

**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**

PATRICK M. GARRY[†]
DEREK A. NELSEN^{††}
CANDICE J. SPURLIN^{†††}

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I. INTRODUCTION

The American political and constitutional system is based heavily on state autonomy. Under the system of federalism, states occupy their own independent sphere of authority separate from and pre-existing to the sphere of authority of the federal government.¹ Within this independent sphere of sovereignty, each state possesses its own legal and political autonomy. This structure has defined the American political and constitutional system ever since the nation's founding.

The federalism revolution waged by the Rehnquist Court sought to breathe new life into the federalist structure of the American system of government.² This federalism revolution focused on the relationship between the states and the federal government, attempting to draw limits around the federal government's ability to infringe on state autonomy, as well as strengthening particular areas of

[†] Director, Hagemann Center for Legal and Public Policy Research, University of South Dakota School of Law. The authors wish to acknowledge the invaluable assistance of Bob Mercer, Reporter for ABERDEEN AMERICAN NEWS, Aberdeen, South Dakota, during this study.

^{††} J.D., University of South Dakota School of Law, 2009.

^{†††} Research Supervisor, Hagemann Center for Legal and Public Policy Research, University of South Dakota School of Law.

1. For a discussion of federalism, see Patrick M. Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights*, 3 SETON HALL L. REV. 851, 854-61 (2006).

2. For a discussion of the Rehnquist Court's federalism revolution, see Garry, *supra* note 1, at 866-73.

state authority. But the federalism structure inherent in the American political system presumes not only that states occupy a separate level of authority from that of the federal government, but also that each state retains its own independence and autonomy from every other state. Each state, for instance, must be free to enact and enforce its own set of laws. This ability, however, may be jeopardized by current patterns of political fundraising and campaign expenditures. For instance, if a state is holding a voter referendum on a particular issue of national importance, the state's decision on that referendum may be significantly affected by out-of-state interests, particularly if those out-of-state interests contribute a substantial majority of the political campaign expenditures relating to that issue.³ Such was the case in South Dakota, when it held a voter referendum on abortion in 2006. Thus, the question becomes whether the outcome of that referendum better represents the wishes of the people of South Dakota or the interests and wishes of organizations and individuals in outlying states.

This article will examine the amount of out-of-state money coming into South Dakota during that 2006 voter referendum and explore whether sparsely populated states such as South Dakota are particularly vulnerable to influxes of out-of-state campaign money. Although the First Amendment may preclude any regulations in this respect, the effects of out-of-state political fundraising and campaign expenditures could be such so as to jeopardize a small state's electoral autonomy.⁴

II. THE ROLE AND VALUES OF FEDERALISM IN THE AMERICAN SYSTEM

A. THE VALUES OF FEDERALISM

Through the maintenance of two levels of competing governments—e.g., state and national—federalism serves to check the power of the federal

3. For a discussion of the impact of money on ballot initiatives, see Daniel R. Ortiz, *The Empirics of Campaign Finance*, 78 S. CAL. L. REV. 940, 941 (2005). See also Margaret Perl & Kimberly Demarchi, *Direct Democracy and Indirect Regulation: The Brewing Conflict Between Federal Campaign Finance Law and State Ballot Measure Campaigns*, 34 WM. MITCHELL L. REV. 591, 592 (2008). As Perl and Demarchi note, although the courts have generally struck down extensive regulation of the initiative process on First Amendment grounds, they have allowed regulations pertaining to financial disclosure requirements. *Id.* at 597.

4. Although the Rehnquist Court did allow rather significant regulation of campaign finance in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) (upholding the Bipartisan Campaign Reform Act of 2002), the Roberts Court has taken a more scrutinizing view of such regulation and has given a higher priority to First Amendment interests in the area of campaign finance law. In a number of cases, *McConnell* has been whittled away at and minimized. See *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down Vermont's expenditure and contribution limits pertaining to state elections); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 451-52 (2007) (striking down the application of the "electioneering communications" provisions of the Bipartisan Campaign Reform Act of 2002 to the ads in question, and stating that the Court "must give the benefit of any doubt to protecting rather than stifling speech"); *Davis v. FEC*, 128 S.Ct. 2759 (2008) (ruling that the Millionaires' Amendment to the Bipartisan Campaign Reform Act unconstitutionally infringed on First Amendment rights).

government.⁵ Federalism also achieves greater political accountability, the assumption being that the smaller the governing unit (e.g., the state) the more likely it is to be responsive to the needs of the community.⁶ Smaller political units are also able to foster a deeper sense of community and increased opportunities for political participation.⁷ As Professor Wechsler has observed, the states “are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, [and] the separate geographical determinants of national as well as local politics.”⁸

