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## The Constitutionality of Campaign Finance Regulation: Should Differences in a State's Political History and Culture Matter?

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## THE CONSTITUTIONALITY OF CAMPAIGN FINANCE REGULATION: SHOULD DIFFERENCES IN A STATE'S POLITICAL HISTORY AND CULTURE MATTER?

William P. Marshall\*

### I. INTRODUCTION

In 2010, in *Citizens United v. Federal Election Commission*,<sup>1</sup> the United States Supreme Court struck down federal limits on independent corporate campaign expenditures.<sup>2</sup> In a deeply divided decision, the Court ruled that such limitations cut at the heart of political discourse and were therefore unconstitutional on First Amendment grounds.<sup>3</sup>

One year later, in *Western Tradition Partnership, Inc. v. Attorney General of Montana*,<sup>4</sup> the Montana Supreme Court faced a parallel First Amendment challenge against a state law restricting independent corporate campaign expenditures.<sup>5</sup> Unlike the United States Supreme Court in *Citizens United*, however, the Montana Supreme Court upheld the independent corporate expenditure limitation.<sup>6</sup> The rationale that the Montana Supreme Court offered in distinguishing *Citizens United* can be summarized in three words: “Montana is different.”<sup>7</sup> According to the Montana Supreme Court, Montana’s history<sup>8</sup> and political culture<sup>9</sup> were such that the state’s rationale in restricting corporate expenditure constituted a compelling state interest even if there was no compelling interest justifying prohibiting independent corporate campaign expenditures at the federal level.<sup>10</sup>

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1. *Citizens United v. Fed. Election Commn.*, 130 S. Ct. 876 (2010).

2. *Id.* at 913 (citing 2 U.S.C. § 441b (2006)).

3. *Id.* at 913.

4. *W. Tradition Partn., Inc. v. Atty. Gen. of Mont.*, 271 P.3d 1 (Mont. 2011), *cert. granted, judgment rev'd sub nom. Am. Tradition Partn., Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

5. *Id.* at 18 (citing Mont. Code Ann. § 13-35-227(1)).

6. *W. Tradition Partn., Inc.*, 271 P.3d at 13.

7. *Id.* at 6 (“[U]nlike *Citizens United*, this case concerns Montana law, Montana elections and it arises from Montana history.”).

8. *Id.* at 9 (“[In the early 1900s,] naked corporate manipulation of the very government (Governor and Legislature) of the State ultimately resulted in populist reforms that are still part of Montana law.”).

9. *Id.* at 11 (“Issues of corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government.”) (emphasis added).

10. *Id.* at 13.

The Montana Court's decision was short-lived. The case was appealed, and the United States Supreme Court summarily reversed.<sup>11</sup> In a terse 5–4 decision, the Court announced simply, “The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does.”<sup>12</sup>

The United States Supreme Court decision, however, did not engage the Montana Supreme Court's reasoning, stating only that the state court “fail[ed] to meaningfully distinguish” *Citizens United*.<sup>13</sup> The Court thus left unexplained why it was not persuaded by the state court's rationale that Montana's political culture and history justified a different result with respect to the state's campaign limits than the Court reached in *Citizens United* with respect to federal limitations.<sup>14</sup>

This essay directly responds to the Montana Court's assertion. Part II examines and expands upon the Montana Supreme Court's claim that Montana is different. It suggests that not only was the state court correct in its assessment of Montana but in fact all states are “different” in the sense that all states have unique political cultures. Part III reviews the effects of federal statutory and constitutional law in shaping the political cultures of the states, noting that in some circumstances federal law has dramatically affected the states' political cultures but that in other areas the states have been relatively free to develop and sustain their internal political cultures without federal interference. The section ends by raising the question of whether campaign finance rules are ones that should generally be federalized or whether they constitute the types of regulations that should be left to the states. Part IV responds to this question by offering the normative suggestion that, given the differences between the states' political cultures, it makes sense that campaign finance rules vary from state to state. Part V addresses the difficult question of constitutionality: do the differences among the states, and between the states and the federal government, support different results on the legality of campaign finance restrictions under the First Amendment? Is it constitutionally permissible that a campaign finance regulation that is found unconstitutional in one state be somehow upheld in another? Part VI briefly raises the question of whether recent

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11. *Am. Tradition Partn. v. Bullock*, 132 S. Ct. 2490, 2491 (2012).

12. *Id.*

13. *Id.*

14. Even the four Justices dissenting from the Court's summary reversal did not accept the Montana Court's reasoning on its own terms. The dissent argued only that the state court's conclusion that the state had a compelling state interest in regulating corporate campaign contributions indicated that *Citizens United* was wrongly decided and should therefore be revisited. The dissent did not address the state court's contention that Montana's corporate restrictions could be distinguished from the federal limitations because of the state's particular political culture and history. *Id.* at 2491–2492 (Breyer, J., dissenting).

developments in the nationalization of American politics means that preserving the states' political cultures is no longer a valid concern. Part VII offers a short conclusion.

## II. ARE THE STATES DIFFERENT?

As noted above, the central assertion of the Montana Supreme Court in distinguishing *Citizens United* was that Montana is different. The Montana Court was right. Montana *is* different. Part of this, as the state court explained, is based in history.<sup>15</sup> The mining industry that dominated Montana's economy for so many years also produced the so-called Copper Kings who, in turn, dominated the State's political system.<sup>16</sup>

Montana is also "different" because of other factors. Contrast Montana, for example, with the state of California. Montana's population is approximately one million people.<sup>17</sup> California's population is thirty-eight million.<sup>18</sup> Think of what this disparity in population means in terms of how expensive it is to run a statewide campaign. The last (2010) gubernatorial race in California, for example, cost over \$250 million.<sup>19</sup> The 2008 election in Montana, by comparison, cost \$2.5 million.<sup>20</sup> A statewide candidate in California, consequently, has to raise and spend more money in order to be competitive and, unless she is extraordinarily independently wealthy, spend considerably more time and energy soliciting contributions than her Montana counterpart.

The disparity in population also leads to differences in the type of campaigning done by the candidates. In California, the race has to center

15. *W. Tradition Partn., Inc.*, 271 P.3d at 11 ("[When the statute in question was enacted,] the State of Montana and its government were operating under a mere shell of legal authority, and the real social and political power was wielded by powerful corporate managers to further their own business interests. The voters had more than enough . . .").

16. *Id.* at 8–9. See also Larry Howell, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 73 Mont. L. Rev. 25 (2012).

17. U.S. Census Bureau, *State & County Quickfacts: Montana*, <http://quickfacts.census.gov/qfd/states/30000.html> (accessed Oct. 13, 2012).

18. U.S. Census Bureau, *State & County Quickfacts: California*, <http://quickfacts.census.gov/qfd/states/06000.html> (accessed Oct. 13, 2012).

19. National Institute on Money in State Politics, *California 2010: Governor Candidates*, [http://www.followthemoney.org/database/StateGlance/state\\_candidates.phtml?s=CA&y=2010&f=G](http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=CA&y=2010&f=G) (accessed Oct. 13, 2012) (reporting a figure upwards of \$254 million that includes primary and general election spending by all thirty-six candidates). See also Seema Mehta & Michael J. Mishak, *Brown Cruises to Win*, L.A. Times, <http://articles.latimes.com/2010/nov/03/local/la-me-election-20101103> (Nov. 3, 2010) (reporting that the two main candidates for California Governor alone spent upwards of \$175 million).

