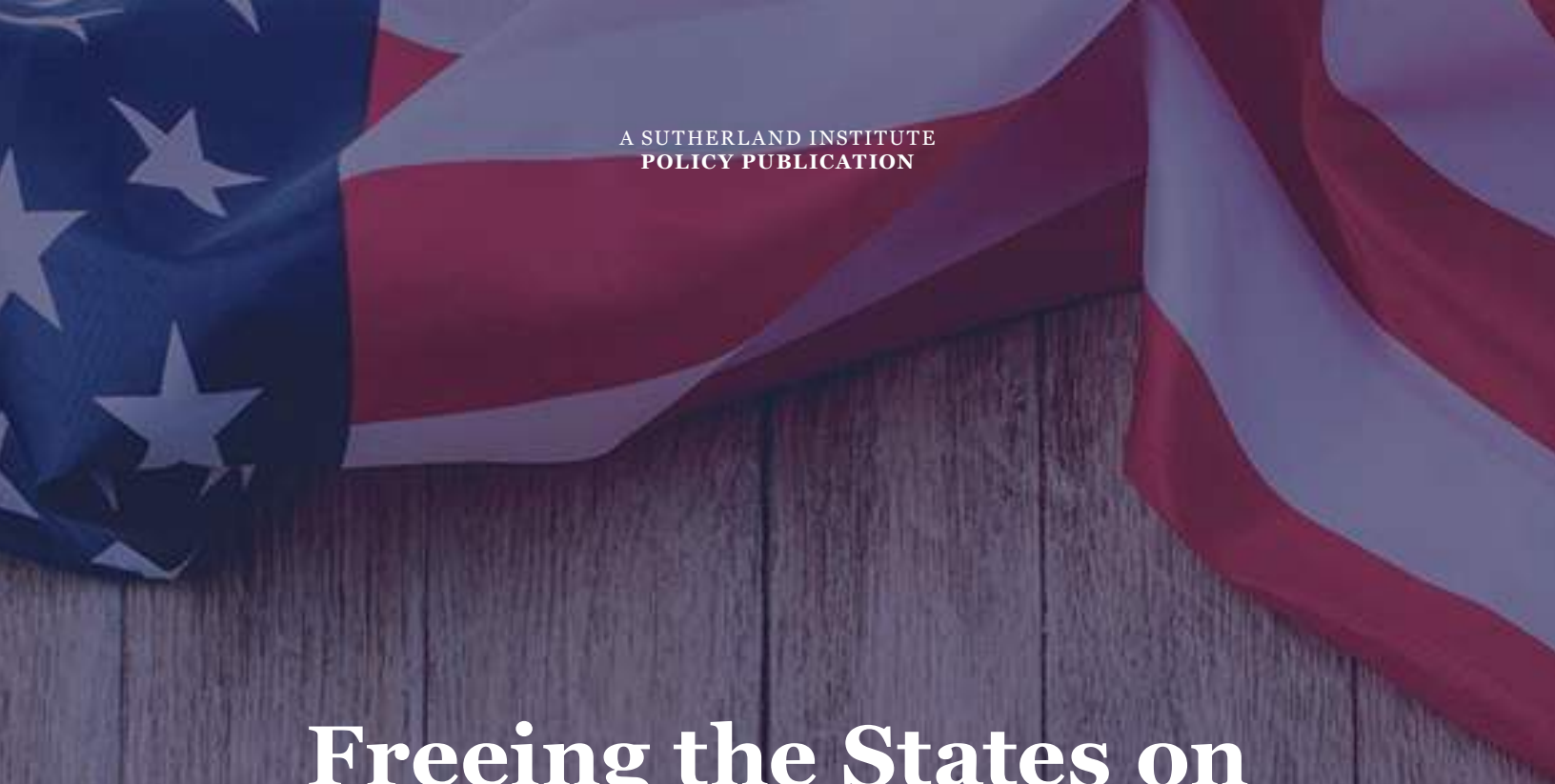

A SUTHERLAND INSTITUTE
POLICY PUBLICATION

Freeing the States on Campaign Finance

Written by William C. Duncan

February 2026

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Layout and design by Spencer Williams & Brooke Turner

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Executive Summary

Over the past fifty years, campaign finance law in the United States has undergone a profound transformation. For the first 200 years of the nation's history, the power to regulate elections and election-related spending rested with the American people and their elected lawmakers. But over the past five decades, the federal courts have increasingly consolidated that power within the judiciary. Beginning with *Buckley v. Valeo* (1976), the Supreme Court has imposed stringent legal standards that constrain the ability of elected representatives to regulate election financing. This has created discord at both the federal and state level.

Federalism was not simply a pragmatic compromise — it was meant to promote democratic accountability, while ensuring that states had latitude to tailor policies to local needs.

Under the precedent set in *Buckley*, state governments may only regulate electioneering under limited circumstances (i.e., when laws are narrowly tailored to prevent quid pro quo corruption). Other compelling state interests, such as protecting election integrity or promoting self-determination, have been deemed insufficient by federal judges. As a result, dozens of state laws aimed at limiting out-of-state contributions, interference by foreign actors, and spending by corporations and unions have been invalidated without regard to local history, voter preferences, or widely shared concerns about corruption and foreign influence. This is an affront to our nation's system of federalism.

