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A Vote Against State Nonresident Contribution Limits

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INTRODUCTION

Bill's home sits high in the mountains of northern Idaho. In the summertime, he likes to watch deer scamper around his backyard while he sips hot coffee and reads the local newspaper. Bill, however, spends more mornings in Alaska than in Idaho. His chain of popular restaurants, Buffalo Bill's, has locations in many Alaskan cities. The success of Bill's business, particularly its "famous" Wild West Buffalo Burger, has allowed the Idahoan to build a restaurant empire throughout Alaska.

Bill pays his fair share in Alaska state taxes, and his restaurants employ hundreds of waiters, bussers, managers, cooks, and dishwashers across the state. To protect and promote his business interests in Alaska, Bill spends more than half of the year traveling throughout the state, strengthening his relationships with the locals and their elected leaders. Because Bill resides in Idaho, however, he cannot vote in any Alaskan elections. He supports his favorite candidates when he can, but his busy schedule limits the amount of time he can devote to campaigning personally for any one candidate. The most effective, efficient, and meaningful way Bill can support candidates is through monetary contributions.

Bill can make campaign contributions to candidates for state office in nearly every state in the nation to the same extent as residents in those states.[1] In Alaska, however, Bill has a problem. Alaska is one of two states that place special limitations on the ability of out-of-state residents to donate money to candidates seeking in-state office.[2] Alaska's law limits Bill's ability to donate in a state where his business creates hundreds of jobs, leads to millions of dollars in state tax revenue, and regularly fills the bellies of Alaskans with thick, juicy burgers. In today's highly mobile society, many Americans just like Bill have significant interests in states other than the ones in which they legally reside. Potential cross-border concerns range from those of parents with children in other states to coastal residents worried about state environmental policies that could

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1. *See State Limits on Contributions to Candidates*, NAT'L CONF. OF STATE LEG., http://www.ncsl.org/Portals/1/documents/legismgt/elect/ContributionLimitstoCandidates2015-2016.pdf (last updated May 2016) (providing a chart comparing laws that limit individual contributions in every state) [https://perma.cc/TT85-RTBC].

2. *See* ALASKA STAT. § 15.13.072 (2017) (capping the amount of contributions candidates may receive from nonresidents—for example, $20,000 for gubernatorial candidates and $5,000 for state senatorial candidates); *see also* HAW. REV. STAT. § 11-362 (2017) (prohibiting Hawaiian candidates from collecting more than 30% of total contributions from nonresidents).

affect their homes. In such high-stakes matters, special limits placed on the rights of Americans to associate with candidates in other states create troubling First Amendment concerns.[3]

The First Amendment prohibits governments from "abridging the freedom of speech."[4] Though originally applicable only to Congress,[5] the First Amendment has long been held to apply to state and municipal governments through the application of the Fourteenth Amendment's Due Process Clause.[6] In addition, the term "speech" within the First Amendment has been interpreted to include a wide variety of other activities, such as rights of political expression and association.[7] Making campaign contributions involves the exercise of both rights.[8] Courts are split on whether state nonresident political contribution limits violate the First Amendment, which

3. This Comment focuses on how such limits interfere with First Amendment rights. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."). It is entirely possible—and perhaps even likely—that such laws also infringe upon other constitutional provisions such as the Privileges and Immunities Clause, the Dormant Commerce Clause, and the Equal Protection Clause. *See* Mitchell L. Pearl & Mark Lopez, *Against Act 64: Preserving Political Freedom for the Candidate and the Citizen, Brief for the Appellants in* Landell v. Sorrell, 27 VT. L. REV. 721 (2003) (discussing how Vermont's law limiting nonresident contributions in state elections likely violates all three constitutional provisions). One intriguing question is whether the multiple constitutional protections *combined* could invalidate laws limiting nonresident contributions, even if no single constitutional protection clearly prohibits such laws. *See* Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067 (2016) (showing the history of the Supreme Court's willingness to entertain such arguments).

4. U.S. CONST. amend. I.

5. This was true for the entire Bill of Rights, the first ten amendments to the United States Constitution. *See* U.S. CONST. amends. I–X.

6. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without the due process of law . . . ."); *see also* Gitlow v. New York, 268 U.S. 652, 666 (1925) (extending application of the First Amendment to the state governments); McDonald v. City of Chicago, 561 U.S. 742, 761 (2010) (citing *Gitlow* for the proposition that the First Amendment falls within the Bill of Rights protections incorporated by the Due Process Clause).

7. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1448 (2014) (citing Buckley v. Valeo, 424 U.S. 1, 15 (1976)).

8. *Id.* ("When an individual contributes money to a candidate, he exercises both of those rights: The contribution 'serves as a general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate.'" (quoting *Buckley*, 424 U.S. at 21–22)).

has created a hole in First Amendment campaign finance jurisprudence.[9] To fill this gap in the law, provide clear guidance for legislators, and protect the political association rights of nonresidents, the United States Supreme Court should, at its next opportunity, invalidate state nonresident contribution limits. Recent Court rulings dictate the direction it should take.[10] Nonresidents without voting power should possess the ability to donate to political campaigns to the same extent as residents as a means of protecting legitimate interests. No one would seriously contest Bill's right to campaign voluntarily on behalf of a candidate for governor in Alaska by, for example, knocking on doors or passing out flyers. But because such activity is impractical for people like Bill, nonresident contribution limits effectively restrict their ability to participate in state elections in which they have legitimate interests.

Part I of this Comment introduces federal campaign finance regulation before summarizing *Buckley v. Valeo*,[11] the root from which all subsequent campaign finance jurisprudence sprouted. Next, Part II presents a holistic overview of state nonresident contribution limits caselaw and then inspects recent Supreme Court decisions that altered the campaign finance jurisprudential landscape within the context of the First Amendment. In Part III, this Comment analyzes the constitutionality of nonresident contribution limits, weaving in policy reasons supporting the invalidation of such laws. Finally, Part IV examines the extent to which states should have the power to restrict *any* political activity to their own residents without violating the First Amendment.

I. TRACING THE HISTORY OF FEDERAL CAMPAIGN FINANCE LAW

Federal lawmakers began policing money's role in politics more than a century ago.[12] Since then, many ambitious politicians have introduced

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9. *Compare* State v. Alaska Civil Liberties Union, 978 P.2d 597, 617 (Alaska 1999) (upholding Alaska nonresident contribution limits), *with* VanNatta v. Keisling, 151 F.3d 1215, 1216 (9th Cir. 1998) (invalidating Oregon nonresident contribution limits); Landell v. Sorrell, 382 F.3d 91, 146 (2d Cir. 2004) (invalidating Vermont nonresident contribution limits), *rev'd in part sub nom*. Randall v. Sorrell, 548 U.S. 230 (2006) (reversing the Second Circuit on other grounds).

10. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (expanding, in general, the First Amendment's protection of political association rights); *McCutcheon*, 134 S. Ct. 1434 (creating an especially high First Amendment hurdle for contribution limits in general).

11. *Buckley*, 424 U.S. 1.

12. R. SAM GARRETT, CONG. RESEARCH SERV., R41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 1

legislative proposals seeking to restrict the potentially corrupting influence of money in elections.[13] But the suggestions have rarely resulted in major legislative change.[14] The methods of regulation have remained remarkably consistent: restricting potential funding sources, requiring the disclosure of permissible funding sources, and limiting campaign contributions.[15] The efforts, however, have proven mostly ineffective.[16]

A. The Federal Election Campaign Act

Understanding modern campaign finance reform requires an introduction to the Federal Election Campaign Act of 1971 ("FECA").[17] Though the initial Act focused mostly on disclosure requirements and hardly resembled the law's present form,[18] the Act and its subsequent amendments still serve as the federal government's central campaign finance legislation.[19] In 1974, prompted in part by the Watergate scandal,[20] Congress passed the first of

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(2016), https://www.fas.org/sgp/crs/misc/R41542.pdf (providing the history of federal involvement in campaign finance beginning with the 1907 Tillman Act, which prohibited federal contributions from nationally chartered banks and corporations) [https://perma.cc/JX2P-6FYB].

13. *Id.* at 2.

14. *Id.*

15. *Id.* at 1.

16. *See* Michael A. Nemeroff, *The Limited Role of Campaign Finance Laws in Reducing Corruption by Elected Public Officials*, 49 HOW. L.J. 687, 695 (2006) ("Campaign finance laws do not appear to have much impact on the public's perception of corruption of the political process. Similarly, these laws also appear to have little impact on election outcomes.").

17. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 52 U.S.C. §§ 30101–30145 (2012)).

18. *See id.*; *see also* GARRETT, *supra* note 12, at 3.

19. *See* GARRETT, *supra* note 12, at 3 (explaining that FECA "remains the foundation of the nation's campaign finance law").

