of the total he raised.⁴¹ Thus far in 2016, gubernatorial candidates have raised over 26% of their funds from out of state.⁴² In the Missouri gubernatorial race, which is regarded as a “toss-up,”⁴³ out-of-state spending has accounted for nearly 70% of Republican Eric Greitens' fundraising.⁴⁴ Greitens' out-of-state donors played an especially prominent role during Missouri's Republican primary race. Since Missouri does not have contribution limits for statewide

38. See *Contributions to Ballot Measure Committees in 2016*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?y=2016&m-exi=1#{1|gro=d-ins> [https://perma.cc/2T22-J99Q] (last visited Nov. 5, 2016) (\$166,105,048 as of Nov. 4, 2016).

39. See J.T. Stepleton, *Crossing the Line: Boosting Gubernatorial Candidates with Out-of-State Contributions*, NAT'L INST. ON MONEY IN STATE POLITICS, tbl.2 (Jan. 28, 2016), <http://www.followthemoney.org/research/institute-reports/crossing-the-line-boosting-out-of-state-contributions-to-gubernatorial-campaigns/> [https://perma.cc/Q2JA-3RLK] (last visited Nov. 1, 2016).

40. See *Contributions to Terry McAuliffe in 2013*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?f-core=1&c-t-eid=1343597&y=2013#{1|gro=d-ins> [https://perma.cc/U8LD-GHYI] (last visited Nov. 1, 2016) (Out-of-state contributions: \$25,895,943; total contributions: \$37,898,782).

41. See *Contributions to Scott Walker in 2012*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?f-core=1&c-t-eid=4656950&y=2012#{1|gro=d-ins> [https://perma.cc/8BN3-2WGW] (last visited Nov. 1, 2016) (Out-of-state contributions: \$22,427,086; total contributions: \$37,556,604).

42. See *Contributions to Gubernatorial Candidates in 2016*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?y=2016&f-core=1&f-ot=2&c-r-ot=G#{1|gro=d-ins> [https://perma.cc/K4M4-NCRY] (last visited Nov. 1, 2016) (Out-of-state contributions: \$47,372,143; total contributions: \$178,443,773).

43. Amber Phillips, *The Top 5 Governors Races in 2016*, WASH. POST (Apr. 15, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/15/republicans-are-sitting-pretty-in-the-top-5-governors-races-in-2016/> [https://perma.cc/HZQ3-UZYD].

44. See *Contributions to Eric Greitens in 2016*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?s=MO&y=2016&f-core=1&c-exi=1&c-t-eid=26734933#{1|gro=d-ins,c-t-id> [https://perma.cc/43S5-R8NW] (last visited Nov. 1, 2016) (Out-of-state contributions: \$12,154,977; total contributions: \$17,435,705).

elections, a political action committee (PAC) called SEALs for Truth was able to donate \$1.975 million dollars to Greitens just fourteen days before the Republican primary.⁴⁵ This was the largest political contribution in Missouri's history,⁴⁶ and it helped Greitens to win the primary by nearly ten points.⁴⁷ Because federal law does not require PACs to disclose their donors until the end of each quarter, Missourians did not know SEALs for Truth's funders until October 15, well after the primary and just a few weeks before the general election.⁴⁸ When the group was finally required to identify the source of the largest donation in Missouri's history, it listed another mysterious organization, the American Policy Coalition, which was formed in late 2015, donated \$2 million to SEALs for Truth in July 2016, and then was promptly dissolved in October 2016.⁴⁹ Greitens has also received \$5 million from the Republican Governors Association,⁵⁰ \$1 million from a California financier,⁵¹ and \$200,000 from Las Vegas casino magnate Sheldon Adelson.⁵²

45. See *Contributions to Eric Greitens in 2016 by Donor*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, [http://www.followthemoney.org/show-me?s=MO&y=2016&c-exi=1&c-r-oc=G00&c-t-id=200454#\[1|gro=d-id](http://www.followthemoney.org/show-me?s=MO&y=2016&c-exi=1&c-r-oc=G00&c-t-id=200454#[1|gro=d-id) (data on file with author) (last visited Nov. 1, 2016) (showing \$1.975 million donated on July 18, 2016).

46. See Travis Zimpfer, *\$2 Million Donation Shows Clear Difference Between the Federal and Missouri System*, MO. TIMES (July 20, 2016), <http://themissouritimes.com/31755/2-million-donation-shows-clear-difference-between-the-federal-and-missouri-system/> [https://perma.cc/4NRC-NSFF].

47. *Official Results: State of Missouri — Primary Election August 2, 2016*, MO. SEC'Y OF STATE <http://enrarchives.sos.mo.gov/enrnet/> [https://perma.cc/U9AD-U3XM] (noting Greitens received 34.561% of the vote, while the second-place candidate received 24.789%).

48. See Kevin McDermott, *Who Made the Biggest Political Donation in Missouri History?*, ST. LOUIS POST-DISPATCH: POL. FIX (July 20, 2016), http://www.stltoday.com/news/local/govt-and-politics/where-did-the-biggest-political-donation-in-missouri-history-come/article_1e3b7af6-5e65-54f3-a5b0-cf37ace6c529.html [https://perma.cc/VLJ2-SAHL].

49. See Benjamin Peters, *Missouri Ethics Commission dismisses one of the complaints filed against Greitens*, MO. TIMES (Nov. 4, 2016), <http://themissouritimes.com/35422/missouri-ethics-commission-dismisses-one-complaints-filed-greitens/> [https://perma.cc/DT3G-YW4C] (“The American Policy Coalition was set up as a nonprofit corporation late last year in Kentucky. After making its \$2 million donation to SEALs for Truth in July, the corporation dissolved on Oct. 1. All that remains of the corporation is a webpage featuring nothing but a logo.”).

50. See *supra* note 45.

51. See Kevin McDermott, *Greitens' Debate Opponents Put Him on Defense Over Campaign Donor*, GUN COMMERCIAL, ST. LOUIS POST-DISPATCH: POL. FIX (July 6, 2016), http://www.stltoday.com/news/local/govt-and-politics/greitens-debate-opponents-put-him-on-defense-over-campaign-donor/article_d1e4eea3-4436-5aab-86e9-d2cd7ef41cd6.html [https://perma.cc/M55Y-2MUQ] (“Michael Goguen, a California-based venture capitalist”).

52. Jason Rosenbaum, *Big Money: Missouri's Governor Hopefuls Get Huge Checks for Campaign's Home Stretch*, ST. LOUIS PUB. RADIO (July 19, 2016),

Out-of-state spending also influences smaller elections. In 2006, for example, the District of Columbia School Board had three seats up for election and attracted almost \$400,000 of donations.⁵³ Almost half (46%) came from outside of D.C.⁵⁴ Similarly, in 2014, Bobby Shriver, a candidate for Los Angeles County's five-member Board of Supervisors, received approximately 11% of his campaign funds from out of state.⁵⁵ He accepted donations from wealthy individuals who frequently support Democrats (including the Gates family, the Kennedy family, Warren Buffet, and George Soros) as well as from waste management corporations, DirectTV, and Coca-Cola.⁵⁶

Out-of-state spending in elections for state law-enforcement officers and judges may be especially worrisome to citizens who believe that donations influence an elected official's actions in office. As the Utah House of Representatives explained, "the corruption of [an] office specifically tasked with ensuring equal justice under law is particularly harmful because it undermines the public's faith that justice in the State is being dispensed equally and without regard to economic, social or political status."⁵⁷ State Attorneys General, who are tasked with enforcing state consumer protection, antitrust, and labor laws are often targeted by out-of-state businesses seeking to influence how they exercise their discretion.⁵⁸ From 2008–2015, out-of-state donations have

<http://news.stlpublicradio.org/post/big-money-missouris-governor-hopefuls-get-huge-checks-campaigns-home-stretch> [<https://perma.cc/3UUU-LCZA>].

53. *Contributions to District of Columbia School Board Candidates in 2006*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, [http://www.followthemoney.org/show-me?s=DC&y=2006&c-exi=1&c-r-oc=C27#\[1|gro=d-ins](http://www.followthemoney.org/show-me?s=DC&y=2006&c-exi=1&c-r-oc=C27#[1|gro=d-ins) [<https://perma.cc/Z58X-Z93U>] (last visited Nov. 1, 2016) (\$392,538 total).

54. *Id.* (\$179,432 from outside of D.C.).

55. *Contributions to Bobby Shriver in 2014*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, [http://www.followthemoney.org/show-me?f-core=1&c-exi=1&c-t-id=191278#\[1|gro=d-ins](http://www.followthemoney.org/show-me?f-core=1&c-exi=1&c-t-id=191278#[1|gro=d-ins) (data on file with author) (last visited Nov. 1, 2016) (Out-of-state contributions: \$374,400; total contributions: \$3,435,439).

56. *Out-of-State Contributions to Bobby Shriver in 2014*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, [http://www.followthemoney.org/show-me?f-core=1&c-exi=1&c-t-id=191278&d-ins=0#\[1|gro=d-eid](http://www.followthemoney.org/show-me?f-core=1&c-exi=1&c-t-id=191278&d-ins=0#[1|gro=d-eid) (data on file with author) (last visited Oct. 29, 2016).

57. JAMES A. DUNNIGAN, UTAH HOUSE OF REPRESENTATIVES, REPORT OF THE SPECIAL INVESTIGATIVE COMMITTEE 2 (2014), available at http://le.utah.gov/investigative/Final_Report_simple.pdf [<https://perma.cc/2UKB-5BSF>].

58. See Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014), <http://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html> [<https://perma.cc/X449-SYCR>] (noting contributions from AT&T, 5-Hour Energy, Pfizer, Comcast, and Altria to Attorneys General as well as other groups that spend in Attorney General elections).

accounted for an average of 15% of the total funds raised by state Attorney General candidates.⁵⁹ However, that average obscures the true impact of out-of-state money because the funds are not distributed evenly across races. For example, in Virginia's 2013 Attorney General election, Democrat Mark Herring received 90% of his contributions from within Virginia,⁶⁰ but raised 54% of his total funds from out of state, suggesting that his out-of-state donors contributed substantially larger sums.⁶¹ Meanwhile, Republican candidate Mark Obenshain raised 48% of his total funds from out-of-state donors.⁶² As with Herring, Obenshain's out-of-state donors gave significantly larger donations than Obenshain's in-state contributors.⁶³ Over half of the candidates' combined funding came from outside of Virginia.⁶⁴

Out-of-state spenders also seek to influence state Supreme Court races. In 2013–2014, out-of-state funding accounted for at least 14% of total spending in state Supreme Court races.⁶⁵ Former United States Supreme Court Justice Sandra Day O'Connor has warned that “judicial elections are becoming political prize-fights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitu-

59. See *Contributions to Attorney General Candidates 2008–2015*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?y=2015,2014,2013,2012,2011,2010,2009,2008&f-core=1&c-exi=1&c-r-oc=Z10#{1|gro=d-ins> [https://perma.cc/RMW2-KGR3] (last visited Nov. 2, 2016) (Out-of-state contributions: \$53,609,808; total Contributions: \$353,776,274).

60. *Contributions to Attorney General Candidates in Virginia in 2013*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?s=VA&y=2013&f-core=1&c-exi=1&c-r-oc=Z10#{1|gro=c-t-id,d-ins> [https://perma.cc/6GKW-F9RS] (last visited Nov. 2, 2016) (4720 contributions from Virginia; 534 from other states).

61. See *id.* (Herring raised \$2,998,319 from 4720 in-state donors, while raising \$3,565,734 from 534 out-of-state donors. His average in-state contribution was \$635.24, while his average out-of-state contribution was \$6677.40.).

62. See *id.* (Out-of-state contributions: \$3,286,534; total contributions: \$6,917,747).

63. See *id.* (Obenshain's average in-state contribution was \$1383 while his average out-of-state contribution was \$17,298. Obenshain raised \$3,631,213 from 2626 in-state contributors, while raising \$3,286,534 from 190 out-of-state contributors.).

64. See *id.* (Out-of-state contributions: \$6,852,268; total contributions: \$13,481,800).

65. See SCOTT GREYTAK ET AL., JUSTICE AT STAKE, BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2013–2014 32 (2015), <http://newpoliticsreport.org/app/uploads/JAS-NPJE-2013-14.pdf> [https://perma.cc/Z6HV-7YLZ] (“In 2013–14, national groups and their state affiliates spent an estimated \$4.8 million on state Supreme Court races, making up about 14% of total spending. Because this estimate excludes contributions by national groups to organizations that did not spend exclusively on state Supreme Court races, the actual figure is likely much higher.” (footnotes omitted)).

tion.”⁶⁶ One notable instance occurred in Iowa in 2010, shortly after the state supreme court unanimously held that Iowa’s prohibition on same-sex marriage violated the state’s constitution.⁶⁷ The next year, three justices faced a regularly scheduled retention election. Two out-of-state groups opposed to same-sex marriage — Mississippi-based American Family Association and Washington, D.C.-based National Organization for Marriage — spent heavily in Iowa, raising over \$1 million dollars to oppose the three justices.⁶⁸ The National Organization for Marriage also funded a forty-five county bus tour, in which opponents of same-sex marriage, including former Pennsylvania Senator Rick Santorum, traveled around the state urging Iowans to recall the justices.⁶⁹ The justices declined to fundraise or campaign.⁷⁰ After all, no justice had ever lost an Iowa recall election since the state adopted the system 48 years earlier.⁷¹ In fact, between 1936 and

66. JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009* 4 (2010), <http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf> [<https://perma.cc/G2E7-5QWR>].

67. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

68. See Press Release, Human Rights Campaign, *Iowa Courts Hijacked By National Organization for Marriage Intimidation Campaign* (Nov. 3, 2010), available at <http://www.hrc.org/press/iowa-courts-hijacked-by-national-organization-for-marriage-intimidation-cam> [<https://perma.cc/K2PK-AZFT>] (“In Iowa, NOM spent an unprecedented \$600,000 on TV ads and a 45-county bus tour.”); Camilla Taylor, *What Happened in Iowa: Background and Analysis of the Judicial Retention Election*, LAMBDA LEGAL (Nov. 12, 2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_what-happened-in-iowa_1.pdf [<https://perma.cc/6GAL-D8X8>] (“[T]he Family Research Council, the Alliance Defense Fund, the Faith and Freedom Coalition and the National Organization for Marriage . . . poured more than \$1 million into a campaign . . . urging Iowa voters to kick the justices off the Court.”).

