

Campaign Finance, Federalism, and the Case of the Long-Armed Donor

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INTRODUCTION

While promoting a new book this past spring,¹ retired justice John Paul Stevens sat down for interviews with Jeffrey Toobin of the *New Yorker* and Adam Liptak of the *New York Times*.² In both conversations, Stevens sharply criticized the ruling that the US Supreme Court had handed down a few weeks earlier in *McCutcheon v Federal Election Commission*.³ In that case, Alabama businessman Shaun McCutcheon challenged federal aggregate limits on how much an individual may contribute during an election cycle to all federal candidates nationwide and to certain political committees.⁴ Those limits had prevented McCutcheon from donating as much money as he would have liked to a variety of political committees and to individuals running for Congress in states and districts other than his own.⁵ By a 5–4 vote, the Court struck down the aggregate limits, holding that they violated McCutcheon’s and other would-be campaign donors’ First Amendment rights.⁶

In Stevens’s view, the trouble with *McCutcheon* began with the ruling’s first sentence. Writing for the plurality, Chief Justice John Roberts opened with a declaration: “There is no right more basic in our democracy than the right to participate in electing our political leaders.”⁷ Toobin recounted Stevens’s criticism:

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¹ See John Paul Stevens, *Six Amendments: How and Why We Should Change the Constitution* (Little, Brown 2014).

² See Adam Liptak, *Justice Stevens Suggests Solution for ‘Giant Step in the Wrong Direction’*, NY Times A14 (Apr 21, 2014); Jeffrey Toobin, *I Told You So*, New Yorker 20 (Apr 28, 2014).

³ 134 S Ct 1434 (2014).

⁴ Id at 1442–43 (Roberts) (plurality).

⁵ Id at 1443 (Roberts) (plurality).

⁶ Id at 1462 (Roberts) (plurality).

⁷ *McCutcheon*, 134 S Ct at 1440–41 (Roberts) (plurality).

“It’s a grossly incorrect decision,” Stevens said. “The very first sentence of the Chief Justice’s opinion lays out a basic error in this whole jurisprudence. He says that there is ‘no right more basic in our democracy’ than to pick our elected officials. But the case is not about whether individuals can pick their own congressmen. It’s about giving lots of campaign contributions, picking other people’s congressmen, not your own.”⁸

Liptak recounted a similar exchange: “Mr. McCutcheon was not trying to participate in electing his own leaders, Justice Stevens said. ‘The opinion is all about a case where the issue was electing somebody else’s representatives,’ he said.”⁹

The Court’s rulings in *McCutcheon* and *Citizens United v Federal Election Commission*¹⁰ have sparked fierce disagreements about a host of matters ranging from whether restrictions on campaign contributions and expenditures are in fact restrictions on speech, to whether the First Amendment grants equivalent speech rights to corporations and natural persons, to the kinds of governmental objectives that can justify restrictions on campaign spending. Regardless of the position that one takes in those debates, I would like to ask readers to assume for a few moments that the Roberts Court’s rulings on those issues are grounded in a sound reading of the First Amendment. With those contested pieces of the campaign-finance puzzle held momentarily in place, I want to focus on Roberts’s first sentence in *McCutcheon* and on Stevens’s critique of it. The disagreement manifest in that exchange raises provocative issues on its own. By contributing to candidates in states and districts other than his own, was McCutcheon indeed trying to influence the selection of other people’s representatives? If so, should that affect our First Amendment appraisal of his actions?

In Part I of this essay, I argue that Stevens’s criticism of *McCutcheon*’s opening line is at odds with the understanding of American federalism that Stevens championed while on the Court and is far more compatible with a conception of federalism that he explicitly rejected. In Part II, I evaluate McCutcheon’s widely dispersed campaign contributions through the federalism

⁸ Toobin, *I Told You So*, *New Yorker* at 20 (cited in note 2).

⁹ Liptak, *Justice Stevens Suggests Solution for ‘Giant Step in the Wrong Direction’*, *NY Times* at A14 (cited in note 2).

¹⁰ 558 US 310 (2010) (striking down federal limits on corporations’ independent political expenditures).

lens that Stevens now endorses. I contend that, even if one posits that McCutcheon was trying to influence the selection of other people's representatives, any effort to restrict his and other long-armed donors' campaign spending on those grounds would face an uphill First Amendment battle.

