ALASKAN EXCEPTIONALISM IN CAMPAIGN FINANCE

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ABSTRACT

This article argues that Alaska's efforts in campaign finance reform are closely tied to a philosophy of "Alaskan Exceptionalism": the view that Alaska is fundamentally different from other states. A recent decision from the Supreme Court, Thompson v. Hebdon*, may, however, weaken Alaska's right to justify its reforms through an "exceptionalist" lens. The same decision suggests the Supreme Court is further narrowing its campaign finance jurisprudence more generally. Without these campaign finance limits, Alaskan politics may continue to be dominated by the oil and gas industry, the very problem those limits sought to address in the first place.*

I. INTRODUCTION

By the time the "Corrupt Bastards Club" was revealed to be just that—corrupt—by the 1996 Atlantic Richfield Company (ARCO) scandal,[1] it seemed three truths could be universally acknowledged about Alaskan politics: 1) it was dominated by oil and gas, 2) the Alaska state legislature, or at least a considerable part of it, could be bought, and 3) it could be bought on the cheap.[2] These truths were seemingly evident even

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1. The "Corrupt Bastards Club" was a name given by a bar patron to a group of Alaska legislators who were overly cozy with the oil and gas industry. *See* AMANDA COYNE & TONY HOPFINGER, CRUDE AWAKENING: MONEY, MAVERICKS, AND MAYHEM IN ALASKA 149 (2011) (explaining when someone called a handful of legislators "corrupt bastards," they "talked about being part of the club" and one legislator made baseball caps embroidered with "CBC" and the name of oil company VECO Corp.). An FBI investigation later revealed that many members of the so-called club had been taking bribes from that industry. *See, e.g.*, *id.* (noting, for example, an instance in which "oilmen" gave one legislator kickbacks in return for pushing a "Big Oil" agenda). Matt Volz, *From Barroom Joke to Federal Warrants*, ANCHORAGE DAILY NEWS (Sept. 5, 2006), https://www.adn.com/news/politics/veco/story/8160122p-8042340c.html (describing the progress of the investigation).

2. The largest amount given to an Alaska state legislator by top VECO executives was $24,550 over a period of six years. Lori Backes, *Follow Money to*

at Alaska's founding, at least among those who were willing to notice.[3] Even recently, as Alaskans were preparing to vote in November 2020 on whether to raise oil taxes, ads bought and paid for by the oil industry were everywhere from yard signs to YouTube.[4] Weeks before the state was set to vote, the oil and gas industry was fighting to remove the initiative from the ballot.[5] The gravitational pull of oil and gas on Alaskan politics seems almost bound up with the development of Alaskan statehood itself.

In spite of oil and gas industry's domination in Alaskan politics, the Alaskan people have always sought ways to reduce its influence, sometimes through the executive and legislative branches, or, as a last resort, through the power of initiative.[6] These efforts are as old as Alaska and its fiercely independent streak.[7] The goal was as simple as it was elusive: reduce oil and gas's out-of-state influence on Alaskan politics by putting limits on how much money the oil and gas industry can give to politicians.

Unfortunately, some of these campaign finance limits have run into opposition not just from big business, but from the Supreme Court of the United States. The Court's recent jurisprudence has been hostile to *any* limits on campaign spending, not only in the form of limits on campaign

Governor's Gas Deal, ANCHORAGE DAILY NEWS (Sept. 5, 2006), http://dwb.adn.com/news/politics/veco/story/8160122p-8042343c.html.

3. *See, e.g.*, E. L. Bartlett, Delegate, Alaska Constitutional Convention, Meeting the Challenge (Nov. 8, 1955), https://www.alaska.edu/creatingalaska/constitutional-convention/speeches-to-the-conventio/opening-session-speeches/bartlett/ (warning delegates of the Alaska Constitutional Convention of the dangers of "exploitation" of Alaska by "outside interests").

4. *See, e.g.*, Alex DeMarban, *Oil Companies Donate Heavily to Fight Initiative Aiming to Raise Production Taxes*, ANCHORAGE DAILY NEWS (May 18, 2020), https://www.adn.com/business-economy/energy/2020/05/18/oil-companies-donate-heavily-to-fight-initiative-aiming-to-raise-production-taxes/ (describing a "surge" of donations from oil companies like ConocoPhillips, Hilcorp, and ExxonMobil to OneAlaska, a group opposing a ballot initiative to raise taxes on the oil industry in part through television and radio advertising).