69. See Press Release, FRC Action, *FRC Action Announces Iowa Judge Bus Tour Urging No “Retention” on Activist Judges* (Oct. 19, 2010), available at <https://www.frcaction.org/action/frc-action-announces-iowa-judge-bus-tour-urging-no-retention-on-activist-judges> [<https://perma.cc/7573-NWBK>] (On this tour, which was scheduled to “make 20 stops, travel over 1,300 miles, and pass through 45 of Iowa’s 99 counties,” Santorum and “other state and national leaders . . . urge[d] Iowans to restore the constitution by voting ‘no retention’ on activist judges who last year forced same-sex ‘marriage’ on the state.”).

70. See A.G. Sulzberger, *Ouster of Iowa Justices Sends Signal to Bench*, N.Y. TIMES, <http://www.nytimes.com/2010/11/04/us/politics/04judges.html> [<https://perma.cc/EW8F-ER5V>] (“In Iowa, the three ousted justices did not raise campaign money, and they only made public appearances defending themselves toward the end of the election.”).

71. See Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System*, A.B.A.J. (Jan. 1, 2011, 6:59 AM), http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system [<https://perma.cc/84TY-3G2Z>] (“In 1962, Iowans changed the way they chose their judges to a system called merit retention, which requires that a special commission nominate qualified judicial candidates for the governor to appoint. Generally, judges serve six to eight years before facing the voters in a retention

2009, 637 state supreme court justices from across the nation faced recall elections and only eight were recalled.⁷² Nevertheless, all three Iowa justices lost their seats.⁷³ An American Bar Association official cautioned that the Iowa recall election “[s]et[] a very dangerous precedent for people who are angry about one single decision and are now able to go out of state to special interest groups to raise large sums of money in an effort to influence decision-making back home.”⁷⁴

Perhaps the most significant impact of out-of-state spending does not involve candidates at all. Ballot measures consistently draw a larger proportion of out-of-state money than any other type of election. From 2010 to 2015, one-third of total funds raised for statewide ballot measures came from out of state.⁷⁵ Thus far in 2016, out-of-state donations have accounted for 37% of funds raised for ballot measures.⁷⁶ Ballot measures attracting the most spending from out of state tend to be hot-button social issues or issues that significantly affect a particular economic interest. For example, in 2012, Californians considered the merits of the “Tobacco Tax for Cancer Research Act,” which would increase taxes on tobacco products and use the funds for cancer research and tobacco cessation programs.⁷⁷ An opposition group called Californians Against Out-of-Control Taxes and Spending

election. . . . For 48 years, things went pretty much as planned. Not a single Iowa Supreme Court justice, or appellate or district judge, was tossed out by the voters during the five decades.”).

72. See *id.* (“Between 1936, when California became the first state to adopt judicial retention, and 2009, 637 state supreme court justices in 16 different states faced retention votes. Only eight lost . . .”).

73. See Sulzberger, *supra* note 70 (“Each of the three justices — Marsha K. Ternus, the chief justice; Michael J. Streit; and David L. Baker — received about 45 percent of the vote, making this the first time members of the state’s high court had been rejected by voters.”).

74. See Curriden, *supra* note 71.

75. *Contributions to State Ballot Measure Committees 2010–2015*, NAT’L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?y=2015,2014,2013,2012,2011,2010&f-core=1&f-fc=2&m-exi=1#{1|gro=d-ins}> [<https://perma.cc/LC2A-A9C4>] (last visited Nov. 2, 2016) (Out-of-state contributions: \$654,710,546; total Contributions: \$1,981,711,189).

76. *Contributions to State Ballot Measure Committees 2016*, NAT’L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?y=2016&f-core=1&f-fc=2&m-exi=1#{1|gro=d-ins}> [<https://perma.cc/W7SV-33UU>] (last visited Nov. 2, 2016) (As of Nov. 2, 2016 — Out-of-state contributions: \$166,105,978; total contributions: \$444,161,851).

77. Letter from N. Eugene Hill, Olson Hagel & Fishburn LLP, to Krystal Paris, Initiative Coordinator, Cal. Attorney Gen.’s Office (Dec. 7, 2009), *available at* http://ag.ca.gov/cms_attachments/initiatives/pdfs/i895_initiative_09-0097.pdf [<https://perma.cc/W8XL-XBM4>] (contains full text of ballot initiative).

raised over \$47 million dollars to oppose the measure.⁷⁸ Despite the local name, the group did not receive a single donation from a California resident. Instead, it raised over 97% of its funds from five out-of-state tobacco companies, with most coming from Philip Morris and RJR Reynolds.⁷⁹

Out-of-state donors also spend to affect ballot measures that have no apparent impact on them. In 2008, Washington voters considered Initiative 1000, also known as the “Death With Dignity Act,” which would permit terminally ill Washingtonians to self-administer a lethal dose of medication.⁸⁰ Two ballot measure committees spent in favor of the Initiative, while one spent against it. The primary committee supporting the measure, “Yes on I-1000,” received over half of its donations from out of state.⁸¹ Meanwhile, another committee supporting the measure called “Compassion & Choices Washington PAC” raised \$627,625 from only thirteen donors.⁸² Twelve of the thirteen donors were from out of state, and the Washington donor contributed only \$25 to the committee.⁸³ The bulk of the committee’s funds came from an Ohio-based attorney who contributed \$400,000 and a Denver organization that provided another \$200,000.⁸⁴ The primary opposition committee, “Coalition Against Assisted Suicide,” raised over 40% of its funds from out of state as well.⁸⁵

78. See *Contributions to Californians Against Out-of-Control Taxes and Spending*, NAT’L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, [http://www.followthemoney.org/show-me?m-eid=10247016&m-t-rt=4&m-t-eid=17445623#\[1|gro=d-eid](http://www.followthemoney.org/show-me?m-eid=10247016&m-t-rt=4&m-t-eid=17445623#[1|gro=d-eid) (data on file with author) (last visited Nov. 2, 2016) (showing Californians Against Out-of-Control Taxes and Spending raised \$47,988,219 total).

79. See *id.* (showing contributions from Philip Morris (\$28,582,836); R.J. Reynolds Tobacco (\$11,169,995); U.S. Smokeless Tobacco (\$3,154,547); American Snuff (\$1,750,000); Santa Fe Natural Tobacco (\$1,148,000)).

80. See WASH. SEC’Y OF STATE, 2008 STATE OF WASHINGTON VOTERS’ PAMPHLET 17–20, available at <http://www.kingcounty.gov/~media/depts/elections/how-to-vote/voters-pamphlet/2008/200811-voters-pamphlet-ed15A.ashx?la=en> [https://perma.cc/44E7-TVS5].

81. See *Contributions to Yes on I-1000*, NAT’L INST. ON MONEY IN POLITICS: FOLLOW THE MONEY, [http://www.followthemoney.org/show-me?f-core=1&m-t-eid=10243785#\[1|gro=d-ins](http://www.followthemoney.org/show-me?f-core=1&m-t-eid=10243785#[1|gro=d-ins) [https://perma.cc/5PNB-7UFE] (last visited Nov. 2, 2016) (7405 donations from out of state; 13,845 donations total).

82. *Contributions to Compassion and Choices Washington*, NAT’L INST. ON MONEY IN POLITICS: FOLLOW THE MONEY, [http://www.followthemoney.org/show-me?f-core=1&m-t-eid=17445413#\[1|gro=d-ins](http://www.followthemoney.org/show-me?f-core=1&m-t-eid=17445413#[1|gro=d-ins) [https://perma.cc/59TH-3PQP] (last visited Oct. 29, 2016).

83. *Id.*

84. *Out-of-State Contributions to Compassion and Choices Washington*, NAT’L INST. ON MONEY IN POLITICS: FOLLOW THE MONEY, [http://www.followthemoney.org/show-me?f-core=1&m-t-eid=17445413&d-ins=0#\[1|gro=d-eid](http://www.followthemoney.org/show-me?f-core=1&m-t-eid=17445413&d-ins=0#[1|gro=d-eid) [https://perma.cc/UPG8-KN43] (last visited Oct. 29, 2016).

85. See *Contributions to Coalition Against Assisted Suicide*, NAT’L INST. ON MONEY IN POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?f-core=1&m-t->

Local ballot measures are also affected. On November 8, 2016, residents of Monterey County, California, will vote on a ballot measure that would ban hydraulic fracturing (fracking) in the county and would also prohibit oil companies from drilling new wells.⁸⁶ Fracking is a process in which a highly pressurized mixture of water and chemicals is injected into the ground to release oil.⁸⁷ It is popular with energy companies, but supporters of the ban argue that it contaminates drinking water,⁸⁸ kills trees,⁸⁹ and causes earthquakes.⁹⁰ Shortly before the initiative was finalized, a group called Monterey County for Energy Independence⁹¹ began airing advertisements opposing the measure.⁹² The group has

eid=10243781#[1|gro=d-ins [https://perma.cc/7C86-9JJK] (last visited Nov. 2, 2016) (Out-of-state contributions: \$683,561; total contributions: \$1,673,265).

86. See *Notice of Local Measures*, MONTEREY CTY. ELECTIONS, http://www.montereycountyelections.us/a_measures_NOVEMBER_2016_EN.html [https://perma.cc/9D9M-5WUC] (Measure Z).

87. See *What is fracking and why is it controversial?*, BBC (Dec. 16, 2015), <http://www.bbc.com/news/uk-14432401> [https://perma.cc/6R9V-LRGD] (“Water, sand and chemicals are injected into the rock at high pressure which allows the gas to flow out to the head of the well.”).

88. See *Can We Afford Enhanced Oil Recovery Water Usage?*, PROTECT MONTEREY CTY. (Sept. 24, 2016, 11:54 AM), http://www.protectmontereycounty.org/water_risks [https://perma.cc/X6AF-Z3X2] (last visited Nov. 5, 2016) (containing blog posts suggesting fracking contaminates drinking water, including one titled “Are Fracking Wastewater Wells Poisoning the Ground beneath Our Feet?” which has a first line stating “Spoiler alert, the answer is YES!”).

89. See *Frack Wastewater Kills Trees*, PROTECT MONTEREY CTY. (July 15, 2016), http://www.protectmontereycounty.org/frack_wastewater_kills_trees [https://perma.cc/K9LC-E3B4] (last visited Nov. 2, 2016).

90. See *Earthquake Risks*, PROTECT MONTEREY CTY., http://www.protectmontereycounty.org/earthquake_risks [https://perma.cc/F59M-Y2YJ] (last visited Nov. 5, 2016) (containing blog posts suggesting fracking causes earthquakes, including one titled “It’s Official: Injection of Fracking Wastewater Caused Kansas’ Biggest Earthquake”).

91. Monterey County for Energy Independence has subsequently changed its name to “No on Measure Z — Stop the Oil and Gas Shutdown.” See NO ON MEASURE Z — STOP THE OIL AND GAS SHUTDOWN, CAMPAIGN DISCLOSURE STATEMENT (09/25/16–10/22/16) AMENDMENT 1, 3–6 (10/27/16), available at <http://nf4.netfile.com/pub2/?aid=MCE> [https://perma.cc/XDB7-LGXD] (Enter “Measure Z” into the “Search by Name” field then click “No on Measure Z.” A box appears stating: “No on Measure Z — Stop the Oil and Gas Shutdown, with Major Funding From AERA Energy LLC and Chevron Corporation previously known as: Monterey County for Energy Independence.”).

92. See Ramin Skibba, *Monterey County Environmental Group Startled by Pro-Oil Production Radio/TV Campaign*, PASADENA-STAR NEWS (Feb. 4, 2016), <http://www.pasadenastarnews.com/science/20160204/monterey-county-environmental-group-startled-by-pro-oil-production-radiotv-campaign> [https://perma.cc/NXK6-8Y67] (noting that Monterey County for Energy Independence began airing advertisements before initiative is drafted); see also Monterey County for Energy Independence, *Monterey*, YOUTUBE (Dec. 31, 2015), https://www.youtube.com/watch?v=sOZogUO_zL4 (video on file with author) (featuring military veteran stating “I’m concerned banning local production

outspent proponents of the fracking ban “roughly 30 to 1”⁹³ and has received over 92% of its funding (\$5.4 million as of Nov. 4, 2016) from Chevron and a California-based oil company called Aera Energy,⁹⁴ which is jointly owned by Shell and ExxonMobil.⁹⁵

III. HARM FROM OUT-OF-STATE SPENDING

This Part identifies three concerns with out-of-state spending. First, Section A explains that out-of-state spending may drown out in-state residents’ speech. Next, Section B suggests that elected officials may favor their out-of-state contributors over the voters who put them in office. Finally, Section C argues that out-of-state spending may lead to national approaches to state and local issues, which would reduce one of the chief benefits of federalism: experimentation among the states.

A. DROWNING OUT

Out-of-state spending may “drown out” arguments from in-state residents who will be most affected by the elections. Drowning out occurs when out-of-state spending is so significant that in-state residents do not have a meaningful opportunity to participate in the political debate. An example from Maryland illustrates the harm. Four years after Maryland voters approved five slot-machine only casinos in 2008, the legislature sent the voters a referendum that would significantly expand gambling in the state by allowing a sixth casino to be built near the Balti-

will force us to import oil from places like the Middle East, taking our money and our jobs. This means the loss of millions of tax dollars.”).

93. Amy Harder, *Can Fracking Bans Succeed in Oil and Gas Country? All Eyes Are on Monterey*, WALL ST. J. (Nov. 3, 2016), <http://www.wsj.com/articles/can-fracking-bans-succeed-in-oil-and-gas-country-all-eyes-are-on-monterey-1478183036> [https://perma.cc/28UL-Q44K] (last visited Nov. 5, 2016) (“Monterey County for Energy Independence, which opposes it, has outspent backers roughly 30 to 1, according to election filings through Oct. 22, spending nearly \$5.5 million; it is funded almost entirely by Chevron Corp. and Aera Energy LLC, a joint venture between Exxon Mobil Corp. and Royal Dutch Shell PLC.”).

94. See NO ON MEASURE Z — STOP THE OIL AND GAS SHUTDOWN, *supra* note 91 (Enter “Measure Z” into the “Search by Name” field. Then click “No on Measure Z.” As of Nov. 14, 2016, total contributions are \$5,420,454, of which Chevron has contributed \$2,228,480 and Aera Energy has contributed \$2,766,974).