20. National Institute on Money in State Politics, *Montana 2008: Governor Candidates*, [http://www.followthemoney.org/database/StateGlance/state\\_candidates.phtml?s=MT&y=2008&f=G](http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=MT&y=2008&f=G) (accessed Oct. 13, 2012) (reporting a figure of \$2.5 million that includes primary and general election spending by all six candidates for Montana Governor). See also *W. Tradition Partn., Inc.*, 271 P.3d at 10 ("[A]ll legislative and statewide candidates for office rais[ed] a total of around \$7 million in 2008.").

primarily in the airwaves.<sup>21</sup> There is no way that a statewide candidate can reach a significant portion of the electorate by grassroots activities such as personal appearances, town hall meetings, or door-to-door campaigning. In Montana, on the other hand, face-to-face grassroots campaigning is not only possible, it is expected.<sup>22</sup>

The differences between the two states may have as much or even greater effect on elections for more local races. The sizes of Montana's and California's statehouses, for example, are roughly equivalent. Montana has 50 state senators and 100 state representatives,<sup>23</sup> while California's numbers are 40 and 80 respectively.<sup>24</sup> But consider what the disparity in population between the two states means in its practical effect in a state legislative race. In Montana there is a state senator for every 20,000 persons while in California there is a state senator for every 1 million persons. A million dollar state senate campaign in California consequently means that only \$1 is spent per citizen. A million dollar state race in Montana means that \$50 has been spent for each citizen.

And Montana is not the only state that is different. New Hampshire, for example, has a population of only 1.3 million,<sup>25</sup> but it has 400 members in its House of Representatives<sup>26</sup>—or one representative for only 3,250 people. That means statehouse politics in New Hampshire are far more localized than in a more sparsely populated state like Montana. And it means a one million dollar house race constitutes an expenditure of \$285 per citizen.

Nebraska, meanwhile, has its own unique political landscape, occasioned by the fact that it has a unicameral legislature whose members are elected on a nonpartisan basis.<sup>27</sup> This changes both how campaigns are waged and how much power a legislator has once elected. In Nebraska, for example, an individual need not have party backing in order to become nominated or elected to the statehouse, and an individual legislator has as

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21. See Seema Mehta & Maeve Reston, *Jerry Brown Nearly Matched Meg Whitman's Campaign Spending on TV in Final Weeks of Race*, L.A. Times, <http://articles.latimes.com/2011/feb/01/local/lame-governor-money-20110201/2> (Feb. 1, 2011) ("Between Sept. 1 and Election Day [Nov. 2], Whitman spent \$40 million buying airtime to Brown's \$29 million.").

22. *W. Tradition Partn., Inc.*, 271 P.3d at 10–11 ("Montana, with its small population, enjoys political campaigns marked by person-to-person contact and a low cost of advertising compared to other states. . . . [T]he dynamic of local Montana political office races . . . [has] historically been characterized by the low-dollar, broad-based campaigns run by Montana candidates.").

23. Lynn Hellebust & Kristen Hellebust, *State Legislative Sourcebook 2012: A Resource Guide to Legislative Information in the Fifty States* 301 (Govt. Research Serv. 2012).

24. *Id.* at 55.

25. U.S. Census Bureau, *State & County Quickfacts: New Hampshire*, <http://quickfacts.census.gov/qfd/states/33000.html> (accessed Oct. 13, 2012).

26. Hellebust & Hellebust, *supra* n. 23, at 329.

27. *Id.* at 311.

much power as any other, regardless of party, to introduce new legislation for consideration by the legislature as a whole.<sup>28</sup>

The location of media markets can also have a dramatic effect on elections. New Jersey has a population similar to that of Georgia and Michigan,<sup>29</sup> but statewide campaigns in that state are much more expensive<sup>30</sup> because candidates in New Jersey have to advertise in the very expensive media markets of New York City and Philadelphia. Georgia and Michigan, in contrast, are dominated by only one media market.

Population, the number and kind of legislative districts, and the location of media markets are only some of the variables that affect the nature and substance of political campaigns. A state's political traditions and history, as the Montana State Supreme Court realized, can have an enormous effect on how campaigns are run<sup>31</sup> and how campaigns are perceived by the voters.<sup>32</sup> Maine, for example, has a tradition of electing independent candidates that gives those waging a campaign outside of traditional party structures greater chances of winning than in most other states.<sup>33</sup> In some states,

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28. See generally Kim Robak, *The Nebraska Unicameral and Its Lasting Benefits*, 76 Neb. L. Rev. 791 (1997) (discussing the advantages of the Nebraska system). For a more skeptical account, see James R. Rogers, *Judicial Review Standards in Unicameral Legislative Systems: A Positive Theoretic and Historical Analysis*, 33 Creighton L. Rev. 65, 86–100 (1999).

29. U.S. Census Bureau, *State & County Quickfacts: New Jersey*, <http://quickfacts.census.gov/qfd/states/34000.html> (accessed Oct. 13, 2012) (reporting New Jersey's population to be 8.8 million); U.S. Census Bureau, *State & County Quickfacts: Michigan*, <http://quickfacts.census.gov/qfd/states/26000.html> (accessed Oct. 13, 2012) (reporting Michigan's population to be 9.8 million); U.S. Census Bureau, *State & County Quickfacts: Georgia*, <http://quickfacts.census.gov/qfd/states/13000.html> (accessed Oct. 13, 2012) (reporting Georgia's population to be 9.8 million).

30. Compare National Institute on Money in State Politics, *New Jersey 2009: Governor Candidates*, [http://www.followthemoney.org/database/StateGlance/state\\_candidates.phtml?s=NJ&y=2009&f=G](http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=NJ&y=2009&f=G) (accessed Oct. 13, 2012) (reporting a figure of \$52.5 million that includes primary and general election spending by all eight candidates) with National Institute on Money in State Politics, *Michigan 2010: Governor Candidates*, [http://www.followthemoney.org/database/StateGlance/state\\_candidates.phtml?s=MI&y=2010&f=G](http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=MI&y=2010&f=G) (accessed Oct. 13, 2012) (reporting a figure of \$26.5 million that includes primary and general election spending by all 15 candidates) and National Institute on Money in State Politics, *Georgia 2010: Governor Candidates*, [http://www.followthemoney.org/database/StateGlance/state\\_candidates.phtml?s=GA&y=2010&f=G](http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=GA&y=2010&f=G) (accessed Oct. 13, 2012) (reporting a figure of \$33.4 million that includes primary and general election spending by all 21 candidates).

31. *W. Tradition Partn., Inc.*, 271 P.3d at 9–10 (“[E]ven small expenditures of money can impact Montana elections. . . . [In 2008] the average candidate for the Montana House raised \$7,475 and the average candidate for the Montana Senate raised \$13,299.”).

32. *W. Tradition Partn., Inc.*, 271 P.3d at 10 (noting one Montana politician's observation that “voters were concerned that they ‘didn't really count’ in the political process unless they can make a material financial contribution . . .”).

33. In the 1994 and 1998 elections, Maine elected independent Angus King governor, and in 1974, it elected independent James Longley. In the 2010 gubernatorial election, Mainers very nearly elected independent Eliot Cutler (Cutler garnered 36% of the vote while Republican Paul LePage, the eventual winner, garnered 38%). Michael Barone & Chuck McCutcheon, *The Almanac of American Politics 2012* 717 (U. Chicago Press 2011).

soliciting and raising money from out-of-state contributors can be a political liability,<sup>34</sup> but in others it is not as much of a concern.<sup>35</sup>

Numerous other factors also lead to divergences in political cultures among the states. Demography is one major reason, as race, religion, and economic status each have profound effects on voting patterns.<sup>36</sup> Political rules are another. Term limits, for example, force turnover in political offices, arguably creating a culture with less political entrenchment and more people ready to directly participate in government by running for office.<sup>37</sup> A state that elects its judges may view the judiciary more politically than those states whose judges are appointed.<sup>38</sup> Even a state's geography can play a significant role in how a state conducts its politics. Montana and Rhode Island may have roughly equivalent populations,<sup>39</sup> but the sheer size of Montana means that statewide in-person campaigning will be more ardu-

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34. For example, the governor of Wisconsin recently faced sharp criticism and national attention for the vast sums he received from out-of-state contributors in the state's gubernatorial recall election in June 2012. See e.g. Claire O'Connor, *Gov. Scott Walker's Big Money Backers Include 13 Out-Of-State Billionaires*, Forbes, <http://www.forbes.com/sites/clareoconnor/2012/06/05/gov-scott-walkers-big-money-backers-include-13-out-of-state-billionaires/> (June 5, 2012).