5. *See* Alex DeMarban, *Industry Trade Groups Appeal to Alaska Supreme Court to Fight Oil-Tax Ballot Measure*, ANCHORAGE DAILY NEWS (July 21, 2020), https://www.adn.com/business-economy/energy/2020/07/21/industry-trade-groups-appeal-to-alaska-supreme-court-to-fight-oil-tax-ballot-measure/ (noting industry trade groups appealed a ruling refusing to invalidate signatures for a ballot measure that would raise taxes on oil producers).

6. *See infra* Part III (detailing Alaskan legislative and popular movements to limit campaign contributions).

7. *See* Editorial, *On July 4, Celebrating Alaska's Independent Character*, ANCHORAGE DAILY NEWS (July 5, 2018), https://www.adn.com/opinions/2018/07/03/on-july-4-celebrating-alaskas-independent-character/ (observing "[t]he independent spirit in Alaska has always been strong," and despite "economic reliance on . . . oil and gas developers . . . Alaskans have made strides towards economic independence").

expenditures, but also on limits on how much money people can give to campaigns (so-called "contributions").[8] Restrictions on campaign contributions have been the main focus of Alaskan reformers starting in the 1990s, but have been coming under increasing scrutiny.[9] In the latest iteration of this conflict, the Supreme Court remanded *Thompson v. Hebdon*[10] to the Ninth Circuit so that the lower court could reconsider its previous decision that had been largely in favor of Alaska's contribution limits.[11] It is a sign of the times that the fact that the Supreme Court *remanded* the decision, rather than outright *reversing* it, was deemed something of a victory.[12]

This Essay takes the occasion of the *Hebdon* remand to offer a brief overview of Alaska's attempt to limit campaign contributions. This investigation is timely for several reasons. First, considering the Supreme Court's treatment of *Hebdon* offers an opportunity to examine how exactly the Court's emphasis on fighting corruption and the appearance of corruption as the *only* justifiable interests in campaign finance is playing out post-*Citizens United*.[13] Second, it provides a lens to consider the Court's shaky insistence on the distinction between campaign expenditures and campaign contributions. Finally, and most importantly, it can help us see to what extent the Court will be willing—or unwilling—to let states craft unique campaign finance reforms, based on their own particular history and characteristics.

My analysis divides into three parts. In Part II, I give a brief overview of the *Buckley v. Valeo* framework of campaign finance, focusing on the goals of stopping corruption and the difference between contributions and expenditures.[14] In Part III, I trace the development of Alaska's efforts to limit the role of large campaign contributions, including contributions coming from out of state. In Part IV, I speculate on what the future of the

8. *See generally* Richard L. Hasen, *Die Another Day*, SLATE (Apr. 2, 2014, 1:13 PM), https://slate.com/news-and-politics/2014/04/the-subtle-awfulness-of-the-mccutcheon-v-fec-campaign-finance-decision-the-john-roberts-two-step.html (noting recent Court decisions have "set the course toward even more campaign finance challenges under the First Amendment and more deregulation").

9. *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185 (2014) (striking down aggregate limits on campaign finance contributions).

10. 140 S. Ct. 348 (2019).

11. *See id.* at 350–51 (observing the Alaska law at issue exhibits similar "danger signs" to a previously invalidated Vermont law, but that there may be some "pertinent special justifications" for it).

12. Rick Hasen, *Breaking: Supreme Court, Ducking Major Confrontation Over Campaign Finance Limits for Now, Reverses 9th Circuit Ruling Upholding Alaska Campaign Contribution Limits*, ELECTION L. BLOG (Nov. 25, 2019, 7:00 AM), https://electionlawblog.org/?p=108184 ("[T]he way the state of Alaska lost today is the least bad way it could lose.").

13. Citizens United v. FEC, 558 U.S. 310 (2010).

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

Thompson v. Hebdon litigation will hold both for Alaska and campaign finance reform more generally.