I. VISIONS OF FEDERALISM

Was McCutcheon meddling in the selection of other people's representatives? Nearly two decades ago, the Court indicated how it would answer such a question, though it did so with a voting lineup that is unexpected in light of Justice Stevens's criticism of *McCutcheon*. In 1995, Stevens wrote for a five-member majority in *U.S. Term Limits, Inc v Thornton*.¹¹ At issue in that case was an amendment to the Arkansas Constitution that barred both placing a person's name on a ballot for election to the US House of Representatives if he or she had already held one of Arkansas's seats in that chamber for three or more terms and placing a person's name on a ballot for election to the US Senate if he or she had already held one of Arkansas's seats for two or more terms.¹² The majority held that the Arkansas amendment was unconstitutional, while Justice Clarence Thomas led those taking the contrary view.¹³ The justices' debate about first principles will bring us back to *McCutcheon* in short order.

Joined by Justices Anthony Kennedy, David Souter, Ruth Bader Ginsburg, and Stephen Breyer, Stevens determined that allowing Arkansas to add qualifications beyond the age, citizenship, and residency requirements prescribed by the US Constitution would disregard "the revolutionary character of the Government that the Framers conceived."¹⁴ When the Framers adopted the Constitution, Stevens wrote, they

envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead

¹¹ 514 US 779 (1995).

¹² *Id* at 784.

¹³ Compare *id* at 845 (Stevens) (majority) ("[T]he Arkansas enactment . . . exceeds the boundaries of the Constitution."), with *id* (Thomas dissenting) ("The Constitution is simply silent on this question.").

¹⁴ *Id* at 803 (Stevens) (majority). See also US Const Art I, § 2, cl 2 (establishing age, citizenship, and residency requirements for members of the House); US Const Art I, § 3, cl 3 (establishing age, citizenship, and residency requirements for members of the Senate).

creating a direct link between the National Government and the people of the United States. In that National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation. . . . Representatives and Senators are as much officers of the entire Union as is the President.¹⁵

Unlike a legislative body akin to the one that existed under the Articles of Confederation, Stevens explained, “[t]he Congress of the United States . . . is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people.”¹⁶ Congress, he reiterated, is “a uniform national body representing the interests of a single people.”¹⁷ The Court concluded that allowing individual states to impose term limits or other qualifications for congressional office would “undermin[e] the uniformity and the national character that the Framers envisioned and sought to ensure” and would “sever the direct link that the Framers found so critical between the National Government and the people of the United States.”¹⁸ Kennedy filed a concurring opinion to underscore his conviction that the Constitution creates “two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”¹⁹

Joined by Chief Justice William Rehnquist and Justices Sandra Day O’Connor and Antonin Scalia in dissent, Thomas advanced a fundamentally different conception of the American constitutional system. According to these justices, the American people do not have a direct, unmediated relationship with the entire national government. Pointing out that the Constitution requires citizens to act through their individual states whenever

¹⁵ *U.S. Term Limits, Inc.*, 514 US at 803 (citation omitted). The majority view was bolstered by the fact that the Constitution “gives the representatives of all the people the final say in judging the qualifications of the representatives of any one State” and by the fact that the Constitution requires payment of representatives’ and senators’ salaries from the US Treasury. *Id.* at 804. See also US Const Art I, § 5, cl 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.”); US Const Art I, § 6, cl 1 (“The Senators and Representatives shall . . . [be] paid out of the Treasury of the United States.”).

¹⁶ *U.S. Term Limits, Inc.*, 514 US at 821.

¹⁷ *Id.* at 822.

¹⁸ *Id.*

¹⁹ *Id.* at 838 (Kennedy concurring) (“The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”).

they wish to elect congressional representatives, choose a president, or amend the Constitution, Thomas argued that “[t]he Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation.”²⁰ For that and other reasons, he rejected the majority’s contention that “each Member of Congress has a nationwide constituency.”²¹ The Framers did indeed establish a direct link between members of Congress and the people, Thomas wrote, but that link was between members of Congress and the people of those members’ respective states:

When the people of Georgia pick their representatives in Congress, they are acting as the people of Georgia, not as the corporate agents for the undifferentiated people of the Nation as a whole.

