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Daniel Hays Lowenstein

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Election Law

Cases and Materials

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For
Sharon
Aaron
Nathan

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Introduction

This book is based on the proposition that elections are important and that the structure and rules that govern them deserve the attention of citizens in general and of scholars and legal professionals in particular.

As the American university is constituted, election law falls at junctures formed by other subjects. This has not been an advantage, because junctures—these junctures, at least—have been peripheries. Most legal scholars who have considered election law issues have done so in pursuance of a different subject, most commonly constitutional law. In political science, election law falls at the juncture of two subdisciplines, American politics and public law. Most political scientists who specialize in American politics have no particular interest in law. Most political scientists who specialize in public law have no particular interest in electoral politics.

So election law has not *been* a subject in the university. But the confrontation of electoral politics and legal regulation has been pervasive and consequential in the past three or four decades. That election law has not been a subject is the university's loss and the university's failure.

Election law *has* been a growing subject in courtrooms, legislative chambers and political headquarters. One consequence has been increased work for lawyers. To prepare for such work is one good reason for law students to study election law. This book attempts to assist students in that preparation, but not in what might be termed a nuts-and-bolts fashion. There are some nuts and some bolts in this book (certainly the former!), but they are not presented exhaustively or systematically. Lawyers who need technical information about the Federal Election Campaign Act or the Voting Rights Act can find it easily enough. Indeed, details learned in law school are likely to have changed by the time the student is ready to apply them.

What distinguishes an outstanding legal professional from an ordinary one in the field of election law is the ability to understand the details of legal regulations as they affect and at least aspire to benefit the democratic political system. The sometimes mindless actions of election authorities (see *Barker v. Wisconsin Ethics Board* in Chapter 13 for one example) provide evidence that not all lawyers practicing election law have an adequate sense of their mission or the ability to carry it out. One goal of this book is to provide stimuli to law students that may help them develop this sense and this ability.

The broader purposes of the book go beyond professional preparation. Study of and debate over democratic institutions are activities that enrich our lives as citizens and that enhance our ability to serve the society in which we live.

The book is interdisciplinary. Not because of a general belief in interdiscipli-

nary studies, but because study of a subject at the juncture of other subjects must be interdisciplinary.

More concretely, the book assumes that lawyers and political scientists have much to learn from each other about election law. The lawyers, judges, and legal scholars who believe they have proved a point because they have shown that a given cause *could* have a given effect are neither imaginary nor extinct. Neither are the political scientists who conclude their rigorous empirical studies with casual and sometimes foolish assertions of their normative or policy implications.

Lawyers can benefit from exposure to the empiricism of political science. Political scientists can benefit from more focused attention on the legal questions to which their empirical studies may be relevant. Legal questions, after all, are normative questions of a particularly concrete and immediate nature.

Conventions Used in This Book

In the interest of saving the publisher's space and the reader's time, most of the materials reprinted in this book have been significantly edited. Insertions are indicated with brackets. Deletions are indicated with brackets or ellipses. However, footnotes have been deleted and citations have been deleted or altered without signalling. Sometimes, formatting of the original sources has been revised. For example, I do not follow the Supreme Court's practice of surrounding indented quotes with quotation marks. For purposes of serious research, the reader should consult the original sources.

Footnotes that are signalled with a number are from the original work and retain the numbers that they have in the original. Footnotes signalled with a letter are mine.

Opinions differ on the extent to which law school casebooks should contain references to the scholarly literature. The interdisciplinary nature of this book has persuaded me that heavy annotations are appropriate. Very few readers of this book—whether instructors, students, or general readers—will have a strong background on all the subjects presented. The references are intended to facilitate further reading on matters of interest and to provide a head start on research projects. They are not intended to be intimidating, and I hope they will not have that effect.

Although the references are extensive, they are not remotely exhaustive. In most cases they should be sufficient to get you into the literature that interests you.

Acknowledgments

This book was conceived more than a decade ago over breakfast with Andy Schepard at a long-since defunct restaurant in Westwood. Andy and I decided that there ought to be an election law textbook and that we should compile it. Shortly thereafter, circumstances enticed Andy into other enterprises, a misfortune for which there is some consolation in the thought that election law's loss has been family law's gain. This would have been a better book if Andy had been able to stay with it. Only a few of his words remain (primarily in Chapter 7), but I like to believe that some traces of Andy's energy, enthusiasm, and incisiveness have continued to animate the project.

Steve Ansolabehere, Bruce Cain, Morgan Kousser, and Ray Wolfinger read portions of the manuscript of this book and gave me helpful suggestions.

Aside from judicial decisions, this book draws primarily on academic materials. Nevertheless, I hope there are some politics in the book. If so, and if the politics make any sense, it is only because my activities in and around politics have allowed me to be associated with people of extraordinary talent and understanding. This group has included Howard Berman, Michael Berman, Jerry Brown, Carl D'Agostino, Doug Faigin, Jean-Marc Hamel, Pierre-Marc Johnson, André Larocque, Tom Quinn, Tony Quinn, Keiko Shimabukuro, Jonathan Steinberg, Bob Stern, and Henry Waxman.

I have been equally fortunate in academic associates. Marlene Nicholson and John Shockley deserve very special mention. Through their participation in the Law and the Political Process Study Group, as well as through their writings, they have done as much as anyone to earn recognition for election law as an academic subject in its own right. Others who have been particularly consistent sources of stimulation and support include David Adamany, Steve Ansolabehere, Bruce Cain, Mike Fitts, Steve Gottlieb, Bernie Grofman, Morgan Kousser, Jerry López, Mark Rush, Gary Schwartz, Steve Shiffrin, and, recently, three of my younger colleagues, George Brown, Dan Bussel and Eugene Volokh.

I thank Deans Bill Warren and Susan Prager individually for the tangible and intangible assistance they have provided and also as surrogates for the entire UCLA Law School Faculty. One could not hope for a more supportive group of colleagues. Similarly, I should like to express my appreciation to Joel Aberbach, Kathy Bawn, Shanto Iyengar, and John Petrocik for their friendship and assistance, but also as representatives of their colleagues in the very strong UCLA Political Science Department.

Many groups of UCLA students have struggled with these materials in versions even cruder than the present published version. Each group has helped me understand the subject better. Particular mention should be made of the many able research assistants who have worked with me. Those who worked most directly on this book were Don Deyo, Todd Schwartz, Michael Sweet, and Stacy Weinstein.

There is no need to thank Myra Saunders and the UCLA Law Library staff. Their invariable helpfulness and friendliness, and the miraculously speedy retrievals that they produce upon demand are things we have learned to take for granted at the law school.

But I do need to thank the clerical assistants who have worked with me over the years. Karen Mathews played this role down the home stretch, and she was almost too good to be true.

Keith Sipe, Mayapriya Long, Andrew Wilson, and the other folks at Carolina Academic Press are patience incarnate.

Although I have not attempted to conceal my own views on the subjects treated in this book, I have tried to assure that the book is not a brief for those or any other views. But I hope the book is animated by a respect for truth and a regard for the public good. My parents taught me this aspiration, and their teaching has been reinforced by the example set by my wife, my sister and a gaggle of cousins, aunts, uncles, and in-laws.

Everyone I have mentioned has left a mark on this book.

Daniel Hays Lowenstein
Los Angeles
May, 1995

Election Law

Cases and Materials

Chapter 1

Introductory Readings

It has been said, "there is no democratic theory—there are only democratic theories."[a] Probably most such theories would include at least two fundamental concepts, however differently they may be defined and combined: first, that certain basic rights or liberties should be guaranteed to each individual, and second, that each individual should have an equal opportunity to participate in the making of public policy so that each individual's interests will be served.[b]

In this book, our primary concern will be with how the laws governing the political process further (or hinder) the attainment of the second of these democratic goals, political equality. Our emphasis will be on statutes that have been enacted and legal doctrines that have been developed, primarily since the early 1960s, with the intention of reforming the political system in the direction of greater equality. Among the most important of these developments are the adoption of the one person, one vote rule by the Supreme Court; the adoption and amendment by Congress of the Voting Rights Act; the adoption by Congress and state legislatures of campaign finance regulations; and, recently, the widespread adoption of legislative term limits.

Some of our attention will be on constitutional law, which may be an instrument of reform, as in the case of the one person, one vote rule, or may be an impediment to some proposed reforms, as in the case of campaign finance regulation. (The word "reform," as used throughout this book, is likely to be a source of controversy. Probably a good working definition of "reform" is a proposed or actual change that at least some people claim will be for the better.) The constitutional issues we will be considering often reflect the tensions long recognized between the twin goals of liberty and equality.

Most of the book deals with elections, the most fundamental mechanism for achieving equality in a democracy. The book also will consider some of the influences most likely to affect political equality that are brought to bear on public officials. Throughout the book we shall be alert to empirical findings of social scientists that cast light on the likely consequences of reforms that have been enacted or proposed.

---

a. Robert A. Dahl, A PREFACE TO DEMOCRATIC THEORY 1 (1956). See also J. Roland Pennock, DEMOCRATIC THEORY xiii (1979).

b. See, *e.g.*, John Rawls, A THEORY OF JUSTICE 60–65 (1971).

We begin with a sampling of theoretical writings on the relationship between majorities and minorities, between public and private interests, and between citizens and representatives. It should be apparent that even if the entire book were devoted to these theoretical questions we could do little more than introduce ourselves to the subject. Nevertheless, the following materials will help give us a broader framework against which to consider the legal and empirical materials that follow.

I. Factions and the Public Interest

The first selection is an essay by James Madison that is possibly the most influential work of political theory ever written by an American. THE FEDERALIST PAPERS were a series of essays by Madison, John Jay, and Alexander Hamilton in which they attempted to persuade the citizens of New York that the new constitution, proposed by the convention that met in Philadelphia in 1787, should be ratified. In the tenth essay in the series, Madison addresses the dangers that are posed for a republic by the existence of "factions." If you substitute "special interest group" for Madison's word "faction," you may be surprised at how contemporary are the issues Madison struggles with.

James Madison, THE FEDERALIST PAPERS, No. 10

(Clinton Rossiter, ed., 1961)

Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished, as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be

found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements and alarm for private rights which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administration.

By a faction, I understand a number of citizens, whether amounting to a majority or 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.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a

manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of the government.

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail. Shall domestic manufacturers be encouraged, and in what degree, by restrictions on foreign manufacturers? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number is a shilling saved to their own pockets.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is that the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be

rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people. The question resulting is, whether small or extensive republics are most favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations.

In the first place it is to be remarked that however small the republic may be the representatives must be raised to a certain number in order to guard against the cabals of a few; and that however large it may be they must be limited to a certain number in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the constituents, and being proportionally greater in the small republic, it follows that if the proportion of fit characters be not less in the large than in the small repub-

lic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit and the most diffusive and established characters.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniencies will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence, it clearly appears that the same advantage which a republic has over a democracy in controlling the effects of faction is enjoyed by a large over a small republic—is enjoyed by the Union over the States composing it. Does this advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here again the extent of the Union gives it the most palpable advantage.

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. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must

secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans ought to be our zeal in cherishing the spirit and supporting the character of federalists.

Notes and Questions

1. Consider carefully Madison's definition of the term "faction" in the second paragraph of *Federalist No. 10*. Does this definition enable you to identify those groups Madison would regard as factions and those he would not? Which terms in Madison's definition, if any, seem subject to differing interpretations? How would you interpret those terms? Do you think you can improve on Madison's definition?

2. Madison says it is the "diversity in the faculties of men, from which the rights of property originate.... The protection of these faculties is the first object of government." In making this statement, was Madison speaking for a faction? Whether or not he was, the approval of the federal constitutional system advocated by Madison was certain to benefit some factions and harm others. As Justice Felix Frankfurter observed,

> Hardly any distribution of political authority that could be assailed as rendering government non-republican would fail... to operate to the prejudice of some groups, and to the advantage of others, within the body politic.... No shift of power but works a corresponding shift in influence among the groups composing a society.
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> *Baker v. Carr*, 369 U.S. 186, 266, 299 (1962) (dissenting opinion).

Throughout this book, we shall see changes in the political system being proposed, opposed, adopted or rejected in legislatures, courts and administrative agencies. The reformers, their opponents, and the decision-makers normally justify their positions by reference to the public interest and democratic principles. Consider, in addition to these considerations, which interest groups will gain and which will lose from the actual or proposed changes. Does the question of who will gain and who will lose affect what interests line up on each side and the eventual outcome? Should it?

3. According to Madison, factions can consist of a majority or a minority of the population, but only a majority faction is likely to have its way under a republican constitution. Why? Many contemporary reformers, both conservative and liberal, believe minority interests too often can veto or bring about changes in a manner contrary to the public interest and opposed by the majority. Are these reformers wrong? Was Madison wrong? Have conditions changed in relevant ways since Madison's time? What conditions?

4. Concern that majorities will tyrranize over minorities in a democracy has continued. One influential book argued that, in principle, unanimous consent should be required for government action, but that since the cost of obtaining

unanimity on any specific proposal would be prohibitive, the unanimity requirement should be applied only to the adoption of a constitution, which would permit day-to-day decisions to be made with less than unanimous approval. James M. Buchanan & Gordon Tullock, THE CALCULUS OF CONSENT (1962). For a cogent criticism of the ethical desirability of a unanimity rule, see Douglas W. Rae, *The Limits of Consensual Decision*, 69 AMERICAN POLITICAL SCIENCE REVIEW 1270 (1975).

5. How persuasive do you find Madison's arguments for larger legislative districts? Do you think his views would be the same if he were writing under modern conditions?

II. Citizens and Representatives

The next selection is a speech by Edmund Burke, one of the great British statesmen of the late eighteenth century. Burke had just been elected to the House of Commons from Bristol, and was addressing his constituents in 1774. His speech followed the other person who had been elected from Bristol at the same time as Burke. The other candidate had expressed views favorable to "instructions," by which was meant the practice of constituents binding their representative to vote on legislative matters in accordance with the opinion of the constituents. Burke's response is the centerpiece for what has become one of the leading debates in democratic theory.

Edmund Burke, *Speech to the Electors of Bristol*

1 BURKE'S WORKS 442, 446–48 (1854)

GENTLEMEN,...

I am sorry I cannot conclude without saying a word on a topic touched upon by my worthy colleague....

He tells you that "the topic of instructions has occasioned much altercation and uneasiness in this city;" and he expresses himself (if I understand him rightly) in favour of the coercive authority of such instructions.

Certainly, gentlemen, it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinion, high respect; their business, unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions, to theirs; and above all, ever, and in all cases, to prefer their interest to his own. But his unbiassed opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or any set of men living. These he does not derive from your pleasure; no, nor from the law and the constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.

My worthy colleague says, his will ought to be subservient to yours. If that be all, the thing is innocent. If government were a matter of will upon any side,

yours, without question, ought to be superior. But government and legislation are matters of reason and judgment, and not of inclination; and what sort of reason is that, in which the determination precedes the discussion; in which one set of men deliberate, and another decide; and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?

To deliver an opinion, is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear; and which he ought always most seriously to consider. But *authoritative* instructions; *mandates* issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience,—these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution.

Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of *parliament.* If the local constituent should have an interest, or should form an hasty opinion, evidently opposite to the real good of the rest of the community, the member for that place ought to be as far, as any other, from any endeavour to give it effect. I beg pardon for saying so much on this subject. I have been unwillingly drawn into it; but I shall ever use a respectful frankness of communication with you. Your faithful friend, your devoted servant, I shall be to the end of my life: a flatterer you do not wish for. On this point of instructions, however, I think it scarcely possible we ever can have any sort of difference. Perhaps I may give you too much, rather than too little, trouble.

Notes and Questions

1. Would Madison have agreed with Burke?

2. Is Burke's argument undercut by modern communications, which make the debate on public issues accessible to each representative's constituents?

3. When Burke spoke, the British Parliament included so-called "pocket boroughs," districts with little or no population whose Member could in effect be chosen by a wealthy landlord or nobleman. Some of these seats in Parliament were for sale, but others would be awarded to leaders of the parliamentary faction favored by the individual who controlled the district. Accordingly, Burke was assured of being returned to Parliament even if, as occurred in 1780, he failed to win reelection from Bristol.

Is Burke's view of the proper conduct of a legislative representative realistic under modern American conditions? Is it consistent with democratic principles? What changes—in our electoral system, in our attitudes toward elective office, or otherwise—would be necessary to induce modern legislators to act consistently with Burke's views?

4. A 19th-century Englishman, W.S. Gilbert, expressed a different view of the "M.P.'s" (i.e., Member of Parliament's, or legislator's) role:

When in that House M.P.'s divide,
If they've a brain and cerebellum, too,
They've got to leave that brain outside,
And vote just as their leaders tell 'em to.
But then the prospect of a lot
Of dull M.P.'s in close proximity,
All thinking for themselves, is what
No man can face with equanimity.

Gilbert & Sullivan, *Iolanthe*, Act II.

Notice that the system described by Gilbert and still prevailing in Britain and many other democracies is different from either of the alternatives considered by Burke. Instead of following his or her own judgment or the views of his or her constituents, the representative is bound by the dictates of the party leadership. Would Burke approve? Would you?