America was built upon a deliberate power-sharing relationship between state and national institutions. Federalism was not simply a pragmatic compromise — it was meant to promote democratic accountability, while ensuring that states had latitude to tailor policies to local needs.

Campaign finance is a policy area where regulatory needs vary significantly across geography. However, these distinctions have been flattened by the one-size-fits-all standard imposed by the federal judiciary, with stark consequences for both elected officials and voters.

We submit, as one possible solution, an amendment to the United States Constitution. The proposed For Our Freedom Amendment would clarify that state and federal lawmakers, not federal courts, retain the authority to determine whether and how campaign contributions and expenditures ought to be regulated. The amendment would help restore equilibrium to our constitutional system, allowing states to once again function as "laboratories of democracy." In a nation so vast and varied, prosperity does not originate from top-down mandates, but from allowing citizens to engage in the trial-and-error that has always defined self-government.

Introduction

For the first two centuries of American history, responsibility for campaign finance regulation was shared among the political branches at both national and state levels, depending on the type of election. But that fundamentally changed in 1976 with *Buckley v. Valeo*, when the Supreme Court began to create national rules for all laws governing money in elections – rules that would be set and enforced by federal courts rather than by elected representatives. As explained more fully in this report, these court decisions have had the practical effect of taking important policy choices away from state legislators.

Jockeying for political advantage also explains the unprecedented levels of spending to promote candidates and causes at every level of government.[1] Here, though, regulations are shaped not only by States and Congress but also, since the 1970s, increasingly by court decisions. In fact, the current climate of campaign spending has been decisively influenced by these decisions, so much so that Congress and the States are often wholly constrained in their ability to try to rein in dramatic political spending even when doing so is popular with voters.[2]

One way to resolve this impasse is by passing an amendment to the United States Constitution – the For Our Freedom Amendment – to specify that the U.S. Congress and the States, as opposed to federal courts, have the authority to decide whether and how to regulate contributions and expenditures in political campaigns.[3]

One of the most important features of the proposed amendment is the federalism angle – allowing States to have a prominent role in campaign finance regulation. This report will provide constitutional context for understanding this feature, describe the current state of the law, and outline the opportunities a federalism-friendly amendment could provide.

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The Promise of Federalism

In the 1787 Constitutional Convention, the Framers faced a conceptual challenge. Accepted wisdom was that, in the words of delegate James Wilson, "there must be a power established from which there is no appeal, and which is therefore called absolute, supreme, and uncontrollable."[4] The question appeared to be whether that final power would be vested in the states or the national government. Wilson proposed, and the Constitution reflected this insight, that the ultimate power was in the people themselves – a concept known as popular sovereignty. Since "the people retained ultimate sovereignty," they could "dole[] out bits and pieces of their sovereign power to their different representatives and agents at both the state and national levels."[5] This is why former Justice Anthony Kennedy wrote that the "Framers split the atom of sovereignty."[6]

This dual delegation of authority by the sovereign people to different levels of government is at the heart of the Constitutional design.[7] The Constitution provides "few and defined" powers to the national government while reserving "numerous and indefinite" powers to the State governments. Doing so promotes crucial protections of liberty and self-government.[8] In addition, as the U.S. Supreme Court has noted, the "federalist structure of joint sovereigns preserves to the people numerous advantages."[9]

One of the key advantages of a federalist structure is that it promotes self-government by allowing geographically distinct communities to decide important matters for themselves. As James Madison explained in Federalist No. 10, state and local lawmakers with particular geographic constituencies can be more "acquainted with all their local circumstances." At the same time, the fact that different geographic constituencies will have different interests and preferences makes it less likely that the national government will become dominated by any particular factional interests: "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."[10]

In explaining how federalism can help to hold a diverse country together, Supreme Court Justice Amy Coney Barrett notes: "[t]he trick lies in deciding when to allow regional differences and when there must be a national rule."[11] By promoting a system where many important decisions would be made at the local and state level, federalism advances at least five specific interests.

First, it promotes **responsive government**. The U.S. Supreme Court has noted that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society" and "it makes government more responsive."[12] "Responsiveness to diverse local preferences is perhaps the oldest and best known rationale for federalism."[13] The various parts of the nation share much in common, but their people also have different characteristics and

interests because of geographic, historical, and cultural backgrounds. Having the bulk of decision-making take place close to these people allows for a variety of different policies and responses to concerns. As Professor Michael McConnell explains, "decentralized decision making is better able to reflect the diversity of interests and preferences of individuals in different parts of the nation."[14]

In the campaign finance context, responsiveness is critical. A rural Western state concerned about out-of-state resource extraction companies buying influence in local elections has different concerns than an Eastern state worried about Wall Street contributions to state races. Yet current Supreme Court precedent may prevent states from addressing their unique vulnerabilities.

Second, and closely related to responsiveness, is **accountability**. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[15] The powers "reserved to the States" are intended to "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[16] Thus, under the Constitution, the States exercise power over matters that impact the day-to-day lives of citizens.