. . .

[T]he people of Georgia have no say over whom the people of Massachusetts select to represent them in Congress. This arrangement must baffle the majority, whose understanding of Congress would surely fit more comfortably within a system of nationwide elections.²²

If the people of Arkansas wished to impose qualifications in addition to those established by the US Constitution for that state’s allotment of seats in the House and Senate, the dissenters concluded, it was no one else’s business.²³

Taking Stevens’s and Thomas’s opposing opinions as our guides, let us return to our question: When a donor in one state or district contributes to the campaign of a Senate or House candidate in another state or district, is the donor trying to influence the selection of somebody else’s representatives? If the understanding of American federalism that Stevens advanced in *U.S. Term Limits, Inc* is embraced, then jurisdictional boundaries fade into irrelevance when identifying congressional constituencies—just as they fade into irrelevance when identifying those to whom the president owes his or her allegiance—and there are very real ways in which an Alabama resident is represented by, say, a senator from Montana. If, instead, Thomas’s

²⁰ *U.S. Term Limits, Inc*, 514 US at 848–49 (Thomas dissenting).

²¹ *Id* at 857 (Thomas dissenting).

²² *Id* at 858–60 (Thomas dissenting).

²³ See *id* at 860 (Thomas dissenting) (“[W]hen it comes to the selection of Members of Congress, the people of each State have retained their independent political identity.”).

understanding of our federal system is adopted, then senators and congresspersons elected by the people of Montana represent only the people of that state and not, say, also the people of Alabama.

It thus comes as a surprise to hear Stevens insist that *McCutcheon* was about “picking other people’s congressmen, not your own.”²⁴ The evident conflict in his views on term limits and campaign finance may explain why Breyer and Ginsburg—two of the five members of the *U.S. Term Limits, Inc* majority—made no effort in *McCutcheon* to draw legal or rhetorical support from the fact that a campaign donor was trying to influence races in states and districts that he did not inhabit.²⁵ Neither did the Government in its briefs.²⁶ As for Kennedy, he took precisely the position in *McCutcheon* that—all else being equal—his views in *U.S. Term Limits, Inc* would have led one to predict: any American can claim any member of Congress as his or her own and can direct his or her campaign contributions accordingly.

II. REGULATING LONG-ARMED CAMPAIGN SPENDING

But what if Justice Stevens got it wrong in *U.S. Term Limits, Inc* and Justice Thomas got it right, such that *McCutcheon* was indeed trying to influence the selection of other people’s representatives? Is it clear that we could then regard *McCutcheon* and other long-armed donors as meddlers, and that regulators could justifiably treat them less favorably than those who keep their money close to home?

A. The Implications of § 441e and *Bluman v Federal Election Commission*²⁷

A good starting point for considering that question is provided by 2 USC § 441e, the federal statute barring foreign nationals from making campaign contributions or electioneering

²⁴ Toobin, *I Told You So*, *New Yorker* at 20 (cited in note 2).

²⁵ Joined by Justices Ginsburg, Sonia Sotomayor, and Elena Kagan in dissent, Breyer principally argued that the other five justices had taken far too narrow a view of political corruption and had underestimated the risk that donors and politicians would circumvent federally imposed (and here unchallenged) base limits on campaign contributions. See *McCutcheon*, 134 S Ct at 1466–78 (Breyer dissenting).

²⁶ See generally Brief for Appellee Federal Election Commission, *McCutcheon v Federal Election Commission*, Docket No 12-536 (US filed July 18, 2013) (available on Westlaw at 2013 WL 3773847).

²⁷ 800 F Supp 2d 281 (DDC 2011), *affd*, 132 S Ct 1087 (2012).