5. Burke's speech provides the leading text for one of the longest-running debates in democratic theory. An excellent modern commentary may be found in Hanna Pitkin, THE CONCEPT OF REPRESENTATION (1967).

A great deal of empirical research in the United States has attempted to discern the influences that affect legislative behavior. One of the many leading works is John W. Kingdon, CONGRESSMEN'S VOTING DECISIONS (3d ed., 1989). For a recent discussion, see R. Douglas Arnold, *Can Inattentive Citizens Control Their Elected Representatives?* in CONGRESS RECONSIDERED 401 (Lawrence C. Dodd & Bruce I. Oppenheimer, eds., 5th ed., 1993).

6. Burke's speech is most often recalled in connection with the question whether representatives should act on their own or their constituents' views, when the two conflict. A related and equally important question addressed in the speech and that should not be overlooked is how the representative should balance the interests of his or her constituency with those of the nation as a whole. What values are served by a district orientation on the part of representatives? Is excessive parochialism inevitable in a district-based democratic system? Is a strong party system along the lines described by W.S. Gilbert likely to be beneficial in accomplishing a balance between local and nationwide interests? For the suggestion that strong presidential leadership may offset the parochialism of Congress, see Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 GEORGETOWN LAW JOURNAL 1737 (1992).

7. A Massachusetts statute, General Laws c. 53, 19 (1986 ed.) provides that if a sufficient number of voters in a state legislative district sign an application for an election on "any question of instructions" to the legislator, then "the attorney general shall... determine whether or not such question is one of public policy." If so, the attorney general and the state secretary draft the question "in such simple, unequivocal and adequate form as shall be deemed best suited for presentation upon the ballot," and the question goes before the voters. Apparently, there is no procedure for requiring the legislator to act upon the views expressed by the voters.

Suppose the required number of voters sign an application for a question on whether individual human life begins at (a) conception; (b) viability; (c) birth; or (d) a different biological term that the voter is invited to write in. The attorney general rejects the application on the ground that it does not raise a question of

public policy. If the proponents of this question seek judicial review of the attorney general's action, how should the court rule? See *New England Christian Action Council v. Secretary of the Commonwealth*, 532 N.E.2d 40 (Mass. 1989).

III. Pluralism and Progressivism

William E. Connolly, *The Challenge to Pluralist Theory,* in THE BIAS OF PLURALISM 3, 3–4, 8–19 (1973)

The Classical Theory of Pluralism

Pluralism has long provided the dominant description and ideal of American politics. As description, it portrays the system as a balance of power among overlapping economic, religious, ethnic, and geographical groupings. Each "group" has some voice in shaping socially binding decisions; each constrains and is constrained through the processes of mutual group adjustment; and all major groups share a broad system of beliefs and values which encourages conflict to proceed within established channels and allows initial disagreements to dissolve into compromise solutions.

As ideal, the system is celebrated not because it performs any single function perfectly, but because it is said to promote, more effectively than any other known alternative, a plurality of laudable private and public ends. Pluralist politics combines, it is said, the best features from the individualistic liberalism of a John Locke, the social conservatism of an Edmund Burke, and the participatory democracy of a Jean-Jacques Rousseau.

The individual's active involvement in group life enables him to develop the language, deliberative powers, and sense of purpose which make up a fully developed personality. His access to a multiplicity of groups promotes a diversity of experience and interests and enables him to reach alternative power centers if some unit of government or society constrains him.

Society as a whole also benefits from pluralism. The system of multiple group pressures provides reasonable assurance that most important problems and grievances will be channeled to governmental arenas for debate and resolution. The involvement of individuals in politics through group association gives most citizens a stake in the society and helps to generate the loyalties needed to maintain a stable regime with the minimum of coercion. Stability is further promoted, in the long run, because public policy outcomes tend to *reflect* the distribution (balance) of power among groups in the society. Yet, the theory goes, innovation and change are also possible in pluralist politics. New groups, created perhaps by changes in economic processes or population distribution, can articulate new perspectives and preferences which will eventually seep into the balancing process, affecting the shape of political conflicts and the direction of issue resolution.

In short, pluralism has been justified as a system which develops individual capacities, protects individual rights and freedoms, identifies important social problems, and promotes a politics of incremental change while maintaining a long-term stability based on consent....

Contemporary Pluralist Theory

The dominant view among social scientists today is that some variant of pluralist theory provides the most adequate framework for understanding the contemporary political process. Two broad "types" of pluralist interpretation can be distinguished. The first, typically advanced by political scientists, views the government as the *arena* where major group conflicts are debated and resolved. The second, more often advanced by economists and sociologists, sees major social associations, especially organized labor and the corporation, involved in a balancing process which operates largely outside of government; the government acts more as *umpire* than as participant, setting rules for conflict resolution and moving in to redress the imbalance when one group goes too far. I will outline representative expressions of both the *arena* and *umpire* variants of pluralist theory....

The Arena Theory

Robert Dahl has formulated perhaps the most precise and persuasive interpretation of the arena version of pluralism.[11] Government is the crucial arena for the study of power, says Dahl.

> Government is crucial because its controls are relatively powerful. In a wide variety of situations, in a contest between governmental controls and other controls, the governmental controls will probably prove more decisive than competing controls....It is reasonable to assume that in a wide variety of situations whoever controls governmental decisions will have significantly greater control over policy than individuals who do not control governmental decisions.

There is no ruling class or power elite which dominates government over a wide range of issues. Rather, there are numerous bases for political power in American society—wealth, prestige, strategic position, voting power—and while each resource is distributed unequally, most identifiable groups in the system have and make use of advantages in one or more of these areas.

The competitive party system plays a major role in maintaining the system of pluralism. Since the "in" party's voting coalition is always threatened by the "out" party's attempts to create new issues which will shift marginal voters to its side, both parties constantly strive to increase their support among the major social and sectional groupings in the country. The result is a broad range of "minorities whose preferences must be taken into account by leaders in making policy choices." Any "active" and "legitimate" group can usually "make itself heard at some crucial stage in the process of decision." Or, as Dahl states the point in slightly more restrictive terms later: "few groups in the United States who are *determined* to influence the government—certainly few if any groups who are *organized*, *active*, and *persistent*—lack the capacity and opportunity to influence

11. The interpretation is sketched in the last chapter of A PREFACE TO DEMOCRATIC THEORY (1956). The same general view is applied to the politics of New Haven in WHO GOVERNS? (1961).

some officials somewhere in the political system in order to obtain at least some of their goals."

Observation of issue resolution in the governmental arenas, then, reveals a decentralized, fragmented bargaining process which involves numerous competing and overlapping minorities. But this bargaining is merely the "chaff" of politics; the social cement and constraints which make peaceful bargaining possible are found elsewhere.

> Prior to politics, beneath it, enveloping it, restricting it, conditioning it, is the underlying consensus on policy that usually exists in the society among a predominant portion of the politically active members. Without such a consensus no democratic system will survive the endless irritations and frustrations of elections and party competition. With such a consensus the disputes over policy alternatives are nearly always winnowed to those within the broad area of basic agreement.

It is true, Dahl agrees, that only a minority of citizens actively participate in politics, but since the active minorities represent a large number of social groupings, since all organized, active, legitimate, and persistent groups have a "voice" in the process, and since the consensus which underlies and controls conflict resolution is a collective product of the whole society (at least of the politically active members), a pluralist system of politics exists.

What desirable functions does the pluralist system perform? Dahl emphasizes its contribution to a stable society based upon minimal coercion and the maximum protection of constitutional rights; it is a "relatively efficient system for reinforcing agreement, encouraging moderation, and maintaining peace in a restless and immoderate people." The system's impact on personality—a central concern of pluralist theorists as diverse as Tocqueville and John Dewey—does not receive close attention from Dahl.

...Another tradition of pluralist thought...more directly links participation, the *development* of citizen capacities to translate problems into political issues, and the production of wise political decisions. It also argues that a viable political pluralism requires the expansion of participation beyond government to "the family, the church, business, and the school." Such a "social democracy" is necessary, in John Dewey's view, "from the standpoint both of the general welfare and the full development of human beings as individuals."...

The Umpire Theory

Adolf Berle is a representative spokesman for the "umpire" theory of pluralism. His modification of the arena theory flows from a recognition that the technological revolution of the twentieth century has generated massive organizations, especially the large-scale corporation, which initiate unilateral actions outside of the governmental process with important consequences for the society.[19] Berle was among the first in this country to perceive the separation of ownership and control in the large corporation and to ask: To whom or what are the corporate managers accountable today? To preserve the pluralist interpretation of American pol-

19. Berle's theory of pluralism is best stated in POWER WITHOUT PROPERTY (1959).

itics, Berle agrees, he must identify forces which effectively constrain and limit the exercise of corporate power.

The market economy, although not as important as it once was, exerts some constraint on corporate practices. Organized labor also exerts countervailing power in some areas. The corporate elites, implicated in the value system of the larger society, are developing a "corporate conscience" which provides a form of self-restraint on their actions. And if corporate managers step out of line, the government, responsive to the general public, will step in to constrain them. "There is," Berle asserts, "the State, through which action can be compelled. There is the public, increasingly capable of expressing a choice as to what it wants and capable of energizing political forces if the system does not want it." Berle often slips into the rhetoric of majoritarian democracy when discussing the government as a regulator of the large-scale corporation. It is well to note also that he is speaking here primarily of public pressures upon government to change a status quo already achieved by unilateral corporate action, not a politics where the "public" vetoes corporate pressures to change governmental policy.

But how do we decide when the corporation is "out of line"? What are our standards of appraisal, where do they come from, and how do we ascertain whether the market, the corporate conscience, organized labor, and the democratic state are sufficiently constraining the corporation? Berle's answer is clear. Underlying and supporting all of the other constraints is the public consensus, "the body of those general unstated premises which have come to be accepted." The consensus determines the content of the corporate conscience; it emerges as public support for organized labor or other social groups when corporations push outside their appropriate limits; it provides the energy for citizen pressure upon the government when redress is required....

But what groups shape these "unstated premises" and who activates the consensus when restraint is needed? All groups contribute to it, including the corporate interests themselves. But "of greater force are the conclusions of *careful* university professors, the *reasoned* opinions of specialists, the statements of *responsible* journalists, and at times, the *solid* pronouncements of *respected* politicians...." [Connolly's emphasis.]

Berle's conclusions are still difficult to pin down. For what criteria determine which pronouncements are careful, reasoned, solid, and respected? Which segments of society are most involved in bestowing "respect" upon those who develop and defend the public consensus? What *concerns* are most prominent among the selected group of intellectuals, specialists, and politicians? How does Berle decide that his "group" has more influence on the consensus than, for example, businessmen and corporate managers?

The "consensus," for both Berle and Dahl, is the most important force sustaining political pluralism. It is also a factor which each theorist subjects to minimal examination.

A Critique of Pluralist Theory

Even the sharpest critics of pluralist theory agree that the politics of balance is a highly visible feature of American politics, and most critics acknowledge that it plays some role of substance in the total system. Further, many of the critics believe that pluralist principles must be included in any ideal of politics relevant to contemporary society....

On this view, the conventional pluralist interpretation is not so much wrong as it is systematically misleading. For conventional pluralist theory focuses on the *competition of elites* operating within a "given" framework or context while the critics believe that a more accurate picture results when one examines the *biased context* or the "other face of power" within which elite competition occurs. The class structure, which helps to provide the social context for elite competition; the "groups" whose lack of organization, persistence, and legitimacy rules them out of (or marginally in) the balancing process; the concerns, potentially of interest to many or all segments of society, which are not carried by organized groups to the governmental arenas—these are the background features of pluralist politics which receive the attention of the critics. It is difficult to observe and weigh these factors, but as we have seen in our summary of pluralist theory, assumptions must be made at this level anyway. The critics, at the very least, refuse to shove these considerations into a residual category called the "consensus."

The late C. Wright Mills... sought to call attention to the biased context of pluralist politics. He reminded us that "the goals for which interests struggle are not merely given; they reflect the current state of expectation and acceptance." Many viable alternatives and potential issues, he contended, do not reach the governmental arenas and thus do not become part of the observable balancing process:

> Only one more point of definition: absence of public issues there may well be, but this is not due to any absence of problems. Impersonal and structural changes have not eliminated problems or issues. Their absence from many discussions—that *is* an ideological condition, regulated in the first place by whether or not intellectuals detect and state problems as potential *issues* for probable publics, and as *troubles* for a variety of individuals.

Mills' view, stated in the terminology of Berle and Dahl, is that for some segments of society the prevailing consensus does not provide an adequate perspective or level of awareness with which to locate the structural causes of their vague feelings of anxiety, malaise, frustration, and resentment. As a result, undifferentiated "troubles" are not stated as clear-cut grievances; potential preferences are not organized as public issues; possible issues are not debated and resolved within governmental arenas. The linkages between private troubles and public issues are highly biased; some segments of society, such as the impoverished, the blacks, unorganized laborers, and many white collar workers, have not even developed a "voice" which can be "heard" on matters of great import for their lives; some kinds of concerns, affecting most or all segments of society, are not channeled to public arenas for debate.

Whose problems and claims does the system favor? Mills' theory of the "power elite" is that corporate managers and military leaders are developing a community of interests in maintaining certain status quo arrangements. They effectively protect, inside and outside of government, the prevailing distribution of wealth and income; corporate management's control over the organization of work life, price levels, investments, expansion, and mergers; a tax structure favorable to wealthy capital holders; the status and growth of the military establishment. Mills contends that policy modifications in these areas are possible which would benefit wide segments of the society psychologically and materially. But such possibilities

are not considered as viable options because of the power elite's influence over the "consensus" accepted by the vast majority of American citizens.

Mills' positive argument for the power elite, as opposed to his pointed critique of areas of analysis omitted from consideration in pluralist theory, is marked by unsupported gaps covered by rhetorical flourish. One point is worthy of emphasis, however. It is possible to combine elements from the "umpire" theory of Berle and the "arena" theory of Dahl to support Mills' view that the pluralist system is significantly biased toward the concerns and priorities of corporate elites. Corporate managers (1) possess tremendous *initiating* power *outside* of government; (2) possess rather effective *veto* power *within* government which can be used to protect their unilateral initiatives in issue areas of greatest concern to them; and (3) are beneficiaries of a *biased consensus* which lends legitimacy to their initiatives and veto power while diminishing it for groups which might otherwise seek to challenge prevailing practices. The interpretation supported by these considerations is not one of a hard line power elite "whose preferences," as Dahl expresses it, "regularly prevail in cases of difference in preference in key political issues." Rather, they support an interpretation of a biased pluralism in which some concerns, aspirations, and interests are privileged while others are placed at a serious disadvantage.

Other recent criticisms of conventional pluralist theory move along similar lines. Henry Kariel[31] points to the oligarchical tendencies within those large organizations which function both as interest groups affecting governmental policy and as agencies taking unilateral action of public consequence. Organizations such as the American Medical Association, labor unions, large corporations and The Farm Bureau achieve a quasi-official status within government as the legitimate representatives of physicians, blue collar workers, corporate managers and stockholders, and farmers. But in fact each unit speaks for a segment of its claimed constituency while presuming to speak for all. The government, in this interpretation, is not a neutral reflection of interests in the society, nor is it primarily a countervailing force acting for those interests and concerns which are severely disadvantaged. By co-opting legitimate interest group elites as the official spokesmen for broad segments of society, the government helps to freeze the status quo, making it difficult for "members" in these imperatively coordinated associations to challenge their "leaders" without risking legally supported internal sanctions.

In addition, the old constellations of interest groups take on a special legitimacy in the balancing process, and citizens with new problems and concerns encounter serious institutional and ideological obstructions to the formation of new organized groups which might express their aspirations. The middle level white collar worker and the unorganized blue collar worker, for example, are marginally represented by corporate and labor interests, yet they are classified under these categories....

[Various critics stress] the level of defense expenditures needed, but the point is that this very question is not readily incorporated into the balancing process; an "answer" emerges which reflects more the aggregation of particular interests than

31. Henry Kariel's critique is best developed in THE DECLINE OF AMERICAN PLURALISM (1961).

a debate over the question itself. Mitigating forces are at work here, we hope. But the example illustrates a point too often overlooked by the celebrants of pluralist practice: the aggregation of organized interests does not always ensure that the public interest is well served.

These critiques of pluralist theory, then, tend to converge around a small cluster of themes. Since there is some confusion about the kinds of claims the critics are advancing, it may be useful to list them in a formal way here, starting with those which point to gaps between pluralist rhetoric and pluralist practice and building to those which imply the need to revise some features of the pluralist ideal itself.

1. The prevailing system inhibits some segments of society from efficacious involvement in the balancing process while bestowing cumulative advantages upon other segments.

2. The process of interest aggregation ignores some concerns explicitly shared by many citizens because persistent, active, and legitimate "groups" fail to define these concerns as high priority interests. This condition could persist even if every citizen belonged to at least one politically effective group.

3. Many *latent concerns*—those which might well interest wide segments of society if they were publicly articulated as issues—are not identified or sharply defined by the prevailing system of issue formation.

4. Work life and decision-making processes within those territorial and functional units which underpin modern pluralism are often not conducive to that personality development which both enhances life for the individual and enables a political system to avoid the potentially debilitating effects of widespread apathy underlaid by simmering hostility and resentment.