20. *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1055 (1996) (explaining how public response to the Watergate scandal led Congress to pass the 1974 FECA amendments, "the toughest and most thorough federal campaign-regulation measures ever passed"). The Watergate scandal refers to former President Richard Nixon's involvement in a massive scheme of promised political favors and spying funded in part by a secret campaign slush fund. *See generally* Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aids Sabotaged Democrats*, WASH. POST (Oct. 10, 1972), https://www.washingtonpost.com/politics/fbi-finds-nixon-aides-sabotaged-democrats/2012/06/06/gJQAoHIJJV_story.html [https://perma.cc /7R4W-F2LU].

several amendments to FECA.[21] Changes included new provisions limiting the amount of money that individuals,[22] corporations,[23] and political committees[24] could give directly to candidates for federal office—referred to generally as *contribution* limits.[25] The new provisions also placed limits on the amount of money individuals and other groups could spend advocating for a particular candidate—referred to generally as *expenditure* limits.[26] In sum, a contribution involves *giving* money *to* a candidate. An expenditure involves *spending* money *on behalf of* a candidate.

The early FECA amendments distinguished expenditures made in coordination with a particular candidate from so-called "independent expenditures."[27] Independent expenditures involve spending that expressly endorses or rejects a particular candidate without the involvement of candidates or their campaigns in the production of such messages.[28] Candidates and their campaign teams have considerable freedom to spend

21. *See* GARRETT, *supra* note 12, at 3 (explaining how FECA was first enacted in 1971 and "substantially amended" in 1974, 1976, and 1979).

22. *See* 52 U.S.C. § 30116(a) (2012) (placing certain limits on the amount of money individuals may contribute to candidates for federal office).

23. *See id.* § 30118 (prohibiting corporations and unions from directly contributing to federal election campaigns).

24. *See* § 30116(a)(2) (limiting the amount of money political committees may contribute to federal candidates and other political committees); *see also id.* § 30101(4) (providing a statutory definition for "political committee").

25. *See* Erwin Chemerinsky, *Symposium: The distinction between contribution limits and expenditure limits*, SCOTUSBLOG (Aug. 12, 2013, 2:42 PM), http://www.scotusblog.com/2013/08/symposium-the-distinction-between-contribution-limits-and-expenditure-limits/ (defining contribution limits as "restrictions on the amount that a person can give to a candidate or political committee") [https://perma.cc/R2AW-NG2V]; *see also* § 30101(8)(A)–(B) (providing a statutory definition for "contribution").

26. *See* Chemerinsky, *supra* note 25 (explaining that expenditure limits restrict how much money a person or group may spend on its own to promote a candidate or issue); *see also* § 30101(9)(A)–(B) (providing a statutory definition for "expenditure").

27. *See* § 30101(17) (providing the statutory definition for "independent expenditure").

28. *See* GARRETT, *supra* note 12, at 5–6, 5 n.21 ("*Independent expenditures* explicitly call for election or defeat of political candidates (known as *express advocacy*), may occur at any time, and are usually (but not always) broadcast advertisements. They must also be uncoordinated with the campaign in question.") (citations omitted).

"contributions" as they see fit,[29] but candidates may not direct, coordinate, or participate in "independent expenditure" spending by groups that support them.[30] The importance of the distinction between contributions and independent expenditures to today's campaign finance regulatory landscape cannot be overstated. Contributions remain highly regulated across the country at the state[31] and federal levels.[32] Independent expenditures, however, exist largely unrestricted.[33]

B. The Mother of All Campaign Finance Jurisprudence

In 1976, the first major challenge to FECA and its early amendments reached the United States Supreme Court.[34] *Buckley v. Valeo* involved First Amendment challenges to some of FECA's contribution and independent expenditure limits.[35] The *contribution* limits prohibited individuals from giving more than $1,000 in a single year to any candidate running for federal office.[36] The *independent expenditure* limits prohibited individuals from spending more than $1,000 in a single year "relative to a clearly identified candidate."[37] The constitutional validity of both types of limits depended on whether the government had a compelling state interest to justify each provision's interference with First Amendment rights of political expression and association.[38]

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29. *See* 52 U.S.C. § 30114 (listing permissible and prohibited uses of campaign "contributions").

30. *See* § 30101(17) (providing the statutory definition of an "independent expenditure").

31. *See generally 50 State Statutory Surveys: Election Law: Campaign Finance Reform, Limits on Individual Contributions to Candidates*, Westlaw 0050 Surveys 3 (2015).

32. *See* 52 U.S.C. §§ 30116–30118.

33. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010) (invalidating federal law that prohibited corporations and unions from spending general treasury funds on certain independent expenditures); SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 689 (D.C. Cir. 2010) (invalidating federal laws that limited contributions to any group that made only independent expenditures).

34. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

35. *See id.* at 13–14.

36. *See id.* at 13.

37. *See id.*

38. *See id.* at 44–45 (explaining that the constitutionality of the expenditure limits depended on "whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression").

The Court in *Buckley* ultimately invalidated FECA's ceilings on independent expenditures but upheld the law's limits on contributions.[39] The Court held that both contribution and independent expenditure limits interfered with First Amendment rights, but contribution limits created "only a marginal restriction upon the contributor's ability to engage in free communication."[40] Unlike *contribution* limits, *independent expenditure* limits represented "substantial rather than merely theoretical restraints on the quantity and diversity of political speech."[41]

The Court's reasoning can be explained as follows:[42] a donor who spends money advocating on behalf of a candidate controls the message. That is, the donor making an *expenditure* can choose what the message says, who says it, where it is said, and how it is delivered. But donors who give money to a candidate do not control the message—the candidate controls the message. The message conveyed by a *contribution* lies in the mere act of giving itself. Because expenditures involve a more direct form of speech than contributions, expenditures deserve more protection under the First Amendment.[43]

The Court's distinction between contributions and independent expenditures—the latter receiving more constitutional protection than the former[44]—laid the foundation for the deregulation of independent expenditures.[45]

Even more significant in *Buckley* was the Court's recognition of FECA's "primary purpose" as limiting "the actuality and appearance of

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39. *Id.* at 58.

40. *Id.* at 20.

41. *Id.* at 19.

42. *See id.* at 19–21 (distinguishing the level of political speech involved in contributions from that in expenditures).

43. *See id.*

44. *See id.* at 23. *But see* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1448 (2014) ("[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. When an individual contributes money to a candidate, he exercises both of those rights: [t]he contribution 'serves as a general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate.'") (citations omitted) (quoting *Buckley*, 424 U.S. at 15, 21–22) The court's reasoning seems to indicate the distinction is not as black and white as it once was. *See id.*

45. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010) (invalidating laws that limit independent expenditures); SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 689 (D.C. Cir. 2010) (invalidating federal laws that limited contributions to political committees that made only independent expenditures and not contributions).

corruption resulting from large individual financial contributions."[46] The Court held that the government's interest in preventing quid pro quo corruption,[47] or its appearance, sufficiently justified FECA's contribution limits but not the law's independent expenditure limits.[48] Although later courts relied on this language to find that preventing corruption was the only government interest that could justify speech-infringing campaign finance restrictions,[49] the Court in *Buckley* actually qualified the anti-corruption interest within the broader goal of "safeguarding the integrity of the electoral process."[50] Regardless, the opinion stands for the principle that only preventing corruption can justify First Amendment interference created by campaign finance laws.

II. SETTING THE STAGE: A STATE-CIRCUIT SPLIT PUNCTUATED BY A FRESH TAKE ON MONEY IN POLITICS AT THE SUPREME COURT

The substantial early amendments to FECA that created campaign contribution and expenditure limits prompted states across the country to adopt similar laws.[51] It was not until nearly 20 years after *Buckley*, however, that a few states began experimenting with nonresident contribution limits.[52] In every state that has implemented nonresident contribution limits, the

46. *Buckley*, 424 U.S. at 26.

47. *See, e.g.*, *id.* at 26–27 ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."); *see also McCutcheon*, 134 S. Ct. at 1441 (defining "quid pro quo corruption" as "the notion of a direct exchange of an official act for money"); *Citizens United*, 558 U.S. at 360 (explaining that "[i]ngratiation and access . . . are not corruption").

48. *Buckley*, 424 U.S. at 58.

49. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1441–42 (explaining that campaign finance restrictions pursuing objectives other than preventing quid pro quo corruption or its appearance "impermissibly inject the Government 'into the debate over who should govern.' And those who govern should be the *last* people to help decide who *should* govern." (quoting Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 750 (2011))).

50. *Buckley*, 424 U.S. at 58.

51. *See* Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super PACs*, 60 DRAKE L. REV. 755, 764–65 (2012).