Yet another value of federalism lies in its facilitation of states as laboratories of experimentation.⁹ This value is reflected in Justice Brandeis’s observation that “one of the happy incidents of the federal system [is] that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁰ Underlying this social laboratory value, as well as all the other values of federalism, is the right of individuals to move from state to state, and hence “vote with their feet” on the desirability or wisdom of particular state policies.¹¹

By preserving a federal-state political system, federalism promotes “competition among governments for citizens and corporations (and their related tax dollars), thereby maximizing choice and utility for everyone and resulting in an aggregate increase in social welfare.”¹² Federalism “assures a decentralized

5. Alexander Hamilton argued that the “necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power[.]” THE FEDERALIST NO. 32, at 197 (Alexander Hamilton) (Clinton Rossiter ed., 1961). “[A] state/federal division of authority protects liberty – both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home.” *United States v. Morrison*, 529 U.S. 598, 655 (2000) (Breyer, J., dissenting).

6. See V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 875 (2004). National decision-makers or representatives are less likely to be aware of localized interests than are decision-makers or representatives in a disaggregated, state system. *Id.*

7. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that federalism “makes government more responsive by putting the States in competition for a mobile citizenry”); *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 789-90 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part) (arguing that federalism fosters citizen participation in government affairs).

8. Herbert Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543, 546 (1954).

9. See *Gregory*, 501 U.S. at 458 (stating that federalism “allows for more innovation and experimentation in government”). As Justice O’Connor has observed, “the fifty states have served as laboratories for the development of new social, economic and political ideas.” *Fed. Energy Regulatory Comm’n*, 456 U.S. at 788. Furthermore, unlike Congress and the national government, the states are “neck-deep in the quotidian work of policing streets, educating children, feeding the hungry, sheltering the homeless, and protecting the public health.” Aaron Jay Saiger, *Constitutional Partnership and the States*, 73 FORDHAM L. REV. 1439, 1443 (2005).

10. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

11. Anuj C. Desai, *Filters and Federalism*, 7 U. PA J. CONST. L. 1, 52 (2004); see also William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 777 (arguing that the “constraints imposed as an incident of federalism itself, namely that people can and will move, enter, or exit, if suitably attracted or repelled, as each state has reason to bear in mind”) (emphasis in original). Scholars argue that state autonomy “allows those who disagree with certain policies, but are politically powerless to change them to leave the jurisdiction or choose not to locate there in the first place.” Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 512 (2002).

12. Desai, *supra* note 11, at 50.

government that will be more sensitive to the diverse needs of a heterogeneous society.”¹³ It allows different communities to choose different laws and modes of governance that reflect the diversity of their citizens’ preferences.¹⁴ To the extent that local majorities in different states have divergent preferences, a federal system can result in a higher degree of citizen satisfaction than a unitary system can.¹⁵ If, for example, a majority in one state prefers a policy of high taxes and high levels of government services, whereas the majority in another state favors low taxes and fewer government services, both majorities can be accommodated by their respective state governments.¹⁶ As Professor Steven Calabresi explains, federalism is a vital ingredient of America’s constitutional democracy:

It prevents religious warfare, it prevents secessionist warfare, and it prevents racial warfare. It is part of the reason why democratic majoritarianism in the United States has not produced violence or secession for 130 years, unlike the situations for example, in England, France, Germany, Russia, Czechoslovakia, Yugoslavia, Cyprus, or Spain. There is *nothing* in the U.S. Constitution that is more important or that has done more to promote peace, prosperity, and freedom than the federal structure of that great document.¹⁷

B. FEDERALISM AS A CONSTITUTIONAL DOCTRINE

Federalism reflects the balancing of power between the states and national government.¹⁸ The Constitution establishes a political system of dual sovereignty, involving both state and national governments. The framers “split the atom of sovereignty” by designating two different political entities (federal

13. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

14. See Desai, *supra* note 11, at 49. Professor Lawrence G. Sager uses the term “cool federalism” to refer to the ability of “maverick” states to “invent” new governmental norms that can subsequently be adopted by other states or the federal government, once those norms have been sufficiently tested in the maverick states. Lawrence Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385, 1385-88 (2005).