expenditures in local, state, and national elections.²⁸ In *Citizens United*, the Court expressly reserved judgment on § 441e’s constitutionality,²⁹ but it has since (in a fashion) resolved the issue. In *Bluman*, the US District Court for the District of Columbia sustained § 441e against a First Amendment challenge brought by a citizen of Canada and a citizen of Israel both of whom were in the United States on temporary visas.³⁰ The plaintiffs in that case both resided in New York State; one wished to make financial contributions to the campaigns of federal candidates in New York State and Washington State, while the other wished to contribute to the campaign of a federal candidate in Oklahoma.³¹ The court reasoned that the statute could survive even strict scrutiny because the government has a compelling interest in preventing foreign nationals from participating in “activities of democratic self-government.”³² The kinds of spending barred by § 441e, the court said, “are an integral aspect of the process by which Americans elect officials to federal, state, and local government offices.”³³ The plaintiffs tried to leverage the fact that, under federal law, “many groups of people who are not entitled to vote may nonetheless make contributions and expenditures related to elections—for example, minors, American corporations, and citizens of states or municipalities other than the state or municipality of the elective office.”³⁴ The court, however, was unpersuaded, stating that “minors, American corporations, and citizens of other states and municipalities are all members of the American political community.”³⁵

The Supreme Court unanimously affirmed the district court’s ruling in January 2012 in a fourteen-word order.³⁶ The

²⁸ See 2 USC § 441e (2012). See also 2 USC § 434(f)(3) (defining “electioneering communication”).

²⁹ See *Citizens United*, 558 US at 362 (“We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”).

³⁰ *Bluman*, 800 F Supp 2d at 282–83, 85.

³¹ *Id.* at 285.

³² *Id.* at 288.

³³ *Id.*

³⁴ *Bluman*, 800 F Supp 2d at 290.

³⁵ *Id.*

³⁶ See *Bluman v Federal Election Commission*, 132 S Ct 1087, 1087 (2012) (“Appeal from the United States District Court for the District of Columbia. Judgment affirmed.”). From the perspective of *Citizens United*’s critics, the Court’s decision to summarily affirm—rather than hear oral arguments and issue a fully reasoned decision—is unsurprising. See, for example, Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 Mich L Rev 581, 605–10 (2011) (arguing that one can endorse § 441e’s

justices' views about the case's implications for Americans' cross-border campaign spending thus remain a matter of speculation. Stevens believes, however, that *Bluman's* implications are clear. In testimony before the Senate Rules and Administration Committee this past spring, he argued that the door is invitingly open for federal and state lawmakers to impose restrictions on long-armed campaign spending:

[R]ules limiting campaign contributions and expenditures should recognize the distinction between money provided by their constituents and money provided by non-voters, such as corporations and people living in other jurisdictions. [He then briefly summarized *Bluman*.] Similar reasoning would justify the State of Michigan placing restrictions on campaign expenditures made by residents of Wisconsin or Indiana without curtailing their speech about general issues. Voters' 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. The *Bluman* case illustrates that the interest in protecting campaign speech by non-voters is less worthy of protection than the interest in protecting speech about general issues.³⁷

In his recent book, Stevens similarly argues that “[u]nlimited expenditures by nonvoters in election campaigns . . . impairs [sic] the process of democratic self-government by making successful candidates more beholden to the nonvoters who supported them than to the voters who elected them.”³⁸

That argument certainly has plausible foundations. States and the federal government share a strong constitutional interest in preserving a republican form of government for each of the states.³⁹ Recognizing “the choice, and right, of the people to be governed by their citizen peers,” the Court has held, for example, that states may exclude foreign nationals from

constitutionality and embrace all the Court's reasoning in *Citizens United* only through doctrinal incoherence).

³⁷ *Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond, Hearing on Campaign Finance before the Senate Rules and Administration Committee*, 113th Cong., 2d Sess 3–5 (2014) (statement of retired US Supreme Court justice John Paul Stevens).

³⁸ Stevens, *Six Amendments* at 78 (cited in note 1).

³⁹ See US Const Art IV, § 4, cl 1 (“The United States shall guarantee to every State in this Union a Republican Form of Government.”).

governmental positions that involve “discretionary decisionmaking, or execution of policy, which substantially affects members of the political community.”⁴⁰ To a point, the Court has recognized that actionable threats to the self-governance of states and municipalities can also come from American citizens. In *Pope v Williams*,⁴¹ for example, the Court held that a state may withhold voting privileges from individuals who refuse to declare an intention to become residents of that state.⁴² In *Holt Civic Club v City of Tuscaloosa*,⁴³ the Court allowed a city to withhold the franchise from nearby nonresidents who had a strong interest in some of that city’s policies.⁴⁴ The Court declared that “no one would suggest” that a person has a constitutional right to vote in a city’s elections merely because he or she is affected by some of that city’s actions.⁴⁵