These are precisely the type of matters that are wisely reserved to the decision-making of elected officials close to the people who will be affected by those decisions. Elected officials who are unresponsive to these citizens can be held accountable in the normal political process. Government officials managing such decisions at a distance (either geographically or culturally) have no similar incentive to ensure they take into consideration the needs of those who will be affected by their decisions.

Local decision-makers also typically live in or closer to the communities and among the neighbors who will be affected by their decisions. They are likely to experience the consequences of those decisions firsthand and to hear from those around them who are also impacted. Citizens are far less likely to ever interact with national officials who make policy decisions that impact them.

When federal courts – rather than state legislators – set campaign finance rules, accountability can break down. Unlike elected lawmakers, federal judges who make these decisions face no electoral accountability to the citizens whose self-governance they constrain.

A rural Western state concerned about out-of-state resource extraction companies buying influence in local elections has different concerns than an Eastern state worried about Wall Street contributions to state races. Yet current Supreme Court precedent may prevent states from addressing their unique vulnerabilities.

Third, when decisions are made at a level of government closer to those affected by the decisions, they are more likely to be **locally tailored** to the unique context of a particular area, including its culture, social, and economic considerations. Decisions made at a national level, by contrast, will often be directed to a diverse and dissimilar range of contexts and thus may fit some better than others.

Campaign finance needs vary dramatically across the states. For example:

- States with robust ballot initiative processes face distinct challenges from foreign and out-of-state money compared to states without a ballot initiative process
- Campaign ad spending is naturally higher in states with expensive media markets relative to states with less expensive media markets
- Campaign requirements in large, rural districts in Midwest, West, and Southern states are different than in some Northeast states where all districts are geographically compact

Current doctrine prevents states from tailoring their laws to these unique contexts.

Fourth, is **experimentation**. As the Supreme Court has recognized in other contexts, an important practical advantage of federalism is that it "allows for more innovation and experimentation in government."[17] As Professor McConnell explains, one reason "federalism has been thought to advance the public good is that state and local governmental units will have greater opportunity and incentive to pioneer useful changes. A consolidated national government has all the drawbacks of a monopoly: it stifles choice and lacks the goad of competition."[18] By contrast, "[h]orizontal competition between states is a major benefit of federalism."[19] Similarly, "state governments can compete with the federal government in providing public goods and social services."[20] That is why Justice Louis D. Brandeis said, "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[21]

Some states' experiments might succeed while others fail – but that learning process is foreclosed when federal courts impose uniform national rules.

The intended promotion of accountability and responsiveness in the Constitution has the happy additional effect of allowing multiple sovereigns to develop solutions to specific needs. Sometimes, as noted above, these will be necessary because of a unique state or local context, but often these efforts can inform the search for solutions by other States, local governments, and even the national government in the specific responsibilities it is assigned by the Constitution.

Campaign finance policy is an ideal area for state experimentation. States could test whether contribution limits, spending caps, public financing, disclosure requirements – or no regulation at all – would best serve their citizens. Some states' experiments might succeed while others fail – but that learning process is foreclosed when federal courts impose uniform national rules.

Finally, federalism supports the **protective** function of states. For example, "state governments can sometimes use their powers to block or mitigate federal violations of fundamental individual rights." In this connection, Professors John O. McGinnis and Ilya Somin point to "state efforts to forestall enforcement of the federal Fugitive Slave Act" and protection of "the free speech rights of unpopular political activists denied protection by federal courts" as examples.[22] Professor Akhil Amar adds State remedies for unlawful searches and seizures as another.[23]

Recent state efforts to ban foreign-influenced corporate spending in ballot campaigns may be seen as an example of this protective function – but federal courts have sometimes blocked these protections, claiming states lack a legitimate interest in protecting self-governance from foreign influence.

Campaign Finance Regulations

The Framers of the Constitution would probably have understood the concerns that motivate efforts to regulate financing of elections in terms different than ours. The most likely candidate might be "factions" which James Madison defined as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[24]

Increasing government power inevitably increases the stakes for controlling it. Madison raised the specter of groups forming to increase religious influence or to gain economic advantages (like wriggling out of debts). In a republican form of government, factions would typically act by securing the election of one of their own or influencing those who are elected. At the outset, election spending controversies involved not contributions by factions to candidates but contributions from candidates to voters (in the form of food and drink).[25]

That obviously changed over time. By the late 19th Century, federal campaign contributions had become far more significant, possibly spurred by the increased power of the national government brought on by the growth of its powers necessary to wage the Civil War. Initial federal responses focused on disclosure of donations but limitations on contribution amounts and on who could make donations began in earnest in the early Twentieth Century.[26]

State Regulations

Given the significant responsibilities of States, it is not surprising that they also have been active in trying to protect the integrity of elections by curbing potential abuses connected to donations to political candidates either intended to, or appearing to, influence lawmaking and enforcement. Even before Independence, Virginia outlawed the practice of plying voters with drink.[27]

Unfortunately, very little has been written about the history of campaign finance regulations in the States. Current practice is better documented. State regulations can be grouped into seven general categories identified by the National Conference of State Legislatures.