15. John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 106 (2004).

16. The ability of federalism to satisfy diverse preferences obviously requires a degree of citizen mobility, whereby citizens who find themselves in a state whose policies they oppose can move to another state with more favorable ones. *Id.* at 107. “As transportation costs have fallen, and a national culture makes Americans feel more at home outside the state where they were born, citizens have become more mobile.” *Id.* at 109. This mobility is further enhanced by the existence of interstate competition through which states actively compete with each other to attract new citizens. *Id.* at 108. “Interstate competition is motivated, in part, by the desire of state governments to attract taxpaying citizens and corporations, which has the effect of increasing the funds available to them for public spending.” *Id.*

According to Professor Amar, “a healthy competition among limited governments for the hearts of the American People can protect popular sovereignty and spur a race to the high ground of constitutional remedies. Each government can act as a remedial cavalry of sorts, eager to win public honor by riding to the rescue of citizens victimized by another government’s misconduct.” Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1428 (1987).

17. Steven Calabresi, *A Government of Limited and Enumerated Powers*, 94 MICH. L. REV. 752, 770 (1995).

18. See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (suggesting that the constitutional scheme envisions a federal structure in which states are equal partners with the national government).

and state), “each protected from incursion by the other.”¹⁹ This division of authority between the state and federal governments, according to the framers, would prevent any distortion in the balance of power between the different levels of government.²⁰

Although its purpose was to create a strong national government, the Constitution also sought to preserve the independent integrity and lawmaking authority of the states.²¹ This bifurcated system of power was codified in the Tenth Amendment, which divides sovereign power between those delegated to the federal government and those reserved to the states.²²

The framers believed that a federalist structure of independent state governments would serve as a limitation on the national government’s exercise of power.²³ Indeed, federalism concerns were so important to the Founders that nearly all the arguments opposing the new Constitution involved the threat to state sovereignty.²⁴ Under the framers’ view of federalism, the national government would exert supreme authority only within the limited scope of its enumerated powers; the states meanwhile would exercise the remainder of sovereign authority, subject to the restraint of interstate competition from other states.²⁵

Although there is no single “federalism” clause in the Constitution, the Tenth and Eleventh Amendments are often the focus of the Court’s federalism decisions.²⁶ In addition to these two amendments, references to federalism pervade the constitutional scheme. Throughout the text, the framers use the term “states” to denote independent entities of sovereignty.²⁷ The term “states” is also used in a way that suggests the framers “intended that these governments possess some of the traditional immunities that states enjoyed” prior to adoption of the Constitution.²⁸

19. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The Constitution created a structure of “two orders of government, each with its own direct relationship . . . to the people who sustain it and are governed by it.” *Id.*

20. See Gregory v. Ashcroft, 501 U.S. 452, 458-64 (1991).

21. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 (1987).

22. *Id.* at 1492. The Tenth Amendment prohibits the national government from exercising un-delegated powers that will infringe on the lawmaking autonomy of the states. The Tenth Amendment states that “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.” U.S. CONST. amend. X.

23. See, e.g., G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 108-11 (Doubleday 1981).

24. Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 252 (2000).

25. William H. Pryor, *Madison’s Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1175 (2002).

26. The Eleventh Amendment states that the “Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI.

27. Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 821, 831-34 (1999).

28. *Id.* at 821. According to Nicholas Rosenkranz, the structure of the Constitution and its recognition of the “states” all work to establish federalism as a “constitutional default rule.” Nicholas

Because the framers took for granted the sovereign powers of the states, the Constitution is somewhat one-sided in its references to governmental authority. It explicitly lists the powers of the federal government; but to the extent it defines state powers, it does so primarily through negative implication, by setting out the limited constraints on those powers.²⁹

C. HORIZONTAL FEDERALISM

The typical view of federalism is one of vertical federalism—the relationship between the central government and the states. However, there is also the notion of horizontal federalism, which refers to relations between the states.³⁰ Implicit within the idea of vertical federalism is the idea that there should be a degree of horizontal federalism. This horizontal federalism reflects the view that each state must have a sufficient degree of independence and autonomy from every other state.³¹ Indeed, it is this horizontal federalism that may be most threatened by the existing practices of political fundraising and campaign expenditures that go on between the states.³²

III. THE SOUTH DAKOTA VOTER REFERENDUM ON ABORTION

A. WOMEN'S LIFE AND HEALTH PROTECTION ACT

In 2005, an act to create a South Dakota task force to study abortion was passed by an overwhelming majority of the 80th Session of the South Dakota Legislature.³³ Governor Mike Rounds appointed the Task Force members.³⁴ In September and October of 2005, the Task Force conducted four days of hearings at which both pro-choice and pro-life experts testified. The Task Force also reviewed the testimony of 1,940 women who had abortions.³⁵ The results of their findings were published in a seventy-one page report in December 2005.

Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2097 (2002).

29. See U.S. CONST. art. I, §§ 1, 8; Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave*, 23 HARV. J.L. & PUB. POL'Y 551, 555 (2000).

30. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494 (2008) (distinguishing vertical federal-state interactions from horizontal state-state interactions).

31. Although states must interact with each other, those interactions “are between entities on an equal plane of constitutional status.” *Id.* at 501. Moreover, this interaction “creates the possibility of interstate friction because there is no bright-line rule capable of fully confining the effects of a state’s regulation within its borders.” *Id.* at 502.

32. A threat to interstate harmony “is that one state will become a haven for behavior that other states seek to restrain.” *Id.* at 516. Related to this, as evident in the issue of small-state voter referendums, outside states can significantly influence or restrain another state’s legal or political developments. Thus, outside states might frustrate the majoritarian will of a small state. Interstate friction can also arise “when one state pursues otherwise lawful objectives that have negative effects in other states.” *Id.* at 523.

33. H.R. 1233, 80th Leg. (S.D. 2005). The Act, House Bill 1233, passed by a vote of 63 to 4 in the House and 28 to 6 in the Senate, and was signed into law by Governor Michael Rounds on March 22, 2005.

34. Report of the South Dakota Task Force to Study Abortion 6 (Dec. 2005) available at <http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf>.

35. *Id.* at 7.

The Report concluded that life begins at conception, and that therefore abortions terminate human life.³⁶

The Task Force Report led to the introduction of House Bill 1215, known as the Women's Life and Health Protection Act.³⁷ This bill essentially outlawed most abortions in South Dakota. The measure was passed by overwhelming margins in the House (50-18) and the Senate (23-12), and on March 6, 2006, Governor Rounds signed HB 1215 into law.³⁸

The 2006 law made no exception for abortions involving rape or incest victims.³⁹ This lack of exceptions helped prompt pro-choice proponents to file a petition for referendum with the Secretary of State. In order to force a referendum on the bill, the petition had to be filed within ninety days after the Legislature adjourned,⁴⁰ and signed by at least five percent of the qualified electors of the state.⁴¹ The petition, known as Referred Law 6, then became a ballot question in the 2006 general election. The referred law was entitled "An Act to establish certain legislative findings, to reinstate the prohibition against certain acts causing the termination of an unborn human life, to prescribe a penalty therefore, and to provide for the implementation of such provisions under certain circumstances".⁴² In the general election, South Dakota voters turned down Referred Law 6.

36. *Id.* at 10.

It can no longer be doubted that the unborn child from the moment of conception is a whole separate human being." During the 2005 legislative session, the South Dakota Legislature passed HB 1166 that expressly found that "all abortions, whether surgically or chemically induced, terminate the life of a whole, separate, unique, living human being."

Id.

37. H.R. 1215, 81st Leg. (S.D. 2006) available at <http://legis.state.sd.us/sessions/2006/1215.htm>.

Section 1. The Legislature accepts and concurs with the conclusion of the South Dakota Task Force to Study Abortion, based upon written materials, scientific studies, and testimony of witnesses presented to the task force, that life begins at the time of conception, a conclusion confirmed by scientific advances since the 1973 decision of *Roe v. Wade*, including the fact that each human being is totally unique immediately at fertilization. Moreover, the Legislature finds, based upon the conclusions of the South Dakota Task Force to Study Abortion, and in recognition of the technological advances and medical experience and body of knowledge about abortions produced and made available since the 1973 decision of *Roe v. Wade*, that to fully protect the rights, interests, and health of the pregnant mother, the rights, interest, and life of her unborn child, and the mother's fundamental natural intrinsic right to a relationship with her child, abortions in South Dakota should be prohibited. Moreover, the Legislature finds that the guarantee of due process of law under the Constitution of South Dakota applies equally to born and unborn human beings, and that under the Constitution of South Dakota, a pregnant mother and her unborn child, each possess a natural and inalienable right to life.

Id.

38. *See id.*

39. Kevin Woster, *Referred Law 6 Ad Denounced*, RAPID CITY JOURNAL, October 19, 2006, available at <http://www.rapidcityjournal.com/articles/2006/10/19/news/top/news01a.txt>.

40. S.D.C.L. § 2-1-4 (2004). "The petition shall be filed in the Office of the Secretary of State within ninety days after the adjournment of the Legislature which passed such law." *Id.*

41. S.D.C.L. § 2-1-3 (2004). "Such petition shall be signed by not less than five percent of the qualified electors of the state." S.D.C.L. § 2-1-5 (2004). "The total number of votes cast for Governor at the last preceding gubernatorial election, shall for the purposes of this chapter, be the basis for determining the number of petitioners required." *Id.*

42. South Dakota Secretary of State, *South Dakota Ballot Question Status*, (2006) available at http://www.sdsos.gov/elections/voteregistration/upcomingelection_ballotquestionstatus06.shtm.