Stevens would extend such cases’ reasoning to allow states to shield their elections from the influence of out-of-state campaign spending. Yet there is a big difference between saying that a state may refuse to allow an American nonresident to cast a ballot on Election Day and saying that a state may refuse to allow an American nonresident to use campaign contributions or expenditures to speak to that state’s voters about favored or disfavored candidates. To appreciate the magnitude of this difference, simply consider what the Court can realistically be expected to say about the voting rights of corporations. The Roberts Court has strongly protected the right of corporations to make independent political expenditures, but do many seriously believe that the Court is poised to declare that each American corporation has a constitutional right to send an emissary to cast a ballot on Election Day? Such visions are the stuff of rhetoric, not reality.⁴⁶

⁴⁰ *Foley v Connelie*, 435 US 291, 296 (1978).

⁴¹ 193 US 621 (1904).

⁴² See *id.* at 633–34.

⁴³ 439 US 60 (1978).

⁴⁴ See *id.* at 68–70.

⁴⁵ *Id.* at 69.

⁴⁶ See, for example, *Citizens United*, 558 US at 424–25 (Stevens dissenting) (“Under the majority’s view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.”); Lyle Denniston, *Analysis: The Personhood of Corporations*, SCOTUSblog (Jan 21, 2010), online at <http://www.scotusblog.com/2010/01/analysis-the-personhood-of-corporations> (visited Sept 6, 2014) (arguing that Stevens made a powerful point and that “[i]t does not matter that the right-to-vote scenario is quite implausible”).

B. Obstacles to Regulation

Scholars and lawmakers should, and likely will, consider the merits of Stevens's proposal at length. I wish here to simply sketch the contours of a few of the formidable obstacles that those who favor restrictions on long-armed campaign spending must overcome.

1. *Bluman's* signals.

Bluman sends mixed signals about restrictions on out-of-state spending by American citizens. The district court's emphasis on democratic integrity does suggest that states may regard campaign contributions from nonresidents as a threat to their own self-governance, no matter the donors' nationalities. The state of Iowa, for example, might regard out-of-state campaign spending as a threat to its self-governance regardless of whether the funds come from a Canadian or a Californian. Yet when the *Bluman* plaintiffs argued that they were no different from Americans who wish to financially support candidates in states and cities in which they are not permitted to vote, the court dismissed the comparison by defining the self-governing community in national terms.⁴⁷ On that line of thinking, Americans' membership in the national political community entitles them to wield a nationwide financial influence in elections of all kinds.

2. Cultural realities.

Restricting long-armed campaign spending would conflict with the norms and practices of our evolving political culture. Put differently, if we are to abide by the proverb that only the blameless may cast stones,⁴⁸ the queue for lobbing stones at long-armed donors is much shorter than one might initially suppose. Cross-border political activity is a long-standing and growing feature of our political system.⁴⁹ Anyone who is old enough to

⁴⁷ See notes 34–35 and accompanying text.

⁴⁸ See John 8:7 (King James Version) (“He that is without sin among you, let him first cast a stone at her.”).

⁴⁹ See Jessica Bulman-Pozen, *Partisan Federalism*, 127 Harv L Rev 1077, 1135 (2014) (“In recent years, political engagement across state lines has increased dramatically.”); Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 Berkeley J Intl L 162, 164 (2009) (“While some out-of-state fundraising has been occurring for years, the scale has dramatically increased recently with the growth of the Internet, making it much easier for out-of-state donors and activist [sic] to track and support candidates.”).

vote and has been even marginally active in mainstream party politics has almost certainly received letters, telephone calls, or emails from national political committees that warn of enemy encroachment in one part of the country or another and urgently request financial support. The nation's political action committees (PACs), super PACs, and politically active nonprofits—including MoveOn.Org for those on the left, Crossroads GPS for those on the right, longstanding players like NARAL Pro-Choice America and the National Rifle Association, and seemingly countless others—provide donors large and small with opportunities to bring nationwide financial resources to bear in targeted races.⁵⁰ No matter the size of their donations, those who have contributed to such entities have spent money to influence the outcome of elections in jurisdictions in which they do not reside and cannot vote.