35. Out-of-state contributions, for example, are considered relatively routine in California, in part because of the prominent role the state plays on the national scene. See Evelyn Larrubia, *Big Donors Give Far and Wide, Influence Out-of-State Races and Issues*, California Watch, <http://californiawatch.org/dailyreport/big-donors-give-far-and-wide-influence-out-state-races-and-issues-18344> (Oct. 15, 2012).

36. See Malcolm E. Jewell & Sarah M. Morehouse, *Political Parties and Elections in American States* 12 (4th ed., CQ Press 2001) (noting that distributions of people of different races, religions, or socioeconomic status within a particular constituency can have important consequences on local political culture, at least with respect to issues on which those groups are divergent).

37. See Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. Chi. L. Rev. 83, 193 (1997) (cited in Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 1004 (4th ed., Foundation Press 2012)) (arguing that term limits reduce collective action problems that face non-incumbents when they run against incumbents and also lower barriers to entry into professional politics).

38. See The Annenberg Public Policy Center of the University of Pennsylvania, *Public Understanding of and Support for the Courts*, [http://www.annenbergpublicpolicycenter.org/Downloads/20071017\\_JudicialSurvey/Judicial\\_Findings\\_10-17-2007.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf) (Oct. 17, 2007) (citing statistics showing that the public favors direct election over gubernatorial appointment (64% to 31%), but that "[l]iving in a state that holds partisan judicial elections is negatively related to the belief that the courts are interpreting the law and not legislating from the bench"). See also Hon. Shirley S. Abrahamson, *Speech: The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973, 995 (2001) ("The public perception is that [elected] judges are influenced by campaign contributions."); Sandra Day O'Connor, *Foreword*, in James Sample, Adam Skaggs, Jonathan Blitzer & Linda Casey, *The New Politics of Judicial Elections 2000–2009: Decade of Change*, [http://brennan.3cdn.net/d091dc911bd67ff73b\\_09m6yvpv.pdf](http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpv.pdf) (Aug. 2010) ("[T]hree out of every four Americans believe that campaign contributions affect courtroom decisions.") (cited in *W. Tradition Partn., Inc.*, 271 P.3d at 13); see generally Melinda Gann Hall, *State Courts: Politics and the Judicial Process*, in *Politics in the American States: A Comparative Analysis* 229, 245–250 (Virginia Gray & Russell L. Hanson eds., 9th ed., CQ Press 2008) (describing four judicial selection systems currently in use and listing which states use which system).

39. See U.S. Census Bureau, *State & County Quickfacts: Montana*, <http://quickfacts.census.gov/qfd/states/30000.html> (accessed Oct. 13, 2012) (reporting Montana's population to be just under one million); U.S. Census Bureau, *State & County Quickfacts: Rhode Island*, <http://quickfacts.census.gov/>

ous, expensive, and time consuming than in Rhode Island, where the candidate has far less ground to cover. Campaign strategies therefore are adjusted accordingly.

All states, then, are different; not just Montana.<sup>40</sup> That difference, moreover, is significant even beyond the quantitative factors of population, demography, size of the legislature, and media costs noted above. Each state has, what political scientists term, its own “political culture”<sup>41</sup> formed in part by custom and tradition<sup>42</sup> as well as by some of the more quantitative measures noted above.<sup>43</sup> And as that political science literature further explains, those differences are deep and have substantial consequences.<sup>44</sup>

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qfd/states/44000.html (accessed Oct. 13, 2012) (reporting Rhode Island’s population to be just over one million).

40. States are not only different from each other; they are also different—in some ways even more dramatically—than the federal government. To begin with, the population of the United States is 311 million, dwarfing the populations of any single state. U.S. Census Bureau, *State & County Quickfacts: USA*, <http://quickfacts.census.gov/qfd/states/00000.html> (accessed Oct. 13, 2012). The costs of maintaining a national campaign are therefore exponentially greater than maintaining any state campaign. See *2008 Presidential Campaign Financial Activity Summarized: Receipts Nearly Double 2004 Total*, Fed. Election Commn., <http://www.fec.gov/press/press2009/20090608PresStat.shtml> (June 8, 2009) (“Financial activity of 2008 presidential candidates and national party convention committees . . . total[ed] more than \$1.8 billion.”).

Second, the chief executive officer, the President, is not elected on the basis of the most votes that he or she receives, as in the states, but rather on the basis of his or her winning a majority of votes in the Electoral College—a structure that leads to campaign strategies being centered on winning “swing states” rather than on more general appeals to the nation as a whole. See George Rabinowitz & Stuart Elaine MacDonald, *The Power of the States in U.S. Presidential Elections*, 80 *Am. Pol. Sci. Rev.* 65, 80 (1986) (demonstrating that voters in certain states are over 20 times more likely to determine the outcome of a presidential election).

Third, one branch of the national legislature, the United States Senate, is not equally proportioned (unlike any of the states) meaning that federal legislative power is disproportionately concentrated in representatives from states with smaller populations.

41. See Gabriel A. Almond & G. Bingham Powell, Jr., *Comparative Politics: A Developmental Approach* 50 (Little, Brown and Co. 1966) (defining “political culture” as “the pattern of individual attitudes and orientations toward politics among the members of a political system”). See generally Steven G. Koven & Christopher Mausolf, *The Influence of Political Culture on State Budgets: Another Look at Elazar’s Formulation*, 32 *Am. Rev. Pub. Admin.* 66–70 (2002) (describing the landscape of scholarship on political cultures).

42. Daniel Elazar’s influential framework placed each of the states into three categories of governmental culture: (1) moralistic culture, where government is a legitimizing instrument for promoting public welfare—best characterized by the Puritan establishments in New England; (2) individualistic culture, which is marked by a preference for limited government and religious tolerance—best characterized by the Quaker settlements in the middle states; and (3) traditionalistic culture, where government was the means of maintaining existing order—best characterized by the governments of the South, which adopted many of the norms of European landed gentry. Daniel Elazar, *American Federalism: A View from the States* 86–94 (Thomas Y. Crowell Co. 1966).

43. Political cultures affect political structures by defining the way those structures are evaluated. In other words, a constituency’s values, as shown through its political culture, determines how that society structures government to best accommodate those values and also defines the criteria used to evaluate the effectiveness of those structures. See Koven & Mausolf, *supra* n. 41, at 67.

44. See Robert S. Erikson, John P. McIver & Gerald C. Wright, Jr., *State Political Culture and Public Opinion*, 81 *Am. Pol. Sci. Rev.* 797, 808 (1987) (“A state’s partisan or ideological bent seems



There is finally one further nuance to consider in examining the differences between the states: some of the differences in political culture between the states may express very different views of democratic theory. As the political scientist Robert Dahl once explained, there is no one theory for democracy.<sup>45</sup> And there is no better evidence of Dahl's assertion than taking a look at the quilt of the divergent democracies that are the states; indeed, each state appears to express its own theory of democracy.<sup>46</sup>

Most states, for example, have independent attorneys general,<sup>47</sup> expressing a political theory that democracy is best served by diluting executive power and having checks on its exercise from within the executive branch<sup>48</sup>—a theory that is different from those of the states (and the federal government) that allow the governor (or president) to remove an attorney general at her discretion.<sup>49</sup> Other states take this model of the divided executive even further—providing independence to a wide range of executive officers including secretaries of state, treasurers, and auditors, among other state officers.<sup>50</sup>

The divided executive is just one of many examples. The states that elect judges reflect a different vision of the independence and accountability of the judiciary in a democracy than those whose judges are appointed.<sup>51</sup>

more a function of its political history and development than of the characteristics of its population.”); Barbara Norrander & Clyde Wilcox, *State Residency, State Laws, and Public Opinion*, in *Public Opinion in State Politics* 38, 49 (Jeffrey E. Cohen ed., Stanford U. Press 2006) (“state residency [is] . . . a small but important determinant of public opinion on a host of issues, from core attitudes such as partisanship and ideology, to opinions on” specific issues); see generally *Politics in the American States: A Comparative Analysis*, supra n. 38 (describing the different political structures of various states).