B. SOUTH DAKOTA'S ABORTION REFERENDUM

The 2006 Abortion referendum in South Dakota provides context for the federalism issues that arise when out-of-state money is used to affect state and local elections.⁴³ On this referendum, out-of-state donors contributed a disproportionate share of the total expenditures made by both sides during the pre-election campaign.⁴⁴ Moreover, these out-of-state contributors may have influenced the outcome of the referendum in a way that may have been different from how South Dakotans would have voted independent of such out-of-state influences.

South Dakota law required that contributions of more than \$100 made in support of, or in opposition to, a ballot measure be disclosed in a state campaign finance form filed with the Secretary of State's Office.⁴⁵ South Dakota campaign finance laws also provide certain limits on contributions to political candidates and organizations.⁴⁶ However, no limit exists for contributions made to ballot question committees.⁴⁷

43. This argument is premised on the notion that money can, and does, have an effect on the outcome of elections. DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* 163 (2000). Broder points out that “[m]oney does not always prevail in initiative fights, but it is almost always a major – even dominant – factor.” *Id.*

44. According to the South Dakota Campaign for Healthy Families—the group working to repeal the abortion ban—as of approximately a week before the election, more than 90 percent of its donations had come from out-of-state donors. Megan Myers, *More Money Falls on Vote Yes Side*, SIOUX FALLS ARGUS LEADER, Nov. 2, 2006, at A1. According to the Vote Yes for Life Campaign—the group supporting the ban—65 percent of its cash donations of more than \$100 were from people and groups within South Dakota. *Id.* At the time those statements were made, the Vote Yes for Life Campaign had reported nearly \$2.2 million in donations, whereas the South Dakota Campaign for Healthy Families had reported \$1.8 million in contributions. *Id.*

45. See S.D.C.L. § 12-27-11 (Supp. 2009). This statute requires that all contributors make known their name and residence to the person receiving the contribution. *Id.* S.D.C.L. section 12-27-22 provides that “a campaign finance disclosure statement shall be filed with the secretary of state by the treasurer of every . . . [b]allot question committee.” A ballot question committee is “a person or organization that raises, collects, or disburses contributions for the placements of a ballot question on the ballot or the adoption or defeat of any ballot question.” S.D.C.L. § 12-27-1(2) (Supp. 2009). Ballot questions include “any referendum, initiative, proposed constitutional amendment, or other measure submitted to voters at any election[.]” S.D.C.L. § 12-27-1(1) (Supp. 2009). In 2006, ballot question committees were required to file with the secretary of state a “detailed statement” that included an accounting of the “valuable consideration received,” as well as other financial information such as: “all contributions and expenditures[,] . . . includ[ing] the name, . . . address and place of employment of any person who has contributed an aggregate amount of more than one hundred dollars[.]” SDCL § 12-25-19.1. Also, in 2006, S.D.C.L. section 12-25-2 (2006) provided that:

No candidate, candidate's committee, political action committee, or political party committee may receive any contribution except from an individual, political action committee, or a political party. No corporation may contribute or attempt to contribute any valuable consideration to any candidate, committee, or political party except a ballot question committee. No association may contribute or attempt to contribute any valuable consideration to any candidate, committee, or political party except a ballot question committee.

Id. This general exception for ballot question committees lead to the formation of many ballot question committees that were not subject to the more rigorous requirements of other contribution sources. See *id.*

46. See S.D.C.L. §§ 12-27-7 to 12-27-10 (Supp. 2009). These limits provide that no more than \$1,000 may be given to a legislative or county candidate campaign committee, and no more than \$10,000 to a political party of political action committee.

47. These ballot question committees include those involved in the 2006 abortion referendum. See

The burden related to filing general campaign financial records lies exclusively with the treasurer of the committee or political party.⁴⁸ This person, under threat of a misdemeanor criminal charge, must file a statement of organization,⁴⁹ as well as ensure that the appropriate state laws are followed by contributors.⁵⁰ Furthermore, under state law, all contributors must disclose the amount of their contributions in a disclosure statement filed with the Secretary of State's office.⁵¹ Within this disclosure statement, the contributor must provide very specific information.⁵²

South Dakota Secretary of State Guidelines, <http://www.sdsos.gov/elections/voteregistration/electvoterpdfs/2010/2010%20Final%20Complete%20Guide%20to%20South%20Dakota%20Campaign%20Finance%20Regulations.pdf> (last visited Dec. 12, 2009).