5. The status quo biases in the prevailing system of issue-formation and conflict-resolution discourage efforts within recognized channels to (a) increase "out" group involvement in the balancing process, (b) bring unorganized and (c) unarticulated concerns to political arenas, and (d) initiate reforms *within* organizations designed to foster personality development. Thus, as a rapidly expanding technology promotes equally rapid social change, ideological and institutional constraints in the political system inhibit efforts to cope with the accompanying dislocations.

Notes and Questions

1. Was James Madison a pluralist?

2. Robert Dahl, mentioned by Connolly as a leading pluralist theorist, placed great emphasis on the concept of "intensity," the strength of an individual's or group's support or opposition to a government policy. Dahl maintained that the best protection for minority groups against tyranny by majorities lay not in constitutional safeguards but in the operation of the political system along pluralist lines. The idea was that groups whose freedoms or vital interests were threatened by a proposed policy would feel the most intensely about the issue, and that intensity would be reflected in increased political activity. "All other things being equal," Dahl concluded, "the outcome of a policy decision will be determined by the relative intensity of preference among the members of a group."

Dahl also asserted that "intensity is almost a modern psychological version of natural rights." Would Madison agree? Do you? How, if at all, would Madison's

definition of "faction" be affected if the term "intense preferences" were substituted for "rights"?

3. One influential criticism of pluralism not mentioned by Connolly is based on the problem of the "free rider." According to this line of thought, a government policy beneficial to a number of people is a "collective good" for that group. That is, either the policy will be adopted and benefit all members of the group, or it will not be adopted and none of the members will benefit. An obvious example is governmental protection of air quality. There is no way for individuals to obtain the benefit of cleaner air for themselves without obtaining it for everyone. If a lot of organizing activity and substantial resources are needed to obtain the benefit, the free rider analysis yields the paradoxical result that a small group may be better situated than a large group. Each member of the small group, perhaps a concentrated industry, will regard its own contribution to the collective effort as crucial, and therefore will be motivated to contribute. But members of a large group, such as consumers, individual taxpayers, or small businesspersons, may be motivated to take a free ride. That is, each such individual will reason that his or her own contribution is such a minute percentage of the whole that the overall success of the effort will not be affected. "Better to take a free ride," individuals might reason. "If others contribute, I will benefit from the favored policy and be even better off because I will have saved the time or money I declined to contribute. If others also opt for a free ride none of us will get the government policy we want, but at least I will save by not contributing to a losing effort."

The classic work on the free rider problem is Mancur Olson, THE LOGIC OF COLLECTIVE ACTION (1965).

4. Pluralism is both a descriptive theory of democratic government and a normative theory. For the most part, critics have attacked pluralism less for its description of government policy as the outcome of the struggle of interest groups than for its normative conclusion that this outcome is satisfactory. Are the struggles over reform of the political system, with which much of this book deals, the practical counterpart of the theoretical debate over pluralism? For one view, see J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE LAW JOURNAL 1001 (1976).

5. During the 1950's pluralism was probably the dominant normative theory in American political science. Criticisms that were developed in the 1960's, including the free rider problem and the criticisms described by Connolly, have had their effect. Nevertheless, it is probably still true that the majority of political scientists and many journalists and people active in electoral politics are greatly influenced by the pluralist outlook, and by a related theory, that of *responsible party government*, which will be described in Chapter 7.

In contrast, popular political thought in America tends to be guided by a different conception most often associated with the Progressive movement of the early twentieth century but extending back to Thomas Jefferson and beyond. In what we shall call the *progressivist* view, the individual citizen is taken as the unit of analysis, in contrast to the pluralists' concentration on groups. Citizens are thought of as rational, reasonably well-informed, concerned about public issues, and desirous of resolving issues in accord with the common good. Their political beliefs are not entirely dominated by the particular interests of groups to which they belong. Candidates for office compete by debating the substance of issues in the manner befitting a rational, informed, public spirited and actively involved

audience. Once elected, representatives act pretty much like the voters who elected them. That is, they consider each issue of public policy individually, voting in accordance with their informed, rational sense of what is in the public interest.

Probably very few people past junior high school age believe that American democracy actually operates in this manner most of the time.[c] Nevertheless, popular progressivist thinking holds up something like this as the ideal. Social prejudice and selfish pursuit of economic and political interests will constantly cause departures from the ideal, but the progressivist goal is to cultivate civic virtue in the individual and design institutions to minimize these departures.

6. As most law students are probably aware, a variety of political and jurisprudential theories are fashionable in contemporary legal writing and pedagogy, including feminism, critical legal studies, critical race theory, civic republicanism and law and economics. Students and instructors with an interest in any of these perspectives will certainly find grist for their theoretical mills in the issues dealt with in this book. However, to the extent the notes and questions in the book are guided by any theoretical perspective, explicitly or implicitly, they will tend to be the pluralist and progressivist perspectives, as well as pluralism's cousin, responsible party government. The main reason is that these theories, far more than the currently fashionable academic theories, have been the prevailing paradigms for most of the participants in the controversies with which the book is concerned.

IV. Electoral Process and Democracy

This book deals with controversies over election procedures and regulations. How important are such questions to the functioning of a democracy? The following short excerpt may help to keep our subject in proper perspective. Is it a challenge to the very idea of this course and this book?

Irving Kristol, Reflections of a Neoconservative 50–51 (1983)

Though the phrase "the quality of life" trips easily from so many lips these days, it tends to be one of those clichés with many trivial meanings and no large, serious one. Sometimes it merely refers to such externals as the enjoyment of cleaner air, cleaner water, cleaner streets. At other times it refers to the merely private enjoyment of music, painting, or literature. Rarely does it have anything to do with the way the citizen in a democracy views himself—his obligations, his intentions, his ultimate self-definition.

Instead, what I would call the "managerial" conception of democracy is the predominant opinion among political scientists, sociologists, and economists, and has, through the untiring efforts of these scholars, become the conventional journalistic opinion as well. The root idea behind this managerial conception is that

c. Perhaps contemporary young children, who draw their edification from the likes of "The Simpsons" and "Beavis and Butthead," are likely to be more rather than less cynical than the general population.

democracy is a "political system" (as they say) which can be adequately defined in terms of—can be fully reduced to—its mechanical arrangements. Democracy is then seen as a set of rules and procedures, and *nothing but* a set of rules and procedures, whereby majority rule and minority rights are reconciled into a state of equilibrium. If everyone follows these rules and procedures, then a democracy is in working order. I think this is a fair description of the democratic idea that currently prevails in academia. One can also fairly say that it is now the liberal idea of democracy par excellence.

I cannot help but feel that there is something ridiculous about being this kind of a democrat, and I must further confess to having a sneaking sympathy for those of our young radicals who also find it ridiculous. The absurdity is the absurdity of idolatry—of taking the symbolic for the real, the means for the end. The purpose of democracy cannot possibly be the endless functioning of its own political machinery. The purpose of any political regime is to achieve some version of the good life and the good society. It is not at all difficult to imagine a perfectly functioning democracy which answers all questions except one—namely, why should anyone of intelligence and spirit care a fig for it?

There is, however, an older idea of democracy—one which was fairly common until about the beginning of this century—for which the conception of the quality of public life is absolutely crucial. This idea starts from the proposition that democracy is a form of self-government, and that if you want it to be a meritorious polity, you have to care about what kind of people govern it. Indeed, it puts the matter more strongly and declares that if you want self-government, you are only entitled to it if that "self" is worthy of governing. There is no inherent right to self-government if it means that such government is vicious, mean, squalid, and debased. Only a dogmatist and a fanatic, an idolater of democratic machinery, could approve of self-government under such conditions.

And because the desirability of self-government depends on the character of the people who govern, the older idea of democracy was very solicitous of the condition of this character. It was solicitous of the individual self, and felt an obligation to educate it into what used to be called "republican virtue." And it was solicitous of that collective self which we call public opinion and which, in a democracy, governs us collectively. Perhaps in some respects it was nervously oversolicitous—that would not be surprising. But the main thing is that it cared, cared not merely about the machinery of democracy but about the quality of life that this machinery might generate.

Question

You have chosen to enroll in or teach a course, or read a book, devoted to the "set of rules and procedures," the "mechanical arrangements," that govern a democracy. I have chosen to compile such a book. Can you defend us against the charge that each of us is "a dogmatist and a fanatic, an idolater of democratic machinery?"

Chapter 2

The Right to Vote and Its Exercise

If the election mechanism is at the heart of any democracy, then the right to vote in elections is a central democratic right and the act of voting is the most elemental form of democratic participation. The simplest and most natural place to begin our study of election law is thus with the right to vote itself. The remaining chapters in this book will consider the electoral system within which the right to vote is located.

For two centuries the history of the United States (and of much of the rest of the world) has usually been in the direction of allowing more people to vote in more elections that increasingly have controlled the most important aspects of government policymaking. The suffrage was limited in important ways when the United States Constitution was adopted. Property qualifications, denial of the vote to racial groups (African Americans and Native Americans), and restriction of the vote to men were the most important departures from universal suffrage. In the course of American history, each of these restrictions on the right to vote and numerous others have been eliminated. In Part I of this chapter, we shall briefly review this history.

Whether we are more impressed with the progress that these developments reflect or with the unfortunate fact that they were necessary in the first place, we should not assume that the direction of change has always been toward extension of the franchise. As we shall see, the late nineteenth and early twentieth centuries comprised a cruelly regressive period during which the hard-won right for African Americans to vote in the southern states was taken away for all practical purposes. That right was finally restored in the mid-twentieth century. Another group, resident aliens, was permitted to vote in many states during much of the nineteenth century. That extension of the franchise was revoked around the turn of the century and, with minor exceptions, has not been restored. The constitutionality of denying the vote to aliens is considered in this chapter's only principal judicial decision.

Whether people actually vote after they are granted the right to do so may seem more a question for political scientists and party activists than for students of the law. However, voting procedures that are either fixed by law or amenable to legal reform may affect turnout, and the distinction between procedural barriers and the denial of the right to vote is not a sharp one. During the post-Reconstruction period, the Fifteenth Amendment precluded white southern Democrats from overtly denying the vote to African Americans. Instead, they relied on a

variety of devices that made voting so difficult that the practical effect was almost as great as a denial of the right to vote. No such extreme restrictions are in effect today in the United States, but various requirements for voting, especially the requirement that individuals take the initiative to register if they wish to be eligible to vote, may be significant causes of low turnout in American elections, compared to those in other industrialized democracies.

In Part II of this chapter, then, we shall look briefly at American voting rates, at the competing explanations offered by social scientists for low turnout, and at possible or actual ways in which the law might improve the situation, including consideration of the recently enacted "Motor Voter" law.

Most people nowadays agree that the right to vote should be nearly universal, but that has not always been the case. Opponents of extending the franchise have argued at various times that the masses would so misuse the vote that, far from being benefited, their lot would be worsened; that mass suffrage would be futile, for power would always remain in an elite class; and that even if extension of the right to vote furthered the goal of political equality, this would be more than offset by harmful effects on other values, such as liberty.[a]

Although no one seriously proposes cutting back the right to vote in major ways, past criticisms of universal suffrage cannot all be dismissed as insincere or lacking in substance. Similar arguments are heard today in opposition to proposals to make it easier to vote. Lurking behind these and many of the legal and policy disputes reviewed in this book is the question whether democracy should be thought of as competition among interests or as a deliberative process seeking the common good. Measures that some have believed would improve the deliberative quality of democracy—restricting the vote to property-owners or to people who can read and write, or requiring would-be voters to take the time to register and thereby demonstrate a sense of the responsibilities of a citizen—have appeared to others as self-interested devices to enhance the political power of the well-off. Is the 18-year-old age requirement for voting a desirable assurance of maturity in public decision-making, or is it a device for reinforcing adult society's strict control over younger teenagers?

I. The Right to Vote

A. The Extension of the Suffrage

1. The Attainment of White Male Suffrage

The American colonies inherited property qualifications for voting that had been established in England at least as early as the fifteenth century. In addition, British law excluded women, Catholics, Jews, aliens, and servants from the fran-

a. Albert O. Hirschman, THE RHETORIC OF REACTION (1991), provides a lively account of the history of conservative arguments against the extension of the franchise over a period of two centuries. He concludes that the arguments have tended to reflect dogmatic assumptions that could be and have been levied against virtually all proposed social, economic, and political reforms, but that these assumptions often have little empirical grounding. In a concluding chapter, Hirschman finds that liberal reformers tend to rely on a set of similarly dogmatic, opposing assumptions.

chise. However, because of cheap land and lax administration, suffrage was far more widespread in practice in the colonies during the eighteenth century than in England.

Although estimates of the percentage of people who were eligible to vote during the colonial and revolutionary periods are uncertain, it appears that at least half the white adult males could vote before the Revolution in all states, and that in some states at least three-quarters and perhaps nearly 100 percent could vote. Because of cheap land and scarce labor, most white men who could not meet the property qualifications during their youth could do so by the time they had attained middle age.

The fact that the property qualifications were not extremely restrictive in practice was one reason that their imposition did not become a major point of contention during the period leading up to the Revolution. Another reason was that the restrictions sometimes were not enforced or were easily evaded, especially when political contests were highly competitive and individuals therefore had the greatest incentive to vote. Finally, there was no ideological consensus during the eighteenth century in favor of universal white male suffrage. Before the Revolution, the prevailing political theory was influenced by Aristotle's idea of balanced government, which held that tyranny would result if either the monarchical, the aristocratic, or the democratic principle dominated the others. In addition, in the absence of a secret ballot, voting by tenants, employees, or paupers was regarded as likely to lead to corruption or coercion, with a consequent magnification of influence by the wealthy.

The Constitution of the United States did not purport to regulate the franchise. The only federal officials chosen by direct election under the original Constitution were the members of the House of Representatives, and Article I, § 2 of the Constitution said that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[b] What those qualifications were to be was entirely up to the states. Nor was there any impetus in the direction of universal suffrage from the federal government. The Northwest Ordinance and other laws governing territories imposed landowning requirements for voting. Difficulties with land titles and other practical problems quickly made property requirements a dead letter in much of the west, however.

With the arrival of the nineteenth century, the idea of universal manhood suffrage became ascendant. The Aristotelian view was opposed by a Puritan belief that for purposes of secular politics, people should be treated as if they were equal and, increasingly, by natural rights theories of political equality.

Religious tests for voting and exclusion on the basis of status as a servant or employee (but not as a slave) were largely eliminated by the end of the revolutionary period. With one significant exception, property qualifications more or less petered out over the three-quarters of a century following the Revolution. In many places, the payment of a tax was permitted as an alternative to satisfying the property qualifications. Although the poll tax later became a prominent device for *denying* the vote to blacks and poor whites in the South, in the eighteenth century it was a liberalizing device that opened the franchise to persons

b. The Seventeenth Amendment, providing for direct election of Senators, contains a virtually identical clause.

whose wealth did not take the form of land. Similarly, service in the militia was increasingly accepted as an alternative to owning land or paying taxes, thereby extending the right to vote to a higher percentage of young men.

During the Jeffersonian period, several states adopted universal white male suffrage or regulations that came very close. The trend continued throughout the first half of the nineteenth century, though at a very uneven pace in different states. Often the movement toward extension of the franchise was pushed forward by party competition, as each party sought to benefit by extending the franchise to new groups of voters who would, it was hoped, reward the party with their votes. The movement also benefited from less savory considerations, such as the contention in Virginia and North Carolina that universal white male suffrage was needed to assure unity among whites in the event of a slave rebellion. Despite this argument, these two states were among the last to adopt universal white male suffrage, in the 1850s.

The only truly dramatic event in the early extension of suffrage occurred in Rhode Island. In that state during the Jeffersonian period, the property qualifications did not prevent most adult males from voting, so there was no strong pressure to eliminate them. After the War of 1812, as industry began to develop and cities to grow, it became apparent that the non-landowning working class would be composed of immigrants, largely Catholic. Resistance to suffrage reform became strong in rural areas, where Protestant farmers had no desire to share political power with these newcomers. Pressure for a liberalized franchise grew, but was stoutly resisted by the rural interests who controlled the state government.

In 1841, a group called the Rhode Island Suffrage Association, under the leadership of Thomas Dorr, called for a constitutional convention, delegates to which would be elected by universal white male suffrage. Dorr's convention competed with a constitutional convention sponsored by the official state government. The official convention's Charter retained property qualifications, and for a time it appeared that popular support for Dorr might result in the overthrow of the Charter government. However, the national government under President John Tyler supported the Charter government, and the following year the constitution was liberalized to allow native-born citizens the right to qualify to vote with personal rather than real property. Dorr was forced to flee from Rhode Island, which for many years continued to discriminate between native-born and naturalized citizens, but whose new constitution was, in one important respect, more liberal than Dorr's, in that it permitted African Americans to vote.