45. Robert A. Dahl, *A Preface to Democratic Theory* 1 (U. Chi. Press 1956) (“There is no democratic theory—there are only democratic theories.”). See also Paul S. Edwards & Nelson W. Polsby, *Introduction: The Judicial Regulation of Political Processes—In Praise of Multiple Criteria*, 9 *Yale L. & Policy Rev.* 190, 194 (1991) (indicating that no generally accepted theory of democracy exists).

46. Cf. Elazar, supra n. 42 (noting the states’ differing views on the role of government).

47. See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *Yale L.J.* 2446, 2448 (2006) (noting that the state attorney general is an independent officer not removable by the governor in 48 states).

48. *Id.* at 2467–2468 (describing some of the normative advantages of independent attorneys general).

49. See e.g. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *Yale L.J.* 541 (1994) (discussing the underlying theory of the so-called unitary executive); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *Ark. L. Rev.* 23, 31 (1995) (same).

50. See *Book of the States* vol. 44, 231 (2012 ed., Council of St. Govt. 2012) (listing which executive officers are independently elected in the 50 states as well as in American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands). See also Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 *U. Chi. L. Rev.* 1385, 1399–1400 (2008).

51. See Philip L. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* 3–5 (U. of Texas Press 1980) (“The concept of an elected judiciary emerged during the Jacksonian era as part of a larger movement aimed at democratizing the political process in America . . . . By the turn of the century, concern over the adverse effects of partisan politics on the quality and operation of

States that allow voters to directly enact or approve laws by the initiative and referendum process signal a far different view of democracy than states that allow laws to be passed only by representatives.<sup>52</sup> The list goes on. The question is: should these different political cultures and the different political theories that they may represent lead to a different set of election rules?

### III. THE INFLUENCE OF FEDERAL LAW ON THE STATES' POLITICAL CULTURES

Because each state has its own political culture, it is not surprising that each state also has its own unique set of laws and constitutional provisions governing its political processes. In fact, it may very well be that a state's rules governing its political processes have as much role in forming a state's political culture as the political culture has in forming the state's governing rules.<sup>53</sup> But whichever is the cart and whichever is the horse, there is no doubt that governing rules differ considerably from state to state.

This is not to say the states are free to develop their rules and maintain their political cultures without external constraints.<sup>54</sup> Federal structures also play a significant role. The Constitution, both in its original form<sup>55</sup> and as amended,<sup>56</sup> places specific and considerable limitations on how a state can structure its politics. Congress also has been a force in re-ordering the states' internal politics. From the Reapportionment Act of 1842 requiring that the states use single member districts in electing members to the House of Representatives,<sup>57</sup> through the Voting Rights Act of 1965 protecting the

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the judiciary led many states to replace partisan elections with systems of nonpartisan nomination and election.”).

52. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1526–1530 (1990).

53. For an excellent account of how democratic structures including constitutional provisions affect political culture, see Sanford Levinson, *Framed: America's 51 Constitutions and the Crisis of Governance* (Oxford U. Press, Inc. 2012).

54. Anthony Johnstone, *The Federalist Safeguards of Politics* (unpublished ms. Sept. 30, 2012) (copy on file with Anthony Johnstone) (discussing the effects of the three federal branches on the states' political cultures).

55. See U.S. Const. arts. I, § 4, cl. 1 (providing that Congress may regulate “Times, Places and Manner of holding Elections for Senators and Representatives”), IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government”).

56. See U.S. Const. amends. XV (establishing that Congress has the power to prohibit state governments from denying a citizen the right to vote on account of “race, color, or previous condition of servitude”), XVII (establishing direct election of United States Senators by popular vote), XIX (establishing that Congress has the power to prohibit state governments from denying a citizen the right to vote on account of sex), XXVI (establishing that Congress has the power to prohibit state governments from denying a citizen, who is eighteen years of age or older, the right to vote on account of age).

57. Reapportionment Act of 1842, Ch. 47, 5 Stat. 491. Before the Act's passage, a number of states elected Congressional representatives from multimember districts. See Issacharoff et al., *supra* n. 37, at 1245.

rights of minority voters and guarding against racial gerrymandering,<sup>58</sup> to the more recently enacted Help America Vote Act reaching into the technicalities of election administration,<sup>59</sup> Congress has at times enacted significant and far reaching legislation affecting the states' internal political climates.

And, of course, United States Supreme Court decisions interpreting broad constitutional guarantees such as the Equal Protection Clause and Free Speech Clause have also had profound effects on the states' political cultures.<sup>60</sup> The political patronage cases virtually rewrote the way that some states conducted their political business and weakened the roles of what had been powerful party machines.<sup>61</sup> The White Primary Cases<sup>62</sup> broke open the political parties' internal processes of nominating candidates. The decision in *Republican Party of Minnesota v. White*<sup>63</sup> fundamentally changed the way judicial elections are conducted.<sup>64</sup> And *Dunn v. Blumstein*<sup>65</sup> directly addressed, and dismissed, the right of the state to attempt to insulate its political culture from those who might not be familiar with it.<sup>66</sup> In *Blumstein*, the state asserted that voter residency requirements were necessary to assure that newly-arrived voters had experience with a state's political culture before exercising the franchise, but the Court found that rationale insufficient to sustain the regulations.<sup>67</sup>

The most dramatic example of a Supreme Court decision changing a state's political culture is undoubtedly *Reynolds v. Sims*<sup>68</sup> requiring states to apportion the branches of their legislature according to the principle of one person, one vote.<sup>69</sup> The *Reynolds* decision fundamentally changed state government, immediately moving centers of political power from rural ar-

58. 42 U.S.C. §§ 1973–1973p (enacted under the Voting Rights Act of 1965, 79 Stat. 437, 438).

59. 42 U.S.C. § 15401 (enacted under the Help America Vote Act of 2002, § 303, 116 Stat. 1666, 1708–1714).

60. For a general account of the Supreme Court's rulings on election law, see Richard H. Pildes, *Foreword, The Constitutionalization of Democratic Politics—The Supreme Court, 2003 Term*, 118 Harv. L. Rev. 28 (2004).

61. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

62. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Herndon*, 273 U.S. 536 (1927).

63. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

64. See e.g. Richard Briffault, *Judicial Campaign Codes after Republican Party of Minnesota v. White*, 153 U. Pa. L. Rev. 181, 182 (2004).

65. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

66. *Id.* at 331–333 (striking down durational residency requirements for voting).

67. *Id.* at 360.

68. *Reynolds v. Sims*, 377 U.S. 533 (1964).

69. *Id.* at 567–568. *Reynolds* did not actually use the phrase “one person, one vote.” Instead, the language stems from *Gray v. Sanders*, where the Court stated: “The conception of political equality . . . can mean only one thing—one person, one vote.” 372 U.S. 368, 381 (1963).

reas into the cities.<sup>70</sup> And while the decision has been widely praised as necessary to counter legislative entrenchment and the reality that elected officials will seldom adopt reforms that threaten their own political viability,<sup>71</sup> the Court, it should be remembered, also applied one person, one vote in *Lucas v. Forty-Fourth General Assembly of Colorado*,<sup>72</sup> where legislative entrenchment was not at issue. In *Lucas*, the state of Colorado approved a system of unequal apportionment for its state senate through voter initiative, indicating that the citizens desired to have a political system in place that reinforced regional representation over and above simple equi-population apportionment concerns.<sup>73</sup> As Justice Stewart argued in dissent, the Court arguably “convert[ed] a particular political philosophy into a constitutional rule.”<sup>74</sup>

Nevertheless, for every example of federal judicial interference in a state’s internal political culture there are counterexamples in which the states have been left to develop and maintain their own political cultures without federal interference.<sup>75</sup> In *Pacific States Telephone and Telegraph*

70. Stephen Ansolabehere & Samuel Issacharoff, *The Story of Baker v. Carr*, in *Constitutional Law Stories* (Michael C. Dorf ed., 2d ed., Thomson Reuters/Foundation Press 2009) (describing *Reynolds* as an “earth-shattering decision”).