95. See *Who we are*, AERA ENERGY LLC, <http://www.aeraenergy.com/who-we-are.asp> [https://perma.cc/J963-HCQJ] (last visited Nov. 2, 2016) (“Formed in June 1997 and jointly owned by affiliates of Shell and ExxonMobil, we are operated as a stand-alone company through our own board of managers.”); see also *supra* note 93 and accompanying text.

more—Washington, D.C. border and by permitting table games (e.g., poker, blackjack, among others) at all Maryland casinos.⁹⁶ The ballot measure became the most expensive election of any kind in Maryland's history, ultimately costing over \$90 million dollars.⁹⁷ Over 99.98% of the funds came from out-of-state casino companies.⁹⁸ The yes campaign received approximately \$41 million from MGM Resorts,⁹⁹ who was expected to operate the new casino in Maryland,¹⁰⁰ while the no campaign received over \$44 million from Penn National Gaming,¹⁰¹ which owns a casino ninety minutes away in West Virginia.¹⁰² If the measure passed, the new gaming options in Maryland could have harmed Penn Na-

96. See *2012 Statewide Ballot Questions*, MD. STATE BD. OF ELECTIONS, http://www.elections.state.md.us/elections/2012/ballot_question_language.html [<https://perma.cc/7EGD-3JCL>] (last visited Oct. 29, 2016).

97. See Matt Connolly, *Casino, Table Games Appear Headed for Victory in Maryland*, WASH. EXAMINER (Nov. 7, 2012, 12:00 AM), http://www.washingtonexaminer.com/casino-table-games-appear-headed-for-victory-in-maryland/article/2512842#.UJrWiW_A-So [<https://perma.cc/XPQ5-WMRB>] (last visited Oct. 29, 2016) (“Both sides contributed more than \$90 million in the fight, shattering the previous record of \$34 million held by the 2006 governor’s race, in which Democrat Martin O’Malley unseated Republican Bob Ehrlich.”).

98. See *Contributions to For Maryland Jobs and Schools in 2012*, NAT’L INST. ON MONEY IN POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?s=MD&y=2012&m-t-eid=17445665#{1|gro=d-ins> [<https://perma.cc/7JGM-FTBN>] (last visited Nov. 2, 2016) (noting this ballot measure committee supported the expansion and raised \$47,241,111, with only \$11,300 coming from Maryland); *Contributions to Get the Facts — Vote No on 7*, NAT’L INST. ON MONEY IN POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?s=MD&y=2012&m-t-eid=15731610#{1|gro=d-ins> [<https://perma.cc/XEA2-6KQ4>] (last visited Nov. 2, 2016) (noting this ballot measure committee opposed the expansion and raised \$44,252,058, with \$0 coming from Maryland).

99. *Contributors to For Maryland Jobs and Schools in 2012*, NAT’L INST. ON MONEY IN POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?s=MD&y=2012&m-t-eid=17445665#{1|gro=d-eid> [<https://perma.cc/5WYG-XQZ9>] (last visited Nov. 2, 2016) (showing a \$40,991,843 contribution from MGM Resorts).

100. See *MGM, National Harbor Reach Casino Deal*, NBC WASH., Jun. 14, 2012, <http://www.nbcwashington.com/news/local/MGM-Considered-for-National-Harbor-Casino-159120845.html> [<https://perma.cc/8LCD-KFUN>] (last visited Nov. 2, 2016) (“Developers with National Harbor and MGM Resorts International announced Friday that they have reached an agreement to bring a high-end casino to Prince George’s County.”).

101. *Contributors to Get the Facts — Vote No on 7*, NAT’L INST. ON MONEY IN POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?s=MD&y=2012&m-t-eid=15731610#{1|gro=d-eid> [<https://perma.cc/WVL3-YCQV>] (last visited Nov. 2, 2016) (showing a \$44,116,058 contribution from Penn National Gaming).

102. See Matthew Yglesias, *Casino Owners Against Gambling*, SLATE (Oct. 25, 2012), http://www.slate.com/articles/business/moneybox/2012/10/maryland_question_7_hollywood_casino_owners_funding_anti_casino_referendum.html [<https://perma.cc/WL3G-UMXR>] (explaining Penn National Gaming owns the Hollywood Casino in Charles Town, W.Va., which is “only 90 minutes from the Baltimore-Washington Metropolitan Area”).

tional's business across the border.¹⁰³ Given these massive sums from out of state, it was practically impossible for Maryland residents who wished to influence the election to make their voices heard.

Citizens of states with small populations may be particularly at risk of having their opinions drowned out by out-of-state spenders.¹⁰⁴ Because of the relatively low cost of political campaigns in those states, even modest spending from out of state can have a substantial impact. For example, in 2012, fifty candidates for the North Dakota State Senate raised an average of \$7187 each, for a combined total of \$359,367.¹⁰⁵ The candidate who raised the most that year brought in \$27,170, while seven candidates raised less than \$1000 each.¹⁰⁶ Given these low fundraising totals, even \$5000 from out of state could significantly affect the election for a given seat. This year, five out of ten ballot measures in South Dakota have been funded mostly by out-of-state money.¹⁰⁷

One objection to this argument is that large spenders drown out small spenders regardless of their location.¹⁰⁸ According to this argument, a large expenditure from a wealthy in-state resident drowns out ordinary citizens' voices just as much as a large expenditure from an out-of-state resident. Therefore, there is no reason to treat out-of-state spending differently. Indeed, the

103. See *id.* ("A casino in the D.C. suburbs, another in Baltimore City, one in Hanover in between, and other scattered further from the region's main population centers would kill Hollywood Charles Town's [owned by Penn National Gaming] business model.")

104. See, e.g., *W. Tradition P'ship. v. Att'y Gen. of Mont.*, 271 P.3d 1, 9–10 (Mont. 2011) (citing affidavits of Montana officials as well as expert witnesses indicating Montana elections are particularly susceptible to corruption by out-of-state corporate spending because of the state's small population and the low cost of political campaigns (e.g., one candidate spent only \$750 on his state legislative campaign in 2002)).

105. *Contributions to North Dakota Senate Candidates in 2012*, NAT'L INST. ON MONEY IN POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?s=ND&f-core=1&c-exi=1&c-r-ot=S&y=2012#{1|gro=c-t-id> (data on file with author) (last visited Nov. 2, 2016) (showing fifty candidates raised \$359,367 total).

106. *Id.*

107. See Liz Essley White, *South Dakota's Proxy War Over Political Transparency*, SLATE (Oct. 13, 2016, 1:12 PM), http://www.slate.com/articles/news_and_politics/politics/2016/10/a_proxy_war_over_political_transparency_is_brewing_in_south_dakota.html [<https://perma.cc/4S4X-VTJS>] ("At least five of the 10 measures on South Dakota's ballot this year are mostly backed by out-of-state money.")

108. See, e.g., *Vannatta v. Keisling*, 899 F. Supp. 488, 497 (D. Or. 1995), *aff'd*, 151 F.3d 1215, 1221 (9th Cir. 1998) (holding limitation on out-of-state contributions was not narrowly tailored because corrupting feature was size of donation and Oregon did not limit similarly sized in-state donations); *Landell v. Sorrell*, 382 F.3d 91, 146–47 (2d Cir. 2002), *aff'd on other grounds*, 548 U.S. 230 (2006) (same).

courts have recognized that significant spending from in-state sources may drown out ordinary citizens.¹⁰⁹ But drowning out by out-of-state spenders may be more harmful to state residents than significant spending by in-state contributors because out-of-state spenders are more likely to cause externalities¹¹⁰ than in-state spenders. Because out-of-state spenders do not bear the full costs of election outcomes in distant states, they are more likely to favor policies that benefit them regardless of the impact on the target states. For example, oil companies may not fully account for costs to in-state residents when they spend in favor of fracking. Fracking is a popular method of extracting oil, but it has also been linked to environmental damage, contaminated drinking water,¹¹¹ excessive noise,¹¹² and even earthquakes.¹¹³ An out-of-state oil executive is unlikely to take these costs into account

109. See, e.g., *Ognibene v. Parkes*, 671 F.3d 174, 189 (2d Cir. 2011) (“In much the same way that anti-noise ordinances help to prevent megaphone users from drowning out all others in the public square, contribution limits can serve to prevent the wealthiest donors from rendering all other donors irrelevant — from, in effect, silencing them. . . . Without restrictions on the size of campaign contributions, the wealthy could flood the campaign coffers of their preferred political candidates, rendering all other contributions negligible by comparison.”); *Jacobus v. Alaska*, 338 F.3d 1095, 1107 (9th Cir. 2003) (“[A] failure to regulate the arena of campaign finance allows the influence of wealthy individuals and corporations to drown out the voices of individual citizens, producing a political system unresponsive to the needs and desires of the public, and causing the public to become disillusioned with and mistrustful of the political system.”); see also *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 470 (2010) (Stevens, J., dissenting) (“[W]hen corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy. . . . The opinions of real people may be marginalized. . . . In addition to this immediate drowning out of noncorporate voices, there may be deleterious effects that follow soon thereafter.”).

110. In economics, an externality is a cost or benefit that is borne by third parties, but not by an actor himself. See MICHAEL PARKIN, MICROECONOMICS 344 (Denise Clinton et al. eds., 8th ed. 2008) (“A cost or benefit that arises from production and falls on someone other than the producer, or a cost or benefit that arises from consumption and falls on someone other than the consumer is called an *externality*.” (emphasis in original)). Because the actor considers only the costs of an action that he incurs, he may take actions that are privately rational but are socially harmful.

111. See Gayathri Vaidyanathan, *Fracking Can Contaminate Drinking Water*, SCIENTIFIC AMERICAN, Apr. 4, 2016, <https://www.scientificamerican.com/article/fracking-can-contaminate-drinking-water/> [<https://perma.cc/RZX6-S376>].

112. See Marie Cusick, *Long After Fracking Stops, The Noise Lives On*, NPR, Oct. 14, 2014, <http://www.npr.org/2014/10/14/356191305/long-after-fracking-stops-the-noise-lives-on> [<https://perma.cc/P4SM-5FGU>].

113. Niraj Chokshi & Henry Fountain, *Oklahoma Orders Shutdown of Wells After Record-Tying Earthquake*, N.Y. TIMES, Sept. 3, 2016, <http://www.nytimes.com/2016/09/04/us/earthquake-ties-record-for-strongest-in-oklahoma-history.html> [<https://perma.cc/2ANA-S9KN>] (“Many seismologists say the quakes are caused by high-pressure injection of wastewater from oil and gas wells, both conventional and hydraulically fractured, or fracked.”).

because he will not drink the water in the target state or endure the earthquakes there. This is not to say that the environmental costs of fracking always outweigh the economic benefits — they may not. But the citizens of the target state who will both enjoy the economic benefits and suffer the environmental costs are in a better position to weigh those competing interests than out-of-state executives who enjoy the benefits without having to endure the costs. Since out-of-state spenders are unlikely to account for the full cost of elections in foreign states they may be more harmful than in-state spenders.

B. DIVIDED LOYALTY

Another concern is that significant out-of-state spending will cause elected officials to favor nonresident campaign donors over their constituents.¹¹⁴ When the policy preferences of out-of-state donors and in-state constituents align, there is no problem. However, as Professor Richard Briffault points out, the policy preferences of constituents and out-of-state donors tend to diverge.¹¹⁵ Professor Briffault demonstrates that contributors are not representative of voters generally, but rather come from a very narrow cross-section of society “that is demographically different from the rest of the population.”¹¹⁶ Contributors tend to be “older, better educated, more likely to be white, more likely to be male, more affluent . . . and more partisan or ideologically extreme than the average voter.”¹¹⁷ This effect is exaggerated for contributors who choose to donate across state lines.¹¹⁸ Perhaps due to these demographic differences, out-of-state contributors’ policy preferences are likely to be different from those of ordinary constituents.¹¹⁹ When donors’ preferences diverge from those of non-

114. For a detailed examination of the demographic differences and divergent policy preferences between constituents and contributors, see Richard Briffault, *Of Constituents and Contributors*, 2015 U. CHI. LEGAL F. 29, 44–51 (2016).

115. *See id.* at 49 (“These financial constituents are likely to have different concerns than non-donor voters and prefer different policy alternatives that non-donor constituents.”).

116. *Id.* at 47.

117. *Id.* at 47.

118. *See id.* at 49 (“Non-constituent donors, particularly those who contribute in multiple campaigns, are even more affluent, better educated, more partisan, and more ideological than donors generally.”).

119. *See id.* at 48–49, 51 (“[Out-of-state donors] often have different political concerns and goals that have may have little relationship to, and may in fact be at odds with, the concerns and goals of the residents of the voting constituency.”).

donor constituents, elected officials are faced with powerful incentives to favor the donors. Professor Briffault argues that donors “serve as ‘gatekeepers’ of the electoral process, helping to determine which candidates are able to effectively compete for election.”¹²⁰ Thus, candidates must satisfy donors before they can even reach the phase of the election where they are courting constituents. Research indicates that, at least at the Congressional level, “voting records of representatives are about six times more reflective of the views of affluent contributors than they are of the opinions of the median-income constituent.”¹²¹

A recent investigation into former Utah Attorney General John Swallow revealed the impact out-of-state money can have on elected officials. Prior to announcing his candidacy for Attorney General, Swallow sought donations from members of the payday industry to help fund his campaign. In exchange, Swallow promised to “go[] to bat for the industry” and “help other AGs understand the importance of the cash advance industry” if he were elected.¹²² In addition to winning the support of Richard Rawle,¹²³ a Utah businessman who owned the Check City payday lending chain,¹²⁴ Swallow also courted out-of-state payday lenders. As he prepared to announce his candidacy, Swallow assured the president of Tennessee-based Check Into Cash, the second or third largest payday lender in the United States,¹²⁵ that he “looked forward to being in a position to help the industry” if he were elected.¹²⁶ A few months later, Swallow traveled to Kansas

120. *Id.* at 48–49.

121. Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 289 (2014).

122. Swallow Timeline, *supra* note 26 (June 29, 2011, email).

123. See DUNNIGAN, *supra* note 57, at 66–67 (“Mr. Rawle was one of Mr. Swallow’s biggest supporters and a very significant donor to his 2012 campaign for Attorney General. . . . Rawle was involved in Mr. Swallow’s campaign months before Mr. Swallow declared his candidacy [and] . . . personally provided undisclosed funds and office space intended to support Mr. Swallow’s campaign. [He also] marketed Mr. Swallow to the payday lending industry . . .”).