52. *See, e.g.*, VanNatta v. Keisling, 899 F. Supp. 488, 491 (D. Or. 1995) (explaining that Oregon voters passed "Measure 6," the constitutional amendment containing the nonresident contribution limits, in November 1994), *aff'd*, 151 F.3d 1215 (9th Cir. 1998); State v. Alaska Civil Liberties Union, 978 P.2d 597, 600 (Alaska 1999) (explaining that the Alaska legislature created its nonresident contribution limits in 1996).

laws operate in a similar way. First, the laws do not regulate out-of-state residents directly but instead indirectly regulate them by placing limits on the amount of money in-state candidates can accept from out-of-state residents.[53] Second, although the laws do not bar out-of-state contributions entirely, the laws create ceilings on nonresident campaign contributions.[54] These restrictions effectively bar contributions once a certain threshold—either a specified amount or a percentage of total donations, depending on the state law—is met.[55]

For example, consider Bill, the restaurant entrepreneur. Alaska's law does not completely prohibit him or other nonresidents from contributing money to an Alaskan gubernatorial candidate's campaign.[56] But once a particular gubernatorial candidate accepts $20,000 from nonresidents in a given year, Alaska's law prohibits the candidate from collecting a single dollar from Bill or any other nonresident for the remainder of the year.[57] Although such laws avoid the jurisdictional and sovereignty issues created by directly regulating nonresidents, nonresident contribution limits create serious First Amendment concerns.[58]

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53. *See* OR. CONST. art. II, § 22 (effectively prohibiting candidates from collecting more than ten percent of their contributions from out-of-district residents), *invalidated by* VanNatta v. Keisling, 151 F.3d 1215 (9th Cir. 1998); ALASKA STAT. § 15.13.072 (2017) (capping the amount of contributions candidates may receive from nonresidents—for example, $20,000 for gubernatorial candidates and $5,000 for state senatorial candidates); VT. STAT. ANN. tit. 17, § 2805 (repealed 2014) (prohibiting candidates from collecting more than 25% of total campaign contributions from out-of-state residents); HAW. REV. STAT. § 11-362 (2017) (prohibiting candidates from collecting more than 30% of total contributions from nonresidents).

54. *See supra* note 53 and accompanying text.

55. *Compare* § 15.13.072 (prohibiting candidates from collecting contributions from nonresidents once candidates have collected a specified value of dollars from them), *with* HAW. REV. STAT. § 11-362 (prohibiting candidates from collecting contributions from nonresidents once a certain percentage of their total contributions consists of nonresident contributions).

56. *See* § 15.13.072.

57. *See id.*

58. *See, e.g.*, *VanNatta*, 151 F.3d at 1218 (invalidating Oregon nonresident contribution limits on First Amendment grounds); Landell v. Sorrell, 382 F.3d 91, 98 (2d Cir. 2004) (invalidating Vermont nonresident contribution limits on First Amendment grounds), *rev'd in part sub nom.* Randall v. Sorrell, 548 U.S. 230 (2006) (reversing the Second Circuit on other grounds).

A. Four States, Two Invalidated Laws

Four states—Oregon, Alaska, Vermont, and Hawaii—have created nonresident contribution limits.[59] In each state, lawmakers sought to prevent outside interests from garnering outsized influence in local elections.[60] Though often popular among residents and their elected representatives,[61] the laws in three of the four states—Hawaii excluded—have been challenged on First Amendment grounds.

1. Pioneers in Oregon Halted

The first state nonresident contribution limits were created by voters, not legislators.[62] In 1994, Oregon voters passed a constitutional amendment effectively prohibiting candidates from collecting more than ten percent of their campaign contributions from people who resided outside of their election districts.[63] The measure was intended to prevent outsiders from "buying influence in elections" and to allow "ordinary people" to control

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59. *See supra* text accompanying note 53. In addition, one Ohio city implemented a nonresident contribution limit for local elections that a federal district judge found "so clearly unconstitutional" that the law did not merit much discussion outside of one footnote. *See* Frank v. City of Akron, 95 F. Supp. 706, 708 n.3 (N.D. Ohio 1999), *rev'd in part*, 290 F.3d 813 (6th Cir. 2002) (reversing in part on other grounds without addressing Akron's nonresident contribution limits).

60. *See, e.g.*, VanNatta v. Keisling, 899 F. Supp. 488, 491 (D. Or. 1995) (identifying the purpose of Oregon's law), *aff'd*, 151 F.3d 1215 (9th Cir. 1998); State v. Alaska Civil Liberties Union, 978 P.2d 597, 617 (Alaska 1999) (identifying the purpose of Alaska's law); *Landell*, 382 F.3d at 99–102 (identifying some of the purposes of Vermont's law); J. 23-185, Reg. Sess. (Haw. 2005) (Conf. Rep.), http://www.capitol.hawaii.gov/session2005/commreports/HB1747_CD1_CCR185_.htm (identifying the purpose of Hawaii's law as to "ensure that elected officials are not disproportionately influenced by outside interests") [https://perma.cc/T3AU-MP3L].

61. *See, e.g.*, Andrew Hyman, Comment, *Alaska Gives Ninth Circuit the Cold Shoulder: Conflicts in Campaign Finance Jurisprudence*, 152 U. PA. L. REV. 1453, 1477–78, 1477 n.152 (2004) (noting the general popularity of statutes aimed at leveling the playing field); *see also Landell*, 382 F.3d at 100 (noting the "powerful support among the Vermont electorate for fundamental reform to the State's campaign financing scheme").

62. *See VanNatta*, 899 F. Supp. at 491 (explaining that Oregon voters passed "Measure 6," the constitutional amendment containing the nonresident contribution limits, in November 1994), *aff'd*, 151 F.3d 1215 (9th Cir. 1998).

63. *See* OR. CONST. art. II, § 22, *invalidated by VanNatta*, 151 F.3d 1215.

their own government.[64] When challenged on First Amendment grounds, Oregon's federal district court invalidated the measure.[65]

The district court in *VanNatta v. Keisling* found that the law suffered from three flaws. First, the measure prevented the extent to which state residents could politically associate with candidates from other districts whose actions likely would affect residents of the entire state, not just the candidate's constituents.[66] Second, the measure did nothing to prevent in-district donors from contributing large amounts of money that could corrupt the political process.[67] Third, because the law's restrictions were based on a percentage of total donations, it failed to eliminate large out-of-district donations so long as a candidate could raise significant in-district donations.[68] Because the law failed to achieve its purpose—preventing corruption—the court struck it down.[69]

On appeal, the Ninth Circuit upheld the lower court's decision.[70] The Ninth Circuit essentially adopted the district court's reasoning related to the law's shortcomings in preventing corruption.[71] The appellate court also rejected the separate state interest of preserving a republican form of government as insufficient to justify the law's interference with the free association rights of nonresidents.[72] The majority's opinion recognized that "[t]he Supreme Court has suggested that states have a strong interest in ensuring that elected officials represent those who elect them,"[73] but the majority distinguished Oregon's law from two cases in which the United States Supreme Court recognized such an interest.[74] Because the Supreme Court denied certiorari in *VanNatta*,[75] the Court effectively upheld the lower court decisions that found Oregon's law unconstitutional on First Amendment grounds.

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64. *See VanNatta*, 899 F. Supp. at 491.
65. *See id.* at 497.
66. *See id.*
67. *See id.*
68. *See id.*
69. *Id.*
70. VanNatta v. Keisling, 151 F.3d 1215, 1216 (9th Cir. 1998).
71. *Id.* at 1216–18.
72. *See id.* at 1217–18.
73. *See id.* at 1218.
74. *See id.* (distinguishing Oregon's law from laws unrelated to campaign finance upheld by the Supreme Court in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), and *Shaw v. Reno*, 509 U.S. 630 (1993)).
75. Miller v. VanNatta, 525 U.S. 1104 (1999).

2. Frontiersmen in Alaska Succeed

While the constitutional challenge to Oregon's law made its way through the appellate review process, Alaskans enacted their own nonresident contribution limits[76] as part of broader campaign finance reform legislation.[77] The stated legislative purpose of the reform was to "restore the public's trust in the electoral process and to foster good government."[78] The legislation also was intended to address public concerns about "actual and apparent corruption in Alaska politics."[79] Within months of the law's passage, the Alaska Civil Liberties Union challenged the law on First Amendment grounds.[80]

Alaska's Supreme Court took a much different approach to Alaska's nonresident contribution limits than the Ninth Circuit did to Oregon's law. The court in *State v. Alaska Civil Liberties Union* held that Alaska's nonresident contribution limits did not violate the First Amendment because the limits were narrowly tailored to address the state's interest in preventing "distortion" of the political process by outsiders.[81] Confusingly, the court held that preventing corruption did not justify Alaska's law but that preventing "purchased or coerced influence" by nonresidents did.[82] Overall,

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76. *See* ALASKA STAT. § 15.13.072 (2017) (providing the following limits per calendar year: $20,000 for gubernatorial candidates; $5,000 for state senatorial candidates; and $3,000 for state representative candidates and candidates for municipal or other offices). The law also limits the amount of contributions candidates may accept from nonresident groups. *See id.* (prohibiting candidates from accepting contributions from nonresident groups and prohibiting resident groups from accepting more than ten percent of their total donations from nonresidents).

77. *See* State v. Alaska Civil Liberties Union, 978 P.2d 597, 600–02 (Alaska 1999) (discussing the history of Alaska's campaign finance reform).

78. Act of May 30, 1996, ch. 48, § 1, 1996 Alaska Leg. Serv. 1.

79. *See Alaska Civil Liberties Union*, 978 P.2d at 601.

80. *See id.*

81. *See id.* at 617 (upholding the law even though Alaska produced "no evidence relating to the potential impact" of out-of-state contributions); *see also* Hyman, *supra* note 61, at 1478 (explaining how the state supreme court had no problem validating the law once it determined the government interest was preventing outsiders from dominating the political process, because a law limiting nonresident contributions is clearly tailored to such an interest).