The large majority of states have limits on how much individuals can contribute to political candidates, generally established by the type of office a candidate is seeking. Thus, the national average limit for an individual contributor to a gubernatorial candidate is $6,645, $3,062 for a State senate candidate and $2,708 for a member of a State House. The highest cap for governor races is $47,100 in New York and the lowest is $625 in Colorado. The highest for State legislators is $13,704 in Ohio and the lowest is $180 in Montana.[28] Twelve states do not have individual contribution limits: Alabama, Alaska, Indiana,

Iowa, Mississippi, Nebraska, North Dakota, Oregon, Pennsylvania, Texas, Utah, and Virginia.[29]

A smaller majority of States impose restrictions on the amount State parties can contribute to candidates. There are no restrictions in 19 States, limited restrictions in 4 other states, 19 States have specific limits on party contributions, and the remaining 8 apply the individual contribution limits to parties.[30]

Most States limit the contributions of corporations and unions, with 23 barring such contributions completely, 5 imposing no caps on such contributions, 18 using the same caps as they impose on individual contributions, and the other 4 applying specific limits to these types of donations.[31] As discussed later, these laws may no longer be enforceable.

Political action committees ("organizations that pool campaign contributions from their members to support or oppose candidates, ballot initiatives or legislation") are able to make unlimited contributions in 7 states and either have PAC-specific limitations or must follow the individual donation limit in the rest of the States.[32]

States also require disclosure of contributions to ballot measures, donations to candidates' campaigns, communication supporting or opposing a candidate or measure, and expenditures made towards a campaign. These requirements can apply to the recipient or donor or both and many are required to register with the State.[33]

A minority of States (15) "provide some form of statewide public financing option for candidates. Each of these plans requires a candidate who accepts public money to promise to limit both how much the candidate spends on the election and how much they receive in donations from any one group or individual." The programs either make public grants to qualifying candidates or match donations to those candidates.[34]

Finally, like the national government, nearly every State prohibits contributions and expenditures by foreign individuals, corporations, and governments to ballot measures and many also to electoral candidates.[35] Six States (Arkansas, Florida, Louisiana, Nebraska, Texas, and Utah) also require agents of foreign governments trying to influence public opinion or policy to register with the State.[36]

An important caveat is that limits on contributions can be circumvented by creating an independent issue organization (a political action committee) that can spend money to influence an election outcome, separate from making direct contributions to a campaign.[37]

This is an area of high legislative interest at the State level. In 2023, 612 campaign finance bills were considered in the 50 States' legislatures, with 62 of these being enacted in 27 States.[38]

Constitutional Issues

Of course, no matter how significant State responsibilities are, they are limited by Constitutional constraints in two ways. First, the Constitution disallows certain State initiatives by assigning them to the federal government or specifically proscribing the State from doing them.[39] Second, States may not violate rights guaranteed by the Constitution. As will be described below, the provision thought to be most relevant to the subject of campaign finance is the First Amendment guarantee of free speech.

This latter point deserves some elaboration. It is a common observation that the First Amendment initially constrained only the actions of the federal government,[40] because its language specifically addresses Congress.[41] There were some commentators in the antebellum period who argued that Article IV guaranteed some rights to citizens even against the laws of their States,[42] but the Framers of the 14th Amendment determined that the rights of newly freed enslaved persons and others to be free from State denials of basic liberties would be best accomplished by an amendment to the Constitution.[43]

Section One of the 14th Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[44] The guarantee of privileges or immunities of citizens "was intended . . . to incorporate the Bill of Rights, and to secure other privileges and immunities against the states."[45] This would include the rights listed in the First Amendment.

Not long after the Fourteenth Amendment was ratified, the U.S. Supreme Court interpreted the privileges or immunities guarantee so narrowly that it has not been treated as an effective limitation on State overreach.[46] It was not until the 20th Century that the Court held that "freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[47]

Thus, in the context of election regulations, States are constrained by the need to respect constitutional rights, including freedom of speech and freedom of the press. The nature of those rights is not always entirely clear, however. The precise nature of those rights is often the source of Constitutional litigation.

Supreme Court Decisions

The Supreme Court's modern campaign finance doctrine first took root fifty years ago in *Buckley v. Valeo*.[48] At issue in *Buckley* was a comprehensive federal law that set limits on federal campaign contributions and expenditures. When it issued its decision in *Buckley*, the Supreme Court for the first time functionally equated spending money in politics with the First Amendment's protection of "the freedom of speech." According to the Court, because limits on campaign spending necessarily reduce the quantity and quality of political expression,[49] campaign finance laws should be subjected to rigorous judicial scrutiny and struck down unless they are narrowly aimed at curbing *quid pro quo* corruption.

Since *Buckley* came down in 1976, the U.S. Supreme Court has gone on to issue a series of decisions on campaign finance that have significantly impacted State and federal campaign finance laws.

Over the past 50 years, federal courts have applied aggressive judicial review to strike down states' campaign finance laws. The federal courts will only uphold a state's campaign finance law if the law is narrowly designed to prevent quid pro quo

corruption or to inform the public about the sources of money. Other important state interests – such as the interests in self-governance and election integrity – are considered by federal judges to be inadequate justifications for campaign finance laws.

The table on page 13 shows how the courts have stripped policy authority from the states in recent decades.