And out-of-state donors have contributed for good and varied reasons. Securing victory in one's own state or district will do little to advance one's national legislative agenda if a majority of the country chooses leaders with substantially different objectives. If one's political identity is bound up with that of the nation, one has strong social-psychological incentives to secure congressional leadership that is compatible with one's own preferences.⁵¹ Those who regard themselves as geographically mobile have an incentive to try to ensure that they will be comfortable with the prevailing regulatory regime no matter where they ultimately reside.⁵² Moreover, as Professor Jessica Bulman-Pozen

⁵⁰ For additional examples ranging from a Washington State-based company that has contributed to an Alaska-focused PAC, to a Florida-based venture capitalist who has contributed to a Kentucky-focused PAC, to two Ohio-based nonprofits that attacked a Senate candidate in a Georgia primary, to Senate Majority PAC's well-financed efforts in numerous races across the country, see Ian Vandewalker, *Election Spending 2014: Nine Toss-up Senate Races*, Brennan Center for Justice (Brennan Center for Justice at New York University School of Law Aug 18, 2014), online at <http://www.brennancenter.org/analysis/election-spending-2014-nine-toss-up-senate-races> (visited Sept 6, 2014).

⁵¹ See Todd E. Pettys, *Sodom's Shadow: The Uncertain Line between Public and Private Morality*, 61 *Hastings L J* 1161, 1194–99 (2010) (describing the “integration thesis,” and arguing that “citizens frequently *do* perceive that, by virtue of their integration with a political community, their individual well-being is affected by the presence or absence of certain kinds of conduct within those geopolitical borders”).

⁵² See Todd E. Pettys, *The Mobility Paradox*, 92 *Georgetown L J* 481, 502–05 (2004) (arguing that, because geographically mobile citizens cannot predict all the places that they will one day live and focus their lobbying resources there, they have an incentive to try to “maximize the likelihood that they will be happy no matter where in the nation their life circumstances take them” by seeking federal legislation that embodies their preferences).

has perceptively pointed out, Americans can, through cross-border political engagement, “seek to create momentum for a particular policy or political party, to build a real-life example to inform national debate, . . . to take comfort in knowing that their preferences are actual policy—and their partisan group is in control—somewhere,”⁵³ as well as affiliate with other subnational jurisdictions when they feel politically alienated from their own.⁵⁴ Many of these incentives not only push people into federal politics, but they drive people to get involved in other jurisdictions’ state and local electoral battles as well.⁵⁵ The various incentives that drive so many donors—large and small, on the left and on the right—to extend their reach beyond their own locales are among the incentives that, to date, have evidently discouraged citizens from launching a major movement against long-armed political activity.⁵⁶ Declaring such reforms both permissible and desirable would mark a substantial change in our political culture.⁵⁷

3. The Roberts Court’s doctrinal trajectory.

Bearing in mind our resolve not to quarrel here with the Roberts Court’s assembly of other portions of the campaign-finance puzzle,⁵⁸ current First Amendment doctrine is plainly hostile to laws aimed at restricting long-armed campaign activity. Restrictions on independent expenditures are especially

⁵³ Bulman-Pozen, 127 Harv L Rev at 1136 (cited in note 49).

⁵⁴ See id at 1140–42.

⁵⁵ See Anthony Johnstone, *Outside Influence*, 13 Election L J 117, 118 (2014) (citing examples of “outside influence” in recall elections, petition circulation, ballot-issue campaigns, lobbying, and other instances of legislative democracy).

⁵⁶ Of course, the fact that out-of-state money commonly finds its way into electoral campaigns of all kinds does not mean that in-state and out-of-state spending are always politically fungible. Those who are disadvantaged by an influx of out-of-state money can try to boost their votes by making a campaign issue out of the matter, warning that meddling outsiders lacking local values are trying to dictate how business is done here at home. See id at 117–18 (citing examples of distaste for outsiders, such as the Reconstruction-era epithet “carpetbagger”). But the threat posed by this characterization evidently does little to deter such spending.