82. *Compare Alaska Civil Liberties Union*, 978 P.2d at 615 ("The State refers us to no specific evidence of corruption or the appearance of corruption caused by out-of-state contributions, and does not contend that quid pro quo corruption justifies these restraints."), *with id.* at 617 ("Without restraints, Alaska's elected officials can be subjected to purchased or coerced influence which is grossly

the court appeared to recognize several other state interests as justifications for Alaska's law.[83] The opinion shows how government interests necessary to justify First Amendment infringement often overlap and can be difficult to distinguish.[84]

The Alaska Supreme Court avoided the Ninth Circuit's persuasive holding—an especially notable move because Alaska sits within the Ninth Circuit—by distinguishing Alaska's law from Oregon's.[85] First, the court explained that Alaska's law interfered less with the political association rights of in-state residents because the law's limitation applied only to out-of-state residents, not out-of-district residents who lived within the state.[86] Second, the court contended that Alaska's law affected nonresidents less than Oregon's because Alaska does not share a border with any other state.[87]

When the United States Supreme Court denied certiorari in *Alaska Civil Liberties Union*,[88] the Court left standing a nuanced distinction. On the one hand, state laws limiting the ability of in-state residents to contribute to candidates seeking statewide office in an election district where the residents did not live and could not vote were unconstitutional.[89] On the other hand, state laws that limited the ability of all out-of-state residents to contribute to election campaigns in states where they did not reside were constitutional.[90] This distinction, however, did not last long.[91]

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disproportionate to the support nonresidents' views have among the Alaska electorate, Alaska's contributors, and those most intimately affected by elections, Alaska residents."). The court did not explain the difference between "corruption" on the one hand and "purchased or coerced influence" on the other. *See id.*

83. *See* Hyman, *supra* note 61, at 1475 (identifying three broad interests recognized by the court: ensuring the integrity of the political structures and processes; preventing nonresident contributors from drowning out the voices of Alaska residents; and preventing distortion of public opinion).

84. *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 387 (2009) (explaining several different concepts used by the Court to identify corruption).

85. *See Alaska Civil Liberties Union*, 978 P.2d at 616.

86. *See id.*

87. *See id.* The court did not provide further explanation about why Alaska's isolation had less of an impact on nonresidents. *See id.* Presumably, the court assumed nonresidents had fewer interactions with, and interests in, Alaska because of its geographic segregation from the contiguous United States.

88. Alaska Civil Liberties Union v. Alaska, 528 U.S. 1153 (2000).

89. *See* VanNatta v. Keisling, 151 F.3d 1215 (9th Cir. 1998) (invalidating Oregon's nonresident contribution limits).

90. *See Alaska Civil Liberties Union*, 978 P.2d 597.

91. *See* Landell v. Sorrell, 382 F.3d 91 (2d Cir. 2002) (invalidating Vermont nonresident contribution limits that applied only to out-of-state residents), *rev'd*

3. Good Try, Vermont

The most recent challenge to a state law that placed special limitations on nonresident contributions occurred in the early 2000s. *Landell v. Sorrell* involved a First Amendment challenge to a Vermont statute that prohibited candidates from collecting more than 25% of their campaign contributions from out-of-state residents.[92] Like Alaska, Vermont created its nonresident contribution limits as part of broader campaign finance legislation.[93] In particular, Vermont sought to limit large contributions from nonresident individuals and groups to "level the playing field"[94] and encourage more residents to participate in funding election campaigns as a means of increasing "public confidence and the robust debate of issues."[95] The state's nonresident contribution limits, however, did not withstand a First Amendment challenge.[96]

Following the Ninth Circuit, the Second Circuit in *Landell* held that Vermont's law was both overbroad and underinclusive as it related to the state's interest in preventing corruption.[97] The court described the statute as overbroad because it ultimately prohibited small contributions from nonresidents that likely would not lead to corruption.[98] The statute's underbreadth, meanwhile, stemmed from its failure to prevent corrupting contributions before a candidate reached the 25% ceiling.[99] The Second Circuit found "no sufficiently important government interest" narrowly

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in part sub nom. Randall v. Sorrell, 548 U.S. 230 (2006) (reversing Second Circuit on other grounds).

92. *See* VT. STAT. ANN. tit. 17, § 2805 (repealed 2014), *invalidated by Landell*, 382 F.3d at 98.

93. *See* Vermont Campaign Finance Reform Act, 1997 Vt. Acts & Resolves 490, http://www.leg.state.vt.us/docs/1998/acts/act064.htm [https://perma.cc/6ZJ4-S6EU]; *see also Landell*, 382 F.3d at 99–102 (discussing the Act's history and purpose).

94. "Leveling the playing field" involves preventing the speech of some people to promote, enable, or strengthen the speech of other people. At least one scholar equates "leveling the playing field" with equalizing otherwise unfair monetary advantages in the election process, analogizing the Court's treatment of equality as a governmental interest in campaign finance to "Voldemort" in the Harry Potter series, "the idea that must not be named." *See* Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARLIAMENTARY & POL. L. 381, 381–82 (2011).

95. *See Landell*, 382 F.3d at 100.

96. *Id.* at 148.

97. *Id.* at 147.

98. *Id.*

99. *Id.*

tailored to support Vermont's law.[100] The court also questioned the reasoning behind the Alaska Supreme Court's contrary ruling.[101] Unlike the court in *Alaska Civil Liberties Union*, the *Landell* court did not find meaningful differences among Vermont's, Alaska's, and Oregon's nonresident contribution limits.[102] Although the United States Supreme Court granted certiorari in *Landell*, ultimately reversing much of the Second Circuit's decision, the Court's opinion did not address Vermont's nonresident contribution limits.[103]

4. An Island in Hawaii

The United States Supreme Court has left open the possibility that nonresident contribution limits, at least in some cases, do not violate the First Amendment. Shortly after the Second Circuit's ruling in *Landell*, Hawaii implemented its own nonresident contribution limits.[104] Like lawmakers in Alaska and Vermont, Hawaiian legislators sought to justify the law by voicing their concern with outside influence in its governing process and elections.[105] Although Alaska and Hawaii are the only two states with nonresident contribution limits, as long as the statutes exist, other states wary of increased outside influence could be encouraged to

100. *Id.* at 146–47 ("We find no support in the record for the alternative claim that Vermont has an important interest in singling out one class of contributors for limitations.").

101. *See id.* at 148.

102. *Compare* State v. Alaska Civil Liberties Union, 978 P.2d 597, 616–17 (Alaska 1999) (distinguishing Alaska's limits from Oregon's), *with Landell*, 382 F.3d at 147–48.

103. *See* Randall v. Sorrell, 548 U.S. 230 (2006).

104. H.R. 1747, 23d Leg., Reg. Sess. (Haw. 2005), http://www.capitol.hawaii.gov/session2005/bills/HB1747_cd1_.htm [https://perma.cc/3PP7-NW3G]. The original statute, Hawaii Revised Statutes § 11-204.5, which since has been repealed, actually limited the amount of total contributions state candidates could collect from nonresidents to 20%. The 2010 amendments to Hawaii's campaign finance laws increased the permissible amount to 30% of total contributions, but various legislative documents do not indicate the reason for the increase. *See* H.B. 2003, 25th Leg., Reg. Sess. (Haw. 2010) ("The purpose of this part is to ensure the integrity and transparency in the campaign finance process . . . . Any ambiguity in the provisions of this part shall be construed in favor of transparency.").

105. *See* J. 23-185, Reg. Sess. (Haw. 2005) (Conf. Rep.), http://www.capitol.hawaii.gov/session2005/commreports/HB1747_CD1_CCR185_.htm ("Restrictions on nonresident contributions will ensure that elected officials are not disproportionately influenced by outside interests.") [https://perma.cc/9MSZ-KQDN].

limit nonresident participation in their political process in similar ways. Recent activity in the United States Supreme Court, however, suggests any First Amendment challenge to a nonresident contribution limit would succeed.

B. The Heightened First Amendment Protection of Political Spending

A pair of recent Supreme Court rulings—*Citizens United v. FEC*[106] and *McCutcheon v. FEC*[107]—represent some of the most fundamental changes to campaign finance law in decades.[108] Taken together, *Citizens United* and *McCutcheon* broadened First Amendment rights in the context of campaign finance restrictions and narrowed the government's options when regulating campaign spending.[109] Although neither decision directly addressed the constitutionality of state nonresident contribution limits, the Court's rulings heightened the threshold a law must overcome when challenged on First Amendment grounds.[110]

Citizens United, arguably the most famous Supreme Court decision in the past decade, established the Herculean strength of the First Amendment's protection of campaign speech and association.[111] The case involved a First Amendment challenge to federal laws that prohibited corporations and unions from making independent expenditures using their general treasury funds for express advocacy and "electioneering communications."[112] The Court ultimately invalidated the laws, rejecting the governmental interests of "leveling the playing field"[113] and preventing

106. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
107. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014).
108. *See* GARRETT, *supra* note 12, at 2.
109. *See Citizens United*, 558 U.S. 310; *McCutcheon*, 134 S. Ct. 1434.
110. *See Citizens United*, 558 U.S. 310; *McCutcheon*, 134 S. Ct. 1434.
111. *See Citizens United*, 558 U.S. at 372.
112. *See id.* at 320–21 (explaining that the Bipartisan Campaign Reform Act ("BRCA") of 2002 amendments to FECA created a prohibition on electioneering communication spending); *see also* 52 U.S.C. § 30104(f)(3)(A)–(B) (2012) (providing a statutory definition of "electioneering communication," which generally includes any broadcast, cable, or satellite communication that "refers to a clearly identified candidate for Federal office" made within 60 days of a general election or 30 days of a primary election).
113. *See Citizens United*, 558 U.S. at 349–50 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976))).