48. S.D.C.L. § 12-27-3 (Supp. 2009).

49. See S.D.C.L. §§ 12-27-4 to 12-27-6 (Supp. 2009).

50. S.D.C.L. section 12-27-19 requires that any contribution that is not made within the boundaries of South Dakota law be returned to the contributor by the treasurer of the ballot question committee. S.D.C.L. § 12-27-19. The failure to return such a contribution is a violation of South Dakota law and is a Class 1 misdemeanor. *Id.*

51. S.D.C.L. § 12-27-22 (Supp. 2009). It is important to note this statute does not require that a contributor to a committee file a disclosure statement.

52. S.D.C.L. section 12-27-24 requires disclosure of:

- (1) Political committee or political party name, street address, postal address, city, state, zip code, daytime and evening telephone number, and e-mail address;
- (2) Type of campaign statement (pre-primary, pre-general, mid-year, year-end, amendment, supplement, or termination);
- (3) If a ballot question committee, the ballot question number and whether the committee is for or against the measure;
- (4) The balance of cash and cash equivalents on hand at the beginning of the reporting period;
- (5) The total amount of all contributions received during the reporting period;
- (6) The total amount of all in-kind contributions received during the reporting period;
- (7) The total of refunds, rebates, interest, or other income not previously identified during the reporting period;
- (8) The total of contributions, loans, and other receipts during the reporting period;
- (9) The total value of loans made to any person, political committee, or political party during the reporting period;
- (10) The total of expenditures made during the reporting period;
- (11) The total amount of all expenditures incurred but not yet paid. An expenditure incurred but not yet paid shall be reported on each report filed after the date of receipt of goods or services until payment is made to the vendor. A payment shall be listed as an expenditure when the payment is made;
- (12) The statement shall state the cash balance on hand as of the close of the reporting period;
- (13) The total amount of contributions of one hundred dollars or less in the aggregate from one source received during the reporting period;
- (14) The name, residence address, city, and state of each person contributing a contribution of more than one hundred dollars in the aggregate during the reporting period and the amount of the contribution. Any contribution from any political committee or political party shall be itemized. Any contribution from a federal political committee or political committee organized outside this state shall also include the name and internet website address of the filing office where campaign finance disclosure statements are regularly filed for the committee. If all of the information required is not on file, the political committee or political party may not deposit the contribution;
- (15) The statement shall contain the same information for in-kind contributions as for monetary contributions, and shall also include a description of the in-kind contribution;
- (16) Upon the request of the treasurer, a person making an in-kind contribution shall provide all necessary information to the treasurer, including the value of the contribution;
- (17) Any monetary or in-kind contribution made by the reporting political committee or

While the law on political disclosure requirements is relatively clear, the actual enforcement of these requirements is not.⁵³ Although the South Dakota state legislature passed amendments to its campaign finance laws in 2007 in an attempt to close certain perceived loopholes,⁵⁴ these amendments did not provide effective enforcement mechanisms for the laws.⁵⁵ Consequently, the Secretary of State's Office lacks the necessary budget and personnel to strictly enforce disclosure statement compliance. As such, it is unclear whether there is substantial compliance with the statutory requirements for disclosure in South Dakota, because there is very little oversight or investigation into the filings. Therefore, it is difficult to accurately identify total campaign contributions in the State, as well as the source of the money spent.

The uncertainty that surrounds this area of the law in South Dakota has created an environment ripe for a consequent uncertainty regarding out-of-state

political party to any political committee, political party, or nonprofit charitable organization shall be itemized;

(18) A categorical description and the amount of the refunds, rebates, interest, sale of property, or other receipts not previously identified during the reporting period;

(19) A categorical description and the amount of funds or donations by any organization to its political committee for establishing and administering the political committee and for any solicitation costs of the political committee;

(20) The total balance of loans owed by the political committee or political party;

(21) The balance of loans owed by the political committee or political party, itemized by lender's name, street address, city, and state, including the terms, interest rate, and repayment schedule of each loan;

(22) The total balance of loans owed to the political committee or political party;

(23) The amount of each loan made during the reporting period. The name, street address, city, and start of the recipient of the loan;

(24) The balance of each loan owed to the political committee or political party, itemized by name, street address, city, and state;

(25) The expenditures made during the reporting period shall be categorized. Disbursements to consultants, advertising agencies, credit card companies, and similar firms shall be itemized into expense categories. Any contribution made by the reporting political committee or political party that is not in exchange for any item of value or service shall be itemized;

(26) The expenditures incurred but not yet paid during the reporting period and to whom the expenditure is owed;

(27) The amount of each independent expenditure, as defined in this chapter, made during the reporting period, the name of the candidate, public office holder, or ballot question related to the expenditure and a description of the expenditure;

(28) The information contained in any statement provided under § 12-27-19; and

(29) The statement shall include a certification that the contents of the statement is true and correct signed by the treasurer of the political committee or political party.