⁵⁷ Alaska and Hawaii are reportedly the only states that place restrictions on out-of-state campaign contributions, and no state restricts out-of-state expenditures. See Alaska Stat Ann § 15.13.072(a), (e) (2013); Hawaii Rev Stat § 11-362 (2013). See also Bulman-Pozen, 127 Harv L Rev at 1137 (cited in note 49). Federal courts have struck down limits on out-of-state campaign contributions in other states on First Amendment grounds. See, for example, *Landell v Sorrell*, 382 F3d 91, 146–48 (2d Cir 2004), revd and remd on other grounds, *Randall v Sorrell*, 548 US 230 (2006); *VanNatta v Keisling*, 151 F3d 1215, 1217–18 (9th Cir 1998).

⁵⁸ See text accompanying note 10.

vulnerable to First Amendment attacks because they draw the Court's most demanding level of scrutiny.⁵⁹ Whether campaign contributions warrant the same strict scrutiny remains debated in some quarters; the Court's current (though perhaps faltering) wisdom is that they do not.⁶⁰ But even if the Court continues to apply a somewhat more lenient standard, it is clear that the Court's mode of inquiry is still "rigorous" and far removed from mere rational-basis review.⁶¹ 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.

Citizens United, in particular, provides a treasure trove of reasons why the Court is likely to find such restrictions unconstitutional. Writing for the five-member majority in that watershed case, Justice Kennedy strongly condemned speech restrictions that "distinguish[] among different speakers, allowing speech by some but not others."⁶² The American political process demands "that voters must be free to obtain information from diverse sources in order to determine how to cast their votes," the Court said, so lawmakers cannot "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."⁶³ With the exception of corporate-speech precedent that it proceeded to overturn, the Court stressed that it had never "allowed the exclusion of a class of speakers from the general public dialogue."⁶⁴ Kennedy

⁵⁹ See *Buckley v Valeo*, 424 US 1, 44–45 (1976) (noting "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression").

⁶⁰ See *id.* at 20–21 (concluding that restrictions on contributions infringe less severely on First Amendment freedoms than do restrictions on expenditures). In *McCutcheon*, the Republican National Committee urged the Court to abandon the constitutional distinction between contributions and expenditures and to apply strict scrutiny to both. See Brief on the Merits for Appellant Republican National Committee, *McCutcheon v Federal Election Commission*, Docket No 12-536, *6–7 (US filed May 6, 2013) (available on Westlaw at 2013 WL 1923314). The plurality in *McCutcheon* found it unnecessary to "parse the differences between the two standards," noting that the aggregate limits could not be sustained even under the somewhat less demanding of the two. *McCutcheon*, 134 S Ct at 1446 (Roberts) (plurality). Justice Thomas refused to join the plurality opinion precisely because he believed that strict scrutiny should be deployed for restrictions on contributions and expenditures alike. See *id.* at 1462–64 (Thomas concurring in the judgment).

⁶¹ *McCutcheon*, 134 S Ct at 1444 (Roberts) (plurality), quoting *Buckley*, 424 US at 29.

⁶² *Citizens United*, 558 US at 340 ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").

⁶³ *Id.* at 341.

⁶⁴ *Id.*

emphatically summed up the point: “When Government seeks to use its full power . . . to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.”⁶⁵

That logic can readily be applied in defense of those Americans who wish to exert a financial influence on other states’ elections. It applies most directly, of course, to independent expenditures—the type of spending that was at issue in *Citizens United*. Why should a state’s voters not be permitted to hear what interested outsiders have to say about the candidates whose names will appear on those voters’ ballots and then decide for themselves whether those views are persuasive? *Citizens United’s* logic also has force in the realm of campaign contributions. Why should a candidate not be permitted to associate with outsiders for the purpose of producing campaign messages, leaving voters free to decide for themselves what they think of those messages and—provided that there is an adequate donor-disclosure regime in place—whether the candidate’s association with those long-armed donors is itself politically meaningful?

Of course, one could ask those same questions regarding the foreign nationals in *Bluman*. But if the Court is pressed to reconcile its affirmance in that case with the strong opposition that it expressed to speaker-based restrictions in *Citizens United*, it is difficult to imagine that the Court would deal a major blow to *Citizens United’s* central logic. Even if a majority of the justices now generally embrace the understanding of American federalism put forward by Thomas in his *U.S. Term Limits, Inc* dissent,⁶⁶ the smart money is on *Bluman*, not *Citizens United*, getting painted into a corner. The Court might say, for example, that, when it comes to making campaign contributions and electioneering expenditures in domestic elections (rather than supplementing the Constitution’s qualifications for seats in the House and Senate), the First Amendment renders the relevant political community national in scope. In support of that conclusion, the Court might say that, because American citizens 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

⁶⁵ Id at 356.