A very basic summary of these decisions is that the Court has consistently held that restrictions on campaign spending do implicate the right to free speech. It has upheld limitations on the total amount a donor can give to a candidate and disclosure requirements for donors and independent campaigns. These are justified, for the Court, by the need to prevent corruption or the appearance of corruption. The Court, by contrast, has struck down limitations on how much a candidate can spend, on speech by corporations, on independent spending, and on aggregate spending a particular donor can make while still complying with the individual caps on candidate contributions. The Court has also said States cannot subsidize a candidate so as to level the playing field with an opponent who chooses private funding. This means that while there are some options open to the States, particularly regarding transparency requirements, there are many areas where State actions to regulate campaign financing are foreclosed by court decisions.

The Montana Example

The state of Montana is an example of how a national rule for money in politics set by the unelected judiciary violates the federalism interests of the states. Montana's unique regional differences illustrate the need for a local approach to campaign finance.

Montana's History of Corruption

Montana's fight for the power to decide how to regulate money in its elections is rooted in its history. At the time of Montana's founding in 1889, Gilded Age tycoons controlled all political power in the state through bribes, campaign donations, and election spending. Known as the "Copper Kings", they owned the mineral mines that fueled the post-Civil War industrialization of 19th-century America. One of them even purchased a seat for himself in the U.S. Senate with $272,000 in bribes to the state legislature.

In 1911, Montana amended its constitution to allow for voter initiatives to fight back against these powerful mining interests. One of the first measures voters passed was the Montana Corrupt Practices Act, to prevent corporations from donating or spending money in Montana elections. Montana's Corrupt Practices Act remained in effect for nearly 100 years until the Supreme Court in *Citizens United* ruled that corporations and unions have a constitutional right to engage in independent spending in elections. Montana has been fighting back ever since.

Montana's Fight against Citizens United

The *Citizens United* decision invalidated laws in 23 states, including Montana's century-old Corrupt Practices Act. A challenge was immediately brought in Montana state court challenging the Act as a violation of both the U.S. Constitution and the state's constitution. A Montana state district court ruled that the ruling in *Citizens United* invalidated

STATE POLICY AUTHORITY

TYPE OF STATE POLICY	EXAMPLES	FEDERAL COURTS SAY...
Limit out-of-state / nonresident money	**Alaska** passed a law to bar candidates from accepting more than $3,000 per year from individuals who are not residents of Alaska.	**Law struck down:** "Alaska argues that the nonresident limit targets the important state interest of protecting its system of self-governance. We reject Alaska's proffered state interest." *Thompson v. Hebdon* (9th Cir. 2021).
	South Dakota passed a law to bar out-of-state contributions to South Dakota ballot question committees.	**Law struck down:** South Dakota's "claimed interest in protecting democratic self-government does not constitute a compelling interest." *SD Voice v. Noem* (D.S.D. 2019).
	Florida, due to concern about out-of-state influence in its ballot elections, passed a law limiting donations from non-residents to $3,000.	**Law struck down:** Although Florida argued that the law "furthers Florida's interest in ensuring that only Florida voters have a say in Florida's law," the federal court concluded that Florida "cannot demonstrate that this is a legitimate state interest." *ACLU v. Byrd* (D. Fla. 2022).
Limit foreign money	**Maine** voters (86%) passed a law to prevent foreign-influenced corporations from spending money in the state's ballot elections.	**Law struck down:** Maine's law is unconstitutional because its 5% foreign ownership trigger sweeps too broadly, in the court's view. *CMP v. Maine Commission* (1st Cir. 2025).
	Ohio passed a law to prevent legal permanent residents (*i.e.*, noncitizen green card holders) from spending in its ballot elections.	**Law tentatively upheld:** Although this law was initially blocked by a federal district court, it has been allowed to take effect by the Sixth Circuit. The law still remains vulnerable under the Supreme Court's campaign finance precedents. *OPAWL v. Yost* (6th Cir. 2025).
Limit corporate and union spending	Before the *Citizens United* decision, 23 states had laws banning corporate, nonprofit, and/or union spending in elections, including **Kentucky**, **Ohio**, **Oklahoma**, **Tennessee**, and **Texas**.	**Dozens of state laws struck down:** The U.S. Supreme Court held that corporations, nonprofits, and unions all have a First Amendment right to spend unlimited amounts to influence elections and noted that "the appearance of influence or access . . . will not cause the electorate to lose faith in our democracy." *Citizens United* (2010).
	Driven by concerns about out-of-state influence, **Montana** had a nearly 100-year-old law to ban corporate spending in state elections.	**Summarily struck down:** In a one-paragraph opinion, the U.S. Supreme Court invalidated Montana's century-old law. *American Tradition Partnership v. Bullock* (2012).
Limit corporate spending in ballot campaigns	**Massachusetts** passed a law to restrict corporations from making contributions or expenditures in state ballot question campaigns.	**Law struck down:** The U.S. Supreme Court concluded the law was unconstitutional because the "risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *Bellotti* (1978).
Limit donations to super PACs	**Maine** voters (75%) passed a law to set a $5,000 limit on contributions to super PACs.	**Law blocked:** A federal district court blocked the law as unconstitutional, finding that it could not "be squared with *Citizens United*." *Dinner Table Action v. Schneider* (D. Me. 2025).

the law, but the Montana Supreme Court reversed that lower court ruling on appeal holding: "unlike *Citizens United*, this case concerns Montana law, Montana elections, and it arises from Montana history." The state supreme court concluded that "[i]ssues 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. Clearly Montana has unique and compelling interests to protect through preservation of this statute."