53. According to one knowledgeable observer, the "South Dakota Secretary of State, to my knowledge, has never audited anyone" on this issue. Interview with Bob Mercer, Reporter, ABERDEEN AMERICAN NEWS (October 7, 2009).

54. See South Dakota Secretary of State Guidelines, <http://www.sdsos.gov/elections/vote-registration/electvoterpdfs/2010/2010%20Final%20Complete%20Guide%20to%20South%20Dakota%20Campaign%20Finance%20Regulations.pdf> (last visited Dec. 12, 2009). This website provides: "In 2007 the State Legislature completed the task of reforming the laws governing campaign finance in South Dakota for the first time in over 30 years." *Id.* at 4. A perceived loophole that continues to exist is the lack of a contribution limitation for Ballot Question Committees. *Id.* at 4. Dissimilarly, Statewide Candidate Campaign Committees (\$4,000), Legislative or County Candidate Committees (\$1,000), Political Parties (\$10,000), and Political Action Committees (\$10,000) have contribution limits. *Id.*

55. See *id.*

influence in South Dakota elections. Most notably, the lack of definite requirements for campaign disclosures has made South Dakota especially susceptible to out-of-state influence on divisive issues.⁵⁶ The 2006 abortion referendum illustrates how people who reside outside of the state can have a major impact on in-state politics. It has been reported that during the 2006 referendum approximately \$5.9 million was spent by both sides of the issue in the state of South Dakota.⁵⁷ The campaign disclosure forms indicate that an overwhelming amount of that originated out-of-state.⁵⁸

56. In the wake of the 2006 election, and partly as a result of all the controversy surrounding campaign contributions for the abortion referendum, a series of campaign finance reforms was presented to the South Dakota State Legislature. See Bob Mercer, *Possible Campaign Finance Changes Ahead*, ABERDEEN AMERICAN NEWS, November 9, 2006. “Officials from various campaigns, especially those involved in ballot measures, [had] leveled allegations against each other of illegal contributions, mysterious large donors, murky organizations, untruthful advertisements and improper reporting.” *Id.* One prominent dissatisfaction with current laws resulted from a \$750,000 contribution given in the late stages of the campaign in support of the abortion ban; this contribution came from a South Dakota corporation, but the corporation did not report who actually provided the money in the first place. *Id.* Under South Dakota law, ballot measure committees not only have no limits on their expenditures and contributions, but also are allowed to receive contributions from corporations.

One motivation for reform of South Dakota campaign laws came from a concern about the influence of out-of-state money. One of the contentious issues in the fight over the abortion ban was “whether the money came from South Dakotans or interests from outside the state.” Terry Woster, *Campaign Finance Laws Get F in South Dakota*, SIOUX FALLS ARGUS LEADER, November 12, 2006, at A1. Another contentious issue involved the ease with which campaigns could use secret financing in their election campaign. According to a 2005 report conducted by the California Voter Foundation, the Center for Governmental Studies, and the UCLA School of Law, South Dakota was given a failing grade of “F” in its campaign disclosure laws. *Id.* According to the study, “[c]ontributor disclosure is particularly weak, and candidates are not required to report the date contributions were received, contributor’s occupations or cumulative amounts donated. Expenditure disclosure is also lacking and does not include vendor name or expenditure date.” *Id.* Moreover, South Dakota has not updated its laws nor tightened its enforcement—and under current law in South Dakota, a violation of a campaign law carries a misdemeanor penalty. *Id.*

The current campaign finance climate has significantly changed the way in which ballot measures are conducted. When South Dakota first gave to its citizens the power to initiate and refer laws, the process usually involved citizen-operated petition drives. Recently, however, out-of-state groups simply pay to have sufficient number of signatures gathered. Consequently, the state ballot questions can be financed by people or groups from other states, according to the Center for Governmental Studies. *Id.*

57. *Id.*; South Dakota Abortion Ban Rejected, USA TODAY, Nov. 8, 2006 (reporting \$4 million as of November 2006). Of this \$5.92 million, approximately \$3 million was spent by the pro-choice movement and \$2,900,000 by the pro-life movement. These figures reflect approximations taken from the campaign disclosure forms on file with the South Dakota Secretary of State’s Office. See Appendix A.