"distortion"[114] of the political process as insufficient to justify the burdens on political speech and association created by the laws. [115] In doing so, the Court indicated that preventing quid pro quo corruption likely was the only governmental interest sufficient to justify campaign spending limits.[116]

Four years later, in *McCutcheon*,[117] the Court confirmed what it hinted at in *Citizens United*.[118] In *McCutcheon*, the Court invalidated a federal law that created aggregate limits on individual contributions to candidates for federal office,[119] slightly weakening the previously significant distinction between speech protections afforded to contributions and independent expenditures.[120] In sum, *McCutcheon* suggested that all political association limits not narrowly tailored to prevent quid pro quo corruption or its appearance violate the First Amendment.[121]

After *McCutcheon*, the jurisprudence that would affect a First Amendment challenge to state nonresident contribution limits points decidedly in one direction.[122] *Alaska Civil Liberties Union* stands as the lone exception to two federal circuit court rulings that invalidated such laws,[123] and the Supreme Court has indicated in other recent campaign

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114. *See id.* at 348–49 (identifying the antidistortion rationale as preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990))).

115. *Id.* at 339–40.

116. *See id.* at 357–61.

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

118. *See supra* note 49 and accompanying text.

119. *McCutcheon*, 134 S. Ct. at 1442, 1462.

120. *See id.* at 1448 ("[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. When an individual contributes money to a candidate, he exercises both of those rights: [t]he contribution 'serves as a general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate.'") (citations omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 15, 21–22 (1976))).

121. *See* James Bopp, Jr., Randy Elf & Anita Y. Milanovich, *Contribution Limits After* McCutcheon v. FEC, 49 VAL. U. L. REV. 361, 395 (2015) ("*McCutcheon* not only substantially changes, but makes more rigorous the analysis used in challenges to regulations of contributions for independent spending and of direct contributions to candidates. Both types of contribution limits are likely unconstitutional under its framework.").

122. *See infra* Part III.

123. *Compare* State v. Alaska Civil Liberties Union, 978 P.2d 597, 617 (Alaska 1999) (upholding Alaska nonresident contribution limits), *with* VanNatta v. Keisling, 151 F.3d 1215, 1216 (9th Cir. 1998) (invalidating Oregon nonresident contribution limits); Landell v. Sorrell, 382 F.3d 91, 146 (2d Cir. 2002)

finance cases the position it likely would take on the issue.[124] An analysis of the constitutionality of nonresident contribution limits showcases the significant hurdles states would face in defending such laws.[125]

III. THE UNCONSTITUTIONALITY OF NONRESIDENT CONTRIBUTION LIMITS

The analysis to determine whether nonresident contribution limits violate the First Amendment involves a three-step inquiry. The first question is whether the law burdens political expression or association.[126] If it does, the second question is whether the state has a compelling governmental interest to justify the burden on activity protected by the First Amendment.[127] Even if a compelling interest exists, however, under the third step, the state also must show that its law is narrowly tailored to serve that interest.[128] The law violates the First Amendment if it burdens speech and the government either lacks a compelling state interest for the law or the law is not narrowly tailored to serve the state's compelling interest.

A. The Heavy Burden on Out-of-State Residents

Campaign contributions represent an exercise of political expression and association rights protected by the First Amendment.[129] Nonresident contribution limits create ceilings on the amount of contributions candidates may accept from out-of-state residents.[130] Once the ceiling is reached, the law effectively bars nonresidents from making campaign contributions. Such a bar clearly burdens nonresident speech protected by the First Amendment.

(invalidating Vermont nonresident contribution limits), *rev'd in part sub nom*. Randall v. Sorrell, 548 U.S. 230 (2006) (reversing the Second Circuit on other grounds).

124. *See supra* Part II.B.

125. *See infra* Part III.

126. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010).

127. *See id.*

128. *See id.* This standard of review often is referred to as "strict scrutiny." *See, e.g.*, United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000) (explaining that a law only passes "strict scrutiny" if it is "narrowly tailored to promote a compelling [g]overnment interest").

129. *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1448 (2014).

130. *See supra* text accompanying note 53.

In certain aspects, nonresidents deserve more political association protection than residents. Some courts, including the Supreme Court, have expressed sympathy for such an argument.[131] Residents can always exercise their political power by voting, whereas no state allows nonresidents to vote in its statewide elections.[132] Out-of-state residents, however, often have legitimate interests in the policies of other states.[133] As political interests of Americans have become increasingly national in scope,[134] with individuals

131. *See McCutcheon*, 134 S. Ct. at 1449 ("The First Amendment burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies."); Landell v. Sorrell, 382 F.3d 91, 146–47 (2d Cir. 2002) (noting that nonresidents have "legitimate and strong interests in Vermont and have a right to participate, at least through speech," in the election process), *rev'd in part sub nom*. Randall v. Sorrell, 548 U.S. 230 (2006) (reversing the Second Circuit on other grounds). *But see* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68–69 (1978) ("[O]ur cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders."). The Court in *Holt Civic Club* held that residents of an unincorporated community could be subject to a neighboring city's police and sanitation regulations, among others, by state statute even though they could not participate in the city's political processes. *See Holt Civic Club*, 439 U.S. at 68–69.

132. *See Voting by Nonresidents and Noncitizens*, NAT'L CONF. OF STATE LEG. (Feb. 27, 2015), http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx ("No state has extended noncitizen voting to statewide elections.") [https://perma.cc/HX3E-YYVD].

133. *See* Todd E. Pettys, *Campaign Finance, Federalism, and the Case of the Long-Armed Donor*, 81 U. CHI. L. REV. DIALOGUE 77, 90–91 (2014) (explaining that because Americans are "highly mobile and are interconnected in countless political, economic, technological, cultural, and familial ways, it is vital that they remain free to speak and associate across state lines in order to shape political leaderships at all levels of government").

134. *See id.* at 86 ("Cross-border political activity is a long-standing and growing feature of our political system."); Dan Hopkins, *All Politics Is Presidential*, FIVETHIRTYEIGHT (Mar. 17, 2014, 5:38 AM) http://fivethirtyeight.com/features/all-politics-is-presidential/ ("In recent years, gubernatorial elections have become increasingly nationalized, to the point where voting patterns in these races bear a striking resemblance to those in presidential races.") [https://perma.cc/S2BZ-GRM5]; Carl E. Klarner & Heather Evans, *The Polarization and Nationalization of State Elections, 1971-2014*, KLARNERPOLITICS, http://klarnerpolitics.com/uploads/3/8/5/0/3850983/featured_manuscript_-_klarner_politics.pdf (last visited Sept. 5, 2017) ("We also present evidence that state legislative and gubernatorial elections have become increasingly nationalized and thus more likely to be ignored by the electorate. This has presumably reduced the extent to which state elected officials are held accountable by citizens.") [https://perma.cc/3RJ6-GBJT]; Jonathan M. Ladd, *3 Trends in This Week's Elections: Biased Electorates, Nationalization, and*

often identifying more with a particular political party than with specific candidates or issues,[135] nonresidents may seek to create political momentum for their parties or for candidates who share views on national issues similar to their own by supporting them in state elections.[136] Any activities that have ripple effects in other states—for example, externalities associated with coal mining and production—represent especially ripe reasons for nonresidents to contribute to candidates who support their views in other states. Moreover, Americans who travel often to other states, whether for familial, business, or entertainment reasons, may have strong ties and associations in those states. People like Bill, the restaurateur, should at least be able to contribute money to out-of-state candidates to the same extent as in-state residents.

Furthermore, the Supreme Court in *Citizens United* rejected the idea that the government may impose political speech restrictions that discriminate based on the *identity* of the speaker instead of the *substance* of the speech involved.[137] The Court stated,

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Redistricting Reform, VOX (Nov. 5, 2015, 2:10 PM), http://www.vox.com/mischiefs-of-faction/2015/11/5/9676268/redistricting-nationalization-elections (presenting elections of Kentucky's governor and Pennsylvania's Supreme Court as anecdotes to demonstrate nationalization of state elections) [https://perma.cc/F223-W6VW]; Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1135 (2014) (explaining how political engagement across state lines has "increased dramatically" in both federal and state elections in recent years).

135. *See* Brian Arbour, *"All Politics Is Local"? Not anymore.*, WASH. POST: MONKEY CAGE (Dec. 9, 2014), https://www.washingtonpost.com/blogs/monkey-cage/wp/2014/12/09/all-politics-is-local-not-anymore/ (explaining how the fate of Congressional campaigns depends more on the candidate's party affiliation than anything else) [https://perma.cc/B8BV-JF4Z].

136. *See* Bulman-Pozen, *supra* note 134, at 1136 (identifying a handful of legitimate reasons nonresidents may want to contribute to state election campaigns in states where they do not reside).

137. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 341 (2010) ("We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on *certain disfavored speakers*. Both history and logic lead us to this conclusion.") (emphasis added); McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1461 (2014) ("For the past 40 years, our campaign finance jurisprudence has focused on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political responsiveness at the heart of the democratic process, or allowing the Government *to favor some participants in that process over others*.") (emphasis added); *see also* Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 766–67 (2015) (recognizing how *Citizens United* did not "invent" the idea that the First Amendment prohibits speaker-based discrimination, but "gave a new, clearer articulation to a principle

> 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. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.[138]

Although the Court in *Citizens United* suggested that the First Amendment forbids all speaker-based discrimination, the Court has, on many occasions, specifically allowed laws to burden the speech of some but not others.[139] Therefore, this argument likely has limits. Still, any burden on political association that applies only to certain speakers—in this case, out-of-state residents—likely will not pass constitutional muster under the reasoning of *Citizens United*.

In addition, *nonresident* contribution limits always exist in conjunction with limits on *resident* contributions. Nearly every state, including Alaska and Hawaii, limits the ability of all individuals, residents and nonresidents alike, to contribute to in-state campaigns.[140] Because blanket contribution

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that had long been implicit and underappreciated in free speech jurisprudence"). *But see* Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 448–49 (2013) (criticizing the Court's application of the speaker-based discrimination principle in *Citizens United* and pointing to several situations in which the Court clearly allowed speaker-based discrimination in the context of First Amendment issues).

138. *Citizens United*, 558 U.S. at 340–41. *But see id.* at 341 (identifying exceptional cases in which the Court upheld speaker-based restrictions that "were based on an interest in allowing governmental entities to perform their functions").

139. For examples, see McConnell, *supra* note 137, at 448–49.

140. *See Contribution Limits Overview*, NAT'L CONF. OF STATE LEG., http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx (last visited Oct. 31, 2017) [https://perma.cc/6FMJ-PB86]; *see also* ALASKA STAT. § 15.13.070(b)(1) (2017) (banning all individuals, regardless of residency, from contributing more than $500 per year to a candidate or a group that is not a political party); HAW. REV. STAT. § 11-357 (a)(1)–(3) (2017) (effectively capping contributions by individuals at $2,000 for candidates for state representative, $4,000 for state senators, and $6,000 for governors per election cycle). By comparison, California, New York, and Ohio each have contribution limits for individuals in the tens of thousands of dollars. *Contribution Limits Overview*, *supra*. Meanwhile, the following states do not place any limits on individual contributions: Alabama, Indiana, Iowa, Mississippi, Missouri, Nebraska, North Dakota, Oregon, Pennsylvania, Texas, Utah, and Virginia. *Contribution Limits Overview, supra.*

limits already place a burden on the political association rights of out-of-state residents, any additional restrictions further increase the interference with the constitutionally guaranteed rights of nonresidents, creating an unquestionably high burden on their political association rights. At minimum, additional nonresident contribution limits risk exacerbating the harms associated with suppressing political speech of people like Bill, the restauranteur, with legitimate stakes and interests in other states.

B. No Government Interest Is Sufficient to Justify the Speech Suppression Created by Nonresident Contribution Limits

When challenged on First Amendment grounds, laws can suffer constitutional deficiencies in two main ways. First, the government may lack a sufficiently compelling interest to enact the law.[141] Second, even if a government has a compelling interest, the law may not be narrowly tailored to address the compelling interest.[142] State nonresident contribution limits suffer shortcomings in both ways.

1. Nonresident Contribution Limits Prevent Participation, but Not Corruption

The Supreme Court has made it clear: a law interfering with Americans' political association rights violates the First Amendment unless it is narrowly tailored to prevent quid pro quo corruption or its appearance.[143] State laws that limit nonresident contributions, however, do little, if anything, to prevent the direct exchange of money for political favors.[144] As two federal circuits have pointed out, such laws often are both overbroad and underinclusive.[145] Even Alaska's attorneys—who successfully argued that the state's nonresident contribution limits did not violate the First Amendment—conceded that preventing corruption could not justify the state's laws.[146]

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141. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1444 (2014) (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

142. *See, e.g.*, *id.*

143. *See id.* at 1441–42.

144. *See infra* notes 149–51.

145. *See supra* Part II.A.1.–A.3.

146. State v. Alaska Civil Liberties Union, 978 P.2d 597, 615 (Alaska 1999) ("The State refers us to no specific evidence of corruption or the appearance of corruption caused by out-of-state contributions, and does not contend that quid pro quo corruption justifies these restraints.").

At best, the effectiveness of contribution limits as a legislative tool to prevent corruption is marginal.[147] At worst, such laws actually may incentivize, rather than deter, corruption.[148] At least one study found that campaign finance regulation has practically no effect on making the political process more democratic.[149] Similar findings prompted Congress at one point to abandon contribution limits altogether,[150] although the federal legislature eventually brought them back in response to the Watergate scandal.[151] Particularly in an era of unlimited independent expenditures, the effectiveness of contribution limits likely will shrink even further as outside spending in state elections grows.[152] In fact, the Supreme Court in *Buckley* foreshadowed this exact issue, hinting that contribution limits could become inappropriate if they began to impede the campaign process

147. *See* Gaughan, *supra* note 51, at 758 (asserting that contribution limits "have failed to advance the underlying policy goals of preventing corruption"). Some scholars have proposed abandoning contribution limits all together. *See id*. at 763. *See generally* John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69 (2000) (proposing to dissolve contribution limits and instead suggesting legislators recuse themselves from voting on issues that would affect their contributors directly).

148. *See* Philip M. Nichols, *The Perverse Effect of Campaign Contribution Limits: Reducing the Allowable Amounts Increases the Likelihood of Corruption in the Federal Legislature*, 48 AM. BUS. L.J. 77, 118 (2011) (explaining how laws mandating a higher number of smaller contributions from a larger donor base increase the incentive to skirt the law all together and accept large contributions from fewer donors).

149. *See* Nemeroff, *supra* note 16, at 693 (noting how a study of election results between 1992 and 2004 indicated campaign finance laws neither level the playing field nor effect party control). *But see id.* at 691 ("Some studies have found that contribution limits do have a democratizing effect in that they reduce the average amount of each contribution and 'level the playing field' among various contributing groups. However, these studies did not find that contribution limits increased the number of contributors.").

150. *Id.* at 696 ("Individual contribution limits were introduced in 1925, but were repealed when FECA was first enacted because the limits were ineffective.").

151. *See* Smith, *supra* note 20, at 1055; *see also* GARRETT, *supra* note 12, at 3.

152. *See, e.g.*, Liz Essley Whyte & Ashley Balcerzak, *Outside Groups Playing Bigger Role in 2015 State Elections*, CTR. FOR PUBLIC INTEGRITY (Oct. 1, 2015, 5:01 AM), https://www.publicintegrity.org/2015/10/01/18074/outside-groups-playing-bigger-role-2015-state-elections [https://perma.cc/2T3E-Z7B7]; J.T. Stepleton, *Crossing the Line: Boosting Gubernatorial Candidates with Out-of-State Contributions*, NAT'L INST. ON MONEY IN STATE POL. (Jan. 28, 2016), http://www.followthemoney.org/research/institute-reports/crossing-the-line-boosting-out-of-state-contributions-to-gubernatorial-campaigns/#ftnref_1 [https://perma.cc/Y5F4-X5DQ].

they were meant to protect.[153] Laws that do not serve their stated purposes cannot possibly be narrowly tailored to justify their existence.[154]

2. The Court Could, but Should Not, Recognize Two Other Government Interests as Sufficient to Justify Nonresident Contribution Limits

The only way nonresident contribution limits can remain constitutionally valid is if the Supreme Court expands the list of government interests that can justify campaign finance restrictions. Among the leading possibilities are preserving a representative form of government and maintaining federalism.[155] Despite the importance of both institutional fixtures of American government, such interests should not overcome the high bar protecting restrictions on political expression and association. Even though courts sometimes have used language indicating support for additional government interests in regulating campaign-related speech,[156] the jurisprudence makes clear that such interests should not outweigh the First Amendment burdens created by nonresident contribution limits.

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153. *See* Buckley v. Valeo, 424 U.S. 1, 21 (1976) ("Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.").

154. *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1457 (2014) (invalidating a "poorly tailored" statute).

155. *See* Pettys, *supra* note 133, at 91 (identifying "the self-governance rationale" as the governmental interest with the most promising possibility of justifying nonresident contribution limits); Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*, 63 EMORY L.J. 781, 823 (2014) (proposing that the Court recognize preserving federalism as a legitimate interest to regulate campaign finance).

156. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." (quoting *Buckley*, 424 U.S. at 14–15 (implicitly recognizing the importance of representation))); Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 287 (D.C. Cir. 2011) ("A State's historical power to exclude aliens from participation in its democratic political institutions [is] part of the sovereign's obligation to preserve the basic conception of a political community." (quoting Foley v. Connelie, 435 U.S. 291, 295–96 (1978) (implicitly recognizing state's interest in preserving representation), *aff'd*, 565 U.S. 1104 (2012))).

a. Preserving Representation

The United States Constitution guarantees a representative government to every state.[157] But the Supreme Court has never recognized a state's interest in preserving a representative or "republican" form of government to justify a nonresident contribution limit,[158] even though similar interests have been recognized as compelling in other contexts.[159] Perhaps the appointment of Associate Justice Neil Gorsuch—a replacement for the late Antonin Scalia—will shift the Court's philosophical makeup such that representation *could* be recognized as a legitimate state interest sufficient to justify campaign spending restrictions in the future.[160] After all, at least one retired Supreme Court justice, John Paul Stevens, believes the law should distinguish between campaign money spent by constituents and non-constituents,[161] and Justice Stevens's belief has doctrinal roots.[162] The

157. U.S. CONST. art. IV, § 4, cl. 1 ("The United States shall guarantee to every State in this Union a Republican Form of Government."). A "republican" form of government is a "government by representatives chosen by the people." *Republican government*, BLACK'S LAW DICTIONARY (10th ed. 2014).