71. See e.g. David Strauss, *David C. Baum Memorial Lecture: Is Carolene Products Obsolete?*, 2010 U. Ill. L. Rev. 1251, 1260–1261 (noting the importance of *Reynolds* for overcoming legislative entrenchment).

72. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 739 (1964).

73. See *id.* at 717–718.

74. *Id.* at 748 (Stewart, J., dissenting).

75. Some of the Court’s decisions leaving the states alone, of course, can be subject to considerable criticism. *Giles v. Harris*, for example, is a particularly ignominious decision in which the Court, per Justice Holmes, refused to act in facing a Fifteenth Amendment challenge to a state that refused to register African-Americans. 189 U.S. 475, 488 (1903). Although Justice Holmes’s opinion apparently recognized that a constitutional violation may have occurred, he refused to intervene, claiming it was beyond the Court’s power to assure that any remedy it might offer could be judicially enforced. *Id.* at 487 (“We express no opinion as to the . . . unconstitutionality beyond saying that we are not willing to assume that they are valid.”).

Another such example is Justice Frankfurter’s opinion in *Colegrove v. Green* where the Court turned down a challenge to mal-apportionment under the Guaranty Clause because, in its words, it wanted to avoid entering into the “political thicket” of reapportionment. 328 U.S. 549, 556 (1946). See also *Luther v. Borden*, 48 U.S. 1, 47 (1849) (refusing to examine which one of two political factions, after competing elections, was entitled to lay claim to lead the state government of Rhode Island, even though the basis of one side’s position was that the other had been chosen by an electorate composed of only 40% of the free white male population).

The Court, of course, eventually moved on from *Giles* and *Colegrove*. The Court abandoned *Giles* when it began to address racial discrimination in voting rights cases. See e.g. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). And in *Baker v. Carr*, the Court reversed the result in *Colegrove* and entered into the “political thicket” by bypassing the Guaranty Clause and holding that apportionment cases were justiciable under the Equal Protection Clause. *Baker v. Carr*, 369 U.S. 186, 209–210 (1962).

Some, of course, might cite *Gomillion* and *Baker* (and by negative example, *Giles* and *Colegrove*) for the proposition that the Court *should* more actively intervene into the states’ internal political cultures. But while the Court’s intervention in *Gomillion* and *Baker* may be uncontroversial, there are counterexamples where judicial involvement may not have been so beneficent. See e.g. *Republican*

*v. Oregon*,<sup>76</sup> for example, the Court, in a very far-reaching decision affecting a state's political culture, refused to intervene to determine whether the "direct democracy" processes of initiative and referendum were constitutionally permissible.<sup>77</sup> In other cases, the Court has left undisturbed state rules governing ballot access,<sup>78</sup> write-in candidacies,<sup>79</sup> open primary systems,<sup>80</sup> and measures that serve to protect the two-party system.<sup>81</sup> It has upheld even the most partisan methods of reapportionment and redistricting.<sup>82</sup> And while the Court has struck down state-imposed term limits for members of Congress,<sup>83</sup> it has signaled that it would not question the constitutionality of term limits for state elected officials.<sup>84</sup>

Campaign finance is the last piece of this puzzle. To what extent should campaign finance rules be left to the states and to what extent should campaign finance rules be federalized either through Congressional enactment or judicial decision?

Obviously, there has already been considerable movement on this question. In the wake of the Watergate scandal, Congress took a lead in federalizing campaign finance rules (at least as applied to elections for federal officers) when it passed the Federal Elections Campaign Act of 1971<sup>85</sup> and its amendments in 1974.<sup>86</sup> And it has continued to act in this area most notably in its passage of the Bipartisan Campaign Reform Act of 2002.<sup>87</sup> The Court has also played an active role in federalizing campaign finance law, not only by the precedential effects of its First Amendment decisions striking down federal campaign finance restrictions, but also more directly in invalidating, among other measures, state campaign contribution limits<sup>88</sup> and state measures designed to encourage candidates to participate in state

*Party of Minn.*, 536 U.S. 765 (holding that candidates for judicial office have a First Amendment right to announce their stands on political issues).

76. *Pac. Sts. Tel. & Telegraph Co. v. Or.*, 223 U.S. 118 (1912).

77. *Id.* at 150–151.

78. *Storer v. Brown*, 415 U.S. 724, 727–728 (1974).

79. *Burdick v. Takushi*, 504 U.S. 428, 430 (1992).

80. *Wash. St. Grange v. Wash. Republican Party*, 552 U.S. 442, 444 (2008).

81. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369–370 (1997). See also Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republican from Political Competition*, 1997 S. Ct. Rev. 331, 331–332 (1997) (noting the effect of *Timmons* in protecting the two-party system).

82. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 410–413 (2006).

83. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995).

84. *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991).

85. 2 U.S.C. §§ 431–456 (1994 & Supp. 1999) (enacted under the Federal Election Campaign Act of 1971, 86 Stat. 3 (1972)).

86. 2 U.S.C. §§ 431–455 (1988) (enacted under Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263 (1974)).

87. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

88. *Randall v. Sorrell*, 548 U.S. 230, 244–246 (2006).

public financing schemes.<sup>89</sup> *Citizens United* and *American Tradition Partnership*<sup>90</sup> are just the latest efforts in this area. The Montana Court's decision in *Western Tradition Partnership*, however, suggests that at least for some the question of whether such federalization is advisable remains unresolved.

#### IV. THE ARGUMENTS IN FAVOR OF DEVOLVING CAMPAIGN FINANCE LAW

A number of years ago, prior to the Court's decision in *Citizens United*, I wrote an article suggesting that campaign finance laws governing federal elections be devolved to the states.<sup>91</sup> In part, I based this argument on the fact, discussed above, that states have very different political cultures;<sup>92</sup> and that money, in particular, plays a much different role in large media-driven states like California than in smaller more grassroots states like New Hampshire or Montana.<sup>93</sup> I therefore suggested that it might make sense for different states to have different campaign finance rules because the political dynamics of the states were so dramatically different.

I supported this claim for devolution with other rationales. First, I asserted that devolving campaign finance to the states would lessen some of the problems in legislative entrenchment that occur when elected officials are permitted to enact the rules that affect their own chances of re-election.<sup>94</sup> Having the states set forth the campaign finance rules governing the election of federal officials would not rid the problems of legislative entrenchment entirely—state legislators might still be motivated to pass laws they believe would benefit their own political party—but there would at least be some space between those making the decisions and those most directly affected by them.<sup>95</sup>

Second, I argued that devolving campaign finance laws to the states might help ameliorate some of the unintended consequences that inevitably arise from campaign finance regulation.<sup>96</sup> One of the problems with cam-

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89. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011).

90. *Am. Tradition Partn.*, 132 S. Ct. 2490.

91. William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 Nw. U. L. Rev. 335 (2000).

92. *Id.* at 383–384 (“[D]ifferences in the role of money and politics may be based on political tradition. Corporations and labor unions have historically been more active in Michigan than in Oregon. Political parties have historically been more powerful in Illinois than in Nevada.”).

93. *Id.* at 383.

94. *Id.* at 380.

95. *Id.* at 377–379.