124. *Id.* at 62–63 (“Mr. Rawle was a prominent figure in the Utah business community. He was the patriarch of a Provo-based network of payday loan and check cashing businesses, most visibly including Check City Check Cashing, a multi-state chain of payday lending storefronts, and Tosh Inc., the parent company of Check City. . . . Mr. Rawle was [also] a director of the Community Financial Services Association of America, a national payday-lending industry group.”).

125. See Daniel Brook, *Usury Country*, HARPER’S MAG. 41, 43 (Apr. 2009) (“[Check Into Cash] is the second or third largest [company] of its kind.”).

126. Swallow Timeline, *supra* note 26 (Mar. 7, 2011, email).

City (on a trip paid for by Rawle¹²⁷) to meet with online payday lenders¹²⁸ who agreed to provide him with at least \$100,000 in funding.¹²⁹ By the end of his campaign, Swallow had received over \$400,000 from the payday industry, including contributions from payday lenders in Kansas, Missouri, Texas, Tennessee, Washington, Maryland, and Ohio.¹³⁰

C. LESS EXPERIMENTATION

Out-of-state spending also threatens to undermine one of the chief benefits of federalism: experimentation amongst the states. As Supreme Court Justice Louis Brandeis famously explained, “[i]t 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.”¹³¹ Justice Brandeis’s description assumes that states generate policy ideas independently of one another. An extreme illustration of Justice Brandeis’ theory is one in which all fifty states try a different policy approach to the same problem. Then, if one approach is considerably more successful than the alternatives, other states may adopt that approach. However, if states do not generate unique policy ideas, but instead try the same policy idea, the nation as a whole loses out on many of the benefits of experimentation. In the most extreme case, rather than studying fifty approaches to a problem, the nation learns about one.

Cross-border spending threatens to undermine states’ traditional roles as laboratories of experimentation. As Professor Briffault has demonstrated, there are relatively few cross-border

127. *Id.* (June 27, 2011, prepaid debit card statement showing “evidence that the trip was funded by Mr. Rawle with cash he provided to Mr. Swallow on a prepaid NetSpend debit card”).

128. *Id.* (June 1, 2011, email showed meetings scheduled for June 23, 2011 between Swallow and several members of the Online Lenders Alliance (OLA). The OLA represents “companies that recruit payday borrowers over the Internet”).

129. *Id.* (June 29, 2011, email in which Swallow explained to a payday industry executive that the Online Lending Alliance had committed to raising \$100,000 for Swallow).

130. See DUNNIGAN, *supra* note 57, at 83–85 (detailing donations and pledges to Swallow from the payday lending industry and concluding “[i]n total, documents reviewed by the Committee suggest that approximately \$452,000 came in to [a fund supporting Swallow]”).

131. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

donors and these donors tend to spend in multiple jurisdictions.¹³² “As a result, candidates, political parties, and the political committees that give to candidates and parties or spend independently to support them are heavily dependent on a relatively small number of very big givers.”¹³³ If these spenders support the same policies in multiple states, the nation as a whole will lose out on the creativity of policymakers from diverse states who might have come up with different approaches in the absence of out-of-state donors. This is not to say that cross-border spending will eliminate experimentation — the example above is stylized for illustrative purposes — but cross-border spending is likely to reduce experimentation and limit the policy alternatives tested in the real world. As Justice Brandeis warned, “[d]enial of the right to experiment may be fraught with serious consequences to the nation.”¹³⁴

There is some evidence to suggest that wealthy donors are spending in multiple states to advance standardized policies across the country. For example, the American Legislative Exchange Council (ALEC) is a nonprofit organization consisting of state legislators and corporate representatives who describe themselves as “dedicated to the principles of limited government, free markets and federalism.”¹³⁵ One of the organization’s most significant political activities is drafting and disseminating model legislation on issues important to the organization.¹³⁶ Both corporate and legislative ALEC members work together as equals to draft model legislation and then ALEC’s legislative members introduce the legislation in their respective states.¹³⁷ Once the legislation is introduced, ALEC’s corporate donors spend in favor of politicians who support the legislation and oppose those who do

132. See *supra* note 114 at 16 (“To begin with, only a small fraction of Americans — perhaps 4 percent in the hotly contested 2008 elections — make any campaign contributions at all . . . In the 2013–14 federal elections, fewer than 700,00 people — less than . . . 1/3 of 1 percent of the adult population . . . account[ed] for 66.7 percent of all individual contributions to federal candidates, parties, and PACs.” (footnote omitted)).

133. *Id.*

134. *Liebmann*, 285 U.S. at 311.

135. *About Us*, AM. LEGIS. EXCHANGE COUNCIL, <https://www.alec.org/about/> [<https://perma.cc/VXB5-UMHZ>] (last visited Oct. 29, 2016).

136. See Alex Sakariassen, *Cookie-Cutter Legislation: How a Corporate Bill Mill Plays Into Montana Politics and Why You Should Care*, MISSOULA INDEP. (Mar. 14, 2013), <http://missoulanews.bigskypress.com/missoula/cookie-cutter-legislation/Content?oid=1733690> [<https://perma.cc/CTZ4-WY7T>].

137. *Id.* (“Model bills get approved with legislators and corporations voting as equals, giving corporations a level of influence that mere lobbying doesn’t necessarily afford.”).

not.¹³⁸ ALEC's opponents have described the organization as a "corporate bill mill" that furthers its agenda by pushing "cookie-cutter legislation" in multiple states.¹³⁹ ALEC members defend the practice as an efficient means of adopting ideas that have been successful elsewhere.¹⁴⁰

The bills are typically modified before they are introduced, while still retaining the core features desired by ALEC's members. On occasion, however, legislators introduce bills without any revision. In November 2011, Florida State Representative Rachel Burgin introduced a resolution urging the federal government to reduce corporate income tax rates.¹⁴¹ The resolution was apparently a word for word copy of an ALEC model bill because the first section stated, "[w]hereas, it is the mission of the American Legislative Exchange Council to advance Jeffersonian principles of free markets"¹⁴² Burgin quickly withdrew the bill and introduced a replacement bill the next day that was identical in every respect, except the paragraph referencing ALEC had been removed.¹⁴³

138. See Edwin Bender, *Beyond Dinner and a Movie: ALEC Actively Courts State Lawmakers*, NAT'L INST. ON MONEY IN STATE POLITICS: THE MONEY TALE BLOG (July 20, 2011), <http://www.followthemoney.org/research/institute-reports/beyond-dinner-and-a-movie-alec-actively-courts-state-lawmakers/> [https://perma.cc/QS6H-DLFD] ("The bottom line is, all sides of corporate America met willing partners at ALEC conferences, sat side by side with elected lawmakers to draft industry-friendly legislation, and helped those candidates win elections to ensure that their legislation had the best possible chance of passage.").

139. Sakariassen, *supra* note 137.

140. *Id.* (quoting Montana State Representative Mark Blasdel, an ALEC member, describing the organization as educational and helpful in allowing legislators to avoid "reinventing the wheel" by identifying "winners" and "losers" from other states).

141. See Alex Seitz-Wald, *Oops: Florida Republican Forgets To Remove ALEC Mission Statement From Boilerplate Anti-Tax Bill*, THINKPROGRESS (Feb. 2, 2012), <http://thinkprogress.org/economy/2012/02/02/417488/florida-gop-alec-forget/> [https://perma.cc/J867-HUNC] ("In November, Florida state Rep. Rachel Burgin (R) introduced a resolution that would officially call on the federal government to reduce corporate taxes . . .").

142. *House Memorial 685*, FLA. HOUSE OF REPRESENTATIVES (2012), http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0685_.docx&DocumentType=Bill&BillNumber=0685&Session=2012 [https://perma.cc/T37A-EK68].

143. See Seitz-Wald, *supra* note 141; *House Memorial 717*, FLA. HOUSE OF REPRESENTATIVES (2012), http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0717_.docx&DocumentType=Bill&BillNumber=0717&Session=2012 [https://perma.cc/26JD-DSWR].

ALEC is alleged to have created at least 800 model bills,¹⁴⁴ focusing on issues ranging from tax policy,¹⁴⁵ right to work laws,¹⁴⁶ and environmental regulation¹⁴⁷ to criminal justice reform¹⁴⁸ and education.¹⁴⁹ In 2015 alone, at least 172 ALEC education bills were introduced in forty-two states.¹⁵⁰ Out-of-state spending by ALEC's corporate members drives this practice by rewarding legislators who advance the organization's preferred policy positions.

Even apart from ALEC, wealthy donors seek to influence state and local policy by contributing directly in support of policies they favor. One prominent example is education, where wealthy donors have spent heavily in support of charter schools,¹⁵¹ private school vouchers,¹⁵² expanded online learning,¹⁵³ and weaker

144. Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws Are All Connected*, ATLANTIC (Apr. 14, 2012), <http://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/> [https://perma.cc/UDF5-MPBV].

145. *Tax Reform*, AM. LEGIS. EXCHANGE COUNCIL, <https://www.alec.org/issue/tax-reform/> [https://perma.cc/U3MH-TJM6] (last visited Oct. 29, 2016).

146. *Local Right to Work Ordinance*, AM. LEGIS. EXCHANGE COUNCIL, <https://www.alec.org/model-policy/local-right-work-ordinance/> [https://perma.cc/YY2K-Z6RX] (last visited Oct. 29, 2016).

147. *Resolution to Retain State Authority Over Hydraulic Fracturing*, AM. LEGIS. EXCHANGE COUNCIL, <https://www.alec.org/model-policy/resolution-to-retain-state-authority-over-hydraulic-fracturing/> [https://perma.cc/H5MX-H3AA] (last visited Oct. 29, 2016).

148. *Archives: Criminal Justice Reform / Model Policies*, AM. LEGIS. EXCHANGE COUNCIL, <https://www.alec.org/issue/criminal-justice-reform/model-policy/> [https://perma.cc/YG9C-G6DW] (last visited Oct. 29, 2016).

149. *Education*, AM. LEGIS. EXCHANGE COUNCIL, <https://www.alec.org/issue/education/> [https://perma.cc/9UYA-P6XF] (last visited Oct. 29, 2016).

150. Brendan Fischer & Zachary Peters, *Cashing in on Kids: 172 ALEC Education Bills Push Privatization in 2015*, COMMON DREAMS (Mar. 10, 2016), <http://www.commondreams.org/views/2016/03/10/cashing-kids-172-alec-education-bills-push-privatization-2015> [https://perma.cc/2B74-DRZV] (“[A]t least 172 measures reflecting American Legislative Exchange Council (ALEC) model bills were introduced in 42 states in 2015, according to an analysis by the Center for Media and Democracy, publishers of ALECExposed.org and PRWatch.org.”).

151. See, e.g., Motoko Rich, *A Walmart Fortune, Spreading Charter Schools*, N.Y. TIMES (Apr. 25, 2014), <http://www.nytimes.com/2014/04/26/us/a-walmart-fortune-spreading-charter-schools.html> [https://perma.cc/43NM-Z2YS] (“[The Walton Family Foundation] has given grants to one in every four charter start-ups in the country, for a total of \$335 million. . . . In addition to the foundation’s activities, many individual members of the Walton family have made millions of dollars in campaign donations to candidates for local school boards and state legislatures who support causes funded by the foundation.”); see also *infra* notes 154–161 (detailing over \$5 million from the Walton family in support of charter schools).

152. See, e.g., Dave Boucher, *Outside interest groups battle over school vouchers*, THE TENNESSEAN (May 4, 2015), <http://www.tennessean.com/story/news/politics/2015/05/03/outside-interest-groups-battle-school-vouchers/26730531/> [https://perma.cc/N38V-PSN7]

teachers' unions.¹⁵⁴ In 2015, three billionaires, Jim and Alice Walton, heirs to the Walmart fortune, and Eli Broad, an insurance magnate, contributed \$650,000 to a Super PAC in Louisiana that sought to influence a state school board election.¹⁵⁵ None of the three lives in Louisiana, yet they accounted for 88% of the Super PAC's funding for that election.¹⁵⁶ In 2012, Alice Walton gave \$1.7 million to support Washington Initiative 1240, which would permit charter schools in the state of Washington.¹⁵⁷ Mr. Broad also donated \$200,000 to the campaign.¹⁵⁸ At the same time, Georgia voters were considering a constitutional amendment that would permit charter schools in the state.¹⁵⁹ Eighty-two percent of the funding in favor of the amendment came from out of state.¹⁶⁰ Alice Walton was the largest donor, contributing

(noting “[t]wo out-of-state groups have spent more than \$1 million in recent years on lobbying and campaigns in an effort to, in part, legalize school vouchers in Tennessee.”).

153. See, e.g., Molly Messick, *Why NYC Mayor Mike Bloomberg Gave \$200,000 To Support Idaho's Education Reform Laws*, NPR STATEIMPACT (Nov. 1, 2012), <https://stateimpact.npr.org/idaho/2012/11/01/why-nyc-mayor-mike-bloomberg-gave-200000-to-support-idahos-education-reform-laws/> [<https://perma.cc/ZE5Q-PRBL>] (detailing Bloomberg's support of Idaho Propositions 1, 2, and 3); *Idaho Voters Resoundingly Reject Propositions 1, 2 And 3*, NPR STATEIMPACT, <https://stateimpact.npr.org/idaho/tag/propositions-1-2-3/> [<https://perma.cc/N64J-EQL5>] (explaining Propositions 1 and 2 weaken teachers' unions and make it easier to fire underperforming teachers, while Proposition 3 would provide every student with a laptop and require online courses).

154. *Id.*

155. See Valerie Strauss, *Why Are Out-of-State Billionaires Pouring Money into Louisiana Board of Education Elections?*, WASH. POST: ANSWER SHEET (Oct. 9, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/10/09/why-are-billionaires-from-arkansas-and-california-pouring-big-money-into-louisiana-board-of-education-elections/> [<https://perma.cc/EXM8-V7RJ>] (noting Broad and the Waltons “collectively poured a total of \$650,000 into [the Super PAC]”).

156. *Id.* (noting \$650,000 of the Super PAC's \$763,710 came from the three billionaires).

157. *Id.* (“Alice Walton of Arkansas, incidentally, gave about \$1.7 million in 2012 to support charter school initiative 1240 in Washington state, which was narrowly passed by voters (who had voted against opening charters three times earlier) but recently ruled unconstitutional by the Washington Supreme Court.”).