II. THE *BUCKLEY* FRAMEWORK

In *Buckley v. Valeo*,[15] the Court addressed the limits placed on electoral expenditures by the Federal Election Campaign Act in the wake of Watergate. A number of political candidates, campaign contributors, and other political actors sued, arguing that the Act violated the rights to freedom of expression and due process.[16] In a lengthy per curiam decision, the Supreme Court partially reversed the Court of Appeals' decision, finding expenditure ceilings unconstitutional under the First Amendment, but giving somewhat more leeway to legislative restrictions on campaign contributions.[17]

Buckley is a decision that seems disfavored by many (even most) Justices on the Court, but for different reasons. Because no particular objection to the case has enough support, *Buckley* stubbornly remains the law.[18] One of the least popular elements of *Buckley* is its distinction between campaign contributions and expenditures.[19] To those on the Right, the distinction seems artificial, as both contributions to campaigns, and spending by and in support of campaigns, implicate fundamental First Amendment rights of speech and association.[20] Those on the Left

15. *Id.*
16. *Id.*
17. *Id.*
18. *See* Richard L. Hasen, *The Nine Lives of* Buckley v. Valeo, *in* FIRST AMENDMENT STORIES 345, 345 (Richard W. Garnett & Andrew Koppelmen, eds., Found. Press 2012) ("Over the years, there have been Court majorities ready to overturn parts of *Buckley*, though *Buckley* has remained good law because the Justices have not agreed on which parts to overturn and Justices in the Court's center have refused to overturn any of *Buckley*'s central tenets."); Eugene Volokh, *Why* Buckley v. Valeo *Is Basically Right*, 34 ARIZ. ST. L.J. 1095, 1095 (2002) ("*Buckley v. Valeo* seems to be almost universally reviled . . . .").
19. *See generally* Erwin Chemerinsky, *Symposium: The Distinction Between Contribution Limits and Expenditure Limits*, SCOTUSBLOG (Aug. 12, 2013, 2:42 PM), https://www.scotusblog.com/2013/08/symposium-the-distinction-between-contribution-limits-and-expenditure-limits/ (discussing how both the right and the left dislike the distinction between contributions and expenditures); Bob Bauer, *Not So "Easy": The Futilities of the Contribution and Expenditure Distinction*, MORE SOFT MONEY HARD LAW (July 31, 2013), http://www.moresoftmoneyhardlaw.com/2013/07/contribution-expenditure-distinction/.
20. *See* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 640 (1996) (Thomas, J., concurring in the judgment and dissenting in part) ("The protections of the First Amendment do not depend upon so fine a line as that between spending money to support a candidate or group and giving money to the candidate or group to spend for the same purpose.").

will agree that the distinction is artificial, not because of free speech but because the possibility for corruption exists in both unlimited contributions to campaigns and unlimited expenditures on behalf of campaigns.[21] Nevertheless, *Buckley* treats contributions and expenditures differently, although how long that distinction will survive is a matter of speculation.

The decision in *Buckley* primarily focused on eliminating overly strict restrictions on what it called "expenditures"—what could be spent *by campaigns* or *on behalf of campaigns*.[22] A campaign that spends money on an ad or a rally appears to be exercising one right that lies at the core of the First Amendment: pure political speech.[23] When an individual or a political action committee puts out an ad supporting a candidate or taking a position on an issue, that too is pure political speech.[24] According to the Court in *Buckley*, so long as speech that is made on behalf of a candidate or an issue is not coordinated with a campaign, then there is not too great a risk of corruption.[25] In other words, if the expenditure is truly independent, the state has little, if any, ability to regulate that speech. Expenditures are protected even when it is a corporation who speaks on behalf of a candidate.[26]

Contributions, on the other hand, are direct cash or in-kind donations directly to campaigns.[27] Here the risk of corruption is greater—donors essentially are giving a candidate money to do with as they please.[28] Unlike contributions, independent expenditures—at least in theory—have the potential to upset a candidate: maybe the candidate did

21. *See* Citizens United v. FEC, 558 U.S. 310, 458 (2010) (Stevens, J., concurring in part and dissenting in part) ("[T]echnically independent expenditures can be corrupting in much the same way as direct contributions . . . .").

22. David Schultz, *Revisiting* Buckley v. Valeo*: Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J.L. & POL. 33, 34 (1998).

23. *See* Buckley v. Valeo, 424 U.S. 1, 15 (1976) ("Appellants respond that contributions and expenditures are at the very core of political speech, and that the Act's limitations thus constitute restraints on First Amendment liberty that are both gross and direct.").

24. Schultz, *supra* note 22, at 58.

25. *Buckley*, 424 U.S. at 46 (1976).