96. *Id.* at 379–380.

paigned campaign finance reform is that some of its efforts unintentionally backfire.<sup>97</sup> Enacting campaign finance reform at the state level would localize, and therefore lessen, any adverse effects.<sup>98</sup>

Third, I contended that devolution in this area was advisable as “it would allow the integration of campaign finance with other state campaign and election law” that affect funding issues.<sup>99</sup> The cost of elections depends in part on the rules governing those elections. It is more expensive, for example, to run for office in a state in which candidates are chosen by primaries than it is to run in states in which candidates are chosen by internal party procedures; the former generally requires significant expenditures to directly reach voters while the latter requires reaching out to only relatively few decision-makers.<sup>100</sup> Allowing states to adjust their campaign finance rules to reflect such realities would both assist the states in enacting legislation that corresponds to their other laws governing elections and perhaps encourage the states to more thoroughly analyze proposed election laws through the lens of its effects on campaign funding issues.<sup>101</sup>

Fourth, I suggested that devolution might increase citizen participation in the political process.<sup>102</sup> In so arguing, I relied upon Justice O’Connor’s observation that “federalism enhances the opportunity of all citizens to participate in representative government” by bringing the locus of political decision-making closer to the people.<sup>103</sup> Decentralizing campaign finance therefore would allow citizens to more closely participate in formulating the rules that affect citizen participation itself.

Finally, I argued that decentralization would allow for much needed experimentation in ways to address the issues raised by the influence or over-influence of money in politics.<sup>104</sup> In that light, I contended the rationale offered by Justice Brandeis in *New State Ice Co. v. Liebmann*<sup>105</sup> that states should serve as laboratories for “experimentation in things social and

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97. See Marshall, *supra* n. 91, at 342. Contribution limitations, for example, have diverted funds from candidates to independent expenditure groups leading to a scenario in which political ads are run without any accountability. At least when the candidate ran the ad, there was the possibility that she would face political backlash if the ad was untruthful or in bad taste. Now the candidate is not politically accountable for such ads because she is not directly responsible for them.

98. *Id.* at 379.

99. *Id.* at 381.

100. *Id.* at 357.

101. *Id.* at 381.

102. *Id.* at 383.

103. Marshall *supra* n. 91, at 383 (quoting *Fed. Energy Reg. Commn. v. Miss.*, 456 U.S. 742, 789–790 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part) (cited in Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 Vand. L. Rev. 1229, 1233–1234 (1994))).

104. Marshall, *supra* n. 91, at 384.

105. *New St. Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

economic”<sup>106</sup> was particularly well-suited to campaign finance reform because the stakes underlying the campaign finance project were so high and the risks and possibilities of error were so great.<sup>107</sup> Moreover, unlike economic or social problems that do not automatically stop at a state’s borders, political cultures do.<sup>108</sup> The problems addressed by regulations of the political process are truly state bound.

To these rationales, Professor Anthony Johnstone has offered another powerful reason: federalism.<sup>109</sup> Decentralization of campaign finance rules (and other rules governing the political process), he argues, serves the value of federalism by allowing states both to increase political accountability and flexibility and reduce the power of interest group entrenchment at the federal level.<sup>110</sup> As such, protecting the states’ political cultures serves to both promote democratic experimentation<sup>111</sup> and diffuse political power in a way that the homogenization of the states’ political systems would not. Further, as Johnstone explains, decentralization also allows the states to develop their own visions of what constitutes a “Republican form of government,” an issue on which there is no national consensus.<sup>112</sup>

## V. CONSTITUTIONAL ISSUES

Not surprisingly, despite its possible merits, the suggestion that campaign finance rules be devolved to the states never gained traction as a possible reform.<sup>113</sup> In fact, it is likely an overstatement to claim that the thesis caused even a ripple in the campaign finance reform debate. *Western Tradition Partnership*, however, once again brings to the fore the question of whether campaign finance regulation is best accomplished at the state level. But the issue now is not whether such an approach is advisable from a policy perspective but rather whether such an approach is constitutional given the Court’s First Amendment rulings on national campaign finance legislation.<sup>114</sup> This section examines that issue.

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106. *Id.* at 311 (Brandeis, J., dissenting).

107. Marshall, *supra* n. 91, at 384–385.

108. *See supra* nn. 40–43 and accompanying text.

109. Johnstone, *supra* n. 54.

110. *Id.*

111. *See generally* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998).

112. Johnstone, *supra* n. 54.

113. In offering devolution as a possible approach to campaign finance regulation, I was careful not to overstate its political viability. Public choice theory suggests that members of Congress might not want to entrust to state legislative bodies the power to make rules that would affect their own chances for re-election. *See* Marshall, *supra* n. 91, at 377–379.

114. *See e.g. Ariz. Free Enter. Club’s Freedom Club PAC*, 131 S. Ct. at 2828; *Citizens United*, 130 S. Ct. at 913; *Davis v. Fed. Election Commn.*, 554 U.S. 724, 741–744 (2008); *Fed. Election Commn. v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469–470 (2007).



### A. *Greater Deference to State Campaign Finance Laws?*

One possible argument is that the Court should less rigorously review state campaign finance laws under the First Amendment than it does national legislation. I rejected that suggestion in my earlier piece, however, and continue to be wary of it here. The Court has never, to my knowledge, treated state laws more leniently than federal laws, and, if anything, it has, from time to time, seemed more inclined to act in the other direction and be more receptive to upholding federal laws than upholding those laws' state counterparts.<sup>115</sup>

The idea that state legislation should be reviewed more deferentially than federal legislation under the First Amendment is controversial. As Oliver Wendell Holmes famously remarked, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."<sup>116</sup>

The position that state campaign finance laws should be more leniently reviewed than their federal counterparts, however, has some support. Justice Jackson, for example, raised such a possibility in his dissenting opinion in *Beauharnais v. Illinois*,<sup>117</sup> when he argued that states should have more latitude under the First Amendment than the federal government in enacting group libel laws.<sup>118</sup> Justice Harlan made a similar point in his dissents in obscenity cases,<sup>119</sup> contending that legislative experimentation at the state level was needed with respect to obscenity regulation because the issues

115. Compare *Metro Broad., Inc. v. Fed. Commun. Commn.*, 497 U.S. 547 (1990) (upholding a federal affirmative action program) with *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (striking down a state affirmative action program). *Metro Broadcasting* was subsequently overruled in *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995). Compare also *U.S. v. Lee*, 455 U.S. 252 (1982) (holding that a federal interest in administering its tax laws constituted a compelling governmental interest sufficient to overcome a free exercise challenge) with *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that a state interest in administering its unemployment compensation laws did not constitute a sufficiently compelling reason to overcome a free exercise challenge). *Sherbert* was subsequently limited in *Empl. Div. v. Smith*, 494 U.S. 872, 883 (1990).

The observation that courts have a tendency to uphold federal laws more easily than they uphold parallel state provisions is documented in Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 822 (2006).

116. Oliver Wendell Holmes, *Law and the Court*, in *Collected Legal Papers* 291, 295–296 (Harcourt, Brace & Co. 1920). This statement echoes the sentiments of Chief Justice John Marshall in *McCulloch v. Maryland*, 17 U.S. 316 (1819); Alexander Hamilton, *The Federalist No. 17*, in *The Federalist* 100 (Robert Scigliano ed., 2000 Modern Library Edition, Random House, Inc. 2000); James Madison, *The Federalist No. 45*, in *The Federalist* 293; James Madison, *The Federalist No. 46*, in *The Federalist* 299. See also Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 Yale L.J. 1552, 1584 (1977).

117. *Beauharnais v. Ill.*, 343 U.S. 250 (1952).

118. *Id.* at 294–295 (Jackson, J. dissenting).