158. *See* VanNatta v. Keisling, 151 F.3d 1215, 1217–18 (9th Cir. 1998) (rejecting the preservation of representation as insufficient to justify Oregon's nonresident contribution limits).

159. *See, e.g.*, Supreme Court of N.H. v. Piper, 470 U.S. 274, 282 n.13 (1985) (recognizing in a Privileges and Immunities Clause case a state's power to restrict the ability to vote to ensure the boundaries of political communities); Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68–69 (1978) (recognizing in an Equal Protection Clause case that "a government unit may legitimately restrict the right to participate in its political processes.").

160. *See* Deborah Hellman & David Schultz, *Foreword to Special Issue on Campaign Finance*, 164 U. PA. L. REV. ONLINE 207, 209–10 (2015–2016) (noting the court's current vacancy combined with the likelihood of additional vacancies soon could lead to a pro-democracy court); *see also Citizens United*, 558 U.S. at 396 (Stevens, J., dissenting) (opining that the recognition of nonresident corporate interests potentially in conflict with constituent interests could undermine representative democracy).

161. *See* Pettys, *supra* note 133, at 84 (quoting Justice Stevens as saying "[v]oters' fundamental right to participate in electing their own political leaders is far more compelling than the right of non-voters such as corporations and non-residents to support or oppose candidates for public office" (citing *Dollars and Sense: How Undisclosed Money and Post-*McCutcheon *Campaign Finance Will Affect the 2014 Elections and Beyond, Hearing on Campaign Finance Before the Senate Rules and Administration Committee*, 113th Cong., 3–5 (2014) (statement of retired United States Supreme Court Justice John Paul Stevens))).

162. *See* U.S. CONST. art. IV, § 4, cl. 1; *see also* Deborah A. Roy, *The Narrowing Government Interest in Campaign Finance Regulations: Republic*

Supreme Court, on occasion, has recognized a state's interest in preserving republicanism even in opinions that ultimately found certain campaign spending limits violated the First Amendment.[163] The Alaska Supreme Court, too, expressed in dicta its support for the belief that preserving representation justifies regulating campaign contributions.[164]

Furthermore, one recent case hints that the Court eventually may recognize a state's interest in preserving representation within the context of contribution limits. In *Bluman v. FEC*,[165] the Supreme Court affirmed a lower court ruling that upheld the constitutionality of a federal law barring foreign nationals from contributing to domestic campaigns.[166] The lower court reasoned that the federal government may exclude foreign citizens from activities "intimately related to the process of democratic self-

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Lost?, 46 U. MEM. L. REV. 1, 39 (2015) ("The Government would fare better in defending campaign finance regulations if it began to build the foundation for a more compelling interest that is firmly embedded in the U.S. Constitution. And no interest is more firmly entrenched than the interest in preserving the representative democracy."); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 449 (Stevens, J., dissenting) ("There are threats of corruption that are far more destructive to a democratic society than the odd bribe.").

163. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 26–27 (1976) ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."); Randall v. Sorrell, 548 U.S. 230, 248 (2006) ("[T]he interests underlying contribution limits, preventing corruption and the appearance of corruption, directly implicate the integrity of our electoral process.'" (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 136 (2003))); *Citizens United*, 558 U.S. at 339 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." (quoting Buckley v. Valeo, 424 U.S. 1, 14–15 (1976))).

164. State v. Alaska Civil Liberties Union, 978 P.2d 597, 616 n.123 (Alaska 1999), *cert. denied sub nom.* Alaska Civil Liberties Union v. Alaska, 528 U.S. 1153 (2000) ("The state's power to preserve the political community by excluding nonresidents from voting is self-evident. Although we have not previously affirmed the authority of the state to limit the influence of nonresidents over state elections through regulation of their campaign contributions, such an extension would not be illogical."); *see also* Hyman, *supra* note 61, at 1480 (explaining the difficulty of identifying the boundaries of various government interests but extrapolating from the state supreme court's opinion that ultimately a combination of three were recognized: "leveling the playing field, *protecting the republican form of government*[,] and preventing corruption") (emphasis added).

165. Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281 (D.C. Cir. 2011), *aff'd*, 123 S. Ct. 1087 (2012).

166. *Id.* at 288.

government."[167] Because of *Bluman*, at least two scholars have suggested that the Supreme Court may be willing to uphold out-of-state contribution limits against a constitutional challenge.[168]

The same two scholars, however, ultimately concluded that *Bluman* probably was not significant enough to overcome other doctrinal and normative hurdles to the constitutionality of nonresident contribution limits.[169] Most importantly, *Bluman* explicitly rejected an analogy between the relationship of foreign nationals to the United States and the relationship of American citizens to different states within the country.[170] Furthermore, *Alaska Civil Liberties Union* rests on questionable legal reasoning,[171] *VanNatta* explicitly rejected the representation interest,[172] and *McCutcheon* rejected all governmental interests except preventing corruption as insufficient justifications for political association restrictions.[173] The doctrine, therefore, strongly suggests that preserving representation cannot justify nonresident contribution limits.

Other hurdles exist, too. Nonresident contribution limits aimed at reducing the influence of outsiders rest on the assumption that out-of-state donations to state candidates will result in the promotion of policy contrary to the interest of state residents.[174] Many interests of nonresidents, however, likely align with resident interests. In the era of unlimited independent expenditures, many candidates for state office likely receive significant

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167. *Id.* at 287.

168. *See, e.g.*, Pettys, *supra* note 133, at 86; Bulman-Pozen, *supra* note 134, at 1137–38.

169. *See, e.g.*, Pettys, *supra* note 133, at 89 ("There are strong reasons to doubt that the Court would find that restrictions on out-of-state campaign spending can be justified by sufficiently powerful governmental interests."); Bulman-Pozen, *supra* note 134, at 1141–42 ("But, I submit, partisan federalism is more consistent with cross-border participation than with its prohibition.").

170. *Bluman*, 800 F. Supp. 2d at 290.

171. State v. Alaska Civil Liberties Union, 978 P.2d 597, 615 (Alaska 1999) ("The State refers us to no specific evidence of corruption or the appearance of corruption caused by out-of-state contributions, and does not contend that quid pro quo corruption justifies these restraints.").

172. *See* VanNatta v. Keisling, 151 F.3d 1215, 1217–18 (9th Cir. 1998).

173. *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441–42 (2014).

174. *See* Tyler S. Roberts, Note, *Enhanced Disclosure as a Response to Increasing Out-of-State Spending in State and Local Elections*, 50 COLUM. J.L. & SOC. PROBS. 137, 153 (2016) (identifying three main harms of nonresident political spending: drowned-out in-state political voices; favoritism by elected officials toward out-of-state donors; and reduced experimentation in local legislation).

support from super PACs funded in large part by nonresidents.[175] Nonresidents with legitimate local interests in other states could provide direct donations to candidates who want to protect local interests from being overshadowed by national agendas. Equipping candidates with more funding of their own, regardless of the source, may even strengthen the ability of candidates to represent their constituents.

b. Maintaining Federalism

In addition to protecting political representation, another government interest the Court could recognize to justify nonresident contribution limits is a state's interest in maintaining federalism. Under a strong view of federalism,[176] states serve as more effective "laboratories"[177] for legislative experimentation if government representatives focus on local interests.[178] At least one scholar has explained that the risks to federalism presented by increased outside spending are most severe in state elections.[179] Further, because neither Alaska nor Hawaii shares a border with any other state, perhaps special geographic factors reduce the number of legitimate interests nonresidents have in those states. Such reasoning could explain the special discrimination against out-of-state residents under a strong view of federalism.

Nevertheless, promoting federalism does not justify state nonresident contribution limits. First, the popularization of residency-based discrimination could encourage elected candidates and courts to substantiate state protectionism, potentially undermining a federal form of government.[180] Second, cross-border political participation actually emphasizes the role of states in the country's political system.[181] If states were politically

175. "Super PACs" are "independent political action committees . . . or other independent political advocacy groups that engage in campaign advertising but do not coordinate their expenditures with candidates or political parties." Gaughan, *supra* note 51, at 759–60.

176. Strong federalism is the inverse of strong nationalism. *See* Bulman-Pozen, *supra* note 134, at 1140 (explaining how cross-border political activity may be proscribed under a strong federalism view).

177. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, *serve as a laboratory*; and try novel social and economic experiments without risk to the rest of the country.") (emphasis added).

178. *See generally* Pursley, *supra* note 155.

179. *See id.* at 823 ("Political safeguards work only if states retain significant political influence.").