The case was appealed to the U.S. Supreme Court in *American Tradition Partnership, Inc. v. Bullock* (2012). Briefs were filed in support of Montana's position by the 22 other states with laws impacted by *Citizens United*. The states urged the Court to consider a full argument on the merits of how the context of the *Citizens United* ruling differed from states' interests in protecting state elections. The Court decided the case without oral argument and issued a summary reversal. In a terse one-paragraph opinion, the Court overruled Montana's highest court, finding "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." Thus, there is no room for regional differences under the Supreme Court's campaign finance doctrine.

Montana Voters Respond with Calls for a Constitutional Amendment

Five months after defeat in the Supreme Court, 75% of Montana voters supported a ballot measure calling for an "amendment to the United States constitution that is consistent with the policy of the state of Montana." Since then, 22 other states have joined Montana in calling for an amendment to overturn the Supreme Court's campaign finance doctrine and restore power to Congress and the States to decide whether and how to regulate money in their elections.

Kirk Cullimore, Senate Majority Leader in Utah, expressed Utah's federalism interests in such an amendment: "Utahns overwhelmingly support taking action against the corrosive effects of dark money in politics and foreign interference in our elections. Simply put, this resolution protects Utah and sets a precedent for states across the nation to reclaim their role as guardians of our republic." Utah is the most recent state to call for an amendment.

The Zip Code Factor in Campaign Finance

Another way in which campaign finance interacts with and potentially undermines federalism is through what might be called the "zip code factor." As noted in the table on page 13, some states have sought to limit the amount of money flowing into their elections from out-of-state sources. One factor that might be motivating state lawmakers is that, in America today, the vast majority of all funding for campaigns and elections now comes from a very small number of zip codes, primarily concentrated in or near the nation's wealthiest cities.[50] By way of example, in the most recent federal election, U.S. Senate candidates reported raising just 27.5% of their itemized donations from within their state, and U.S. House candidates reported raising just 17.5% of contributions from in-state donors.[51]

When the major contributors to congressional campaigns are overwhelmingly located in just a few major cities, "[i]ncentives are created that encourage potential and actual candidates as well as elected officials to focus excessive amounts of attention on the very few contributor areas in the United States. The result is that contributor areas substantially shape the congressional candidates, campaigns and officials that are meant to represent recipient areas."[52]

State lawmakers might wish to implement policies that could change candidates' incentives so that they focus more on in-state residents and constituents and less on out-of-state donors with deep pockets.[53] But, under current Supreme Court precedent, those policies are being struck down by judges as unconstitutional. As the Ninth Circuit majority explained when it invalidated Alaska's limit on out-of-state contributions: "The dissent makes a cogent case for the view that states should be able to limit who may directly influence the outcome of an election by making financial contributions. But that debate is over. The Supreme Court has expressly considered and rejected those arguments. ... The dissent's conclusion that self-governance is an important state interest in this context is clearly irreconcilable with the Supreme Court's reasoning[.]"[54]

Originalism and Campaign Finance

As discussed above, the Supreme Court's campaign finance doctrine harms federalism by taking important policy choices away from the states. But it also suffers from another important defect: it lacks grounding in the original meaning of the Constitution's text.

As a recent brief filed by American Promise in a pending Supreme Court case notes, the Court's campaign finance decisions have not typically focused on the original meaning of the First Amendment in reaching their holdings.[55] That analysis is important because the Constitution has a fixed meaning that is established at the time of ratification.[56] Without a fixed meaning, the Constitution cannot constrain government actors.

The analysis of original public meaning can also be complicated. When the First Amendment is applied to the States through the Fourteenth Amendment, does the meaning of the First Amendment in 1791 apply or could there be a different meaning in 1868 when the Fourteenth Amendment was ratified?[57]

State lawmakers might wish to implement policies that could change candidates' incentives so that they focus more on in-state residents and constituents and less on out-of-state donors with deep pockets. But, under current Supreme Court precedent, those policies are being struck down by judges as unconstitutional.

To understand how the original understanding of the First Amendment should be brought to bear on campaign finance questions, it's crucial to understand how the Founding generation conceived of rights. Recent originalist scholarship by Professor Jud Campbell of Stanford Law School argues that the Founders believed that legislatures could regulate

liberty in the public interest – speech included – so long as the people consented through their elected lawmakers. This explains why electoral representation was so important to the Founders: so long as the government *actually* represented the people, the government could regulate their affairs, even extensively, without infringing their liberty.

In addition, there is another originalist question of whether courts or legislatures should have primary responsibility over campaign finance? There is no historical evidence that the Founders understood campaign finance as an area where courts would play the dominant policymaking role through judicial review.

This is where the proposed For Our Freedom Amendment comes in. It would restore the original understanding by specifying that the representative branches of government at the State and federal levels have the authority to regulate campaign finance without judicial micromanagement.[58] Putting aside federal law implications which are beyond the scope of this report, this would leave the States free to enact campaign finance regulations.