119. See *Jacobellis v. Ohio*, 378 U.S. 184, 203–204 (1964) (Harlan, J., dissenting); *Roth v. U.S.*, 354 U.S. 476, 503–504 (1957) (Harlan, J., dissenting).

were so difficult—a rationale that also applies to campaign finance.<sup>120</sup> And perhaps most importantly for our purposes, Justice Rehnquist made the argument directly in the context of campaign finance regulation, when, expressly relying on Justices Jackson and Harlan, he wrote, “that not all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment.”<sup>121</sup>

Nevertheless, there are strong arguments for not diluting First Amendment doctrine in its application to state campaign finance laws as opposed to its application to federal campaign finance laws. First and most broadly, the position that state laws in any area be more deferentially reviewed than federal laws is problematic on a number of counts. To begin with, the numerous checks in the federal legislative process serve better to protect constitutional rights than do state legislative processes, which are generally more subject to capture.<sup>122</sup> Further, the size and scope of the federal government also work to better insulate the Congress from the pressures to undercut constitutional guarantees than occurs at the state level.<sup>123</sup> For these reasons, many have persuasively argued that, if anything, judicial review should be less deferential when applied to state enactments than when applied to federal.<sup>124</sup> Second, and more specifically, campaign finance regulations operate in an area in which judicial review is particularly warranted. The problem of political self-dealing, even if it is tempered by decentralization, argues strongly against an added layer of deference based on the locus of the regulatory decision-maker.<sup>125</sup> Finally, as *Buckley v. Valeo*<sup>126</sup> holds, campaign finance regulation affects activity at the core of the First Amendment.<sup>127</sup> Although there may be an argument, as Professors Schauer and Pildes maintain, that the Court should carve out a category of

120. See *supra* Section IV.

121. *Buckley v. Valeo*, 424 U.S. 1, 291 (1976) (Rehnquist, J., concurring in part and dissenting in part).

122. See Choper, *supra* n. 116, at 1584–1585 (“On states [sic] rights matters, ‘the people of all the States, and the States themselves, are represented in Congress’; Congress is thus ‘subject to political restraints which can be counted on to prevent abuse.’ But state and local legislatures contain no representatives of the central government or of those persons outside the jurisdiction upon whom the weight of the local laws may fall. . . . [T]he force of special interest groups is markedly greater in local legislative bodies than in the federal political process . . . .” (internal citations omitted)).

123. See *e.g.* James Madison, *The Federalist No. 10* 64 (Clinton Rossiter ed., Signet 1961) (“The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States.”). See also Steven G. Calabresi, *Thayer’s Clear Mistake*, 88 Nw. U. L. Rev. 269, 276 (1993) (“[I]t is highly likely that the institutions of a large, national federation will in many ways be better decision-makers than the institutions of small, relatively more homogenous entities such as the states.”).

124. See Choper, *supra* n. 116; Calabresi, *supra* n. 123.

125. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U. Press 1980).

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

127. *Id.* at 14–15.

election speech for more deferential regulation than speech in other areas,<sup>128</sup> that argument applies to the treatment of election speech generally and does not distinguish between state and federal regulators.

### B. *Differences among the States*

The more substantial constitutional argument is the one offered by the Montana Supreme Court—that the political culture of a particular state can serve as a compelling state interest justifying campaign finance regulation even if the political cultures in other states might not be sufficiently compelling.<sup>129</sup> Under this approach, the constitutionality of campaign finance restrictions could vary from state to state even if the campaign finance restriction in question is exactly the same. That is, a provision such as a restriction on corporate campaign contributions might be permissible in one state and invalid in another, depending upon that state’s political culture.

It is, of course, at least awkward that something like a restriction on corporate contributions could be deemed permissible under the First Amendment in Montana yet an exactly parallel provision be unconstitutional in New York. Such a result, however, is not incompatible with constitutional doctrine. The compelling interest test,<sup>130</sup> under which restrictions upon First Amendment rights are measured, requires a balancing between the speech right at stake and the strength of the state’s interest. And although strict scrutiny demands a particularly strong state interest in order for a challenged provision to survive, strict scrutiny does not mean “‘strict’ in theory and fatal in fact” as Gerald Gunther once asserted.<sup>131</sup> Rather, as Adam Winkler has documented, many laws can, and do, survive the strict scrutiny inquiry.<sup>132</sup> Thus, even if corporate speech rights are constant no matter where the location, it is certainly possible that Montana could have a greater interest in limiting corporate contributions than New York does and that Montana’s interest could therefore be considered compelling even if New York’s is not. The real question is the extent that the Court would be willing to tailor its application of the compelling interest test to the political cultures of each specific state in this manner.<sup>133</sup>

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128. See Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 Tex. L. Rev. 1803 (1999).

129. *W. Tradition Partn., Inc.*, 271 P.3d at 235–236.

130. *E.g. Citizens United*, 130 S. Ct. at 898 (“Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” (citations omitted)).

131. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

132. See Winkler, *supra* n. 115, at 795–796, 822.

133. For an argument that courts should tailor the application of constitutional tests to the level of government involved, see Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional*

In this regard it is notable that there is some non-judicial precedent for treating the states differently on account of political culture. Section 5 of the Voting Rights Act (“VRA”),<sup>134</sup> in particular, varies its coverage of the states based upon the latter’s history and culture of racial discrimination.<sup>135</sup> Under Section 5, states that are considered “covered jurisdictions,” because of factors indicating a history and culture of racial discrimination, must seek “preclearance” from either U.S. District Court or the Department of Justice if they initiate changes to their voting rules or procedure (including redistricting and reapportionment).<sup>136</sup> Non-covered states, however, are exempt from such requirements. Thus it could be argued that if a state’s political culture can be relevant in determining VRA coverage, so might a state’s political culture be relevant in determining the scope and application of the First Amendment.<sup>137</sup> Moreover, because Congress’s treating states differently under Section 5 on account of history and political culture was upheld by the Court in *South Carolina v. Katzenbach*,<sup>138</sup> it might be further argued that there is some judicial authority for states to be treated differently under the First Amendment.

To be sure, the Section 5 example is not fully on point. First, the issue raised by Section 5 and addressed in *Katzenbach* was whether congressional *legislation* can apply differently or selectively to states; the First Amendment is not a piece of legislation. Second and related, *Katzenbach* concerned efforts by the *national* Congress to apply different rules to different states, not to attempts by states *themselves*, because of their own political history and culture, to apply different rules to those within their jurisdiction than might be constitutionally permissible in other states.<sup>139</sup> Third,

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*Principles*, 153 U. Pa. L. Rev. 1513 (2005) (discussing whether the courts should tailor the application of constitutional tests to the level of government enacting the challenged provision; i.e., whether courts should distinguish between provisions enacted at the state or local level as opposed to provisions enacted by the federal government). Rosen does not address whether courts should tailor their decisions based upon the circumstances of specific states as is suggested here.

134. 42 U.S.C. § 1973c (enacted under the Voting Rights Act of 1965), 79 Stat. 437 (1982).

135. See *S.C. v. Katzenbach*, 383 U.S. 301, 308 (1966) (determining that “[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects”).

136. 42 U.S.C. § 1973c(a); 28 C.F.R. § 51.10.

137. The constitutionality of Section 5 is currently before the Court, which granted certiorari in *Shelby County v. Holder* on November 9, 2012. 133 S. Ct. 594 (2012), opinion below at 679 F.3d 848 (D.C. Cir. 2012). The challengers’ claim, however, is not that treating the states differently is unconstitutional *per se*, but that the initial reasons for treating certain jurisdictions differently have eroded since the time the VRA was passed. See also *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197, 203 (2009) (declining to reach the constitutional question, but indicating, in dicta, that if voter discrimination is no longer *particularly* problematic in covered jurisdictions, Section 5 may be unconstitutional (emphasis added)).

138. *Katzenbach*, 383 U.S. 301, 308.