26. *Citizens United*, 558 U.S. at 365; James Bopp, Jr. et al., *The Game Changer: Citizens United's Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMEND. L. REV. 251, 262–63 (2011).

27. "A contribution is anything of value given, loaned or advanced to influence a federal election." *Types of Contributions,* FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/types-contributions/ (last visited Sept. 5, 2020).

28. J. Robert Abraham, Note, *Saving* Buckley*: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1083 (2010) (identifying the greater corruption risk with direct contributions to candidates).

not want the donor's support, or not in the way offered.[29] Moreover, per *Buckley*, not only do contributions present a greater risk of corruption because they can look just like giving a bribe to a candidate, they are less like core political speech.[30] The concern is not necessarily that money does not equal speech, but that the *only* message conveyed when a person gives money is that they believe the candidate should have more money to spend on their campaign.[31] A contribution has some expressive and associational value, the *Buckley* Court said, but not much: it is kind of an inarticulate shout in support of a candidate, like saying "I support you $1000 worth."[32] A contribution is not the same as making a speech in support of a candidate or buying an ad.

Buckley also suggested that the major, if not the only, state interest in regulating either contributions or expenditures was to battle corruption or the appearance of corruption.[33] Both of these terms needed greater elucidation than *Buckley* gave them. While it is clear that avoiding bribery—in the form of a quid pro quo—is certainly a compelling governmental interest,[34] it is less clear what it means to avoid the appearance of corruption. Does it mean just working to avoid the perception that legislators are being bribed, or something more? Even the exact contours of corruption were left somewhat open in *Buckley*. Could corruption mean a broader sort of political dependence on money rather than the people, as Lawrence Lessig has suggested?[35] Cases like *Austin v. Michigan Chamber of Commerce*[36] developed the theory that large amounts of money in the political system would "distort" normal politics, but this conception of corruption did not survive *Citizens United*.[37] Indeed, *Citizens United* seemed to almost close the door on any state interest in campaign finance apart from the narrow interest in preventing bribery in

29. *See id.* at 1083–84 (noting that independent expenditures "require the absence of prearrangement and coordination by definition").

30. *Buckley*, 424 U.S. at 21, 28–29.

31. *Id.*

32. *Id.*

33. *Id.* at 45.

34. *Id.* at 26–27.

35. Lawrence Lessig, *Forum: Democracy After Citizens United*, BOSTON REVIEW (Sept. 4, 2010), http://bostonreview.net/lessig-democracy-after-citizens-united; Dennis F. Thompson, *Two Concepts of Corruption* 7 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 16, 2013).

36. 494 U.S. 652 (1990), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

37. *See* Ofer Raban, *Constitutionalizing Corruption: Citizens United, Its Conceptions of Political Corruption, and the Implications for Judicial Elections Campaigns*, 46 U.S.F. L. REV. 359, 361 (2011) (discussing *Citizens United*'s rejection of *Austin*'s anti-distortion rationale due to being "inconsistent with precedent and with established First Amendment principles").

the form of a quid pro quo.[38] Even opposing the *appearance* of corruption may no longer be a legitimate interest, or if it is one, it is not very strong.

III. ALASKAN EFFORTS AT REFORM

Alaska's efforts in campaign finance have been based around two ideas: first, that Alaska is a state that is dominated by the oil and gas industry, and second, that Alaska has a small population with a small legislature.[39] These principles demonstrate the problem of Alaskan political campaigns: large, wealthy corporations in oil and gas can exert a disproportionate influence on Alaskan politics because they can focus their (massive) spending on just a few politicians.[40] Getting those few politicians to reliably support pro-oil and gas initiatives serves to advance pro-industry legislation, sometimes just by dooming anti-industry legislation.[41] Accordingly, much of Alaskan campaign finance reform has focused on *Buckley*'s contribution prong: limiting how much wealthy donors can give to particular candidates by putting a strict cap on donations to politicians and political campaigns.[42] The limits have been fairly low compared to other states.[43] As part of the reform push in the 1990s, Alaska also tried to limit the amount out-of-state residents could give to candidates or agendas in Alaskan elections.[44] The campaign finance reform package was characterized by a strong sense of "Alaskan exceptionalism," the view that the facts on the ground in Alaska are different from other states, given its small population and reliance on oil

38. *Id.* at 364; Citizens United v. FEC, 558 U.S. 310, 359 (2010).