158. *Contributors to Yes on 1240 Coalition for Public Charter Schools*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, [http://www.followthemoney.org/show-me?m-t-eid=15794511#\[{1|gro=d-eid](http://www.followthemoney.org/show-me?m-t-eid=15794511#[{1|gro=d-eid) [<https://perma.cc/R33E-SSK3>] (last visited Nov. 2, 2016).

159. Motoko Rich, *Georgia's Voters Will Decide on Future of Charter Schools*, N.Y. TIMES (Nov. 5, 2012), <http://www.nytimes.com/2012/11/06/education/future-of-georgias-charter-schools-on-ballot.html?ref=motokorich> [<https://perma.cc/8G2X-KEFG>] (“[The future of charter schools in Georgia] could be determined Tuesday by a ballot measure that asks voters to amend the State Constitution so that an appointed statewide commission could authorize new schools.”).

160. See *Contributions to Families for Better Public Schools in 2012*, NAT'L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show->

\$600,000.¹⁶¹ Jim Walton has also contributed hundreds of thousands of dollars to PACs supporting charter schools in California and Tennessee, even though he does not live or vote in those states.¹⁶² The Walton Family Foundation has spent heavily on these policies around the country. In fact, the Foundation recently pledged to spend \$1 billion dollars “to expand educational opportunity” and “support better schools” over the next five years.¹⁶³ The Foundation did not provide a precise explanation of how the funds will be allocated, but the Foundation’s Strategic Plan states that the education initiative will “support[] state-level policy work” in at least thirteen states and will “advoca[te] for favorable policies that support the school choice environment.”¹⁶⁴

This Note does not take a position on the motives of ALEC, wealthy out-of-state donors, or on the merits of the policies they seek to advance. These examples are provided only to illustrate the practice of wealthy donors spending across state lines to pursue a nationalized approach to what were once predominantly state and local issues. This approach leads to less variation amongst the states. Rather than all fifty state legislatures brainstorming policy options and experimenting with their own approaches, several states are adopting the desired policy choices of coordinated wealthy donors. In doing so, the nation loses meaningful contributions arising from states’ unique perspectives.

me?f-core=1&m-t-eid=15666277#{1|gro=d-ins [https://perma.cc/65VC-C5VM] (last visited Nov. 2, 2016) (Out-of-state contributions: \$1,892,190; total contributions: \$2,306,846).

161. *Out of State Contributors to Families for Better Public Schools in 2012*, NAT’L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?f-core=1&m-t-eid=15666277&d-ins=0#{1|gro=d-eid> [https://perma.cc/FV85-GZKP] (last visited Sept. 27, 2016).

162. *See, e.g., Contribution to California Charter Schools Association by Jim Walton*, NAT’L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?s=CA&d-eid=2742228,42087189,14101414,32043538,38314710,42080710,17605503,26472095,38174993,2794090,37930419,37930456,38175083&d-id=67604982#{1|gro=d-id> [https://perma.cc/G9U7-EJA3] (showing contribution of \$250,000 in 2014); *Contribution to Tennessee Federation for Children by Jim Walton*, NAT’L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, <http://www.followthemoney.org/show-me?d-eid=2742228%2C42087189%2C14101414%2C32043538%2C38314710%2C42080710%2C17605503%2C26472095%2C38174993%2C2794090%2C37930419%2C37930456%2C38175083&s=TN#{1|gro=d-id> [https://perma.cc/X8RW-NA43] (showing \$200,00 contribution in 2016).

163. *See* 2015–20 K–12 Education Strategic Plan, Walton Family Foundation 2, 4, <http://www.waltonfamilyfoundation.org/~media/documents/k12-strategic-plan-overview.pdf?la=en> [https://perma.cc/ET7R-QANE] (last visited Oct. 29, 2016).

164. *Id.* at 5.

IV. STATES' FIRST ATTEMPTS TO LIMIT OUT-OF-STATE SPENDING HAVE BEEN LARGELY UNSUCCESSFUL

Several states have taken measures to limit the influence of out-of-state interests. In Section A, this Part details states' attempts to limit out-of-state spending and legal challenges to those attempts. Section B examines the Supreme Court's political spending jurisprudence generally and argues that restrictions on out-of-state spending are unlikely to be constitutional due to the Court's broad view of the First Amendment. Section C discusses *Bluman v. Federal Election Commission*, a recent case that suggests limits to the Court's jurisprudence described in Section B. Section D details the ongoing uncertainty around the constitutionality of restrictions on out-of-state spending in state and local elections.

A. LOWER COURTS' RESPONSES TO RESTRICTIONS ON OUT-OF-STATE SPENDING

Alaska, Hawaii, Vermont, and Oregon have attempted to limit contributions flowing in from out of state.¹⁶⁵ These efforts received a mixed reaction from judges, but ultimately most were struck down by narrow margins.

1. *Legal Framework*

Since its first major campaign finance decision in 1976, the Supreme Court has recognized that restrictions on election spending implicate “the most fundamental First Amendment activities.”¹⁶⁶ In the Court's view, “because virtually every means of

165. See HAW. REV. STAT. § 11-362 (2010) (limiting contributions from outside of Hawaii to 30% of a candidate's total contributions during an election period with exemptions for contributions from family members); VT. STAT. ANN. tit. 17 § 2805(e) (2012) (limiting contributions from outside of Vermont to 25% of a candidate's total contributions during an election period) (invalidated by *Landell v. Sorrell*, 382 F.3d 91, 146–48 (2d Cir. 2002), *aff'd on other grounds*, *Randall v. Sorrell*, 548 U.S. 230 (2006)); OR. CONST. art. II, § 22 (limiting contributions from outside of the district in which the candidate is running to 10% of a candidate's total campaign funding per election) (invalidated by *Vannatta v. Keisling*, 899 F. Supp. 488, 497 (D. Or. 1995), *aff'd*, 151 F.3d 1215, 1221 (9th Cir. 1998)); ALASKA STAT. § 15.13.072(a)(3) (banning contributions from groups organized outside of Alaska); ALASKA STAT. § 15.13.072(e) (limiting the amount candidates can accept from individuals outside of Alaska to a cumulative total ranging from \$3000 to \$20,000 depending on the office sought).

166. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

communicating in today's mass society requires the expenditure of money,"¹⁶⁷ "a restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."¹⁶⁸ Consequently, the Court has required restrictions on election spending to survive heightened scrutiny. Restrictions on independent expenditures¹⁶⁹ are subject to strict scrutiny,¹⁷⁰ while restrictions on campaign contributions need only survive "exacting scrutiny," which requires the government to establish that a statute is "closely drawn" to further a "sufficiently important" government interest.¹⁷¹

167. *Id.* at 19.

168. *Id.*

169. In *Buckley*, the Court distinguished between two types of political expression: contributions and independent expenditures. See *Buckley v. Valeo*, 424 U.S. 1, 23 (1976) ("[E]xpenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions."). A contribution is a donation to a candidate's campaign that the candidate can use at his or her discretion. An independent expenditure is spending by the donor herself. For example, if a supporter records and airs her own advertisement, that spending is regarded as an independent expenditure and not a contribution to the candidate, even though it may aid the candidate. See generally *id.* at 12–23. While the line between contributions and independent expenditures is murky in practice, the test is whether the purportedly independent spending is coordinated with a campaign. If not, the spending is an independent expenditure and may not be limited. If the expense is coordinated with a campaign, the spending is a contribution and may be limited. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010) ("By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.").

170. See, e.g., *Citizens United*, 558 U.S. at 340.

171. See *Buckley*, 424 U.S. at 25 ("Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." (internal citations and quotation marks omitted)); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136 (2003) ("[A] contribution limit involving even 'significant interference' with associational rights is nevertheless valid if it satisfies the 'lesser demand' of being 'closely drawn' to match a 'sufficiently important interest.'" (internal citations omitted)). In *Buckley*, the Court held that restrictions on independent expenditures "impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions." *Buckley*, 424 U.S. at 23.

Since the primary expressional value of a contribution is in the "symbolic act of contributing," *id.* at 21, a contribution "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* Independent expenditures, on the other hand, are more communicative since donors must create and disseminate their own messages: they cannot just write checks and let someone else decide how to use the funds. This theoretical distinction has been undermined in practice by the rise of Super PACs, which collect contributions from a variety of sources and then decide how to spend them. In those instances, donors may not be involved in crafting the message at all and may be merely demonstrating a general expression of

The *Buckley* Court also addressed registration and disclosure requirements, holding that because compelled disclosure may burden speech by “seriously infring[ing] on privacy of association and belief guaranteed by the First Amendment,”¹⁷² it is subject to exacting scrutiny.¹⁷³ However, disclosure requirements “do not prevent anyone from speaking”¹⁷⁴ and “impose no ceiling on campaign-related activities,”¹⁷⁵ so in practice, the Court has afforded legislatures considerably more deference in enacting disclosure requirements than in restricting election spending, striking down disclosure requirements in only the most extreme circumstances. For example, one of only a handful of cases where the Court struck down disclosure requirements was when the Court rejected Alabama’s attempt to require the NAACP to disclose its members in the midst of the civil rights movement, because doing so might have “exposed [its] members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”¹⁷⁶

2. Oregon

In 1994, Oregon voters amended the state’s constitution to prohibit candidates from using contributions from any source outside of the electoral district in which a candidate was running.¹⁷⁷ In practice, the amendment did not serve as a total ban

support for the Super PAC’s message. Nevertheless, the distinction between the two standards of review remains.

172. *Buckley*, 424 U.S. at 64.

173. See *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (“We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed ‘exacting scrutiny.’”).

174. *McConnell*, 540 U.S. at 201.

175. *Buckley*, 424 U.S. at 64.

176. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); see also *Brown v. Socialist Workers ‘74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982) (holding Ohio disclosure requirement unconstitutional as applied to the Socialist Workers Party in light of threats to members, gunfire into an SWP office, destruction of SWP members’ property, as well as government hostility toward the group evidenced by police harassment of an SWP candidate and intensive FBI surveillance of the party’s members); compare *John Doe No. 1*, 561 U.S. 186 (holding Washington State could require disclosure of signatories to initiative opposing same-sex marriage despite possible backlash).

177. See OR. SEC’Y OF STATE, MEASURE NO. 6, 1994 GENERAL ELECTION VOTERS’ PAMPHLET 24–25 (1994), available at <http://library.state.or.us/repository/2010/201003011350161/> [<https://perma.cc/XTC6-V6PQ>] (Section 1 states: “a candidate may use or direct only contributions which originate from individuals who at the time of their do-

on out-of-district contributions because there were no enforcement consequences until out-of-district contributions exceeded 10% of a campaign's total funding.¹⁷⁸ If a candidate exceeded the 10% threshold and won the election, the candidate was required to forfeit the elected office and was prohibited from holding elected office for a period of twice the term of the office originally sought.¹⁷⁹ In *Vannatta v. Keisling*,¹⁸⁰ individuals who wished to contribute to candidates running outside of their districts challenged the constitutional provision, arguing that it violated their First Amendment rights.

The government offered two interests to justify the restriction: preventing political corruption and protecting a republican form of government for Oregon.¹⁸¹ A three-judge panel of the Ninth Circuit acknowledged that preventing corruption was a sufficiently important government interest to justify Oregon's campaign finance regulation, but unanimously held that Oregon's restrictions were not closely drawn to serve that interest.¹⁸² The court explained that corruption is limited to quid pro quo corruption — contributions in exchange for political favors — and that corruption results from large contributions but cannot, as a matter of law, arise from small contributions.¹⁸³ Since the Oregon constitution banned all out-of-district contributions, regardless of size, and the government failed to provide evidence that all out-of-district contributions carried a risk of corruption, the regulation was not closely drawn.¹⁸⁴

nation were residents of the electoral district of the public office sought by the candidate . . .”).

178. *See id.* (Section 2 states: “[w]here more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1), and the candidate is subsequently elected, the elected official shall forfeit the office and shall not hold public office for a period equal to twice the tenure of the office sought.”).

179. *Id.*

180. *Vannatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998).

181. *See id.* at 1221 (“There are essentially two purported interests advanced by Measure 6. One is corruption. . . . A second interest . . . involves protecting the integrity of republican government by assuring that constituents are truly selecting their representatives.”).

182. *See id.* (“Measure 6 is not closely drawn to advance the goal of preventing corruption and under this analysis fails to pass muster under the First Amendment.”).

183. *See id.* (citing *Buckley* for the proposition that “corruption stems from large campaign donations and not small ones”).

184. *See id.* (“Measure 6 bans all out-of-district donations, regardless of size or any other factor that would tend to indicate corruption. . . . Measure 6 is not closely drawn to advance the goal of preventing corruption and under this analysis fails to pass muster under the First Amendment.”).

The judges divided on the second interest. Judge Brunetti agreed with Oregon that the state had a sufficiently important interest in “ensuring that only those who are constituents participate in the electoral process.”¹⁸⁵ He explained that “elections are for all intents and purposes often decided well before any resident steps into a voting booth” and that states “have a strong interest in making sure that elections are decided by those who vote.”¹⁸⁶ Judge Brunetti relied on the Supreme Court’s holding in *Holt Civic Club v. City of Tuscaloosa*¹⁸⁷ for the proposition that nonresidents are not entitled to “participate in the political process” of a given jurisdiction merely because the jurisdiction’s policies may affect them.¹⁸⁸

Judge Ferguson and Judge King rejected the interest in a republican form of government as inadequate.¹⁸⁹ They noted that the court had never recognized such an interest as sufficiently important to justify restrictions on speech¹⁹⁰ and distinguished *Holt*, explaining that while *Holt* may permit jurisdictions to deny nonresidents the right to vote in their elections, the same principle does not extend to limiting nonresidents’ speech.¹⁹¹

3. *Alaska*

The next year, the Alaska Supreme Court heard a similar challenge and rejected the Ninth Circuit’s conclusion. The court considered an Alaska statute that limits the total funds a candidate may accept from non-residents,¹⁹² bars candidates from ac-

185. *Id.* at 1224.

186. *Id.* at 1223.

187. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). In *Holt*, the Supreme Court upheld Alabama’s ability to extend city police powers to nonresidents living up to three miles outside of Tuscaloosa city limits, but to simultaneously deny those nonresidents the right to vote in Tuscaloosa elections.

188. *Vannatta*, 151 F.3d at 1222.

189. *See id.* at 1217–18.

190. *See id.* at 1217 (“The right to a republican form of government has never before been recognized as a sufficiently important state interest.”).