180. *See* Hyman, *supra* note 61, at 1481.

181. *See* Bulman-Pozen, *supra* note 134, at 1142.

irrelevant in the context of American government, nonresidents would have no reason to participate in the politics of other states.[182] Finally, as Bill's story demonstrates, geographic borders and physical distance do not significantly impede legitimate cross-border activity in a world where information travels nearly instantaneously and many people can afford to travel long distances within a short amount of time on a regular basis. The preservation of federalism, therefore, should not justify nonresident contribution limits that burden the political association rights of Americans who deserve the protections as much or more than in-state residents.

IV. EXPLORING THE CONSTITUTIONAL BOUNDARIES OF STATE LAWS RESTRICTING NONRESIDENT POLITICAL ACTIVITY

The First Amendment likely prohibits states from placing special limitations on the ability of people to donate money to election campaigns in states where they do not reside.[183] Undoubtedly, however, the First Amendment does not act as a bar on all state laws that burden constitutionally protected political activity by nonresidents. For example, neither the First Amendment nor any other constitutional provision prevents Texas from denying California residents the ability to vote in Texas elections.[184] Alternatively, Florida certainly cannot ban a Georgian from vehemently endorsing a Florida gubernatorial candidate during barroom banter in Tallahassee. The interesting question, then, is determining where the constitutional divide should fall. When does the permissible preservation of a political community stop and the impermissible burdening

182. *See id.* ("The very fact that individuals from Texas seek to influence California politics, and vice versa, indicates that the states are critical actors on the national stage. Cross-state political participation demonstrates states' importance as sites of governance and identification, not their lack thereof.").

183. *See supra* Part III.

184. *See, e.g.*, Supreme Court of N.H. v. Piper, 470 U.S. 274, 282 n.13 (1985) ("A State may restrict to its residents, for example, both the right to vote, and the right to hold state elective office.") (citation omitted); Dunn v. Blumstein, 405 U.S. 330, 333 (1972) ("We have in the past noted approvingly that the States have the power to require that voters be bona fide residents of the relevant political subdivision."); Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68–69 (1978) ("[O]ur cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.") The Court in *Holt Civic Club* held that residents of an unincorporated community could be subject to a neighboring city's police and sanitation regulations, among others, by state statute even though they could not participate in the city's political processes. *See Holt Civic Club*, 439 U.S. at 68–69.

of speech begin? To what extent may states exclude nonresidents from participating in their political process without violating the First Amendment?[185]

This Comment does not answer these questions definitively. Instead, it gauges the appropriateness of applying the same constitutional logic that likely renders state nonresident contribution limits unconstitutional to other avenues of cross-border political participation. Donating money to a candidate's campaign coffers is merely one of myriad ways that people can participate in state elections. Particularly zealous crusaders may volunteer to distribute campaign flyers, plant yard signs, or stuff mailing envelopes. Less ardent supporters may offer simply to put in a good word with their friends. The universe of potential campaign participation activities runs the gamut.

Determining exactly when states may limit such behavior to their own residents without violating the First Amendment has proved tricky. One often-litigated example involves state laws that prohibit nonresidents from circulating ballot initiative petitions.[186] As with nonresident contribution limits, courts are split on the constitutionality of such laws,[187] and the United States Supreme Court has not ruled directly on the issue.[188] For the most part, federal circuit courts have invalidated such laws on First

185. Residency-based discrimination by states also raises other constitutional concerns, such as equal protection and privileges and immunities. This Comment, however, focuses only on First Amendment issues.

186. Ballot initiative petitions, allowed by a handful of states, involve the process by which voters gather signatures in support of a law or constitutional amendment to petition either the state's legislature or its citizens to vote on the issue. *See Initiative and Referendum States*, NAT'L CONF. OF STATE LEG., http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx (last visited Jan. 20, 2017) (providing a chart that shows which states allow either ballot initiative petitions or popular referendums, which involve the process by which voters petition to hold a vote on whether to keep a law passed by the state's legislature) [https://perma.cc/7JFX-JHMB].

187. *Compare* Chandler v. City of Arvada, 292 F.3d 1236, 1243–44 (10th Cir. 2002) (invalidating petition circulator residency requirement on First Amendment grounds), *and* Yes On Term Limits, Inc. v. Savage, 550 F.3d 1023, 1030–31 (10th Cir. 2008) (same), *and* Nader v. Brewer, 531 F.3d 1028, 1038 (9th Cir. 2008) (same), *with* Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 615 (8th Cir. 2001) (upholding petition circulator residency requirement against First Amendment challenge).

188. *See* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 197 (1999) (invalidating Colorado's voter registration requirement for petition circulators but expressly declining to discuss the constitutionality of its residency requirement because it was not in dispute in the lawsuit).

Amendment grounds.[189] Although the courts uniformly found some version of protecting the integrity of the election process to be a compelling state interest,[190] they also often found that states could not prove that residency requirements were narrowly tailored to prevent election fraud.[191] In essence, as with nonresident contribution limits, the courts did not deny that states have an interest in protecting the integrity of their elections. The fatal flaw, instead, involved the states' use of residency-based discrimination to achieve their goals.

One of the cases in particular, *Yes On Term Limits, Inc. v. Savage*,[192] resulted in several noteworthy takeaways. In that case, the Tenth Circuit Court of Appeals ultimately invalidated on First Amendment grounds an Oklahoma law banning nonresidents from circulating ballot initiative petitions.[193] Even though Oklahoma presented evidence of fraudulent behavior by some nonresident petition circulators, the court held that the evidence failed to show that nonresidents "as a class" were more likely to engage in fraudulent behavior than residents.[194] In addition, the court took the opportunity in a footnote to highlight alarming issues raised by Oklahoma's proposed interest in restricting nonresident speech "simply because the speech may indirectly affect the political process . . . ."[195] The court in *Yes On Term Limits, Inc.* continued,

> To accept the wholesale restriction of the petition process to residents of Oklahoma as a compelling state interest would have far-reaching consequences. For example, the prohibition of non-residents from driving voters to the polls would seemingly be a logical extension. This court is unwilling to approve as a compelling state interest the restriction of core First Amendment rights in this manner.[196]

189. *See supra* note 187 and accompanying text.

190. *See, e.g.*, *Chandler*, 292 F.3d at 1242 (failing to narrowly tailor its law to prevent fraud, malfeasance, and corruption); *Yes On Term Limits*, 550 F.3d at 1031 (failing to narrowly tailor its law to protect the integrity of the election process); *Nader*, 531 F.3d at 1037–38 (failing to narrowly tailor its law to prevent fraud in the election process).

191. *See supra* note 185 and accompanying text.

192. *Yes On Term Limits*, 550 F.3d at 1023.

193. *Id.* at 1030–31.

194. *Id.* at 1029.

195. *Id.* at 1028 n.2.

196. *Id.*

The Tenth Circuit clearly placed more emphasis on protecting nonresident political participation than on Oklahoma's desire to defend its defined political community, at least in the context of petition circulators.

It requires no stretch of the imagination to apply similar arguments to protect other nonresident political activities. For example, the Tenth Circuit's concerns in *Yes On Term Limits, Inc.* about "wholesale restriction"[197] of nonresident participation in the ballot initiative petition process also apply to nonresident contribution limits that effectively ban nonresident donations once a candidate receives a certain threshold level of money from nonresidents.[198] Residential voting restrictions should be able to preserve political cohesion sufficiently without help from unnecessary restrictions on nonresident political activity. A fine line exists between maintaining a political community and silencing speech as a form of political protectionism or isolationism. A defining principle of democratic institutions involves robust public discussion of political issues untethered from unnecessary government censorship.[199] As one scholar wrote,

> The value of democratic legitimation occurs . . . specifically through processes of communication in the public sphere. It requires that citizens have access to the public sphere so that they can participate in the formation of public opinion, and it requires that governmental decision making be somehow rendered accountable to public opinion.[200]

Some limits, such as residency-based voting restrictions, generally fit within the category of appropriate and constitutional residency-based political discrimination.[201] Beyond that, however, the constitutionality of yet-to-be-challenged or perhaps even yet-to-be-created residency-based speech restrictions remains hazy. As with nonresident contribution limits, any state law that burdens nonresident political activity risks invalidation

197. *Id.*

198. *See supra* Part II.

199. *See generally* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 *passim* (2011) (explaining the value of free speech to democracy); James Weinstein, *Participatory Democracy as The Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 491 (defending the view that free speech doctrine "is best explained as assuring the opportunity for individuals to participate in the speech by which we govern ourselves").

200. *See* Post, *supra* note 199, at 482.

201. *See, e.g.*, Supreme Court of N.H. v. Piper, 470 U.S. 274, 282 n.13 (1985) ("A State may restrict to its residents, for example, both the right to vote, and the right to hold state elective office.") (citation omitted).

under one of America's most sacred societal and institutional values: free speech.

CONCLUSION

The Supreme Court, when given its next opportunity to do so, should invalidate state nonresident contribution limits. In today's highly mobile society, nonresidents like Bill the restauranteur have many legitimate interests in states other than the one they legally call home. The First Amendment protects all Americans,[202] and out-of-state residents deserve more, not less, political association protection than in-state residents.

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202. *See* U.S. CONST. amend. I.

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