Federalism's Promise Applied to Campaign Finance

Returning to the contributions of federalism noted above, how would these advantages likely play out in State regulation of campaign finance if States were unfettered in their lawmaking?

Responsiveness. States are in a position to enact regulations that respond to local preferences. Most State citizens would likely bristle at the possibility of their elections being influenced by funding from other States, so allowing States to prevent that possibility would be responsive to their concerns.

Accountability. State-level campaign financing laws would be made by elected officials accessible to citizens, with whom they can have significant contact. State lawmakers' actions, or failure to act, can be directly addressed in State and local elections.

Local Tailoring. In many ways, the States are alike in the laws they have enacted to regulate campaign financing, but there are some differences tailored to unique on-the-ground experience and culture. While some States are sensitive to corporate involvement in financing elections, others are not, and that is reflected in their different laws.

Experimentation. Some States appear to be relatively unconcerned with enacting campaign finance laws, while others have enacted stringent regulations. Which approach, and which specific incentives and disincentives, are likely to prevent corruption? The answer to that question is more likely to come when different approaches are being tried simultaneously to see which are making a difference.

Protection. States have acted to secure protections for citizens in other areas. Here, too, States could provide legal protections against foreign or out-of-state influence that is unlikely to be provided by the federal government.

Brian Boyle has identified a number of areas of concern in the domain of campaign finance that state legislators might wish to address:

- "Can we regulate and limit the money that candidates spend when they are running for election?"
- "Can we regulate how much money individuals can contribute to a candidate's campaign?"
- "Can we set different spending rules for constituents versus non-constituents?"
- "When people spend money in elections, can we require them to disclose the true sources of that money?"
- "What about artificial entities, such as corporations, non-profits, and unions – can we regulate and limit the money that those organizations spend in campaigns and elections?"
- "[H]ow should American voters be able to guard their elections against the influence of foreign actors and foreign-influenced entities?"[59]

Currently, court decisions allow the States to legislate in some but not all of these areas. States are, absent

future court decisions, able to cap individual donations to candidate campaigns, and to make some rules about funding disclosure. They are not able to limit candidate spending, limit corporate giving, and are hampered in some attempts to get disclosure of funding sources.

With the For Our Freedom Amendment in place, States would be able to legislate in all of these areas. The foregoing description of current State laws suggests that there could be a great variety of answers to these questions. That would not surprise the Constitution's Framers. As noted above, variance in State responses to pressing concerns is a feature, not a bug, in our Constitutional system. State legislation in these areas can advance the purposes of federalism.

Conclusion

Much of the discussion of campaign finance focuses on federal elections, in part because many high-profile lawsuits have challenged federal laws. The States, however, also have a critical role to play in ensuring election integrity. The proposed For Our Freedom Amendment is currently the most important innovation in campaign finance regulation. It has resulted in 23 States calling on Congress to propose the amendment.[60] This interest among States suggests that the discussion of campaign finance and the proposed amendment needs a more significant federalism component. Indeed, an important promise of the amendment is its ability to free the States to do what federalism is intended to allow – natural experiments that can demonstrate productive ways forward.

Endnotes

[1] *See* Sarah Bryner & Brendan Glavin, "Total 2024 election spending projected to exceed previous record" Open Secrets (October 8, 2024), https://www.opensecrets.org/news/2024/10/total-2024-election-spending-projected-to-exceed-previous-record; Domenico Montanaro, "More than $10 billion has been spent on ads in the 2024 election" NPR (November 1, 2024), https://www.npr.org/2024/11/01/nx-s1-5173712/2024-election-ad-spending-trump-harris

[2] See Andy Cerda & Andrew Daniller, "7 Facts about Americans' views of money in politics" Pew Research Center (October 23, 2023), https://www.pewresearch.org/short-reads/2023/10/23/7-facts-about-americans-views-of-money-in-politics/

[3] "For Our Freedom Amendment" American Promise, https://americanpromise.net/for-our-freedom-amendment/

[4] Gordon S. Wood, *Power and Liberty: Constitutionalism in the American Revolution* 94 (2021).

[5] *Id*. at 95.

[6] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[7] This passage is drawn from an amicus curiae brief filed by Sutherland Institute with the U.S. Supreme Court in *Utah v. United States*, No. 160, Original (October 22, 2024).

[8] The Federalist No. 45.

[9] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[10] The Federalist No. 10.

[11] Amy Coney Barrett, *Listening to the Law* 161 (2025).

[12] *Id*.

[13] John O. McGinnis & Ilya Somin, "Federalism Vs. States' Rights: A Defense of Judicial Review in a Federal System" 99 *Northwestern University Law Review* 89, 106 (2004).

[14] Michael W. McConnell, "Federalism: Evaluating the Founders' Design" 54 *University of Chicago Law Review* 1484, 1493 (1987).

[15] U.S. Constitution, amendment 10.

[16] The Federalist No. 45.

[17] *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

[18] McConnell, *supra*, note 14.

[19] McGinnis & Somin, *supra* note 13 at 107.

[20] *Id*. at 111.

[21] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also *Roth v. United States*, 354 U.S. 476, 505 (Harlan, J., concurring and dissenting) (referring to states as "experimental social laboratories").

[22] McGinnis & Somin, *supra* note 13 at 110 and note 88.