39. *See, e.g.*, Thompson v. Hebdon, 140 S. Ct. 348, 351–52 (2019) (statement of Ginsburg, J.) ("Moreover, Alaska has the second smallest legislature in the country and derives approximately 90 percent of its revenues from one economic sector—the oil and gas industry.").

40. *Transcript: Alaska: The Senator and the Oil Man*, NOW ON PBS (week of Sept. 1, 2008), https://www.pbs.org/now/shows/347/transcript.html (statement of Pat Dougherty, editor-in-chief of Anchorage Daily News) ("I would say history suggests not. Because I don't think that there has been a time in—Alaska in the last 25 years, 30 years, in which the state was not—really being pushed around by the oil industry.").

41. COYNE & HOPFINGER, *supra* note 1 (reviewing such machinations by the oil and gas industry).

42. *See* Thompson v. Hebdon, 909 F.3d 1027, 1031–32 (9th Cir. 2018) (noting that Alaska has "long regulated campaign contributions to political candidates"), *vacated*, 140 S. Ct. 348 (2019) (per curiam).

43. *Id.* at 1037; *see* ALASKA STAT. § 15.13.070 (2018) (setting contribution maximums at $500 and $1,000); *see also* Peter Segall, *Alaska Case on Campaign Finance Laws Could Go National*, JUNEAU EMPIRE (Nov. 21, 2019), https://www.juneauempire.com/news/alaska-case-on-campaign-finance-laws-could-go-national/ (describing recent contribution enforcement action).

44. Election Campaign Finance Reform § 11, 1996 Alaska Sess. Laws ch. 48, 7–11.

and gas.[45] Because Alaska is viewed as being different, its campaign finance rules are thought to necessarily be different (and more restrictive) as well. Alaska is unique in many ways—including a unique vulnerability to corruption.[46]

In fighting restrictions on contribution, the oil and gas industry allied with the American Civil Liberties Union (ACLU). In a state court-based challenge against campaign finance limits passed by the legislature, the ACLU of Alaska alleged that the out-of-state contribution caps were too low: even though the interest the State had in anti-corruption was legitimate, tight restrictions on contributions could unreasonably burden individuals' speech and associational rights.[47] This may have been a plausible argument. In identifying *some* First Amendment interests even in contributions, the U.S. Supreme Court had suggested that at some point, contribution limits could be set at a level that would not be justified.[48] Nevertheless, the Alaska Supreme Court rejected the ACLU's argument.[49] Citing evidence of corruption in Alaska's recent history, as well as the fact that campaigns could be run with less money in Alaska, the Alaska Supreme Court held that the limits were constitutional.[50] The court recognized that the threat of corruption was real, given that Alaskan politics *had* been corrupt in the past and there was an ever-present threat of corruption in the future.[51] Moreover, given the small size of Alaska's legislature, it would not take much to corrupt Alaskan politicians.[52] And because Alaska was a small state, limiting campaign contributions did not mean limiting the reach of Alaskan campaigns.[53] Just as Alaskan politicians could be bribed for smaller sums of money because there were so few politicians in Alaska, it did not take much money to run an effective campaign because there were so few people.[54]

A federal challenge to a 2006 ballot initiative which lowered

45. *See* Thompson v. Dauphinais, 217 F. Supp. 3d 1023, 1029 (D. Alaska 2016) (noting the ease of influencing state legislatures due to Alaska's size and oil and gas industry), *vacated*, Thompson v. Hebdon, 140 S. Ct. 348 (2019).

46. *Id.*

47. State v. Alaska Civ. Liberties Union, 978 P.2d 597, 608 (Alaska 1999).

48. *Id.* at 605 (citing Buckley v. Valeo, 424 U.S. 1, 26–27 (1976)).

49. *Id.* at 634.

50. *See id.* at 617–18 (holding that outside interests have attempted to influence Alaskan politics and the State has a compelling interest to limit such interests through contribution limits).

51. *Id.* at 620–21.

52. *See id.* at 608 (noting the State's argument that the expenditure prohibition is needed to avoid a "disproportionate impact" on the political process).

53. *See id.* (referencing the State's argument that corporations still had "ample alternatives for political expression").