191. *See id.* at 1218 (“It is true that states have wide latitude in determining requirements for voting. However, the political process at issue in *Holt* was the right to vote and not the right to First Amendment speech. Therefore, *Holt* does not support the republican form of government argument made here.”).

192. ALASKA STAT. § 15.13.072(e) (2008) (providing the following limits per calendar year: \$20,000 for governor or lieutenant governor, \$5000 for state senator, and \$3000 for state representative or local office).

cepting contributions from out-of-state groups,¹⁹³ and prohibits groups, political parties, and other organizations in Alaska from accepting more than 10% of their contributions from out of state.¹⁹⁴

The court distinguished *Vannatta* on its facts and also rejected aspects of the Ninth Circuit's reasoning. First, the court distinguished *Vannatta* because the restriction in Oregon applied to in-state residents who might still be directly affected by elections in other districts even though they resided in different districts.¹⁹⁵ By contrast, Alaska's statute did not restrict any in-state residents' contributions.¹⁹⁶ Next, the Alaska Supreme Court disagreed with the Ninth Circuit's holding that, as a matter of law, only large contributions could corrupt. The Alaska Supreme Court recognized that large individual contributions could be corrupting, but also determined that an aggregation of small contributions could corrupt.¹⁹⁷ The court held that "nonresident contributions may be individually modest, but can cumulatively overwhelm Alaskans' political contributions."¹⁹⁸ Thus, the Court upheld the restrictions as closely drawn to further the government's compelling interest in "preventing non-resident contributors from drowning out the voices of Alaska residents."¹⁹⁹

193. *Id.* § 15.13.072(a)(3) (prohibiting contributions 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").

194. *Id.* § 15.13.072(f) ("A group or political party may solicit or accept contributions from an individual who is not a resident of the state at the time the contribution is made, but the amounts accepted from individuals who are not residents may not exceed 10 percent of total contributions made to the group or political party during the calendar or group year in which the contributions are received."); *see also* § 15.13.072(h) (applying same restriction to "nongroup entities").

195. *See State v. Alaska Civil Liberties Union*, 978 P.2d 597, 616 (Alaska 1999) ("[W]e think *VanNatta* is distinguishable on its facts. Oregon's out-of-district restrictions applied to both nonresidents and residents of Oregon. But Alaska's challenged provisions apply only to nonresidents of Alaska, and do not limit speech of those most likely to be directly affected by the outcome of a campaign for state office — Alaska residents regardless of what district they live in.").

196. *See id.*

197. *See id.* ("[Alaska's restrictions] are aimed not at very large individual contributions, by which a single contributor can influence a candidate, but at cumulatively vast out-of-state contributions. *Austin* recognized this sort of corrupting influence.").

198. *Id.* at 617.

199. *Id.* at 617.

4. Vermont

In 1997, Vermont adopted a similar measure, prohibiting candidates from accepting more than 25% of their contributions from donors residing outside of Vermont.²⁰⁰ Several Vermont politicians sued. Vermont, looking to the Alaska Supreme Court's opinion in *Alaska Civil Liberties Union*, argued that it had an interest in "limiting cumulatively vast out-of-state contributions" that would contribute to corruption or the appearance of corruption.²⁰¹

The Second Circuit rejected Vermont's interest, explaining that Vermont had provided "only vague references to the danger of out-of-state contributions, and all refer to the danger of excessively large (not cumulatively great) contributions."²⁰² Furthermore, the Second Circuit held that the statute was not closely drawn because it "prohibits small contributions from out-of-state sources once the 25 percent threshold has been reached, even though such contributions are no more likely to corrupt than in-state contributions."²⁰³ Finally, the court appeared to accept the District Court's suggestion that non-residents have a right to speak in Vermont elections because they are affected by Vermont politics.²⁰⁴ The court then disagreed with the Alaska Supreme Court's analysis in *Alaska Civil Liberties Union*, explaining that "the government does not have a permissible interest in disproportionately curtailing the voices of some, while giving others free rein, because it questions the value of what they have to say."²⁰⁵ In the end, the court invalidated Vermont's restrictions on out-of-state spending.

200. VT. STAT. ANN. tit. 17, § 2805(c) (2012) ("A candidate, political party or political committee shall not accept, in any two-year general election cycle, more than 25 percent 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.").

201. Brief of Marcela Landell at 66–81, *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2002) (No. 00-9159(L)), 2000 WL 33994515, at *66.

202. *Landell v. Sorrell*, 382 F.3d 91, 147 (2d Cir. 2004) *rev'd on other grounds and remanded sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006).

203. *Id.*

204. *See id.* at 146–47 (referencing portion of district court opinion that states, "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 v. Sorrell*, 188 F. Supp.2d 459, 484 (D. Vt. 2000), and rejecting "alternative claim" that Vermont may prohibit out-of-state contributions after the 25 percent threshold is met).

205. *Id.* at 148.

B. THE SUPREME COURT'S CAMPAIGN FINANCE JURISPRUDENCE
CASTS DOUBT ON THE CONSTITUTIONALITY OF RESTRICTING
OUT-OF-STATE SPENDING

Although the lower courts have not been uniform, states seeking to limit out-of-state spending face a Supreme Court that has grown increasingly skeptical of campaign finance regulation. The Court's perspective has been shaped by its determination that the primary value of political speech is in informing voters rather than permitting speakers to participate in elections. This focus on the value of speech rather than the rights of speakers has paved the way for a significant broadening of the First Amendment and, consequently, a narrowing of permissible campaign finance regulation.

Since the first major campaign finance challenge in *Buckley*, the Supreme Court has recognized that one fundamental purpose of the First Amendment is to foster political debate and to ensure that voters have unfettered access to multiple viewpoints.²⁰⁶ Another purpose is to protect citizens' "right to participate in democracy through political contributions."²⁰⁷ Over the past forty years, the first purpose — protecting speech because of its value to those who hear it — has played a central role the Court's campaign finance cases, while the second purpose's role has been largely diminished.

Two years after *Buckley*, the Court suggested that the primary focus of the First Amendment is speech and the identity of the speaker is irrelevant. Specifically, in considering whether corporate speech is protected by the First Amendment, the Court explained that "[t]he proper question therefore is not whether corporations 'have' First Amendment rights. . . . Instead, the question must be whether [the statute] abridges expression that the

206. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (recognizing "the unfettered interchange of ideas," "free discussion of governmental affairs," and "the ability of the citizenry to make informed choices among candidates" as three purposes of the First Amendment); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 8 (1986) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." (quoting *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978))).

207. *McCutcheon v. Fed. Election Comm'n*, 134 S.Ct. 1434, 1441 (2014).

First Amendment was meant to protect.”²⁰⁸ The Court went on to strike down restrictions on corporate political speech because “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”²⁰⁹

Even when directly confronted with restrictions expressly based on speaker identity, the Court has recast its analysis in terms of society’s loss of information rather than an infringement on the speaker’s individual rights. For example, in *Citizens United*, the Court held that restrictions based on speaker identity are subject to strict scrutiny because “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”²¹⁰ Indeed, the Ninth Circuit Court of Appeals interpreted the Court’s recent cases as holding that government may restrict speech based on the identity of the speaker, so long as the restriction is content-neutral.²¹¹ The Supreme Court reversed the Ninth Circuit, but nevertheless recast speaker-based restrictions as content-based restrictions in its analysis. The Court explained that “the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral.”²¹² Thus, while the Supreme Court has acknowledged that protecting speakers is still one purpose of the First Amendment, it is not clear what role — if any — the identity of the speaker should play in contemporary First Amendment analysis.²¹³ The focus in recent cases has been almost exclusively on the value of speech to society as a whole.

208. *Bellotti*, 435 U.S. at 776.

209. *Id.* at 777.

210. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010).

211. *See Reed v. Town of Gilbert, Ariz.*, 707 F.3d 1057, 1069 (9th Cir. 2013) (reaffirming “distinctions based on the speaker or the event are permissible where there is no discrimination among similar events or speakers”); *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1076–77 (9th Cir. 2006) (holding sign ordinance that exempted some speakers from its requirements but not others was permissible because the speaker-based discrimination was not based on a government preference for or aversion to the content of the signs).

212. *Reed*, 135 S.Ct. at 2230–31 (“In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral.”).

213. *See, e.g., Citizens United*, 558 U.S. at 340–41 (“Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”).

This speech-based rather than speaker-based focus has led to a broadening of First Amendment rights in the political context. Thus, corporations, which have no right to participate in elections, still retain robust political speech rights.²¹⁴ As Justice Kennedy explained in *Citizens United*, “it is our law and our tradition that more speech, not less, is the governing rule.”²¹⁵ This logic — that valuable speech is protected regardless of its source — suggests that future attempts to prohibit nonresidents from spending in state and local elections would likely be struck down as violating the First Amendment.

C. DOES *BLUMAN v. FEC* SIGNAL A RETREAT IN THE SUPREME COURT’S CAMPAIGN FINANCE JURISPRUDENCE?

The Supreme Court was confronted with a case testing the outer bounds of its speech-focused logic in *Bluman v. Federal Election Commission*.²¹⁶ In *Bluman*, two foreign citizens temporarily residing in the United States pursuant to work visas challenged a federal statute prohibiting foreign nationals from spending in American elections.²¹⁷ Bluman sought to contribute to candidates supporting net neutrality, environmental protection, and same-sex marriage,²¹⁸ and also sought to print and distribute flyers in support of President Obama’s reelection campaign, which would be an independent expenditure. Bluman’s co-plaintiff had similar intentions with respect to candidates who would support “economic liberty” and would prevent government from taking over the American healthcare system.²¹⁹ The plaintiffs argued that since the First Amendment applies to “foreign nationals lawfully residing and working in the United States,” they should be permitted to spend in American elections.²²⁰

214. See *Citizens United* at 342 (collecting twenty-three Supreme Court cases recognizing First Amendment rights for corporations).

215. *Id.* at 361.

216. *Bluman v. Fed. Election Comm’n*, 132 S.Ct. 1087 (2012).

217. See *id.*; see also 52 U.S.C. § 30121.

218. Complaint at ¶¶ 12–14, *Bluman v. Fed. Election Comm’n*, 800 F. Supp.2d 281 (D.D.C. 2011) (No. 110-cv-01766), 2010 WL 4236439, at *4.

219. *Id.* at ¶¶ 16–19.

220. *Id.* at ¶ 3 (“Plaintiffs lawfully reside and work in the United States and are protected by the First Amendment to the United States Constitution. . . . § 441e and its implementing regulations are unconstitutional as applied to foreign nationals lawfully residing and working in the United States . . .”).

A three judge panel of the United States District Court for the District of Columbia upheld the statute, with Judge Kavanaugh from the United States Court of Appeals for the District of Columbia writing the opinion. The court decided that the foreign spending ban was narrowly tailored to serve a compelling government interest in “limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.”²²¹ On appeal, the Supreme Court summarily affirmed the district court’s judgment without commenting on the opinion.²²² This decision suggests a limit to the Court’s focus on the value of speech rather than the identity of the speaker. The government never argued that what foreign citizens have to say is less valuable than speech by American citizens. Instead, the government’s objection was based solely on the fact that the plaintiffs were not United States citizens.²²³ Thus, a further examination of the district court’s reasoning is warranted.

The court arrived at a compelling government interest by looking to the political function exception to the Equal Protection Clause.²²⁴ Although the Equal Protection Clause typically prohibits government from discriminating based on alienage, the political function exception permits states to “exclude foreign citizens from activities ‘intimately related to the process of democratic self-government.’”²²⁵ “The rationale behind the political-function exception is that within broad boundaries a State may establish its own form of government and limit the right to govern to those who are full-fledged members of the political community.”²²⁶ Furthermore, limiting political functions to those within the relevant political community ensures that citizens are not governed by those with “divided loyalty,” which “might impair

221. *Bluman*, 800 F. Supp.2d 281, 288 (D.D.C. 2011), *aff’d*, 132 S.Ct. 1087 (2012).

222. *Bluman*, 132 S.Ct. 1087.

223. *See* Mot. Dismiss or Aff., *Bluman v. Fed. Election Comm’n*, 123 S.Ct. 1087 (2012) (No. 11-275), 2011 WL 5548718, at *15 (“Government can thus exclude noncitizens from the activities of self-government not because they are a ‘politically disfavored’ minority, but because noncitizens’ temporary admission gives them no right to participate in American electoral processes.” (citation omitted)).

224. *Bluman*, 800 F. Supp.2d at 287.

225. *Id.* (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)).

226. *Bernal v. Fainter*, 467 U.S. 216, 221 (1984).

the exercise of [their] judgment or jeopardize public confidence in [their] objectivity.”²²⁷

Prior to *Bluman*, the Supreme Court had interpreted the right of democratic self-government to encompass core political functions such as voting and holding elected office, and also any government functions that involve “discretionary decisionmaking, or execution of policy, which substantially affects members of the political community.”²²⁸ Accordingly, the Supreme Court had recognized serving as a police officer, parole officer, juror, or public school teacher as political functions from which nonmembers could be excluded.²²⁹ Although these positions do not involve policymaking, they do involve a substantial amount of discretion, which means that individuals in these positions have the ability to “govern” within the domain of their discretion. For example, when a police officer decides to stop and question a citizen, that police officer is “governing” by using his discretion to exercise the power of the State over another citizen.

The *Bluman* court expanded this category when it determined that “[p]olitical contributions and express-advocacy expenditures . . . are part of the overall process of self-government . . . [and] government may bar foreign citizens . . . from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections.”²³⁰ *Bluman* reads the government interest in democratic self-government more broadly than the Supreme Court has in the past. While the previously recognized activities involve individuals making policy decisions or actually exercising the power of the State on others, much of the Court’s jurisprudence regards voters as policymakers and political spenders seeking to influence voters as one step removed from directly determining government policy.²³¹ Nevertheless, *Bluman*

227. *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973) (internal quotation marks omitted).

228. *Foley v. Connelie*, 435 U.S. 291, 296 (1978).

229. *See Bluman*, 800 F. Supp.2d at 287 (citing *Foley v. Connelie*, 435 U.S. 291 (1978) (police officers); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (parole officers); *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974), *aff’d* 426 U.S. 913 (1976) (jurors); and *Ambach v. Norwick*, 441 U.S. 68 (1979) (public school teachers)).

230. *Id.* at 288.