By the time of the Civil War, adult white male suffrage was the rule in most of the states, with relatively minor exceptions. Although limited voting by women had been permitted in New Jersey until 1807, the almost universal rule restricted voting to men. For African Americans, there had actually been a regression since the colonial period, when a number of states, north and south, had permitted voting by free blacks. By 1860, most states restricted voting to whites, with most of the exceptions located in New England.[c]

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c. There was also a regression in the first half of the nineteenth century in the number of states permitting aliens to vote. The history of voting by aliens is sketched briefly in Note 4 following *Skafte v. Rorex, infra.*

2. The Fifteenth Amendment and Its Betrayal

As the Civil War ended, black suffrage was not only the exception rather than the rule in the north, it was unpopular, as evidenced by its defeat in several (though not all) referendums that occurred in the 1860s. Accordingly, in 1865 and 1866, the Republicans, uncertain of their electoral prospects, did little to promote voting rights for African Americans. In 1866, the congressional Republicans won a landslide victory and thus felt safe in ordering black suffrage in areas that would not arouse opposition in their northern constituencies. In 1867, blacks were given the franchise in the District of Columbia and in federal territories. The Reconstruction Act of 1867 required that blacks be allowed to vote in southern states as a condition of readmission.

By 1868, the Democrats were resurgent, and although Ulysses Grant, the Republican candidate, was elected in 1868, the margin was perilously close in many northern states. Republicans also began to fear that some black voters in the South were in danger of being won over by the Democrats. The Republicans responded to these concerns by rushing the Fifteenth Amendment through the lame duck session of Congress in January and February, 1869. This was accomplished with some difficulty, and the final version of the Fifteenth Amendment was something of a compromise, falling short of the hopes of some that the federal Constitution would impose universal adult male suffrage or bar literacy and property tests. As adopted, the Fifteenth Amendment reads as follows:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Ratification by the requisite number of states was completed within thirteen months, but only after considerable uncertainty. Ratification was assisted by legislation requiring Georgia, Mississippi, Texas, and Virginia to ratify the Fifteenth Amendment as a condition of readmission to the Union.

Some impetus for the Fifteenth Amendment came from the principled view of many that it was wrong to deny the vote on grounds of race, especially to a group whose vulnerability as recently emancipated slaves made the protection accorded by the right to vote particularly important. Perhaps even more impetus came from the desire of the Republican Party for electoral advantage. Black voters in many northern states, though few in number, could be expected to reinforce shaky Republican majorities, while the gratitude of African Americans in north and south would strengthen their voting loyalty to the GOP. In the north, the Republicans may have believed they had more to lose with white voters from the Democrats raising the *threat* of black voting than from a fait accompli. Thus, it would be a mistake to assume that the Fifteenth Amendment was aimed primarily at the south. In the southern states, extension of the vote to blacks had been accomplished by military reconstruction and by the constitutions of the states that had already been readmitted. The Fifteenth Amendment had the dual purpose of enfranchising African Americans in the northern states and reinforcing the right to vote in the south. The first purpose was successfully accomplished, but despite the Fifteenth Amendment, a disastrous retrenchment was to occur in the South.

The year 1877, when Union soldiers were removed from the South as part of the settlement of the disputed presidential election of 1876, is often given as the end of Reconstruction. It is easy to imagine that from 1877 on, the Solid South system—an almost exclusively white electorate, ubiquitous control by the Democratic Party, and low voter turnout—was firmly entrenched. In reality, it took thirty years of concentrated effort to accomplish this result. The driving forces were racism, partisanship, and class politics.

Partisan political competition was a reality in the South until nearly the end of the nineteenth century. It is true that the Democrats carried every southern state in presidential elections from 1880 on, but the vote was not always lopsided, and state and local races were often more competitive. Republicans or the candidates of a variety of third parties occasionally won statewide elections and often mounted a serious threat.

White support for disfranchisement of African Americans came primarily from "black belt counties" (those with especially large African American populations) and from wealthier areas. Typical leaders in the disfranchisement movement were wealthy, well-educated, and from established families. White opposition to disfranchisement came mostly from poorer and predominantly white areas, and from members of the Republican and other opposition parties. Their opposition to disfranchisement may have been motivated by principle, but it certainly was motivated by recognition that their partisan and class interests had no hope of success without the support of black voters. Blacks themselves actively resisted disfranchisement in both judicial and political arenas, though ultimately without success.

Roughly speaking, in the 1870s and 1880s, southern Democrats often relied on violence and fraud to gain or consolidate control of state legislatures. Violence was often ineffective. The use of fraud was more successful, but it created the danger that it would trigger a new round of federal intervention. Accordingly, in the 1880s and 1890s, southern Democratic legislatures adopted laws making it more difficult for blacks (and often poor whites) to vote. Finally, in the 1890s and the 1900s, constitutional conventions were summoned. The discriminatory laws that had already been passed helped to assure that these conventions would be dominated overwhelmingly by Democrats. The new constitutions that emerged entrenched even stronger discrimination devices.

The following is a description of some of the leading devices that were adopted in the southern states during this period, together with a brief indication of their subsequent history:

> **Secret Ballots:** Although ostensibly introduced as a good government device to reduce voter corruption and preserve the integrity of the ballot box, the secret ballot was also favored in the South (and perhaps in the North as well) as a device to prevent illiterates from voting. In the South, this had a discriminatory impact against blacks, who often had been denied education as slaves or had been subjected to inferior education after the Civil War. Furthermore, election officials could discriminatorily provide assistance to white voters who needed it, while denying assistance to black voters. In South Carolina and Florida, the "eight-box" device was used, to similar effect. Voters had to place separate ballots for different offices in separate ballot boxes, and ballots placed in the wrong box were not counted. Precinct officials gave no assistance to illiterate blacks, and the boxes could

be moved around frequently during the day of the election, to confound any outside person who might seek to instruct black voters on which box was which.

Currently, most Americans are sufficiently literate that the secret ballot is not a major barrier to voting. Furthermore, in the 1982 amendments to the Voting Rights Act, Congress inserted a provision mandating that any voter who needs assistance because of blindness, disability or illiteracy, is entitled to receive it from a person of the voter's choice.[d]

Poll Tax: Georgia adopted a poll tax in 1877. Other southern states did not follow suit until the 1890s, but by 1904 all the former states of the Confederacy had adopted a poll tax. The poll tax was justified by its proponents as a device to disenfranchise blacks, but it also had the effect, and probably the intent, of lowering white turnout. The poll tax was a particularly severe obstacle to voting in some states, which required an individual to pay not only the current year's tax but also unpaid taxes from previous years.

The 24th Amendment, added to the Constitution in 1964, banned poll taxes in federal elections. Two years later, the Supreme Court in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), ruled that the use of the poll tax in any election violated the Equal Protection Clause.

Literacy Tests: Literacy tests were among the most important devices adopted at the disfranchisement conventions in the decades before and after the turn of the century. They were often accompanied by escape provisions, the best known of which was the "grandfather clause," which waived the literacy test for persons who were eligible to vote or whose ancestors were eligible to vote on a date prior to the initial enfranchisement of African Americans. Grandfather clauses were declared unconstitutional in *Guinn v. United States*, 238 U.S. 347 (1915), but the literacy tests could be and were administered in a discriminatory manner against blacks. By the 1950s and early 1960s, discriminatory literacy tests were the most important devices for restricting voting by African Americans in the South.

In *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), the Supreme Court held that a literacy test, fairly applied, did not violate the Equal Protection Clause. Literacy tests in the South often were *not* fairly applied, but proving discrimination on a case-by-case basis was a laborious chore. The Voting Rights Act of 1965 banned literacy tests in most of the Deep South. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Supreme Court held that the literacy test ban was a permissible exercise of Congress' power to enforce the Fifteenth Amendment, despite the fact that the literacy test itself was not unconstitutional. In the 1970 amendments to the Voting Rights Act, Congress extended the literacy test ban to the entire country, but only until 1975.[e] In 1975 the ban was made permanent. See 42 U.S.C. § 1973b(e)(2).

White Primary: Democratic primaries were held in some local elections in the South beginning in the 1870s as a device to coopt opposition or to assure a unified party vote. Apparently the first statewide primary held any-

d. Voting Rights Act § 208, 42 U.S.C. § 1973aa-6.

e. The Supreme Court upheld the nationwide literacy test ban in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

where in the country was held in Louisiana in 1892, to prevent an intra-party division over the state lottery from leading to a Republican or Populist victory. Black voting in Democratic primaries was sometimes permitted until around the turn of the century, and was not much of an issue. Until the 1930s, the overwhelming majority of African Americans wanted to vote *against* the Democrats in the South, not to vote in their primaries. However, once interparty opposition was essentially eliminated, the white primary helped preserve the Democratic monopoly and provided an extra barrier against effective participation by black voters.

The elimination of the white primary was a major objective of civil rights litigation from the 1920s until success was finally achieved in the 1940s. The *White Primary Cases* are described in Chapter 7, in connection with the constitutional status of political parties.

The end result of this process was the elimination of partisan competition in the South during the first half of the twentieth century, drastically low rates of black registration and voting, and turnout even among whites that was much lower than in the rest of the country. The absence of partisan competition reduced the incentive to vote. Furthermore, a number of the discriminatory devices, though ostensibly aimed solely at African Americans, could be and sometimes were turned against poor white voters when it was necessary to protect the political control of the dominant groups.

3. Votes for Women

Enactment of the constitutional amendment guaranteeing the vote to racial minorities was accomplished relatively quickly, but the Fifteenth Amendment marked only the beginning of the long struggle to make suffrage for blacks a permanent reality. The struggle for the enfranchisement of women was similarly long, but the sequence was the opposite. The adoption of the Nineteenth Amendment took more than three-quarters of a century, but once it was accomplished, the struggle was over.

The beginning of the American women's rights movement is commonly dated from an 1848 meeting in Seneca Falls, New York, led by Elizabeth Cady Stanton and Lucretia Mott. The demand for the right to vote contained in the Declaration of Sentiments adopted at Seneca Falls was regarded as particularly radical. The founders of the women's movement were abolitionists, and their call for the right to vote was motivated in part by the desire to win the right to participate more effectively in the movement to end slavery. Leaders of the movement, including Lucy Stone and Susan B. Anthony, worked actively to support the Union cause during the Civil War. Many of them were disillusioned when, after the war, the Republican Party pushed for votes for blacks but not for women. Efforts to obtain judicial relief failed when the Supreme Court ruled that the Fourteenth Amendment did not prevent denying women the right to vote. *Minor v. Happersett*, 88 U.S. 162 (1875).

In 1890, two women's suffrage groups merged to form the National American Woman Suffrage Association. By this time several states allowed women to vote in school or municipal elections and, in 1890, Wyoming was admitted as the first state to allow full woman suffrage. Colorado, Utah, and Idaho followed suit by 1896, but it was not until 1910 that Washington became the next state to do so. After 1910, several more states joined the fold, and New York's doing so in

1917 became the turning point in the effort to obtain women's suffrage nationwide. By that time, enough representatives had voting female constituents to provide impetus to the approval by Congress of the Nineteenth Amendment in 1919. The amendment was ratified by the 36th state and became part of the Constitution in August, 1920.

In the 1890s, arguments for women's suffrage were cast largely in terms of equality and individual rights. However, around the turn of the century, the appeal of arguments based on the principle of universal suffrage diminished, as opposition to voting by immigrant groups in the north and blacks in the South mounted. One of the leading arguments made against suffrage for women was that it would give more influence to "the poor, the ignorant, and the immoral," groups who were often assumed to be identical by proponents of this viewpoint.

The leaders of the women's suffrage movement were mainly white, native-born, middle-class women who were by no means immune to the prejudices that characterized their period. Accordingly, arguments for women's suffrage shifted from arguments based on equality and the principle of universal suffrage to arguments based on reforms that women would favor and help to bring about, particularly prohibition of alcoholic beverages and a variety of reforms espoused by the Progressive movement.

In contrast to the highly partisan politics that led first to the granting of the franchise to blacks and then to the denial of it to blacks in the South, party played a much smaller role in the struggle for women's suffrage. The NAWSA was consistently nonpartisan. Indeed, many of its members shared the general anti-party views of many Progressive reformers. It is true that as a general rule, Republican legislators were more likely to support women's suffrage than Democrats, at least in part because women were expected to support prohibition, a cause supported by more Republicans than Democrats. A group known as the Women's Party, smaller and more militant than the NAWSA, in 1914 and 1916 urged women in states where they could vote to oppose Democrats because of President Wilson's lack of leadership in support of women's suffrage. However, there is little evidence that such campaigning was effective. As the inevitability of nationwide women's suffrage began to be clear, representatives of both parties joined the bandwagon so as not to provoke opposition from the new class of voters.

Contemporaries expected that voting by women would boost two political causes: peace and prohibition. Whether this would have occurred is hard to say, because World War I ended and the prohibition amendment (the Eighteenth) was enacted before women's suffrage was accomplished. As Aileen S. Kraditor, a historian of the women's suffrage movement, has written:

> The addition of women to the electorate has not significantly altered American voting patterns as the suffragists predicted it would.[f] But it would not be correct for that reason to deny that an enormous change took place with the enactment of the Nineteenth Amendment. Even those many suffragists who wanted the vote primarily to enact reforms became suffragists partly because of the intense shame they felt at being thought

f. Kraditor was writing in 1965. Beginning in the 1980s political analysts have sometimes observed a "gender gap," consisting of somewhat greater support for Democrats by women and Republicans by men.

unfit to help govern their country. When they acquired that right they felt a new pride in American democracy and a new respect for themselves.[g]

4. The Reenfranchisement of African Americans in the South

In 1910, when racial segregation and disfranchisement of blacks were firmly established in the South and when belief in racial equality was at a low point throughout the nation, blacks and whites who retained a commitment to civil rights formed the National Association for the Advancement of Colored People. Reenfranchisement was one of the NAACP's major goals, and litigation was one of its major weapons.

The NAACP's most important litigation campaign relating to voting rights was a sustained attack on the white primary. The key victory, in *Smith v. Allwright*, 321 U.S. 649 (1944), was largely responsible for an increase in black registration in the South from an estimated 250,000 in 1940, to as many as 775,000 in 1947.

A second disfranchisement device, the poll tax, was vulnerable to political attack because it prevented some whites as well as blacks from voting and was sometimes associated with corrupt political machines, which would pay the poll tax for voters expected to be reliable machine supporters. The poll tax was repealed in North Carolina in 1920, and in five other states, Florida, Georgia, Louisiana, South Carolina, and Tennessee, between 1937 and the mid-1950s.

In addition to attacks on legal impediments to registering, action to encourage registration of blacks began in earnest after World War II. In Mississippi, returning African American veterans led registration efforts, and although these did not achieve great numerical success, Mississippi's discriminatory practices received nationwide exposure during a Senate investigation into the Democratic senatorial primary of 1946. The NAACP and a variety of voter leagues and other civil rights organizations conducted intense registration drives.

These legal and political efforts were by no means without effect. By the mid-1950s, over a million African Americans were registered in the South, representing 20 to 25 percent of the voting age black population, as compared with about 5 percent before *Smith v. Allwright*. However, the gains were concentrated in the upper South and the largest cities of the deep South. In 24 deep South black belt counties, not a single African American was registered at the end of 1952. Literacy tests and often flagrantly discriminatory administration of the registration system, supplemented by violence and economic retaliation sometimes directed against African Americans who sought to register, blocked further progress. It became the consensus among voting rights supporters that federal action would be necessary.

Voting rights legislation was passed by Congress in 1957 and 1960, and there were relatively minor voting provisions in the Civil Rights Act of 1964. The general thrust of these laws was to enable the Justice Department and private citizens to bring actions in federal courts to enforce nondiscriminatory voting procedures. It would be an exaggeration to say that these reforms were a failure. By 1964, an estimated 38 percent of southern voting age blacks were registered, a significant increase from a decade before. The 1957 and 1960 civil rights laws contributed to this progress, which also was prompted by intensified registration drives conduct-

g. Aileen S. Kraditor, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890–1920 263–64 (1965).

ed by the NAACP and newer organizations such as the Student Non-violent Coordinating Committee, the Congress of Racial Equality, and the Southern Christian Leadership Conference. Still, the laws that had been passed were not sufficient to bring about equal access to the ballot box throughout the South. The key flaw was that the burden of initiating litigation was on the Justice Department or on voting rights proponents. Case-by-case litigation was slow and costly.

Events in Selma, Alabama, in 1965, led the voting rights issue to a climax. Martin Luther King, who had recently been awarded the Nobel Peace Prize, led a series of voting rights demonstrations in Selma. 2,000 demonstrators, including King, were arrested. King later met with President Lyndon Johnson, who agreed to seek legislation prohibiting literacy tests and eliminating local officials' discretion by imposing federal registrars where necessary. On March 7, 1965, demonstrators marching from Selma to Montgomery were beaten by state troopers and county police. A week later, in a dramatic address to Congress, President Johnson employed the civil rights slogan, "We shall overcome," in demanding strong voting rights legislation. In August, he was able to sign the Voting Rights Act of 1965 into law.[h]

Sections 2 and 3 of the Act were permanent additions to law and generally applicable. Section 2 essentially restated the Fifteenth Amendment, barring states and localities from employing voting mechanisms that would deny or abridge on account of race or color the right of American citizens to vote. Section 3 further strengthened the remedies in suits brought by the Justice Department to enforce the Fifteenth Amendment. Although Section 2 was later to become, in an amended form, a key provision of the Act, in 1965 Sections 2 and 3 were regarded as relatively unimportant.