54. *See, e.g.*, *Transcript: Alaska: The Senator and the Oil Man*, *supra* note 40 (stating that legislators allegedly being bribed did not receive a significant amount of cash "gifts").

campaign contribution limits received similar favorable treatment at the Ninth Circuit.[55] A similar challenge against the ballot initiative was brought, and reasoning similar to the Alaska Supreme Court's won the day. However, while both the district court and the Ninth Circuit emphasized Alaska's recent history of corruption, small legislature, and small population, such reasoning was only applied to in-state contributions.[56] The limitation on out-of-state donations was struck down: the Ninth Circuit said that the threat to Alaska's interest in self-governance by out-of-state donors was not a cognizable interest under *Buckley*.[57] Here, the Ninth Circuit reflected the Supreme Court's move away from articulating *any* other state interest in campaign finance other than one of fighting corruption or the appearance of corruption.[58]

More problematically, in upholding the campaign contribution limits, the Ninth Circuit relied not on the Supreme Court precedent in *Randall v. Sorrell*,[59] but on its own circuit precedent which it said was more applicable.[60] The Ninth Circuit's test was more generous in allowing limits on campaign contributions than the Supreme Court's test, which led to the Supreme Court granting certiorari on the opinion and ultimately a per curiam reversal.[61] The Ninth Circuit, according to the Supreme Court, had ignored many of the most relevant *Randall* factors—what the Supreme Court had called "danger signs"—in deciding *Thompson*, and so needed to reconsider.[62] In particular, *Randall* was applicable to *Thompson* because Alaska's limits were unusually low compared to other states and did not take inflation into account.[63]

Although the Supreme Court's decision was technically a remand rather than an outright reversal, the writing seemed to be on the wall. Still, those who supported the limits tried to make the best of the decision: it

55. *See* Thompson v. Hebdon, 909 F.3d 1027 (9th Cir. 2018) (upholding most of Alaska's campaign finance laws), *vacated*, 140 S. Ct. 348 (2019).

56. *See id.* at 1041, 1044 (referencing the district court's analysis of corruption in Alaska, though applying it as a compelling state interest for all challenged provisions except for the nonresident aggregate contribution limit).

57. *Id.* at 1042 n.10.

58. *Id.* at 1034.

59. Randall v. Sorrell, 548 U.S. 230 (2006); *see generally* J. Brett Busby & Lee B. Kovarsky, United States Supreme Court Update, 19 APP. ADVOC. 16, 23–24 (2006) ("In this case, the Court struck down provisions of the Vermont campaign finance statute as inconsistent with the First Amendment. . . . Justice Breyer authored the plurality opinion, in which Chief Justice Roberts joined and Justice Alito joined in part.").

60. *See Hebdon*, 909 F.3d at 1037–40 (applying Lair v. Motl, 873 F.3d 1170 (9th Cir. 2017), because the court found *Randall* was not binding authority due to not commanding a majority of the Court).

61. Thompson v. Hebdon, 140 S. Ct. 348, 350 (2019).

62. *Id.*

63. *Id.* at 351.

could have been worse, they said, and the remand was better than they expected.[64] Given the direction of the Supreme Court's jurisprudence, they had reasonably expected the Court to slam the door on Alaska's reform efforts.[65] In its decision, however, the Court seemed to have given at least a slight hope of preserving some of the limits, if not all of them. The Court noted in its order that the parties disputed whether there could be a "special justification" for Alaska's contribution limits, which might justify them being so low.[66] Certainly, the out-of-state limitation was doomed; but, with more facts, could the Alaskan limits not survive even the more stringent *Randall* test? Justice Ginsburg's dissent to the per curiam decision offered a map—but then again, it was only a dissent.[67] The tenor of the Court's opinion suggested a much greater skepticism about the limits.

IV. THE FUTURE OF ALASKA'S CAMPAIGN FINANCE REFORM

It is commonplace today to blame the Supreme Court and especially *Citizen's United* for opening the door to big money in politics.[68] This blame may be overstated. Big money will usually find a way into politics; it is sometimes just a matter of *how* it finds its way in.[69] Even if states close off one way of money and influence in politics, that may just open up another way. And simply blaming the Court for allowing money into politics ignores the fact that at least in the Court's eyes—and in the ACLU's too—there are real First Amendment interests at stake.[70] The Court's

64. Hasen, *supra* note 12 ("[T]he way the state of Alaska lost today is the least bad way it could lose.").

65. *Id. See also* Thompson v. Hebdon*: Guidance on the Marks Rule?*, COUNTING TO 5 (Dec. 1, 2019), https://www.countingto5.com/thompson-v-hebdon-guidance-on-the-marks-rule/ (explaining the Supreme Court found the Ninth Circuit only erred in not applying *Randall* without the Court giving its decision as to what the correct application of *Randall* looked like).