231. *See, e.g., Bellotti* at 790–92 (“To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.”).

appears to ignore this distinction when the court recognizes attempting to influence policymakers as a third category of democratic self-government from which outsiders may be excluded.

D. *BLUMAN*'S REACH REMAINS UNCERTAIN

The logic of *Bluman* suggests that an interest in democratic self-government may justify preventing citizens of other states from spending in state and local elections. America is made up of several concentric political communities. Each citizen is a member of the national political community, but also of state and local political communities. The political function exception has applied equally to all levels of government in the past²³² and it is not clear why the concerns about self-government would not apply equally to states and localities here. The *Bluman* court's inclusion of contributions and independent expenditures as "part of the overall process of democratic self-government"²³³ suggests that states should be allowed to prohibit nonresidents from spending in their elections. In fact, there is some language in the opinion suggesting as much.²³⁴ At the same time, *Bluman* involved foreign citizens seeking to spend in American elections and the court took pains to emphasize that the relevant political community was the United States as a whole.²³⁵

Some observers believe *Bluman* cannot be reconciled with the Court's prior emphasis on the value of speech rather than the identity of speakers.²³⁶ Ultimately, whether the Court will rely

232. See, e.g., *supra* note 229 (collecting cases applying political function exception at state and local level).

233. *Bluman*, 800 F. Supp.2d at 288.

234. See, e.g., *id.* at 283 ("The Supreme Court has long held that the government (federal, state, and local) may exclude foreign citizens from activities that are part of democratic self-government in the United States." (emphasis added)); *id.* at 288 ("Political contributions and express-advocacy expenditures are an integral aspect of the process by which Americans elect officials to federal, state, and local government offices." (emphasis added)).

235. See *id.* at 290 ("The statute does not serve a compelling interest in limiting the participation of non-voters in the activities of democratic self-government; it serves the compelling interest of limiting the participation of non-Americans in the activities of democratic self-government." (emphasis in original)); *id.* ("The compelling interest that justified Congress in restraining foreign nationals' participation in American elections [is] namely, preventing foreign influence over the U.S. government . . .").

236. See e.g., Rick Hasen, *Breaking News: Supreme Court Affirms that First Amendment Not Violated by Barring Foreign Individuals from Spending Money (or Contributing) in U.S. Elections*, ELECTION L. BLOG (Jan. 9, 2012, 7:38 AM), <https://electionlawblog.org/>

on *Bluman* to uphold restrictions on out-of-state spenders will likely come down to the judgment of Justice Scalia's successor on the Court. Justice Scalia was staunchly opposed to restrictions on political speech, and the loss of his voice leaves the remaining Justices deadlocked 4–4.²³⁷ Given contribution limits' mixed track record in the lower courts and uncertainty about the Supreme Court's approach, scholars and policymakers have begun searching for other means to protect states and localities from the influence of nonresidents.²³⁸

V. ENHANCED DISCLOSURE WILL INFORM VOTERS ABOUT OUT-OF-STATE INTERESTS SPENDING IN THEIR ELECTIONS

States that are concerned about the influence of out-of-state money should adopt enhanced disclosure requirements for out-of-state spenders. In Section A, this Part discusses the benefits of disclosure for voters. Section B recommends several features for an effective enhanced disclosure regime. Then Section C and D explain, in turn, why regulations targeted toward out-of-state spenders are desirable and likely constitutional.

A. DISCLOSURE INFORMS VOTERS

With multiple candidates having distinct positions on a variety of issues, even the most assiduous voter is unlikely to spend the time to obtain perfect information about each candidate. Instead, voters rely on informational shortcuts such as party affiliation or endorsements in order to assess candidates.²³⁹ Contributor information is one such shortcut.²⁴⁰ As the Supreme Court

²³⁷ <https://perma.cc/D6ZP-4W7N> (arguing the only way for *Bluman* and previous First Amendment cases to be reconciled is through “doctrinal incoherence.”).

²³⁸ See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *McCutcheon v. Fed. Election Comm'n*, 134 S.Ct. 1434 (2014).

²³⁹ See, e.g., Briffault, *supra* note 114, at 63–68 (suggesting a public financing system conditioning receipt of public funds on a threshold number of in-state contributions would survive constitutional scrutiny).

²⁴⁰ See Lloyd Hitoshi Mayer, *Disclosure About Disclosure*, 44 IND. L. REV. 255, 262–63 (2010) (discussing voter use of “heuristic cues” to assess candidate qualifications).

²⁴¹ See Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 299 (2010) (“Campaign contribution and expenditure reports are more useful in enabling the voters to learn which individuals, organizations, or groups support or oppose a candidate or ballot proposition, thereby giving the voter a better sense of what more politically sophisticated actors believe to be at issue in the election and of what are the likely consequences of electing or defeating a certain candidate or approving or rejecting a proposal.”).

noted in *Buckley*, “[t]he sources of a candidate’s financial support . . . alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions about future performance in office.”²⁴¹ For instance, voters could interpret a large contribution from a well-known organization such as the National Rifle Association or Mothers Against Drunk Driving as a signal about the policies a candidate will support in office. In a 2015 Associated Press poll, 82% of voters stated that they believe campaign contributions influence elected officials’ decisions, with 59% of voters believing that they affect such decisions “a lot.”²⁴² Furthermore, in a New York Times/CBS poll, 85% of voters stated that they believe that candidates who win public office promote policies that help their campaign donors.²⁴³

These informational shortcuts are even more important in the context of state ballot initiatives, where many of the other signals associated with candidate elections are absent.²⁴⁴ Unlike candidates, state ballot initiatives are not affiliated with a political party and cannot be interviewed by the media.²⁴⁵ Ballot measures are often dense, technical, and full of “legalese” that is not readily accessible to the ordinary voter.²⁴⁶ In fact, David

241. *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976).

242. See ASSOCIATED PRESS: NORC CTR. FOR PUB. AFFAIRS RESEARCH, *supra* note 30, at 7–8.

243. N.Y. TIMES/CBS NEWS, MAY 2015 POLL 11 (May 28–31, 2015), available at <https://assets.documentcloud.org/documents/2091162/poll-may-28-31.pdf> [<https://perma.cc/363U-KV4P>] (In response to the question, “How often do you think candidates who win public office promote policies that directly help the people and groups who donated money to their campaigns — most of the time, sometimes, rarely or never?” 55% of those surveyed responded, “most of the time,” while 30% of those surveyed responded, “sometimes.”).

244. See Mayer, *supra* note 239, at 265 (“Studies that have shown the greatest positive effect from contributor or other supporter information has been in the context of ballot initiatives, where party affiliation and other candidate-related heuristic cues are often lacking.”).

245. See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 297 (2005) (“The environment of direct democracy, however, lacks one of the most powerful voting cues in candidate elections: party affiliation, a cue that appears on most general election ballots next to candidate names.”).

246. For example, in 2015, Washington State voters considered Initiative 1366, which involved complex legal and fiscal considerations resulting from earlier political squabbles. In short, the Initiative required a cut to the state sales tax rate from 6.5% to 5.5% unless the Washington State legislature sponsored a referendum that would allow the voters to consider an amendment to the state constitution which would require a supermajority in the legislature to approve every tax increase. See *Initiative Measure No. 1366*, WASH. SEC’Y OF STATE, 2015 WASH. VOTERS’ PAMPHLET 8, available at https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2015/General-Election/Documents/

Binder, a pollster and expert witness in *California Pro-Life Council v. Getman*, has explained that in his ten years of experience overseeing several hundred focus groups, “voters frequently state that they have difficulty understanding complicated ballot questions.”²⁴⁷ The Ninth Circuit has also recognized voters’ struggles to understand ballot measures: “[k]nowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown.”²⁴⁸ At the same time, ballot measures have a more direct and immediate impact on citizens than candidate elections, because ballot measures are enacted into law once they are passed, without the legislature serving as an intermediary.²⁴⁹

While a comprehensive analysis of voting behavior is outside the scope of this Note, there is at least some evidence that voters are less likely to support a ballot proposition based solely on the fact that most of the funding for the measure comes from out of state. The Ninth Circuit approvingly cited one study where a sample of California voters were asked to “vote” on a California ballot measure, which would affect fundraising for labor unions.²⁵⁰ After the initial tally, the voters were informed that more than 60% of the funds used to put the proposition on the ballot came from outside of California, but voters were not informed of

Editions/-ED05-low%20res.pdf [https://perma.cc/S5UL-W2S5]. Accompanying the initiative were statements against the initiative arguing, among other things, that the statute was unconstitutional under the state supreme court’s decision striking down a previous initiative, where the court held that constitutional amendments must be proposed by the legislature. *Id.* The average voter is unlikely to be equipped to fully understand each of the various fiscal and legal issues raised by this initiative.

247. Affidavit of David Binder at ¶ 9, *Cal. Pro-Life Council v. Getman*, No. S-00-1698 (E.D. Cal. Sept. 30, 2008), 2004 WL 3770230, at *3.

248. *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003).

249. See generally *Initiative, Referendum and Recall*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 20, 2012), <http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx> [https://perma.cc/C2HE-GF2P] (describing the three types of ballot measures: initiatives, referenda, and recall votes).

250. *Cal. Pro-Life Council, Inc.*, 328 F.3d 1088, 1106 n.25 (“[A]fter a sample of California voters was informed that more than 60% of the funds used to place Proposition 226 on the 1998 ballot came from out-of-state interests, support for the ballot measure waned significantly. (In this pre-election focus group, voters were asked to ‘vote’ on Proposition 226 after reading the ballot title and a summary of the measure. Then voters were informed about the out-of-state interests backing the initiative and asked to revote. The number of ‘undecided’ votes diminished and many previous supporters of the proposition now voted against the measure. The total ‘swing’ in votes equaled 15 to 20 percentage points.)”).

the identities of the out-of-state donors.²⁵¹ Even so, support for the measure dropped by 15–20%.²⁵²

B. SUGGESTED DESIGN OF DISCLOSURE REQUIREMENTS

While the precise details of an effective disclosure regime are best left to each individual state, this Section offers four suggestions for states seeking to inform voters about out-of-state money flowing into their elections. First, states should impose the same disclosure requirements on out-of-state spenders who make independent expenditures as they do on out-of-state contributors. Second, states should “pierce the veil” by requiring disclosure of multiple levels of groups until the initial source of funds is revealed. Third, states should focus on aggregate disclosure, which is more helpful to voters than details about individual donors. Finally, states should require donor disclosure on advertisements themselves, in addition to in campaign finance reports on the Secretary of State’s website. For example, instead of “Paid for by Californians Against Out-of-Control Taxes and Spending” at the bottom of an advertisement, the advertisement would read “Paid for by Californians Against Out-of-Control Taxes and Spending, which receives 97% of its funding from outside of California.”

1. *Aggregate Disclosure*

The first measure states should adopt is to require aggregate disclosure for out-of-state donors. In other words, states should require candidates and ballot measure committees to disclose to the public what percentage of their funding comes from out of state. While voters strongly support disclosure, more disclosure is not always better. First, too much disclosure may actually impede the electorate’s ability to identify important information, because too much campaign finance information may “drown out” the most useful information.²⁵³ Since voters are unlikely to be familiar with the vast majority of people listed in campaign finance reports, there is no significant benefit to reporting their

251. *See id.*

252. *See id.*

253. Briffault, *supra* note 240, at 276 (2010) (“[M]ore encompassing and stringent disclosure laws could, paradoxically, undermine . . . disclosure’s . . . voter education value. . . . Voters are unlikely to be able to process ever-increasing amounts of campaign finance information . . .”).

names and addresses, and there may also be a cost to political privacy.²⁵⁴ As Professor Briffault explained, increased disclosure may deter small donors from participating in elections.²⁵⁵ Since individual donor names are unlikely to be helpful, particularly from out-of-state donors, state disclosure requirements should focus on characteristics of donors with which voters are likely to be familiar. For example, voters may find it more useful to know the city and state the donor is from, the donor's profession, the donor's employer, and the donor's job title. Voters might be interested to know that 85% of a ballot initiative's support comes from residents of New York City who work in the financial services industry, but they may be less likely to pore over hundreds of campaign finance reports to aggregate that data themselves.

2. *Piercing the Veil*

Next, states should require disclosure for multiple levels of donations so that voters can identify the origin of election funds. Organizations that spend in campaigns often adopt opaque or misleading names to obscure the source of their funding.²⁵⁶ One common technique is for out-of-state funders to create organizations with local names. For example, a group called "Alaska's Future" claims to be "a diverse group of Alaskan individuals and organizations" endorsing bipartisan policies to ensure "a stable economic foundation for Alaska,"²⁵⁷ even though the group was established by three large oil companies: ExxonMobil, BP, and ConocoPhillips.²⁵⁸ Another group, America's Wetland Foundation, describes itself as a "balanced forum for problem solving"

254. *Id.* at 299 ("Few people, other than their relatives, friends, neighbors, and coworkers, will know who these donors are . . .").

255. *See id.* at 290–95.

256. *See* Mayer, *supra* note 239, at 269–70 ("While some organizations that pay for political communications are well-known to voters, others are 'front' organizations given innocuous-sounding or otherwise misleading names that hide the true motivations and views of those who created and them."); Garrett & Smith, *supra* note 244, at 300 ("[S]ome groups active in campaigns seek to disguise themselves using misleading or meaningless names . . ."); Briffault, *supra* note 240, at 298 ("[M]any organizations assum[e] names often suggestive of an interest or ideology quite different from that of their principal backers . . . or simply sounding patriotic or populist themes . . .").

257. *About Us*, ALASKA'S FUTURE, <http://www.akfuture.org/about-us/> [<https://perma.cc/THN5-25W5>] (last visited Oct. 30, 2016).