⁶⁶ See notes 20–23 and accompanying text.

order to shape political leadership at all levels of government. Even if *Bluman's* fit with *Citizens United* ultimately remains uncomfortable, the Court's decision to issue a two-word affirmation in the former seems only to confirm that the justices are unlikely to rethink a central piece of *Citizens United*.

Among the governmental objectives that might be invoked to justify restrictions aimed specifically at long-armed campaign spending, the leading contender is the self-governance rationale that Stevens identified: if a state's elected officials feel more indebted to the outsiders who provided direct or indirect financial support than they do to the individuals who voted on Election Day, then that state's representative system of government may be threatened.⁶⁷ That argument comes perilously close, however, to suffering from the same vulnerabilities as the anticorruption and antidistortion rationales that the Court rejected in *Citizens United*. The Court in that case said that money might secure "[i]ngratiation and access," but those are not sufficient bases to curb campaign speech because they "are not corruption."⁶⁸ The fact that campaign spending is aimed at persuading voters to cast their ballots in a particular way, Kennedy wrote, presupposes the reality "that the people have the ultimate influence over elected officials."⁶⁹ With respect to the Government's fear that wealth-amassing donors (corporations, in that case) would produce huge amounts of democracy-distorting speech, the Court stated that this was simply a different way of trying to justify the kind of speaker-based, information-limiting speech restriction that the First Amendment forbids.⁷⁰

The stage is thus advantageously set for those who would resist restrictions on long-armed campaign spending. What is the constitutionally redressable problem, long-armed donors' attorneys will ask, if an out-of-state individual wins access to another state's elected leaders by making campaign contributions and expenditures? The power to retain or discard those elected officials still rests in the hands of the voters who must ultimately appraise their leaders' performance. Moreover, so far as direct campaign contributions are concerned, out-of-state donors will be subject to the same base limits that in-state donors face—and

⁶⁷ For a sympathetic discussion of this argument, see Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*, 63 Emory L J 781, 820–28 (2014).

⁶⁸ *Citizens United*, 558 US at 360.

⁶⁹ *Id.*

⁷⁰ See *id.* at 349–56.

if contributions at or below those limits do not unacceptably skew candidates' loyalties when in-state donors make them, then why should it be different when the money comes from beyond the state's borders? Again, it is the state's voters—not the donors—who must ultimately decide whether the elected officials are performing satisfactorily, and voters can send their leaders packing when they perceive that those leaders' loyalties have drifted. Section 441e does nip at the heels of that argument, but the district court in *Bluman* has already signaled how those difficulties might be waved away—namely, by determining that, when it comes to campaign spending, the First Amendment simply does not provide foreign nationals and members of the American political community with equivalent levels of protection. That approach clearly chafes against *Citizens United's* unqualified condemnation of speaker-based restrictions on expressive freedoms, but by affirming the district court's ruling in *Bluman*, the Court has already signaled that it is likely willing to abide this tension.

CONCLUSION

Was Shaun McCutcheon trying to pick “other people’s congressmen,”⁷¹ as Justice Stevens charged, or was he trying to pick his own? Under the vision of federalism that Stevens endorsed on behalf of a majority of the Court nearly twenty years ago, McCutcheon was trying to choose his own leaders. As Stevens explained in 1995, regardless of the state within which they live, each congressperson has a direct relationship with each American. If that is the view of federalism that one holds, state borders should be irrelevant to determining whether long-armed American donors' campaign spending in congressional elections is, in whole or in part, constitutionally proscribable.

Even if one takes the contrary view of our federal system and posits that senators and representatives represent only the states and districts from which they come, the First Amendment stands as an obstacle to concluding that long-armed donors' campaign activities may be uniquely restricted. Absent a dramatic shift, *Citizens United* and other increasingly entrenched features of our political culture strongly suggest that cross-border campaign spending is here to stay.

⁷¹ See note 8 and accompanying text.