The provisions that were dramatically new and that would make the Fifteenth Amendment a reality were in Sections 4 through 9, which were to be in effect only for five years and were applicable only in states or localities that in 1964 used a literacy or other test as a condition for registering or voting and in which less than half the voting age population voted in the 1964 presidential election. As a practical matter, the areas "covered" by the Act were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and large parts of North Carolina.

Section 4 of the act prohibited the use of literacy tests or other tests or devices in covered areas. Sections 6 through 8 authorized the federal government, under specified circumstances but without the need for judicial proceedings, to appoint federal registrars and election observers, to assure nondiscriminatory election administration. To prevent states from devising new means of disfranchisement, Section 5 required covered states and localities to submit changes in "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" to either the attorney general or to the U.S. District Court for the District of Columbia for "preclearance." No such change could be implemented without preclearance, but if preclearance were denied by the attorney general, it could be sought judicially.

The Voting Rights Act proved to be one of the most successful civil rights measures in American history. In the words of one leading student of the Act:

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h. 42 U.S.C. § 1973 et seq. Provisions of the Voting Rights Act are commonly referred to by the Act's internal section numbers rather than by their codification in the United States Code, and that practice will be followed henceforth in this volume.

> In Mississippi, that stronghold within a stronghold, black voter registration increased from 6.7 percent before the act to 59.8 in 1967. The act simply overwhelmed the major bulwarks of the disfranchising system. In the seven states originally covered, black registration increased from 29.3 percent in March 1965 to 56.6 percent in 1971–72; the gap between black and white registration rates narrowed from 44.1 percentage points to 11.2.[i]

The great impact that reenfranchisement of African Americans has had on southern politics is manifested in many ways. One of the most dramatic is the change in the way in which southern politicians seek electoral support. A well known example is George Wallace, who in the 1960s had been a national symbol of racial segregation, but who in 1982 was elected governor of Alabama only because his changed attitudes permitted him to carry the black vote by an overwhelming majority against a Republican opponent.

The fact that the major provisions of the Act were temporary has turned out to be an advantage to proponents of minority voting rights rather than a hindrance, for each time the Act has been scheduled to expire it has not only been renewed, but strengthening or broadening amendments have been added. For example, in 1970, the coverage formula was updated to refer to the 1968 rather than the 1964 presidential election, thereby considerably expanding the covered areas. In addition, the 1970 amendments made the ban on literacy tests nationwide for a five-year period.

The Act was again renewed and amended in 1975. The nationwide ban on literacy tests was made permanent, and plaintiffs were given new advantages in litigation brought under the Act, including the possibility of being awarded attorneys' fees. The most important of the 1975 amendments extended the protection of the Act beyond racial minorities to specified language minorities—Asian Americans, Native Americans, Alaskan natives, and persons of Spanish heritage. Concomitantly, coverage was extended to three new states, Alaska, Arizona, and Texas, and portions of many other states around the country.

The most recent extension and amendment of the Voting Rights Act occurred in 1982.[j] We shall consider the 1982 amendments in Chapter 5.

5. Additional Extensions of the Franchise

The elimination of property qualifications and of racial and gender discrimination have been the most important extensions of the franchise in American history, but by no means the only ones. A few additional ones are worthy of brief consideration.

Age: Until 1970, most states set the minimum voting age at 21. The 1970 amendments to the Voting Rights Act prohibited states from setting a minimum voting age above 18. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), four justices believed Congress had no power under the Constitution to set a voting age, but four justices believed Congress was acting within its power to enforce the Four-

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i. Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING 7, 21 (1992).

j. The coverage of one portion of the Act, requiring bilingual voting assistance in specified areas, was expanded in 1992 and extended to the year 2007, the same year the other major portions of the Act are scheduled to expire.

teenth Amendment. The remaining member of the Court, Justice Black, believed Congress had the power to set the voting age for federal elections but not state and local elections. This was a very reasonable interpretation of the Constitution, so long as one was willing to disregard the actual constitutional text, which says in Article I, § 2 and in the Seventeenth Amendment that the qualifications for electors in congressional elections are to be the same as the qualifications for electors for the most numerous branch of the state legislature. Despite this minor difficulty, Justice Black's view prevailed, because there were five justices who believed Congress could set the voting age in federal elections and there were five who believed Congress could not set the voting age for state and local elections. The anomaly was eliminated in 1971 by adoption of the 26th Amendment, which prohibits a state from setting a voting age above 18.

Durational residency: Prior to 1972, states commonly denied the right to vote to persons who had recently moved into the state. Typically, a residency period of one year was required. Because of the high rate of transiency in the United States, lengthy durational residency requirements prevented significant numbers of people from voting. However, the Supreme Court struck down a Tennessee requirement of one year's residency in the state and three months' residency in the county, observing that "30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud." *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972). Despite this statement, the next year the Court upheld Arizona's 50-day durational residence requirement, *Marston v. Lewis*, 410 U.S. 679 (1973), and Georgia's 50-day pre-election cut-off for registering to vote, *Burns v. Fortson*, 410 U.S. 686 (1973).

The registration cut-off is distinct from, though related to, the durational residence requirement. Long-time residents of the state who satisfy the durational residence requirement will be barred from voting if they miss the registration cut-off. The difference between a 50-day and a 30-day residency requirement is not particularly great, because it affects only people who move into the jurisdiction within a twenty-day period. The same 20-day difference in the registration cut-off may have a much more substantial effect on turnout, because the closer to the election, the more likely people are to have developed an interest in the campaign that generates an incentive to register.

Marston and *Burns* notwithstanding, nearly all states have 30-day residency requirements and registration cut-offs or less. An important reason for this near-uniformity is that Section 202 of the Voting Rights Act, added in 1970, sets a maximum 30-day residence and registration period for voting in presidential elections. States that might otherwise prefer longer than a 30-day period no doubt would find it more trouble than it is worth to retain one deadline for presidential registration and another for all other elections. Section 202 also requires states to provide absentee ballots for presidential voting to voters who will be out of the state on election day, and it permits voters who move during the thirty days before a presidential election to vote for president in their old state of residence.

Notes And Questions

1. *Bibliographical Note*: An excellent overview of the history of the franchise in America is provided in J. Morgan Kousser, *Suffrage*, in 3 ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 1236 (Jack P. Greene, ed., 1984). The above

account has drawn primarily on Kousser's essay and on the following sources: Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING 7–51 (Bernard Grofman and Chandler Davidson, eds., 1992); William Gillette, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965); J. Morgan Kousser, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 (1974); Aileen S. Kraditor, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890–1920 (1965); Steven F. Lawson, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969 (1976); and Chilton Williamson, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760–1860 (1960).

2. In *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), the Supreme Court made a celebrated statement regarding its function of reviewing the constitutionality of state and federal laws, especially under broadly worded constitutional guarantees such as "due process of law" and "equal protection of the laws." The Court explained that ordinarily, legislatures would be given broad leeway to enact laws deemed to be in the public interest. Legislatures were more likely than courts to be aware of the varied consequences of legislative policies, and interest groups were presumably capable of defending themselves against unjustifiably harsh policies by exercising their political rights. In the famous footnote 4, however, the Court mentioned several possible exceptions to this generally deferential approach, one of which was "whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation [might] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

Surely the most basic process that might be used by a group seeking repeal of undesirable legislation is their right to vote. As you contemplate the history of the suffrage reviewed above, how prominent a role has the Supreme Court played in protecting this most fundamental of political liberties? Has the Court demonstrated that it is more consistently able and willing to protect the right to vote than Congress and the state legislatures, against whom footnote 4 suggests groups may need protection? Bear these jurisprudential questions in mind as you work your way through the diverse legal and policy issues regarding political processes that are raised in this book. Are the ramifications of policies adopted on issues such as legislative districting or campaign finance any less complex than on issues such as taxation or economic regulation, as to which *Carolene Products* suggests the Court should be more deferential? Does the Court's review of policies affecting the political process consistently enhance political liberty and the equal opportunity of individuals and groups to influence pubic policy? Are there additional considerations that might strengthen or weaken the case for activist judicial review on political process issues?

For a theoretical discussion of some of these questions, see Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUMBIA LAW REVIEW 1326 (1994).

3. This section has dealt with the broadening of categories of people who are generally eligible to vote. It is worth noticing, in passing, that the scope of the right to vote also has expanded enormously. When the Constitution was adopted, only one chamber—the House of Representatives—of one of the three branches

of government was subject to direct popular control. By 1800, the selection of electors for president and vice-president became, in reality, a process of popular election in most states. In 1913, the Seventeenth Amendment made the Senate subject to popular elections as well.

State governments may have been more democratically controlled from the start than the federal government, but the domain of popular elections has expanded even further at the state level. All state legislative chambers are chosen in direct elections, as are governors and, in most states, other executive officials such as attorneys general and treasurers. In many states, judges are elected. In 1818, Connecticut adopted a constitution providing that future constitutional amendments would be subject to popular approval. Today, every state but Delaware subjects constitutional amendments to an election, and most states submit bond measures or other types of special legislation to popular approval as well. Since early in the twentieth century, about half the states have employed the initiative and referendum devices to permit a vote of the people on particular legislative proposals.

Perhaps it is in order to paraphrase a television commercial that some older readers may recall: Are we voting more now, and enjoying it less?

B. Should Aliens Vote?

Skafte v. Rorex

191 Colo. 399, 553 P.2d 830 (1976), appeal dismissed, 430 U.S. 961 (1977).

PRINGLE, Chief Justice.

[Appellant Skafte, a permanent resident alien, was denied the right to register to vote in school elections and then challenged the constitutionality of a Colorado statute permitting only United States citizens to vote. The District Court ruled that the statute was valid, and the Colorado Supreme Court affirmed on the grounds stated in this opinion.]

I.

The appellant asserts that the statutes prohibiting permanent resident aliens from voting in school elections violate the Equal Protection Clause.

A.

At the outset, the registrar contends that the Equal Protection Clause has no application to the issue in this case. For this proposition, she relies on section 2 of the Fourteenth Amendment. Section 2 provides, in part:

> [W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, *and citizens of the United States*, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which

> the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. [Emphasis supplied.]

The registrar argues that section 2 makes the Equal Protection Clause of the Fourteenth Amendment inapplicable to this case, since the specific wording of the section shows that those adopting the Fourteenth Amendment considered citizenship a valid classification in legislation dealing with the franchise. We do not agree with this contention.

Local school elections are not contained in the types of elections expressly listed in section 2. Moreover, the implicit sanction of a citizenship requirement contained in section 2 for the elections there listed does not warrant a conclusion that the Equal Protection Clause is inapplicable in the instant case. Indeed, the United States Supreme Court has rejected the general proposition that section 2 was intended to supplant the Equal Protection Clause in the area of voting rights. *Richardson v. Ramirez*, 418 U.S. 24 (1974); *Reynolds v. Sims*, 377 U.S. 533 (1964).

Nevertheless, we do believe that section 2 is helpful in deciding the constitutional questions raised in this appeal. The section demonstrates, as an historical matter, that the requirement of citizenship to exercise the franchise was assumed to be a valid one at the time the Fourteenth Amendment was adopted. Hence, in deciding the constitutional issues in this case, we are mindful of the language of section 2.

B.

The appellant asserts that the alienage classification created here requires strict judicial scrutiny. The United States Supreme Court has consistently used language suggesting that citizenship with respect to the franchise is not a suspect classification and that therefore the compelling interest test does not apply. See *Hill v. Stone*, 421 U.S. 289 (1975); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969).

C.

We hold that the state's citizenship requirements for a school district election do not contravene the Equal Protection Clause of the Fourteenth Amendment. The state has a rational interest in limiting participation in government to those persons within the political community. Aliens are not a part of the political community.

The United States Supreme Court has recognized a state's valid interest in establishing a government and in limiting participation in that government to those within the concept of a political community. *Sugarman*, 413 U.S. at 642. The Supreme Court has noted that "alienage itself is a factor that reasonably could be employed in defining 'political community.'" *Sugarman*, *supra*, at 649. Indeed, the Court has further stated that "implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights." *Sugarman*, *supra*, at 649.

The appellant contends that this justification satisfies the Equal Protection requirement only as it pertains to voting in *general* elections. He contends, however, that a school election is a "special interest" election, and therefore the proposition that a citizenship requirement is valid for general elections does not apply.

We believe that a school election is an election which falls within the class of cases prohibiting aliens from voting contemplated by the Supreme Court in *Sug-*

arman. We point out that school districts are governmental entities.... Further, in *Kramer v. Union Free School District No. 15, supra*, the Supreme Court indicated that school elections are elections involving participation by the political community.

Moreover, voting in school elections involves participation in the decision making process of the polity, a factor which indicates the "general" nature of such elections. It is in fact a determination of participation or not in the government policymaking process which often has been crucial in deciding cases contesting alienage classifications. The Supreme Court in *In Re Griffiths*, 413 U.S. 717 (1973), held unconstitutional a requirement that bar examinees be citizens. The court noted that the acts of a lawyer "hardly involve matters of state policy" and that the status of holding a license to practice law does not "place one so close to the core of the political process as to make him a formulator of government policy." 413 U.S. at 729 (footnote omitted).

The administration of school districts, however, does involve... matters of "state policy" and entails the formulation of such policy. Therefore, voting in school elections constitutes participation in the government policy-making process.

[The court stated that the denial of suffrage to resident aliens "is properly tailored to the state's interest," citing an earlier decision upholding the exclusion of aliens from juries on the ground that aliens as a group did not owe allegiance to the United States. Although many aliens do in fact hold such allegiance, the court said there was no test short of citizenship that would distinguish those who did from those who did not.]

Thus, we conclude that the State has shown a reasonable basis justifying the classification here challenged. Consequently, the citizenship requirement in school elections does not deprive the appellant of equal protection of the laws.

[In Part II, the court rejected appellant's argument that the prohibition against voting by resident aliens created an unconstitutional "conclusive presumption." In Part III, it rejected the assertion that the prohibition was an interference with Congress' power to regulate immigration and naturalization.]

The judgment is affirmed.

Notes And Questions

1. *The Equal Protection Clause:* In a number of the cases in this book, persons claim that an election regulation, such as the denial of the right to vote challenged by Skafte, violates the Equal Protection Clause. That clause appears in Section 1 of the Fourteenth Amendment, which reads in part as follows:

> 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.* [Emphasis added.]

There is no occasion here to consider in depth the intricacies of equal protection doctrine, but the following very simplified summary should assist persons who have never studied constitutional law to understand the equal protection cases contained in this book.

Although the phrase "equal protection of the laws" might seem to suggest that the clause is more concerned with the enforcement of laws than with their content, the overwhelming majority of controversies under the Equal Protection Clause arise because of attacks on classifications that are explicitly or implicitly written into statutes. However, as the Supreme Court has often recognized, almost all legislation classifies people and thus treats them differently. Persons who engage in certain economic transactions are subjected to different forms of taxation and regulation than persons who engage in different types of transactions. Persons convicted of engaging in certain forms of conduct are punished by the criminal law while others who refrain from such conduct are not. And so on.

Because the Supreme Court has not wanted the Equal Protection Clause to be a means of voiding virtually all legislation, it has said that only "invidious" distinctions are prohibited. Since World War II, the Court's determination of what distinctions are invidious has tended to depend on the nature of the classification and on the nature of the benefit or penalty that is contingent on the classification.

Certain types of classifications are regarded as "suspect." Classifications drawn according to race or national origin are examples. When a law draws a suspect classification, the Court will subject it to "strict scrutiny" under the Equal Protection Clause. It will be struck down unless the law is shown to be "necessary" to promote a "compelling state interest." Furthermore, even a law that is necessary for such a purpose will be struck down unless it is "narrowly tailored" to avoid an unnecessary burden on the disfavored class. (Strict scrutiny that requires "necessity," a "compelling state interest," and "narrow tailoring" is not limited to equal protection cases. In this book we shall see essentially the same concept applied in many cases arising under the First Amendment.)

In cases such as *Sugarman*, cited in *Skafte*, the Court has treated most laws discriminating against aliens as "suspect," but has made an exception for laws restricting the ability of non-citizens to participate in government. It was because of this exception that the denial of suffrage to non-citizens was not regarded as a suspect classification in *Skafte*.

Even if the classification drawn by a statute is not suspect, it will still be subject to strict scrutiny if the classification burdens or denies a "fundamental right" for some people while not burdening or denying the rights of others. As we shall see in Chapter 3, one of the fundamental rights that has triggered strict scrutiny under the Equal Protection Clause has been the right to vote.

If the classification being challenged is not suspect and does not burden a fundamental right, then it will not be subjected to strict scrutiny. Instead, it will be upheld so long as it has a rational basis.[k] This is usually a standard that statutes can meet, since the Court will accept any legitimate interest the statute may be intended to further. The Court will not even require a showing that a statute actually accomplishes its purposes, so long as the legislature could have believed it would. Although there are exceptions, some of which we shall encounter in this

k. In some cases the Court engages in "intermediate scrutiny," which is not as severe as "strict scrutiny" but not as lax as the "rational basis" test. For example, different statutory treatment of men and women receives intermediate scrutiny. *See Craig v. Boren*, 429 U.S. 190 (1976). By and large, the equal protection cases contained in this book do not raise questions of intermediate scrutiny or other inroads that have occurred in the last couple of decades on the "two-tier" system of equal protection review that is described in the text.

book, statutes that are subjected to strict scrutiny usually are struck down, and those that are tested for a rational basis usually are upheld.