258. Matt Volz, *Official: Tax-exempt group started as a front for oil giants*, JUNEAEUROMPIRE.COM (Oct. 11, 2006), http://juneauempire.com/stories/101106/sta_20061011012.shtml [<https://perma.cc/36V5-584G>].

and a “neutral arbiter” regarding environmental policy affecting the Gulf Coast.²⁵⁹ The organization’s top funders, Shell, Chevron, Citgo, ConocoPhillips, and ExxonMobil, are also oil companies.²⁶⁰ Permitting these groups to use only their organization names to identify themselves publicly is not helpful to voters. Instead, state disclosure laws should “pierce the veil” and require groups to disclose their funders. This will accurately inform the public of the interests supporting or opposing the messages they encounter. As the Ninth Circuit has recognized, “[d]isclosure . . . prevents the wolf from masquerading in sheep’s clothing.”²⁶¹

Voters’ difficulty in identifying political donors is compounded when these opaquely named organizations engage in a practice this Note refers to as “political money laundering.” Money launderers attempt to obscure the origin of illegally obtained funds by passing them through multiple accounts. Political donors who wish to obscure their identities engage in the same practice, transferring funds through various non-profit organizations, PACs, and corporations. For example, in 2012, as Idahoans were considering three education-related ballot measures,²⁶² a group called Parents for Education Reform spent over \$600,000 on advertisements in support of the measures.²⁶³ It turns out the group was not funded by local Idaho parents but rather received 77% of its funding from another group, Education Voters of Idaho.²⁶⁴ Education Voters of Idaho refused to disclose its donors and when sued by Idaho’s Secretary of State, the organization

259. *About Us*, AM.’S WETLAND FOUND., <http://www.americaswetland.com/custompage.cfm?pageid=241> [https://perma.cc/V59C-LYGT] (last visited Oct. 30, 2016).

260. *Sponsors*, AM.’S WETLAND FOUND., <http://www.americaswetland.com/custompage.cfm?pageid=252> [https://perma.cc/8RKJ-MECQ] (last visited Oct. 30, 2016).

261. *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 n.23 (9th Cir. 2003).

262. Adam Cotterell & Emilie Ritter Saunders, *Props 1, 2, and 3: A Voter Guide to Idaho’s Controversial Education Laws*, BOISE STATE PUB. RADIO (Oct. 19, 2012), <http://boisestatepublicradio.org/post/props-1-2-and-3-voter-guide-idahos-controversial-education-laws?nopop=1> [https://perma.cc/G95F-PL55] (noting Propositions 1 and 2 made it easier to fire teachers, and Proposition 3 expanded technology in the classroom, including requiring two semesters of online courses for high school students).

263. *See Contributions to Parents for Education Reform*, NAT’L INST. ON MONEY IN STATE POLITICS: FOLLOW THE MONEY, [http://www.followthemoney.org/show-me?fc-core=1&m-t-eid=17440193#\[{1|gro=d-eid](http://www.followthemoney.org/show-me?fc-core=1&m-t-eid=17440193#[{1|gro=d-eid) [https://perma.cc/N79D-5XSB] (last visited Sept. 29, 2016); *see also* Betsy Z. Russell, *Judge orders Idaho group to disclose secret donors*, THE SPOKESMAN-REV., <http://www.spokesman.com/stories/2012/oct/29/judge-orders-idaho-group-disclose-secret-donations/> [https://perma.cc/KCN3-ZJ94] (noting Parents for Education Reform used \$200,000 from another group to purchase “TV campaign commercials in favor of three Idaho school reform ballot measures.”).

264. *See id.* (showing \$500,350 of contributions from Education Voters of Idaho, out of \$650,350 of total contributions).

fought desperately to keep its donors secret, even offering to return all of its funds rather than disclose its funders.²⁶⁵ Eventually, under court order, the group revealed that it received 50% of its funding from corporations and wealthy individuals residing outside of Idaho.²⁶⁶ Most notably, former New York City Mayor Michael Bloomberg contributed \$200,000, Wyoming financier Foster Friess added \$25,000, an Oregon chemical company founder added \$10,000, and California-based John J. Fisher, heir to the Gap fortune, contributed \$5000.²⁶⁷ Education Voters of Idaho also received funds from other groups, including the Republican Governors Policy Committee, which gave \$50,000 to the effort.²⁶⁸ In order to fully understand the sources of funding behind Parents for Education Reform, Idaho voters would have to sift through the campaign finance reports for Parents for Education Reform, then for Education Voters of Idaho, then for the Republican Governors Policy Committee, then groups that gave to that group, and so on. Rather than requiring voters to engage in such a time-intensive and laborious process, the burden for compiling donor information should fall on the groups themselves, which already have the information readily available. Piercing through opaque group names to actual donors is essential to enable voters to identify out-of-state interests seeking to affect their elections.

3. *Disclosure at Time of Advertising*

Voters must have access to campaign finance information prior to Election Day if it is to affect their votes. However, as evidenced by SEALs for Truth's \$1.975 million dollar contribution to Eric Greitens just fourteen days before Missouri's gubernatorial primary,²⁶⁹ quarterly disclosure schedules are often too infrequent to be effective. Each state should determine a disclosure

265. See Betsy Z. Russell, *Idaho Sues to Force Disclosure of Secret Donations*, THE SPOKESMAN-REV., <http://www.spokesman.com/stories/2012/oct/22/secret-donations-group-vows-gear-back-idaho-campai/> [https://perma.cc/RV5J-AZDL] ("Last week, attorney Christ Troupis, on behalf of the group, offered to refund the \$200,000-plus in contributions rather than disclose the donors.").

266. See Betsy Z. Russell, *NYC Mayor Big Donor in Idaho Vote*, THE SPOKESMAN-REV., <http://www.spokesman.com/stories/2012/nov/01/nyc-mayor-big-donor-in-idaho-vote/> [https://perma.cc/88U8-U2QA].

267. *Id.*

268. *Id.*

269. See *Contributions to Eric Greitens in 2016 by Donor*, *supra* note 45.

schedule based on its unique circumstances. For example, a state that allows early voting may wish to require more frequent disclosure leading up to an election than a state where voting takes place on only one day. If technologically possible, an online disclosure system that updates instantly would be ideal. Even if instant disclosure is not feasible, states should develop a disclosure timeline that is frequent enough to prevent donors from strategically timing their contributions to avoid disclosure before Election Day. One common technique is to require increasingly short disclosure windows as Election Day approaches.

Next, contributor information is likely most useful to voters “at the crucial moment of choice” when they are evaluating a donor’s message.²⁷⁰ Thus, disclosure included in advertisements themselves is more effective than requiring voters to track down information later. One approach is to require groups to list their top five donors on an advertisement.²⁷¹ However, this approach can be unhelpful because the top five donors may be five other obscure groups. A more effective approach is to require a disclaimer revealing what portion of the advertiser’s funding came from out of state. Instead of “Paid for by Californians Against Out-of-Control Taxes and Spending” at the bottom of an advertisement, the advertisement would read “Paid for by Californians Against Out-of-Control Taxes and Spending, which receives 97% of its funding from outside of California.” This provides voters with information they need to evaluate arguments when they encounter them, rather than requiring voters to recall the organization name and search through the campaign finance reports later. To discourage attempts to evade this requirement, states should require advertisers to disclose the greater of (1) the percentage of their funds from out of state or (2) the percentage of their donors from out of state. Without this requirement, an organization that receives one large donation from out of state may be able to truthfully tell voters that 99% of its donations come from in-state, even if that one donation accounts for a larger portion of the group’s

270. See Garrett & Smith, *supra* note 245, at 297.

271. See, e.g., WASH. REV. CODE § 42.17A.320(2) (2013) (“[A]ll political advertising undertaken as an independent expenditure or an electioneering communication by a person or entity other than a bona fide political party must include as part of the communication . . . the statement: ‘Top Five Contributors’ followed by a listing of the names of the five persons or entities making the largest contributions in excess of seven hundred dollars reportable under this chapter during the twelve-month period before the date of the advertisement or communication . . .”).

funds. This disclaimer requirement should also extend to groups' statements published alongside ballot measures in state voters' guides, group websites, social-media sites, and other outreach efforts.

4. *Treat Independent Expenditures and Contributions Equally*

States should impose the same disclosure requirements on out-of-state spenders who make independent expenditures as they do on out-of-state contributors. If independent expenditures are not subject to the same disclosure requirements as contributions, out-of-state spenders seeking anonymity could conceal their spending by making independent expenditures rather than contributions. Since independent expenditures cannot be restricted,²⁷² such a regime would allow these spenders to pour unlimited funds into other states' elections without disclosing their identities.

5. *Other Operational Issues*

States will have to grapple with several additional operational issues based on their unique circumstances. One problem is that most states do not currently track all out-of-state money flowing into their elections. Since most states do not require campaigns to disclose donors who contribute less than a certain threshold per election cycle,²⁷³ out-of-state donors could shield their contributions by donating in amounts lower than the thresholds. For example, North Dakota does not require campaigns to disclose donors who contribute less than \$200 per election cycle.²⁷⁴ If a candidate were to receive a significant number of donations less than \$200 from out of state, those funds would not be accounted for in the aggregate out-of-state amounts. One possible solution is to require campaigns to report all contributions to the state, regardless of size, but to publicly disclose only the personal information of contributors who exceed the threshold. This would allow states to calculate the total portion of a group's funds from out of state without the negative consequences to political privacy

272. See *supra* Part IV.A.

273. See *State-by-state comparison of campaign finance requirements*, BALLOTPEDIA, https://ballotpedia.org/State-by-state_comparison_of_campaign_finance_requirements#tab=Reporting_requirements [https://perma.cc/BV9H-GHGN] (last visited Nov. 7, 2016).

274. N.D. CENT. CODE § 16.1-08.1-02(2) (2013).

that arise from disclosing the identities of small donors. Another difficulty is determining whether and when campaigns should be required to update their advertisements. If, for example, a campaign runs an advertisement over the course of several months, its percentage of out-of-state donors may vary. Regulators will have to balance accurately informing the public about the influence of out-of-state money against the risk of unduly burdening campaigns.

In sum, states should require groups receiving out-of-state funds to disclose aggregate data about their funding, identify what portion of the groups' funds come from out-of-state, and include this information on the advertisements they create. This is especially important for independent expenditures from out of state, which cannot be limited after *Citizens United*.

C. ENHANCED DISCLOSURE IS LIKELY CONSTITUTIONAL

In contrast to restrictions on political spending, the Supreme Court has consistently endorsed compelled disclosure as a permissible means of campaign finance regulation. In *Buckley*, the Court described disclosure as “a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.”²⁷⁵ Notably, the Court reaffirmed this view in *Citizens United*, even while simultaneously striking down restrictions on campaign spending and dramatically narrowing the justification for future campaign finance regulation.²⁷⁶ Enhanced disclosure is also likely constitutional. There are two government interests that justify enhanced disclosure: (1) the government interest in “democratic self-government” recognized in *Bluman v. Federal Election Commission*²⁷⁷ and (2) the government’s interest in informing voters. Since the government’s interest in democratic self-government was discussed in detail in Part IV.D, this Section focuses on the government’s interest in informing voters.

Disclosure requirements were first challenged in *Buckley*, where the Court identified three government interests “sufficiently important” to justify compelled disclosure. Relevant here, the

275. *Buckley v. Valeo*, 424 U.S. 1, 82 (1976).

276. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 369 (2010) (“[D]isclosure is a less restrictive alternative to more comprehensive regulations of speech.”).

277. *See supra* Part IV.D.

Court held that the government has an interest in providing information to voters for use in evaluating candidates.²⁷⁸ The Court explained that disclosure aids voters in accurately placing candidates along the political spectrum and also allows them to identify the interests to which a candidate may be most responsive if elected.²⁷⁹ Although the *Buckley* Court characterized the informational interest as a single interest, the Court went on to describe two informational interests for voters. The first is an interest in learning more about a candidate based on the political preferences of the candidate's contributors.²⁸⁰ If, for example, the National Rifle Association contributes to a candidate, that contribution signals to voters that the candidate is likely to oppose restrictions on access to firearms. The next informational interest is subtly different. The Court explained that "[t]he sources of a candidate's financial support . . . alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."²⁸¹ This interest does not aid voters in identifying a candidate's existing policy preferences. Instead, the Court suggests that a candidate is likely to be more responsive to the interests of those who contribute. This shift from viewing contributions as providing a signal to voters about a candidate's policy preferences to viewing contributions as affecting the candidate's performance in office is significant when considering state and local elections, where candidates are supposed to represent the interests of state residents, even if they receive donations from out of state.

These dual informational interests have become increasingly prominent since *Buckley*. Later that year, in *Bellotti*, the Court reaffirmed that "people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. . . . Identification of the source of advertising may be required as a means of disclosure, so that the people

278. See *Buckley* at 66–67 (“[D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.” (internal citations and quotation marks omitted)).

279. *Id.*

280. *Id.*

281. *Id.*

will be able to evaluate the arguments to which they are being subjected.”²⁸² And in *Citizens United*, the Court explained that, “the right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”²⁸³ In fact, the informational interest is so strong that the Court has struck down only a handful of disclosure requirements over the past several decades and those arose out of unique circumstances. For example, the Court rejected Alabama’s attempt to require the NAACP to disclose its members in the midst of the civil rights movement because doing so might have “exposed [its] members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”²⁸⁴

VI. CONCLUSION

Increasing out-of-state spending in state and local elections has troubled citizens, scholars, and politicians who fear that voters are losing control of their democracies. Out-of-state spending affects elections of all sizes, ranging from large statewide gubernatorial elections to small school board elections, but the effect of out-of-state money is likely to be particularly acute in the least expensive elections. In response to these concerns, sparsely populated states have enacted campaign finance regulations attempting to limit out-of-state spending in their elections. These regulations have had mixed success in the lower courts and there is considerable doubt that the Supreme Court would approve them. This has left policymakers and scholars looking for alternatives.

As a response, states should adopt enhanced disclosure requirements that focus on out-of-state spenders. These disclosure requirements are likely constitutional because compelled disclosure has been consistently upheld by the Supreme Court over the last fifty years and has been struck down only in extraordinary circumstances. Although disclosure requirements are nominally subject to exacting scrutiny, in practice, the Court has afforded legislatures considerably more deference in enacting disclosure requirements than in restricting election spending.

282. *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 791–92 n.32 (1978).

283. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010).

284. See *supra* note 176 and accompanying text.

Furthermore, stronger disclosure requirements for out-of-state spenders will better inform voters about who is speaking in their elections so that they can evaluate the messages as well as the effects of out-of-state spending on elected officials. States adopting tougher disclosure requirements on out-of-state spenders should require all individuals and groups spending in the state to put a disclaimer on their advertisements disclosing what portion of the advertiser's funding come from out of state. These states should also make aggregate donor characteristics available to the public, with an emphasis on characteristics like occupation, job title, and city and state, which are likely to be most relevant to voters. Finally, these states should make sure to "pierce the veil" of groups that receive donations from other groups to provide voters with information about an organization's true funders. Given that the Supreme Court is unlikely to approve restrictions on election spending flowing in from out of state, enhanced disclosure requirements are an effective and low-cost alternative for states seeking to protect their democracies.