139. *Katzenbach* addressed the legality of Section 5 under the so-called “doctrine of the equality of states,” but that doctrine may be something of a misnomer. As the Court explained: “The doctrine of the

*Katzenbach* employed a less demanding “rational means” test to the VRA when it upheld Section 5;<sup>140</sup> the question of whether a similar campaign finance law can be upheld in one state and not another involves the application of the much more demanding “compelling interest” test directly to the provisions at issue.<sup>141</sup> Thus, even if the Section 5 example suggests that there would be no constitutional difficulty solely because a law might be upheld in one state and not in another because of differing political cultures, it does not reach whether the preservation of a particular state’s political culture would be enough to constitute a compelling government interest for either state. Still, the Section 5 experience does show a state’s political culture can matter in the constitutional equation.

Nevertheless, even if theoretically possible that the Court could reach dissimilar results in reviewing the constitutionality of a particular type of provision depending upon the unique circumstances of the states in which the issue arose, I am not aware of any instances in which the Court has actually done so. Perhaps this issue may come up if the Court chooses to again review the constitutionality of voter identification laws<sup>142</sup> given that the lower courts seem to reach different outcomes depending on how well the states have demonstrated that there is a voter fraud problem to be redressed.<sup>143</sup>

But even if the Court does reach the issue, there are still practical if not constitutional reasons to be skeptical that the Court would actually be willing to tailor its analysis of the constitutionality of campaign rules to the states’ political cultures. First, the Court might be troubled that reaching differing results on parallel measures would lead to the appearance of anomalous or arbitrary results. As noted earlier, it is at least awkward that a

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equality of States . . . does not bar [Congress’s choice to limit its attention to the geographic areas where immediate action seemed necessary through the VRA], for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.” 383 U.S. at 328–329.

The level of scrutiny to be applied when examining the constitutionality of the national government’s treating states differently also appears to be quite lenient. See Louis Touton, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 Colum. L. Rev. 817, 834–835 (1980) (“[T]he equal footing doctrine does not require the federal government to treat every state equally. . . . Because different states embrace different portions of the nation, ‘area, location, geology, and latitude have created great diversity’ . . . . Congress must be able to adapt legislation admittedly within its power to meet these naturally diverse local needs.” (internal citations omitted)).

140. *Katzenbach*, 383 U.S. at 324 (“As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”) (emphasis added).

141. See e.g. *Citizens United*, 130 S. Ct. at 898.

142. See *Crawford v. Marion Co. Election Bd.*, 553 U.S. 181, 204 (2008) (rejecting a facial challenge to Indiana’s voter ID law).

143. See generally Brennan Center for Justice, *Court Cases: Voter ID*, [http://www.brennancenter.org/content/resources/court\\_cases/category/voter\\_id](http://www.brennancenter.org/content/resources/court_cases/category/voter_id) (accessed Oct. 13, 2012) (listing the voter ID cases).

provision found constitutional in Montana could be unconstitutional in New York. Second, the Court might also be concerned with the workload costs inherent in an approach that would require it to review the constitutionality of controversial regulatory measures state by state rather than allow it to decide the matter wholesale. What is clear, however, is that, whether for these reasons or others, none of the United States Supreme Court Justices reviewing the Montana decision appeared to take the state court's tailoring approach seriously.<sup>144</sup> The problem is that respect for the divergence in the states' political cultures means they should have.<sup>145</sup>

#### VI. POSTSCRIPT—THE DECLINE IN THE UNIQUENESS OF STATES' POLITICAL CULTURES

One other matter needs to be addressed before concluding. The argument that the states' unique political cultures should be preserved, of course, depends upon the states actually having differing political cultures. And in that respect it must be noted that although many of the distinguishing structural features between the states discussed above remain intact,<sup>146</sup> there is no doubt that state politics have become increasingly nationalized in the last few years. Part of this is due to the fact that some local issues may achieve national prominence because they are seen as harbingers of matters that will soon arise on the national stage.<sup>147</sup> Another part of this is because national interest groups work to implement the same types of laws in a variety of states,<sup>148</sup> thus nationalizing the debate over the advisability of these laws. And perhaps most saliently, much of this phenomenon stems

144. See *supra* nn. 13–14 and accompanying text.

145. Cf. Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after Adarand and Shaw*, 149 U. Pa. L. Rev. 1, 169 (2000) (“Strict scrutiny must be calibrated to the goals it has inarticularly but inescapably been designed to serve.”).

146. See *supra* Section III.

147. The Wisconsin recall election appears to be such an instance. See Tom Kertscher, *Behind the Rhetoric: The In-State, Out-of-State Campaign Money Debate*, Milwaukee Journal Sentinel: PolitiFact Wisconsin, <http://www.politifact.com/wisconsin/article/2012/may/22/behind-rhetoric-state-out-state-money-debate/> (May 22, 2012) (reporting the opinion of one Wisconsin lobbyist: “donors outside of Wisconsin are motivated to give, depending on their political persuasion, because they want to see [Republican Governor] Walker’s reforms replicated or squelched in other states. The recall is also a ‘mini-barometer’ on the presidential election and the result could give a ‘psychological boost’ either to President Barack Obama or . . . Mitt Romney”).

148. See Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. Times, <http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html> (Apr. 21, 2012) (describing the American Legislative Exchange Council, which promotes national policies in state legislatures and creates model legislation advancing a conservative agenda) (cited in Johnstone, *supra* n. 54); Raymond Hernandez, *Bloomberg Starts ‘Super PAC,’ Seeking National Influence*, N.Y. Times, <http://www.nytimes.com/2012/10/18/nyregion/bloomberg-forming-super-pac-to-influence-2012-races.html> (Oct. 17, 2012) (reporting that New York Mayor Michael Bloomberg plans to spend \$10–15 million in competitive state, local and congressional races backing candidates who support his biggest policy initiatives, already having spent to support candidates in Illinois, Maine, and California).

from the influence of money. Already, for example, money from out-of-state contributions floods local elections;<sup>149</sup> and as a result, local politicians may feel that they are equally, if not more, accountable to their national funders than to their actual constituents.<sup>150</sup> Even more broadly, the role of money in politics may have already become so pervasive in every state's politics, that it may be too hard to correct against its further encroachment. The uniqueness of a state's political culture and therefore the need to preserve it, particularly with respect to the role of money, may be rapidly becoming a relic of the past.

## VII. CONCLUSION

In its *Western Tradition Partnership* decision, the Montana Supreme Court ruled that the constitutionality of state campaign finance restrictions should be reviewed with particular reference to the political history and traditions of the state enacting the regulation. In so holding, the Montana Court recognized that the states have different political cultures and that these different political cultures can lead to very different regulatory concerns. On this basis, the Montana Court concluded that a type of campaign finance restriction that may be unconstitutional when applied to national elections or to elections in one state might be constitutionally permissible when applied to elections in another. The United States Supreme Court did not take this argument seriously. It should have. The political cultures of the states *are* different, and applying a one-size-fits-all prescription to the constitutionality of campaign finance rules undercuts both this reality and sound principles and protections of federalism.

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149. See Patrick M. Garry, Derek A. Nelsen & Candice J. Spurlin, *Raising the Question of Whether Out-of-State Political Contributions May Affect a Small State's Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion*, 55 S.D. L. Rev. 35, 46 (2010) (noting the effect of outside contributions on a state ballot measure). See also *N.Y. Mayor Bloomberg Didn't Fare Well Backing California Campaigns*, L.A. Times, <http://latimesblogs.latimes.com/california-politics/2012/07/ny-mayor-bloomberg-didnt-fare-well-in-backing-california-campaigns.html> (July 27, 2012) (noting the efforts of New York Mayor and billionaire Michael Bloomberg to spend money to influence political issues in other states).

150. Cf. William P. Marshall, *American Political Culture and the Failures of Process Federalism*, 22 Harv. J.L. & Pub. Policy 139, 151 (1998) (noting that federal officeholders may be more responsive to their funders than to their constituents).