2. In *Skafte*, the court says that the citizenship qualification for voting is not a suspect classification, a conclusion that is consistent with the Supreme Court's alienage decisions just referred to in the preceding note. However, should the court have applied strict scrutiny on the ground that even if the basis of classification is not suspect, the right being granted to some (citizens) and denied to others (resident aliens) is the right to vote, which the Supreme Court has treated as a "fundamental right" for equal protection purposes? For a strong argument to this effect, see Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICHIGAN LAW REVIEW 1092, 1106–09 (1977).

3. What state interests might justify the denial of the right to vote to aliens? Rosberg, *supra*, considers a number of possible state interests, including that aliens may have less of a stake in the outcome of elections than citizens; that aliens are likely to lack the information and understanding of politics needed to vote intelligently; and that aliens may have less of a commitment to the well-being of the United States and its states and localities than citizens. Rosberg argues that none of these alleged interests holds much water, though he acknowledges that some of them may be plausible enough to pass a rational basis test.

Rosberg's unstated assumption is that denial of suffrage to aliens must serve some instrumental purpose of the state. Unquestionably, the right to vote serves instrumental purposes for individuals and groups, namely protecting their interests that are affected by public policy decisions. If that is the primary reason for the importance of the right to vote, then the denial of the suffrage to aliens in the absence of a strong instrumental purpose served by that denial may be quite troubling. In *Skafte*, the court justifies the denial as a limitation of the vote to "persons within the political community." Is this an instrumental purpose? Is the right to vote important not only as a means of protecting the rights and interests of individuals and groups but as a means for a community as a whole to define and govern itself? If so, is it legitimate for the community to protect its own self-definition by determining which individuals will be deemed members of the community and therefore entitled to participate in its self-government? These general questions are discussed in Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLORIDA LAW REVIEW 443 (1989).

Sanford Levinson, *Suffrage and Community: Who Should Vote?*, 41 FLORIDA LAW REVIEW 545, 557 (1989), doubts whether denial of the vote to noncitizens can be justified under a conception of voting either as an instrumental means of protecting individual interests or as an expression of the "shared values" embodied in a community:

> If we asked persons only five yes-or-no questions to figure out their basic values, would citizenship be one of them? If the answer is "no," because a person's citizenship conveys too little relevant information, then we might ask why something as important as the vote is based on citizenship, even within a communalist perspective.
>
> [A] conception of citizenship as a surrogate for shared interests is a fatally underinclusive category because the universe of people whose interests are vitally affected by any given election is far larger than the universe of those who are allowed to participate... If we view citizenship

> as a surrogate for shared values, then it may be grossly overinclusive: the set of people sharing the (proper) values may be far smaller than the set of people designated as citizens. Noncitizens also may share what are thought to be the requisite values.

4. According to Rosberg, *supra*, 75 MICHIGAN LAW REVIEW at 1094–1100, alien voting was fairly widespread at the end of the eighteenth century, but in the first half of the nineteenth there was a trend toward making citizenship a requirement for voting. This trend was reversed after the Civil War, and by the end of the nineteenth century, about half the states had had some experience with alien suffrage. Starting in the 1890s, a reaction set in, which received additional impetus from the assassination of President McKinley in 1901 by an immigrant and from World War I. The last state to repeal alien suffrage was Arkansas in 1926. More recently, aliens have been permitted to vote in decentralized school elections in Chicago and New York City, and several towns in Maryland have permitted aliens to vote in municipal elections.

If, as *Skafte* holds, resident aliens do not have a constitutional right to vote, is it an unconstitutional abridgement of citizens' right to vote if aliens are given the suffrage? In Germany, where immigration has been a controversial political issue, the Federal Constitutional Court has so ruled. See Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 MICHIGAN JOURNAL OF INTERNATIONAL LAW 259, 283–87 (1992). Neuman acknowledges that from a communitarian perspective a plausible case could be made that permitting aliens to vote is unconstitutional in the United States, but he concludes that American courts would be unlikely to intervene because

> Popular sovereignty in the United States has been a flexible notion, which has not restricted political power by a rigid definition of the 'People,' and certainly not by the legal category of national citizenship.

Id. at 324.

5. The authors of a recent study of political participation by Latinos have proposed an innovative form of voting by resident aliens:

> [We advocate] a modified form of the current effort to make noncitizens eligible to vote. We would add two twists. First, we would allow noncitizens to vote only for the five-year period during which they are statutorily ineligible to naturalize. Under this system, recently immigrated permanent residents would be able to obtain a five-year voter registration card.... After the five years, they would no longer be eligible for permanent resident voting privileges, but would be able to naturalize.... Although the authors of this discussion do not fully agree on whether voting should be limited to local elections (de la Garza) or should include all elections (DeSipio), we both advocate the extension of noncitizen voting privileges to local elections at a minimum.
>
> The second twist is that naturalization applicants who can show that they voted in most primary and general elections during the five-year period of noncitizen voter registration would be exempt from the naturalization exam. The exam is designed to test good citizenship through indirect measures such as knowledge of American history and civics. We pro-

> pose that voting is an equally good measure of commitment to and understanding of the American system.

Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEXAS LAW REVIEW 1479, 1522–23 (1993).

6. The *Skafte* opinion refers to *Richardson v. Ramirez*, 418 U.S. 24, 41–56 (1974), in which the Supreme Court upheld provisions of the California Constitution denying the vote to persons who had been convicted of felonies, even after they had finished their sentences and paroles. The Court relied primarily on Section 2 of the Fourteenth Amendment:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, *and citizens of the United States*, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. [Emphasis added.]

Section 2 thus imposes a sanction consisting of reduced representation in the House of Representatives upon a state that denies suffrage to its inhabitants, but specifies a number of grounds upon which suffrage may be denied that are exempt from the sanction. One of these exempt grounds for denial of suffrage is participation in rebellion or other crime. In *Richardson*, Justice Rehnquist wrote for the majority that Section 1 of the Fourteenth Amendment, which contains the Equal Protection Clause, "in dealing with voting rights as it does, could not have meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement." 418 U.S. at 55. Note that the sanction in Section 2 also is inapplicable when a state denies the franchise to noncitizens. Why did the *Skafte* court not regard *Richardson* as dispositive? Should it have? See Rosberg, *supra*, 75 MICHIGAN LAW REVIEW at 1102–04.

Richardson v. Ramirez has come in for severe criticism from some scholars. See Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1094 (2d ed. 1988); David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARVARD LAW REVIEW 293, 302–04 (1976).

Under some state constitutions, the franchise is denied to those who have been convicted of crimes of "moral turpitude." Under such a provision, should the vote be denied to an individual who has been found to be a habitual violator of the statute prohibiting drunk driving? See *Jarrard v. Clayton County Board of Registrars*, 425 S.E.2d 874 (Ga. 1993).

7. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1391, 1417–41 (1993), maintains that extending the fran-

chise to resident aliens is neither prohibited nor required by the Constitution. Doctrinally, he bases his disagreement with Rosberg's view that the vote is constitutionally required on Section 2 of the 14th Amendment and *Richardson*. He adds an additional and broader point:

> [E]ven if we follow the doctrinal somersaults required to arrive at Rosberg's position, his argument is not wholly persuasive as a description, historical or normative, of how the franchise expands in the American polity. None of the principal excluded national groups who gained access to the ballot in American history did so by way of judicial action through the Equal Protection Clause. Rather, they fought their way in through political agitation. This history encloses an important democratic logic: it is the standing citizenry, after hearing and debating appeals from the voteless, that must extend rights of political membership to disenfranchised outsiders seeking entry and equality.

Id. at 1431–32.

II. Voter Turnout and the Motor Voter Law

The proportion of Americans eligible to vote who actually *do* vote is low. You may ask, low compared to what? Low compared to other industrialized democracies, and low compared to our own experience earlier in our history. In the 1980s, the average turnout in national elections in twenty countries was as follows:[a]

Belgium	94%	Israel	79%
Austria	92%	Greece	78%
Australia	90%	Finland	74%
New Zealand	89%	United Kingdom	74%
Sweden	88%	Ireland	73%
West Germany	87%	Canada	72%
Denmark	86%	France	70%
Italy	84%	Japan	68%
Netherlands	84%	**United States**	**53%**
Norway	83%	Switzerland	49%

The United States not only ranks nineteenth of these twenty countries, but its turnout percentage is lower by a full fifteen percentage points than Japan, the eighteenth ranking country. Turnout has not always been so low in the United States. In the fifteen presidential elections from 1840 to 1896 (the peak period in American history), turnout averaged 78 percent.[b] Figure 2.1 shows that turnout declined precipitately during the period from around 1896 to 1920, that it gained some ground during the 1920s and 1930s, but that it has again declined significantly during the period since 1960.[c]

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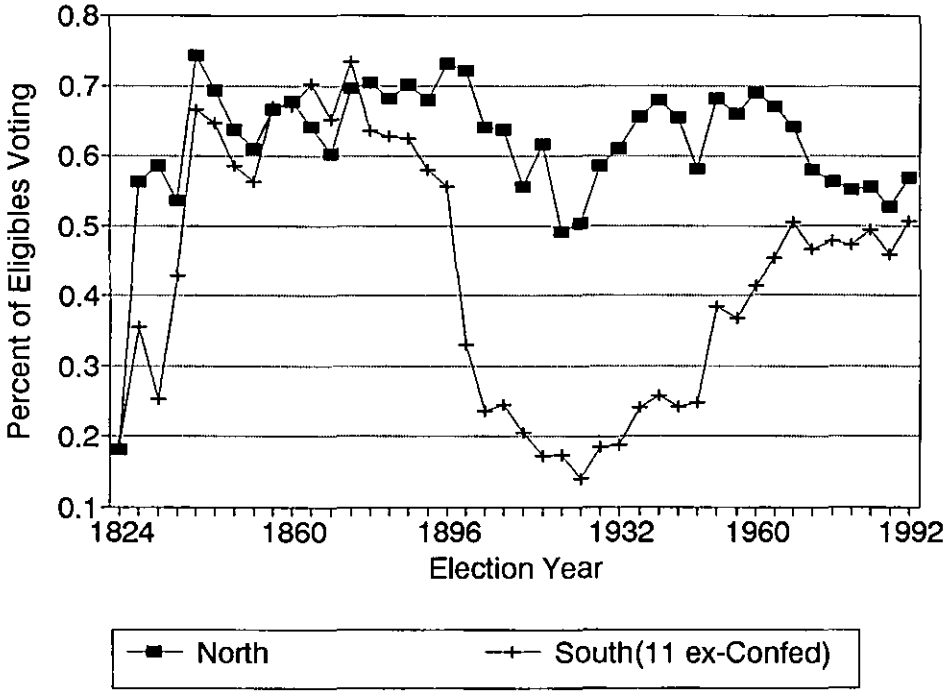
a. See Ruy A. Teixeira, THE DISAPPEARING AMERICAN VOTER 8 (1992). The elections used to calculate these average turnout percentages were presidential elections in the United States and national legislative elections in the other countries.

b. Calculated from id. at 9 (Table 1-3).

c. Figure 2.1 shows turnout separately for the 11 former Confederate states and the rest of the country, because in the former, the drastic decline around the turn of the century was caused by the disfranchisement of African-Americans and the concomitant elimination of party

Figure 2.1 Sectional Patterns of Turnout, Presidential Elections, 1824–1992.



A. Civic Responsibility and Rational Voters

When one recalls the long struggle outlined earlier in this chapter to extend the suffrage to increased segments of the American population, and when one considers the importance placed on the right to vote in the American civic culture, one may well be puzzled why so many citizens fail to take advantage of such a central part of their birthright. In a period when government's role in society is more far-reaching than ever before, why do not all citizens seek a voice in the decisions that affect their own lives? If people are dissatisfied with the performance of government, why do they abandon their best opportunity to enforce improvement? Given the elimination of poll taxes, how can so many people not find voting worth the minimal expenditure of time and effort required?

Such questions are common enough in discussions of nonvoting in the news media and other civic forums. Nevertheless, academic theorists have devoted vast amounts of time and energy to the opposite question—why, they ask, do citizens ever bother to vote at all? This question is difficult to answer if one starts with the

competition, which discouraged many whites from voting. Turnout in the South remained low until after World War II, when blacks began to be reenfranchised and when competition between Democrats and Republicans reemerged. Separation of southern and northern turnout figures in this manner shows the extent of the recent turnout decline, which would be masked by the special developments in the South if only national figures were considered.

Figure 2.1 was prepared for this volume by J. Morgan Kousser, whose assistance is gratefully acknowledged.

assumption that underlies a contemporary branch of political science known as "public choice theory." Public choice theorists study politics using analytic techniques usually associated with economics, and they assume that an individual's political behavior is guided by a preexisting, consistent set of policy preferences. The closer public policy matches an individual's preferences, the higher that person's "utility" will be. Because political outcomes are uncertain, individuals take account of probabilities and act to maximize their "expected utility."

Public choice theorists do not deny that the issues at stake in elections may have large effects on the utility of eligible voters. Whether one will have a job, the taxes one will have to pay, the quality of the air one will breathe, and whether there will be war or peace are among the vital issues that may be at stake in an election. Why, then, are public choice theorists puzzled that many people vote in elections? If the reason you vote is to influence policy in the direction you favor, then it is not enough that you perceive a significant difference in your utility depending on the outcome of the election. This difference must be multiplied by the probability of your single vote determining the result of the election.[d]

Except in the case of local elections in very small jurisdictions, the probability that an election will be decided by a single vote (which for simplicity we shall assume is decisive if it either makes or breaks a tie) is so incredibly small that for all practical purposes it may be regarded as zero. For example, when you go to vote for president, the chance that you will be killed in an accident on the way to the polling place is probably greater than the probability that your vote will decide the election. No matter how large you may regard the stakes in an election, your "expected utility" from voting is virtually zero, since your benefit from the electoral outcome that you favor must be multiplied by a probability of virtually zero. Even if the costs of voting in time and effort are modest, they are above zero. Accordingly, from the perspective of public choice theory, it appears to be irrational for you (or anyone else) to vote. To solve this "rational voter" problem, public choice theorists usually assume that voters vote because they receive benefits from doing so that do not depend on affecting the outcome.[e]

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d. Probability is conventionally expressed as a number between 0 and 1. If you are certain that your vote will be decisive the probability will be 1, and your expected utility from voting will be exactly equal to your difference in utility between the outcome you favor and the one you oppose, because multiplying that utility by 1 does not change it. If you are certain that your vote will not be decisive, then the expected utility from voting is 0 no matter how much you care about the outcome, because any quantity multiplied by 0 is 0. If there is a 50–50 chance that your vote will be decisive, the probability is .5 and your expected utility from voting will be half the amount of your enhanced utility if the side you favor wins.

e. The seminal discussion of the rational voter problem is Anthony Downs, AN ECONOMIC THEORY OF DEMOCRACY 260–76 (1957). For a sampling of the diverse approaches to the problem, see Brian Barry, SOCIOLOGISTS, ECONOMISTS, AND DEMOCRACY (1978); John A. Ferejohn & Morris P. Fiorina, *The Paradox of Not Voting: A Decision Theoretic Analysis*, 68 AMERICAN POLITICAL SCIENCE REVIEW 525 (1974); Peter E. Meehl, *The Selfish Voter Paradox and the Thrown-Away Vote Argument*, 71 AMERICAN POLITICAL SCIENCE REVIEW 11 (1977); George A. Quattrone & Amos Tversky, *Causal Versus Diagnostic Contingencies: On Self-Deception and on the Voter's Illusion*, 46 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 237 (1984); Carole J. Uhlaner, *Rational Turnout: The Neglected Role of Groups*, 33 AMERICAN JOURNAL OF POLITICAL SCIENCE 390 (1989); Raymond E. Wolfinger, *The Rational Citizen Faces Election Day; or, What Rational Choice Theorists Don't Tell You About American Elections*, in ELECTIONS AT HOME AND ABROAD: ESSAYS IN HONOR OF WARREN E. MILLER 71 (M. Kent Jennings & Thomas E. Mann, eds., 1994). Uhlaner's article provides sufficient ref-

The rational voter problem is a specific application of the free rider problem described in Chapter 1 and should be deeply troubling only if one has an abiding commitment to the underlying assumption that political behavior is motivated solely by rational calculations to maximize expected utility. Undoubtedly, a considerable portion of human behavior is "rational" in this sense. On the other hand, people often act in a self-sacrificing manner, as they do, for example, if they adhere to Immanuel Kant's "categorical imperative," which can be interpreted precisely as an injunction *not* to act as a free rider. Furthermore, empirical psychologists have discovered in the last quarter century that people assess probabilities in ways that depart widely from the assumptions of public choice theorists.[f]

On the other hand, even without subscribing heart and soul to the dogmas of rational choice theory, one can recognize the factors that may dissuade citizens in a democracy from political participation. In the 1830s, long before the rise of rational choice theory, one of the most astute observers of American democracy, Alexis de Tocqueville, noted some of these factors:

> As the men who inhabit democratic countries have no superiors, no inferiors, and no habitual or necessary partners in their undertakings, they readily fall back upon themselves and consider themselves as beings apart.... Hence such men can never, without an effort, tear themselves from their private affairs to engage in public business; their natural bias leads them to abandon the latter to the sole visible and permanent representative of the interests of the community; that is to say, to the state. Not only are they naturally wanting in a taste for public business, but they have frequently no time to attend to it. Private life in democratic times is so busy, so excited, so full of wishes and of work, that hardly any energy or leisure remains to each individual for public life. I am the last man to contend that these propensities are unconquerable, since my chief object in writing this book has been to combat them. I maintain only that at the present day a secret power is fostering them in the human heart, and that if they are not checked, they will wholly overgrow it.[g]

What conclusions can we draw from this brief discussion? The conventional perspective of the civic forum that expects people to welcome the opportunity to participate in public policymaking suggests that voter turnout will be higher to the extent citizens perceive that they have a civic obligation to vote and believe that the outcome of an election will matter to them and to the community generally. The public choice perspective predicts that individuals will not vote because the costs of doing so outweigh the expected benefit. If we accept this insight without applying it dogmatically, we may expect that the relative costliness of voting in time and effort will affect turnout. The temptation to take a free ride is likely

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erences to get students wishing to spend the rest of their lives studying this interesting problem off to a good start.

f. For an introduction to these findings, see JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al., eds., 1982). For one effort to reconcile public choice theory with the empirical findings of psychology, see Bryan D. Jones, RECONCEIVING DECISION-MAKING IN DEMOCRATIC POLITICS: ATTENTION, CHOICE, AND PUBLIC POLICY (1994). Jones' book contains extensive references to relevant research.

g. 2 Alexis de Tocqueville, DEMOCRACY IN AMERICA 310 (Phillips Bradley, ed., 1945).

to increase as the cost of voting becomes less trivial. In general, empirical research bears out all these expectations, but with a few surprising twists.