66. *Thompson*, 140 S. Ct. at 351.

67. *Id.* at 351–52 (statement of Ginsburg, J.). In particular, Ginsburg suggested that Alaska's situation varied in several salient respects from Vermont's so that *Randall* was distinguishable. Ginsburg stressed Alaska allowed greater contributions to political parties and (relevantly for this paper) that Alaska had a small legislature and its economy was dominated by oil and gas. *See id.*

68. *See Influence of Big Money*, BRENNAN CTR. FOR JUSTICE (last visited Aug. 5, 2020), https://www.brennancenter.org/issues/reform-money-politics/influence-big-money ("Today, thanks [to] Supreme Court decisions like *Citizens United*, big money dominates U.S. political campaigns to a degree not seen in decades.").

69. *See* Chad Flanders, *Super PACs and Politics of the Weird*, POLITICO (Mar. 7, 2012 9:32 PM), https://www.politico.com/story/2012/03/super-pacs-unleash-politics-of-the-weird-073679 ("[B]ig money will always find a way to get spent.").

70. *See Thompson*, 140 S. Ct. at 351 (remanding to investigate whether Alaskan contribution limits are consistent with First Amendment precedents); *The ACLU*

jurisprudence does not seem to be a simple capitulation to money in politics, as if the Supreme Court were itself corrupt. Rather, the Supreme Court seems to follow the idea that under the First Amendment, spending money is a means of spreading ideas, and to limit money in politics is to limit political speech, something that has long been understood to be at the core of the First Amendment.[71] Whether or not the Ninth Circuit upholds Alaska's limits will ultimately depend on three questions which implicate trends in the United States Supreme Court's campaign finance jurisprudence.

First, how durable is the distinction between contributions and expenditures? The surest way to get rid of contribution limits is to treat them the same as expenditure limits and subject them to the strictest scrutiny, rather than some indeterminate lower standard. In a number of opinions, Justice Thomas has challenged this distinction, and he makes a good point.[72] Should it really matter whether a contribution is not as clear or articulate a form of speech as an expenditure? The First Amendment's protection does not turn on whether speech is crude and blunt or elegant and sophisticated. Even if a $100 contribution is essentially just a supportive grunt, a grunt is still protected speech. And one may even think that it is better that the candidate made the speech *for* you—that is why you gave money, after all. A more principled stand would thus require both contributions and expenditures be recognized as pure political speech.[73] Recognizing this, however, might not inevitably doom contribution limits, as states would still be able to argue that the interest in avoiding quid pro quo corruption is so compelling that most contribution limits would still remain.

Second, how expansive is the state's anti-corruption interest? *Citizens United*, by reversing *Austin*, seemed to close out almost decisively the idea that one could fight money in politics for any other reason than the risk that legislators might be bribed.[74] If this is the state's main interest,

and Citizens United, ACLU (last visited Aug. 5, 2020), https://www.aclu.org/other/aclu-and-citizens-united (expressing concern that First Amendment rights may be restricted in response to the influx of corporate money in elections).

71. Citizens United v. FEC, 558 U.S. 310, 342–43 (2010) (recounting precedents affirming the extension of First Amendment expression to political speech).

72. *See, e.g.*, FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 467–68 (2001) (Thomas, J., dissenting) (challenging the majority's conclusion that coordinated expenditures by political parties and contributions by individuals and political committees are no different).

73. *See* Schultz, *supra* note 22, at 104 (recognizing that expenditures and contributions are "two sides of the same coin"); Buckley v. Valeo, 424 U.S. 1, 241–42 (1976) (Burger, J., concurring in part and dissenting in part) (same).