[23] Akhil Amar, "of Sovereignty and Federalism" 96 *Yale Law Journal* 1425, 1506 (1987).

[24] Federalist 10.

[25] Lisa Bramen, "Swilling the Planters With Bumbo: When Booze Bought Elections" *Smithsonian Magazine* (October 20, 2010), https://www.smithsonianmag.com/arts-culture/swilling-the-planters-with-bumbo-when-booze-bought-elections-102758236/

[26] "Money-in-Politics Timeline"

[27] Jon Kukla, "The Promise of Patrick Henry" Trend and Tradition (July 10, 2018), https://www.colonialwilliamsburg.org/discover/resource-hub/trend-tradition-magazine/trend-tradition-summer-2018/the-promise-of-patrick-henry/

[28] "Campaign Contribution Limits: Overview" NCSL (July 9, 2025), https://www.ncsl.org/elections-and-campaigns/campaign-contribution-limits-overview

[29] *Id*.

[30] *Id*.

[31] *Id*.; "State Limits on Contributions to Candidates 2025-2026 Election Cycle" NCSL (May 2025), https://documents.ncsl.org/wwwncsl/Elections/State-Limits-on-Contributions-to-Candidates-2025-2026.pdf

[32] "Campaign Contribution Limits: Overview," *supra* note 26.

[33] "State Campaign Finance Disclosure Requirements Toolkit" NCSL (July 30, 2023), https://www.ncsl.org/elections-and-campaigns/state-campaign-finance-disclosure-requirements-toolkit

[34] "Public Campaign Financing" NCSL (September 9, 2025), https://www.ncsl.org/elections-and-campaigns/public-financing-of-campaigns-overview,

[35] "Foreign Campaign Contributions and Expenditures" NCSL (July 14, 2025), https://www.ncsl.org/elections-and-campaigns/foreign-campaign-contributions-and-expenditures

[36] Brian Weber, "Countering Foreign Influence in State Politics" NCSL (August 6, 2025), https://www.ncsl.org/state-legislatures-news/details/countering-foreign-influence-in-state-politics

[37] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[38] "2023 Campaign Finance Enactments" NCSL (January 17, 2024), https://www.ncsl.org/elections-and-campaigns/2023-campaign-finance-enactments

[39] See U.S. Constitution, article I, sections 8, 10.

[40] *Barron v. Baltimore*, 32 U.S. 243 (1833).

[41] U.S. Constitution, Amendment 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[42] See Randy E. Barnett, "Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment" 3 Journal of Legal Analysis 165 (2011).

[43] William Baude, Jud Campbell & Stephen E. Sachs, "General Law and the Fourteenth Amendment" 76 *Stanford Law Review* 1185, 1214-1218 (2024).

[44] U.S. Constitution, Amendment 14, section 1.

[45] Michael Zuckert, "On the Fourteenth Amendment: A Textual Analysis" 48 Perspectives on Political Science 246, 249 (2019); see also David R. Upham "A Coherent Measure" 48 Perspectives on Political Science 234 (2019).

[46] *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

[47] *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

[48] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[49] *Id*. at 19.

[50] *See, e.g.*, David Fontana, *The Geography of Campaign Finance Law*, 90 S. Cal. L. Rev. 1247, 1249 (2017) ("[D]onors in five percent of the nation's zip codes – concentrated in the nation's major metropolitan areas – contribute more than three times as much in itemized contributions to federal elections than the rest of the country combined.").

[51] https://www.opensecrets.org/news/reports/outside-money-inside-influence

[52] Fontana at 1273.

[53] *See, e.g.*, 2024 Platform and Resolutions of the Republican Party of Texas, Principle 202 on State Governance ("[T]he State of Texas should pass legislation for non-federal elections which bans campaign contributions and expenditures that originate from outside of the State of Texas, including those by individuals, organizations, and political action committees, and including those on any questions, propositions, and amendments on any ballots.").

[54] *Thompson v. Hebdon*, No. 17-35019 (9th Cir. 2021), at 27-28, 30.

[55] Brief of American Promise as Amicus Curiae Supporting Neither Party, *National Republican Senatorial Committee v. Federal Election Commission*, No. 24-621 (August 2025).

[56] Larry Solum, "Original Public Meaning" 2023 *Michigan State Law Review* 807 (2023).

[57] William Baude, Jud Campbell & Stephen E. Sachs, "General Law and the Fourteenth Amendment" 76 *Stanford Law Review* 1185, 1247-1250 (2024); John O. McGinnis, "Originalism and *Sullivan*" *Law & Liberty* (November 14, 2024), https://lawliberty.org/forum/originalism-and-the-case-for-overturning-sullivan/

[58] "For Our Freedom Amendment" American Promise, https://americanpromise.net/for-our-freedom-amendment/

[59] Brian Boyle, "Popular Sovereignty and the For Our Freedom Amendment" SSRN at 17-18 (January 28, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5088593

[60] "American Promise," https://americanpromise.net/

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Much of the discussion of campaign finance focuses on federal elections, in part because many high-profile lawsuits have challenged federal laws. The States, however, also have a critical role to play in ensuring election integrity. The proposed For Our Freedom Amendment is currently the most important innovation in campaign finance regulation.

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