B. Who Votes?

It has long been believed that in twentieth-century America, persons of relatively high socioeconomic status (SES)—greater than average wealth and education, higher occupational status—were more likely to vote than persons of lower SES. Whites, who on average enjoy higher SES than blacks and Latinos, are more likely to vote than minority group members. Beginning in the early 1970s, data collected by the Census Bureau have made it possible to refine our understanding of demographic influences on voter turnout.

In a landmark study using the new census data, Raymond E. Wolfinger and Steven J. Rosenstone discovered that of the socioeconomic factors, level of education has by far the greatest influence on propensity to vote.[h] Once education and other relevant factors are controlled, the effect of income is relatively small and almost entirely confined to those at the lowest income levels. That is, all else being equal, a person whose income is below the poverty level is somewhat less likely to vote than a person whose income is above the poverty level.[i] However, differences in income above the poverty level have almost no effect on the likelihood of voting. Wolfinger and Rosenstone did find some connection between voting and occupation, but it was not a straightforward correlation between voting and occupational status. Rather, persons in certain occupations—particularly farmers and people with lower status white-collar jobs such as clerical and sales positions—were especially likely to vote, all else being equal.[j]

Aside from SES, two demographic factors that have a significant effect on voting include age (likelihood of voting increases with age, and a person between 18 and 24 is 28 percent less likely to vote than a 55-year-old)[k] and mobility (persons who have recently moved are less likely to vote).[l]

Turnout among white anglos has been consistently higher than among racial and ethnic minorities. Between blacks and whites, the gap in 1988 was under eight percentage points, about five percentage points less than in 1964.[m] Though the turnout rate declined among blacks during this period, it declined even more among whites. Not surprisingly, these general trends mask differences between

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h. Raymond E. Wolfinger & Steven J. Rosenstone, WHO VOTES? 23–25 (1980).

i. Id. at 25–26.

j. Id. at 28–33. Wolfinger & Rosenstone also found that after controlling for other factors, turnout among farm workers was 6 percentage points lower than what would be expected. Id. at 34.

k. Id. at 50.

l. Id. at 52–53. Wolfinger & Rosenstone had found this factor particularly strong in midterm elections. Moving is shown to have a substantial negative effect on the probability of voting in presidential elections in Peverill Squire, Raymond E. Wolfinger & David P. Glass, *Residential Mobility and Voter Turnout*, 81 AMERICAN POLITICAL SCIENCE REVIEW 45 (1987). Since there is no reason to expect a person's interest in a presidential election to be affected by moving, Squire et al. conclude that the effect is caused by the need to re-register.

m. Data in this paragraph are taken from Teixeira, *supra*, 70–74. Not too much stock should be put in precise percentages, for the data are subject to a variety of technical problems and vary depending on which survey is used.

North and South during the period that the Voting Rights Act was enacted and took hold. In the South, the gap decreased from 15.5 percentage points in 1964 to 8.4 points in 1988, as black turnout increased by 4.0 points and white turnout declined by a modest (compared to the North) 3.1 points. In the rest of the country, the gap was less than three points in 1964. Both black and white turnout decreased substantially in subsequent elections, and in 1988 the gap was about five points. The gap had fluctuated considerably in the intervening period. Separate data for Latino citizens have been collected only since 1976. Nationwide, the turnout rate for Latino citizens of the United States has trailed that of blacks by about six points.[n]

Though racial minorities have voted at rates below that of the white anglo majority, race does not appear to have been an *independent* cause of low turnout. To the contrary, Wolfinger and Rosenstone found that a black was slightly *more* likely to vote than a white with similar education and other demographic characteristics.[o] The same was true of Mexican-Americans. Puerto Ricans, on the other hand, were seven percent less likely to vote than other citizens, after controlling for other variables. Wolfinger and Rosenstone explained this difference between Mexican-Americans and Puerto Ricans on the ground that the former have to wait at least five years after arriving in the United States before they are eligible for citizenship, during which time they may acquire skills, information, and acculturation that make them more likely to vote, whereas Puerto Ricans are eligible to vote as soon as they arrive on the mainland. They go immediately into the denominator that forms the turnout rate, though some may regard themselves as merely temporary visitors to the mainland, and others may be less likely to vote until they have lived here at least a few years.[p] In sum, racial and ethnic minorities vote at lower rates than white anglos, but the reason appears to be that racial minorities on average have received less education, are younger, and share other demographic attributes associated with nonvoting, and not that race is an independent factor lowering the probability of voting.

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n. For more detailed discussion of Latino voting rates, see Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEXAS LAW REVIEW 1479 (1993).

o. Wolfinger & Rosenstone, *supra*, at 90. In recent elections, the greater propensity of blacks to vote, demographic variables held constant, has become more pronounced. This was particularly true in 1984, which could have been the result of heightened mobilization activity among blacks in that election and of Walter Mondale being a particularly popular candidate among blacks, while Ronald Reagan was a particularly unpopular candidate. See Jan E. Leighley & Jonathan Nagler, *Individual and Systemic Influences on Turnout: Who Votes? 1984*, 54 JOURNAL OF POLITICS 718, 726 (1992). Studies of turnout in the 1950s and 1960s found that African Americans were especially likely to vote if they were both politically knowledgeable and relatively negative in their view of the political system. This contrasts with whites, whose propensity to vote is not associated with such political alienation. A study of more recent elections finds that this difference between blacks and whites has disappeared. However, the authors found that African Americans are more likely to vote in areas with black big-city mayors, and they suggest that whereas in earlier times blacks were motivated to vote by the need to protect themselves within a hostile system, currently they are most likely to vote when they feel empowered within the system. See Lawrence Bobo & Franklin D. Gilliam, Jr., *Race, Sociopolitical Participation, and Black Empowerment*, in CONTROVERSIES IN VOTING BEHAVIOR, at 39 (Richard G. Niemi & Herbert F. Weisberg, eds., 3d ed., 1993).

p. See Wolfinger & Rosenstone, *supra*, at 92–93.

C. The Registration Barrier and Motor Voter

Why are young people, people who have recently moved, and people with relatively little education less likely to vote than others? Why do people in certain occupations such as farmers and lower status white collar workers vote at a higher rate than would be predicted, given their age and level of education? Wolfinger and Rosenstone assert that these and other demographic aspects of turnout are consistent with the theoretical framework sketched above, predicting that turnout will be sensitive to relatively small changes in the cost of voting, but that voters who derive satisfaction from participating in government policymaking will vote when the costs of doing so are low.

The costs of voting consist primarily of 1) the time it takes to register, together with the time it takes to learn the procedure for doing so; 2) the time it takes to become sufficiently informed of the matters appearing on the ballot; and 3) the time it takes to go to the polls and vote (or to fill out and mail an absentee ballot, if one is eligible to do so).

Some readers, especially those interested in and knowledgeable about politics, may regard these "costs" as so minor as hardly to be worth mentioning. However, two points should be borne in mind. First, as was explained above, because of the infinitesimal chance that one's vote will be decisive, even small costs will outweigh the strictly instrumental benefits from voting. Second, these costs may not seem nearly so small to persons less interested in politics and less well educated than the typical reader of this book. It is the second point, Wolfinger and Rosenstone maintain, that underlies the demographic influences on turnout.

Persons with relatively little education, Wolfinger and Rosenstone maintain, will have more difficulty finding the answers to questions like where they are supposed to register, and when. To some extent, age, and the life experiences that go with it, may provide a substitute for education in developing the ability and self-confidence to accomplish such tasks. Even young people with relatively little education may develop the pertinent skills if they are engaged in white collar work that familiarizes them with forms and bureaucratic procedures. Similarly, people who are well educated in school or in life experience are likely to have both background knowledge and practice in thinking at a level of some abstraction that makes it far easier for them to understand and retain new information about public issues and elections than for people with little education and background knowledge. This greatly reduces the effort needed to acquire the minimum information needed to cast a vote. At the same time, persons with such intellectual resources are likely to find greater satisfaction in learning and thinking about public issues, and therefore may be more susceptible to the civic satisfactions inherent in voting. Farmers, Wolfinger and Rosenstone suggest, typically are particularly dependent on government programs and have an unusually high amount of routine contact with the government officials who administer such programs. It should not be surprising, then, that for farmers the difficulty of learning about elections should be relatively low and the perceived benefit of participating in them should be high, given their age and level of education.

It follows from the Wolfinger-Rosenstone approach that one way to increase turnout would be to reduce the cost of voting. The barrier that they and many others have discussed most is the registration requirement. The United States is one of the few if not the only major democracy in the world that requires advance

registration as a prerequisite to voting without the government assuming responsibility for seeing to it that all eligible people are registered. One scholar estimates that American registration requirements may account for fourteen percentage points of the turnout gap between the United States and most other democracies.[q] If this estimate is correct, then elimination of the registration requirement or the maintenance of universal registration by the government would not by itself put the United States near the top of the list in turnout, but could be predicted to close most of the gap between the United States and other low ranking countries such as Canada, France, and Japan. Furthermore, registration requirements have not always been imposed in the United States. Most were put in place around the turn of the century, possibly for the very purpose of discouraging voting by immigrants, workers, and others who were regarded by some as too ignorant to vote, though this is a point of contention among historians.[r]

Neither elimination of registration requirements nor universal registration is likely in the foreseeable future, but easing of barriers to registration is feasible and, as we shall see, has recently become a federal policy. Though every state but North Dakota requires voters to register, states vary considerably in their registration requirements. The large number of people surveyed by the Census made it possible for Wolfinger and Rosenstone to estimate the effect of the different requirements on turnout, after controlling for demographic factors that could raise or lower turnout in different states. They concluded that the factor that by far had the greatest impact on turnout was the closing date for registration. States permitting registration up to election day or close to it enjoy higher turnout than those that require registration thirty or (in a couple of states) more days in advance. Presumably, this is because the desire to vote grows as the election nears and the campaign intensifies, to the point that some additional voters will have the incentive to take the effort to register.

Other differences in registration procedures that affect turnout, though not as much as the closing date, are whether the registration offices are open evenings or week-ends; whether the registration offices are open full-time during business hours; whether registration by mail is permitted for persons who are sick, disabled, or absent from home; and how quickly voters are "purged" from the registration lists for not voting in one or more elections. Perhaps surprisingly, the general availability of registration by mail (as opposed to the limited availability mentioned above) and the availability of "deputy registrars," private citizens who

q. G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, in CONTROVERSIES IN VOTING BEHAVIOR, *supra*, at 56, 78.

r. See Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE LAW & POLICY REVIEW 370, 380–85 (1991). Historians seeking to explain the drop in turnout in the North after 1896 disagree on how much was caused by registration laws and how much by lessened party mobilization. Party mobilization is believed to have decreased in part because after 1896, the South was safely controlled by Democrats and many areas in the North were almost as safely controlled by Republicans. Less competition might naturally lead to less mobilization. In addition, party mobilization may have been lessened because of the introduction, in approximately the same period, of the secret ballot, also referred to as the "Australian ballot." Previously, parties printed up their own ballots in a distinctive color and pre-marked, so that the fidelity of voters a party mobilized could be confirmed. Among historians who believe the introduction of registration requirements was a major cause of turnout decline, there is disagreement on the extent to which this consequence was intended.

are deputized to register voters at homes, workplaces, shopping malls, etc., do *not* appear to measurably increase turnout. Political scientists estimate that if all states had the most liberalized procedures of the sort that have been shown to make a difference (i.e., voters can register up to election day, registration offices keep regular hours including being open evenings or weekends, the sick, disabled, and absent can register by mail, and voters are not purged without checks to confirm that they have either died or moved), then national turnout might increase by about seven to nine percentage points.[s]

Findings like these have caught the attention of politicians. In 1993, Congress enacted the National Voter Registration Act, better known as the "Motor Voter" law, because it ties voter registration to applying for or renewing one's driver's license. The following excerpts contain the major provisions.

National Voter Registration Act of 1993

42 U.S.C. § 1973gg

Section 4. **National Procedures for Voter Registration for Elections for Federal Office.**

(a) IN GENERAL.—Except as provided in subsection (b), notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office—

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 5;

(2) by mail application pursuant to section 6; and

(3) by application in person—

(A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and

(B) at a Federal, State, or nongovernmental office designated under section 7.

(b) [The Act is not applicable in states that do not require registration or that permit registration at the polling place on election day.]

Section 5. **Simultaneous Application for Voter Registration and Application for Motor Vehicle Driver's License.**

(a) IN GENERAL.—(1) Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.

(2) An application for voter registration submitted under paragraph (1) shall be considered as updating any previous voter registration by the applicant....

(c) FORMS AND PROCEDURES.—(1) Each State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license.

(2) The voter registration application portion of an application for a State motor vehicle driver's license—

s. See Wolfinger & Rosenstone, *supra*, at 71–77; Teixeira, *supra*, at 107–12.

(A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));

(B) may require only the minimum amount of information necessary to—(i) prevent duplicate voter registrations; and (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(C) shall include a statement that—(i) states each eligibility requirement (including citizenship); (ii) contains an attestation that the applicant meets each such requirement; and (iii) requires the signature of the applicant, under penalty of perjury;....

(d) CHANGE OF ADDRESS.—Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.

(e) TRANSMITTAL DEADLINE.—...(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

Section 6. **Mail Registration.**

(a) FORM.—(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission...for the registration of voters in elections for Federal office....

(b) AVAILABILITY OF FORMS.—The chief State election official of a State shall make the forms described in subsection (a) available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs....

Section 7. **Voter Registration Agencies.**

(a) DESIGNATION.—(1) Each State shall designate agencies for the registration of voters in elections for Federal office.

(2) Each State shall designate as voter registration agencies

(A) all offices in the State that provide public assistance; and

(B) all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities.

(3) [In addition to the agencies required in paragraph 2, states may designate additional state and local offices and, with their agreement, federal and nongovernmental offices.]

(4) (A) At each voter registration agency, the following services shall be made available: (i) Distribution of mail voter registration application forms in accordance with paragraph (6). (ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance. (iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.

(B) If a voter registration agency designated under paragraph (2)(B) provides services to a person with a disability at the person's home,

the agency shall provide the services described in subparagraph (A) at the person's home.

(5) A person who provides service described in paragraph (4) shall not

(A) seek to influence an applicant's political preference or party registration;

(B) display any such political preference or party allegiance;

(C) make any statement to an applicant or take any action the purpose or effect of which is to discourage the applicant from registering to vote; or

(D) make any statement to an applicant or take any action the purpose or effect of which is to lead the applicant to believe that a decision to register or not to register has any bearing on the availability of services or benefits.

(6) A voter registration agency that is an office that provides service or assistance in addition to conducting voter registration shall [provide forms for registering by mail, together with specified information regarding registration procedures. Subparagraphs (b) and (c) call for voluntary cooperation by federal agencies and private entities with the states in providing registration services and require that each armed services recruitment office be considered a "voter registration agency."]

Section 8. **Requirements with Respect to Administration of Voter Registration.** [Section 8 contains numerous additional provisions, including a requirement that registrants be eligible to vote in a federal election if their applications are received or postmarked 30 days before the election, or handed in by that deadline at a motor vehicle agency or "voter registration agency." Section 8 also requires states to make "a reasonable effort" to remove ineligible voters from the lists, but only in accordance with detailed regulations. States are not permitted to purge a voter based on nonvoting alone. The section contemplates that primary reliance will be placed on change-of-address information supplied by the Postal Service. Before voters are purged, forwardable notices with postage-paid return post cards must be sent to the voter's old address or, if the voter has moved within the same registrar's jurisdiction, to the new address. Voters who fail to return the notices may still not be purged until they fail to vote in two consecutive federal elections.]