58. See appendix A for a complete breakdown of the contributions made to the ballot question committees formed for the 2006 abortion referendum. The methodology used to identify total contributions, location of contributors, and percentage of out-of-state contributions is provided below. The total contributions that were made toward the abortion referendum were calculated by adding the reported total contribution figures reported by the 11 ballot question committees represented on the South Dakota Secretary of State’s website. See South Dakota Secretary of State, *2006 South Dakota Ballot Question Committees*, <http://www.sdsos.gov/elections/voteregistration/campaignfinancebqcs.shtm> (last visited Oct. 26, 2009). Each of these committees was required to submit disclosure forms consistent with SDCL § 12-25-19.1. One of these forms was titled the Schedule A which listed the unattributed and attributed contributions for donors both located both in and out-of-state. The itemized contributions that were attributed for were then added from all of the filed disclosures. In some cases, a committee would file Pre General Election, Mid-Year, Supplement, Year End, and termination disclosures. See South Dakota Secretary of State, *South Dakota Ballot Question Committees*, <http://www.state.sd.us/applications/ST12ODRS/CommitteeViewList.asp?psarch=vote+yes&CType=All1&RYear=All&RType=All&psearchtype=OR> (last visited Oct. 26, 2009). Each of these disclosures

IV. CONCLUSION

A study of the 2006 abortion referendum in South Dakota demonstrates that it is very difficult to determine precisely who or what is contributing to referendum campaigns in the state. One of the primary reasons for this difficulty is that, while disclosure laws exist, such laws are not enforced in such a way that would compel sufficient and predictable compliance. Nonetheless, in a state of 804,194 people, a \$5.9 million political campaign is a significant campaign.⁵⁹ Moreover, approximately fifty to eighty percent of this money was supplied by out-of-state residents.⁶⁰ The natural assumption is that this huge influx of out-of-state money certainly had the potential to affect the outcome of the referendum. And if the out-of-state money affects the outcome of a referendum in a way that would be different from how South Dakotans alone may have voted, then the whole notion of horizontal federalism and state autonomy may be undermined.

were reviewed and added to the total reflected in Appendix A. The out-of-state contributions were totaled by adding the attributed itemized contributions from the reported Schedule A form to reach the final dollar amount. The out-of-state contributors were those that reported an address on the Schedule A from any state outside of South Dakota. The out-of-state percentage was then calculated by dividing the out-of-state total contributions from the total contributions, less the unattributed contributions. It is important to note that some committees made contributions to other committees. These contributions were only calculated once, although they technically appear on the Schedule A forms twice. For example, Promising Future, Inc. had \$750,000 contributed without attribution. That amount was then contributed to the VoteYesForLife.com committee. Although this amount appears in both disclosures for both committees, it was only added once in arriving at the total direct contributions total for those committees for the abortion ban. Interestingly, the total amount of out-of-state contributions without considering the location of the unattributed contributors is approximately 50%. However, if it is accepted that the unattributed contributions were from out-of-state contributors, which seems most likely, the total out-of-state contributions comprised approximately 80% of the total amount spent for the referendum.

59. Following the 2006 election, concerns about the influence of large out-of-state contributors in South Dakota ballot measure campaigns continued. A series of investigative reports was conducted to look at “how outside political forces are using South Dakota ballot this year to advance their causes and using illegal loopholes to try to hide their identities.” Bob Mercer, *Ballot Issue Funding Mysterious*, ABERDEEN AMERICAN NEWS, April 30, 2008. According to this investigative report, South Dakota was especially susceptible to large out-of-state donors because it is thinly populated and, in connection with an issue of national importance, has a much lower-cost news media, which in turn significantly reduces the cost of campaign advertising. *Id.* Because South Dakota has such a small population, it is relatively much easier to obtain enough signatures on a petition to put a ballot measure on the ballot. Moreover, “[e]lection reforms passed by the [South Dakota] Legislature in 2007 have proven ineffective at halting the practice of hiding the identities of large contributors. That issue surfaced in two 2006 ballot measure campaigns over outlawing abortion and outlawing video lottery gambling.” *Id.* And in fact, the out-of-state money continued to pour into South Dakota, as evidenced by the 2008 campaign over Initiated Measure 11, which proposed a ban on abortions, but which contained exceptions for rape, incest, protection of the mother’s life, and threat of failure for a major body organ. Bob Mercer, *Money Still Pouring Into Abortion Fight*, ABERDEEN AMERICAN NEWS, November 1, 2008. In connection with this campaign over Initiated Measure 11, “[t]he overwhelming majority of the late new money opposing the ban came from outside South Dakota, while the majority of late new money supporting the ban came from people who live in South Dakota.” Bob Mercer, *Money Pouring Into Abortion Ban Fight*, ABERDEEN AMERICAN NEWS, October 30, 2008.

60. See Appendix A.

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