74. *See Citizens United*, 558 U.S. at 357 (2010) ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise

then why couldn't the state simply more aggressively enforce its anti-bribery laws in order to deter corruption?[75] If anti-corruption also extends to the appearance of corruption, then what exactly does it mean to prevent a system of campaign finance from *appearing* to tolerate corruption? Does this give the states license to do more in limiting campaign contributions than what is necessary to prevent *actual* corruption? The Court's case law here is unclear, and it seems plausible to speculate that the "appearance of corruption" rationale will be increasingly disfavored by the Court, or simply treated as a stand-in for preventing bribery—that is, actual corruption.[76] If a state does not provide recent evidence of actual corruption, the Court may say merely preventing the appearance of corruption is not a great enough interest.[77] More generally, the Court may rightly suspect that avoiding the appearance of corruption is simply too vague and amorphous an interest to justify restrictions on core political speech. Even if avoiding the appearance of corruption means that states have to give evidence that corruption is a real risk and that citizens distrust the political process, it is unclear what kind of evidence would suffice.[78]

Finally, to what extent can the Supreme Court tolerate diversity among states on their campaign finance reform efforts? Herein lies the spirit of Alaskan exceptionalism. Alaska has said repeatedly in litigation that Alaska is special and different, and so it is justified in being more restrictive in limiting campaign contributions than other states.[79] Other

to corruption or the appearance of corruption.").

75. This is a point that Justice Thomas has advanced in several opinions. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 267 (2003) (Thomas, J., concurring in part and dissenting in part) ("[A] broadly drawn bribery law would cover even subtle and general attempts to influence government officials corruptly, eliminating the Court's first concern.").

76. *Compare Citizens United*, 558 U.S. at 360 ("The appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."), *with McConnell*, 540 U.S. at 144 ("Take away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.'" (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 392 (2000))).

77. Daniel J. Ganz, Note*: Are Campaign Contributions Really Different?:* Thompson v. Hebdon *and Inconsistencies Within Supreme Court and Ninth Circuit Campaign Finance Jurisprudence*, 45 OHIO N.U.L. REV. 433, 435–37 (2019).

78. A history of corruption can be sufficient evidence. *See Buckley* at 27 (confirming that examples of corruption can "demonstrate that the problem is not an illusory one"). Opinion polls might also be sufficient evidence. *See Nixon*, 528 U.S. at 394 (noting that the public overwhelmingly believed that contribution limits were necessary to curb corruption).

79. Thompson v. Hebdon, 909 F.3d 1027, 1045–46 (9th Cir. 2018) (per curiam); *see generally* Thompson v. Dauphinais, 217 F. Supp. 3d 1023, 1029–32 (D. Alaska 2016) (discussing idiosyncrasies of Alaskan electoral politics and how they increase susceptibility to corruption or the appearance thereof).

states may experience greater factionalism, so in those states many different industries and interest groups will push and pull at politicians, with the result that their collective impact is much more diffuse and perhaps less troublesome. And other states may have larger legislatures, so that when industry captures a small number of politicians it may not matter much. Alaska, being dominated by oil and gas and having a small legislature, does not have these inherent political checks, so it needs to be more aggressive in limiting contributions. But will any of this matter to the Supreme Court? The Supreme Court's per curiam decision and its enumeration of the *Randall* factors comes very close to suggesting a one-size-fits-all model for campaign finance regulation. There is some limit on contributions that will simply be too restrictive, and Alaska may have dipped under that limit. Again, it is not a matter of limitless giving to a candidate. The question is rather whether states will be given room to experiment, or whether the Supreme Court will push states towards uniformity in campaign contribution limits. The trend certainly seems to be in the direction of uniformity, which is bad news for states like Alaska that want to point to their unique history to argue for uniquely low contribution limits.

V. CONCLUSION

Even if Alaska prevails at the Ninth Circuit, the end result will almost certainly represent a further narrowing of the Supreme Court's campaign finance jurisprudence. That, in the end, is the signal that the Court's remand sends, even if it does not say so explicitly. The more that contributions are treated like expenditures, the less room the state will have to regulate them. If states can only justify limits on donations via an anti-corruption rationale, they will have to be more creative in finding and identifying corruption—they will less and less be able to refer dismissively to the risks of "big money" sloshing around the political system. They will be held to a higher standard. Finally, and most concerning to Alaska, there may simply be less room for states to say that they are different and special, and so to justify taking exceptional measures that might not be necessary for other states. It is not that Alaska will have to obey the First Amendment just like everybody else, but that the balance will be so far in favor of the speech interests that the unique concerns Alaska might have will be harder to prove. The result of these types of limits being struck down, ironically, will probably be more corruption—not just of the diffuse "appearance" kind, but of the quid pro quo kind. But by then it will be too late to have prevented it.[80]

80. *Cf.* Shelby Cty., Ala. v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) (arguing that in the context of the Voting Rights Act that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.").