Section 9. **Federal Coordination and Regulations.** [This section gives varied administrative duties to the Federal Election Commission, including the responsibility to design a uniform mail voter registration form and to provide reports to Congress every two years assessing the impact of the Act. Section 10 requires each state to designate an election official responsible for coordination of the state's responsibilities under the Act. Section 11 allows the Attorney General and private citizens to bring civil actions to enforce the Act, and permits attorney's fees to be awarded to a prevailing party other than the United States. Section 12 defines certain criminal violations. Section 13 sets the effective date of the Act as January 1, 1995, but provides extra time for states to amend provisions in their constitutions that would be inconsistent with the Act and that therefore could require states to maintain separate registration lists for state and federal elections.]

Notes and Questions

1. A similar bill was passed in 1992 on a partisan vote by Democratic majorities in Congress, but was vetoed by President Bush. The 1993 law was passed pri-

marily with Democratic votes. However, the Democrats needed the support of at least a few Republicans in the Senate to avoid a filibuster. They achieved that Republican support by removing unemployment offices from the mandatory list of voter registration agencies in Section 7(a)(2) and requiring that potential registrants at welfare and disability offices be informed that if they choose not to register, it will not affect the services they receive.[t]

2. In a few countries, including Belgium and Australia, voting is mandatory. Enforcement may be lax and penalties may be light, but such provisions seem to greatly enhance the turnout rate. Should mandatory voting be adopted in the United States, either at the federal or state level? If not, should Congress have gone further than it did in enacting the Motor Voter law, and provided for universal registration by a federal agency such as the Census Bureau or the Social Security Administration? Had Congress done so, it would have brought American practice more into line with what is done in most other democratic nations.

Some proponents of registration reform have criticized the motor voter concept on the grounds that it is not only too limited but also biased.

> [M]otor voter programs...expand the electorate without overcoming its upward class skew, a feature that may explain why both Republicans and Democrats sometimes support them. In 1983, only 47 percent of the 36 million adults in households with incomes under $10,000 held driver's licenses. But 93 percent of the 31 million adults in households with incomes over $40,000 had licenses.

Frances Fox Piven & Richard A. Cloward, WHY AMERICANS DON'T VOTE 222 (1988). See also Cunningham, *supra*, 9 YALE LAW & POLICY REVIEW at 389–90, asserting that the percentage of African Americans who have driver's licenses runs ten to eighteen points below the percentage for whites.

Do these figures demonstrate that a motor voter registration law is likely to benefit whites and people who are affluent disproportionately? If so, do they provide a reason for opposing a motor voter system? Do you believe the argument is applicable to the Motor Voter law, which despite its nickname contains additional provisions intended to extend registration?

3. The Motor Voter law applies only to registration to vote in federal elections. Why? Should it apply to all elections? Is the limited coverage of the law likely to make a practical difference?

4. How much of a difference will the Motor Voter law make to the rate of participation in American elections? Time, of course, will provide the best answer to that question. In the meantime, a good guess is that it will noticeably improve turnout, at least in the short run, but not to the point that American turnout will compare favorably with other democratic countries. As noted above, social scientists have estimated that liberalizing registration procedures in certain respects—especially shortening the closing date before the election—across the country to the extent they are already liberalized in some states might increase turnout by seven to nine percentage points. Motor Voter does not shorten the deadline for registering, but the ability to register with little more than an extra signature

t. The provisions accomplishing the latter purpose are not set forth in the excerpts reprinted above.

when one is applying for or renewing a driver's license may have an equal or greater effect.

5. As of early 1995, Republican governors of some states, including California and South Carolina, were refusing to implement the Motor Voter law on the ground that it imposed costs on the states that the federal government was not reimbursing. In addition, some Republican Senators were discussing possible ways to modify or even repeal the law. See Richard Scammon, *Senators Strike at Motor-Voter Law*, CQ WEEKLY REPORTS, January 14, 1995, at 151.

D. The Puzzle of Participation and the Consequences of Low Turnout

As the reader may have noticed, there is a tension between the long-term trends in American turnout and the theoretical and demographic influences on the probability that an individual will vote. Empirical studies show that the strongest demographic factor relating to voting is education, and we have seen that it is at least plausible to believe that being well-educated reduces the costs and enhances the benefits of voting to the individual. Yet, as Richard A. Brody has written:

> Over the past quarter century, the proportion of the population continuing on to post-secondary education has doubled. In light of this development, and the manifest relationship between education and participation, the steady decline in turnout since 1960 is all the more remarkable.[u]

Brody's point is equally applicable if we take a longer view and consider the generally low turnout in the twentieth century compared to the nineteenth, despite the steady increase in levels of education. Similarly, theoretical considerations, confirmed by empirical studies, indicate that reducing procedural barriers to voting should have a significant upward effect on turnout. Yet, the period of turnout decline since 1960 has coincided with substantial reductions in the barriers to voting. For example, during that period, poll taxes and literacy tests have been eliminated, the typical year-long waiting requirement was reduced to thirty days in most places as a result of *Dunn v. Blumstein*, and at the state level changes have almost invariably been in the direction of facilitating registration. How can the aggregate trend over time be reconciled with individual-level influences on voting? Even in the South, where because of the Voting Rights Act the lowering of the barriers was the most dramatic, turnout has only been able to remain roughly unchanged since 1960.

Broadly speaking, students of turnout offer two divergent types of explanation. One approach, which might be termed the mainstream or conventional approach, looks for additional individual-level changes that can explain the turnout decline. A recent and comprehensive presentation of this approach is the study by Ruy A. Teixeira, who uses survey data from the Census and from other sources in an attempt to quantify a number of factors that have had offsetting

u. Richard A. Brody, *The Puzzle of Political Participation in America*, in THE NEW AMERICAN POLITICAL SYSTEM 287, 296 (Anthony King, ed., 1978).

effects on turnout but whose net should account for a decline of approximately ten percentage points from the early 1960s to the late 1980s.

One factor that Teixeira identified, which he calls "connectedness," has two dimensions, connectedness to parties and "social connectedness." The decline in the closeness of voters to parties may seem the more relevant to a discussion of voting, but Teixeira finds that this decline explains less than one percentage point of the decline in turnout since 1960. Teixeira measures "social connectedness" as an amalgam of (1) the percentage of people who are married and living with their spouse, (2) age (on the theory that as people get older, they tend to get more deeply rooted in their communities), and (3) church attendance. Whether or not these three items really represent one phenomenon, each is associated with a higher probability of voting and each has declined since 1960. Altogether, the decline in partisan and social "connectedness" account for about five percentage points of turnout decline, but this is barely enough to offset the *increase* in turnout that should have been generated by increased levels of education and income.[v]

Ultimately, since demographic changes cannot explain the decline in turnout, social scientists who take the conventional approach seek to explain the decline as the result of changed attitudes toward voting and toward the political system. At first blush, this seems like a promising explanation, because the major shift toward a more negative public view of elected officials and the major branches of government over the past quarter century is well known. Nevertheless, scholars have generally rejected these increasingly negative views as an explanation for declining turnout, because those who hold negative views are no less likely to vote than those who hold more positive views.[w]

On the other hand, scholars have found correlations between voting and two other characteristics: "political involvement" and sense of government responsiveness. Political involvement is measured by items such as propensity to read newspaper articles about election campaigns. Both involvement and belief that the government is responsive to "people like me" or that voting will make a difference have declined since the early 1960s. There is sufficient correlation between nonvoting and both of these phenomena for Teixeira to conclude that these factors can explain most, though not all, of the overall decline in turnout.[x] In Brody's words, "abstention flows from the belief—held by an increasingly large segment of the electorate—that voting simply isn't worth the effort."[y]

One may question how satisfactory these explanations are. Political scientists can ask voters if they think politicians care about people like themselves and label the answers indicators of "government responsiveness," while putting a different label such as "political cynicism" on answers to questions about confidence or

v. Teixeira, *supra*, at 36–42.

w. See Stephen Earl Bennett & David Resnick, *The Implications of Nonvoting for Democracy in the United States*, 34 AMERICAN JOURNAL OF POLITICAL SCIENCE 771, 779 (1990). As Bennett and Resnick suggest, a likely explanation is that the most cynical are also likely to be strong partisans and ideologues, and strong partisans and ideologues tend to vote at a high rate. Social scientists do not appear to have considered the possibility that pervasive cynicism could reduce turnout by reducing the social pressure on all people to vote, including those who themselves do not hold particularly cynical views.

x. Teixeira, *supra*, at 42–46.

y. Brody, *supra*, at 305–6.

trust in government. It is not clear that potential voters, who respond casually to opinion surveys, would categorize their own attitudes in the same way.

Even if one accepts the characterization of the attitudes that are associated with nonvoting, one may still question how much of a cause has been given. If more people think that voting doesn't matter and therefore do not vote, *why* do they think that? Are we satisfied with failure to read newspaper articles about the campaign as a cause for nonvoting, or are we curious about the deeper causes of both forms of behavior?

It is precisely the failure of the conventional approach to consider the deeper causes that animates the opposing view, whose proponents, by the nature of their opposition, almost inevitably come from the left of the political spectrum. These writers criticize the conventional reliance on socioeconomic characteristics to explain turnout. One of their strongest points is that although it is true in the United States today that people with relatively little education and with low income are relatively unlikely to vote, this has not been true at most times and in most places.[z]

> The standard [socioeconomic status] model fares poorly in terms of generalizability. First, it is contradicted by cross-national data. It is of almost no apparent use outside of the United States and possibly some Third World nations; it seems to be most applicable to political systems with limited electoral competition. Second, it does not apply to aggregate youth vote, black activism, or the female vote; this leaves it supported only by the current turnout of older white American males. Third, the current theory does not explain causation in a way compatible with some aggregate data across areas. Fourth, it does not apply over time in the United States, but only since the Eisenhower administration, and even then, the changes in turnout during this period are not compatible with the standard SES theory. Fifth, in order to compensate for all the anomalies of the data, it must be supplemented by contrary alternative theories. Finally, the standard socioeconomic model, by virtue of its own focus, provides no insight into how to raise, or for that matter lower, voter turnout.[a]

Scholars who take this approach maintain that there is nothing intrinsic about less educated or lower income people that makes them less likely to vote. Rather, American politics is structured so that people of lower socioeconomic status have less reason to vote.

> Political campaigns in this country are disproportionately run on middle-class issues. This focus shapes expectations. Because the relationship between the government and the middle class is emphasized, middle-class persons, as opposed to working-class and poor persons, come to see government as a solution to their problems. Working-class and poor persons are not led to believe that the government will help them and see their economic problems as individual problems.... Tax questions are examples

z. See, e.g., Piven & Cloward, *supra*, at 15.

a. Michael J. Avey, THE DEMOBILIZATION OF AMERICAN VOTERS 8 (1989).

of just such a focus; they relate more directly to middle- and upper-class interests than to interests of the poor.[b]

These writers maintain that the introduction around the turn of the century of voter registration, the secret ballot, and other "reforms" disfranchised large numbers of lower class voters and put into place a vicious cycle in which parties do not appeal to the lower classes because they do not vote, and lower class citizens do not vote because the parties do not appeal to them.[c] Proponents of this alternative view differ over what is needed to break the vicious cycle. Frances Fox Piven and Richard A. Cloward maintain that registration reforms strong enough to bring about virtually universal registration would enhance turnout to the point that parties would be forced to appeal to the interests and desires of lower class voters.[d] In contrast, Michael J. Avey agrees with the conventional scholars that the likely effect of registration reforms will be a noticeable increase in turnout, but not an increase great enough to bring the United States out of the lowest ranks among world democracies. He suggests that to substantially raise turnout, a "major political party focused on the concerns of the lower 60 percent of the economic strata" is necessary.[e]

Although some of the criticisms directed at the conventional view may have merit, the alternative view has difficulties of its own. Avey does not suggest how a political party focused on class interests of the bottom tier of society can be formed if, as he asserts, Piven and Cloward are overly optimistic that liberalizing registration rules will stimulate the growth of a lower class political movement.

More fundamentally, there is almost no empirical support for the premise that underlies the alternative view, namely that nonvoters have markedly different political interests and opinions than voters and that they fail to vote because no alternative is offered to them responsive to their concerns. The overrepresentation among nonvoters of racial and ethnic minorities, people with less education, and people of low income, might suggest that if all nonvoters began voting, there would be a major electoral movement toward Democrats and liberal candidates. To the contrary, surveys almost invariably show the political views of nonvoters are similar to those of voters. The percentages who favor the Democrats tend to be almost identical. There are more independents among nonvoters, and therefore a smaller proportion of Republicans, but only by a few percentage points, not enough to have a major electoral impact. Opinions on policy issues of voters and nonvoters almost never diverge by more than a small amount, though there is a very slight tendency for voters to be more liberal than nonvoters on social issues and more conservative on economic issues.[f] Chronic nonvoters and irregular voters tend to be more politically independent and less interested and less informed about candidates, parties, and political issues than regular voters. John R. Petrocik hypothesizes from these characteristics that irregular voters and nonvoters will be more susceptible to short term influences than regular voters, resulting in a

b. Id. at 24.

c. See Piven & Cloward, *supra*, at 18–19, 70–111; Avey, *supra*, at 22.

d. *Supra*, at xvi–xvii, and *passim*.

e. Avey, *supra*, at 4.

f. See Wolfinger & Rosenstone, *supra*, at 109; Teixeira, *supra*, at 86-101; Bennett & Resnick, *supra*, at 789–795.

bandwagon effect. Increased turnout, Petrocik asserts, will tend to add to the margin of victory of the leading candidate. His research confirms that this has been the case, with one significant exception—the 1980 election, in which nonvoters favored Carter by about the same margin as voters favored Reagan. The 1980 election apparently would have been much closer if everyone had voted, but in every other case Petrocik studied, the winner would have won by an equal or greater margin.[g]

Although there is no evidence that low turnout has had a major effect on the outcome of elections, proponents of the alternative view contend that changing political dynamics that would be stimulated by higher turnout would eventually stimulate greater class consciousness and more distinct views among the groups currently underrepresented among voters.[h] One drawback of this claim (skeptics might claim it is an advantage!) is that it is not susceptible to empirical testing.

A recent study agrees with the alternative view that part of the explanation for the decline in voter turnout must be found in the political system rather than in the characteristics of individuals, but does not adopt the ideological foundation of the alternative view. Steven J. Rosenstone & John Mark Hansen, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA (1993), argue that individuals can be mobilized to vote by candidates, parties, and other political leaders. Such mobilization can be direct or, more importantly, indirect through organizations and social networks. Mobilization can reduce the costs of voting by providing information about the time, place, and procedures for registering and voting and can enhance the benefits by providing social approval for voting and disapproval for not voting. Rosenstone and Hansen argue:

> [T]he usual suspects in research on voter participation fall well short of explaining the most important puzzles of recent American politics. The personal attributes of Americans—their resources, involvement in communities, identifications with political parties, and opinions of the candidates—leave over half of the decline in voter turnout still missing and unaccounted for, but we know now just exactly where to find the remainder. Half of the decline of voter turnout since the 1960s occurred because electoral mobilization declined.[i]

For Rosenstone and Hansen, it is not so much the ideologies put forward by parties and candidates that affect turnout but the electoral techniques that they employ.[j]

> Political leaders clearly do not mobilize public involvement just for its own sake. Instead, they mobilize participation in pursuit of their own advantage: to win elections, pass bills, amend rulings, and influence policies. Accordingly, when these leaders face new political, economic, and

g. See John R. Petrocik, *Voter Turnout and Electoral Preference: The Anomalous Reagan Elections*, in ELECTIONS IN AMERICA 239 (Kay Lehman Schlozman, ed., 1987).

h. See Piven & Cloward, *supra*, at 20.

i. Rosenstone & Hansen, *supra*, at 217.

j. But Rosenstone and Hansen express the view that inequality of participation that may result from the strategies of political leaders may in turn cause government policy to become less egalitarian. See id. at 234–48.

social incentives, their willingness to mobilize citizen involvement in elections and in government changes to exploit the new opportunities and accommodate the new constraints.

> ...Over the last forty years, American politics, economy, and society have undergone significant and interrelated changes. The population has changed. Citizens have become more affluent, educated, and mobile. Their partisan, ethnic, religious, and community identifications have weakened. Equally, the political system has changed. Party organizations fueled by patronage have almost disappeared. Labor unions have atrophied. Television has assumed greater and more varied responsibilities....
>
> Political, economic, and social changes have dramatically altered the mix of incentives for political mobilization. Electoral campaigns have seen once dependable blocs of committed, partisan voters shrink. They have lost loyal cadres of union and patronage workers. They have witnessed the efficiencies of television and direct mail in reaching a mobile, disconnected citizenry. In response, political campaigns have evolved from labor-intensive to capital-intensive organizations. Face-to-face canvassing in neighborhoods has given way to polls and focus groups as means of assessing the public's opinions and reactions to issues. Door-to-door electioneering in wards and precincts has given way to direct mail and television spots. Grass-roots organization has given way to professional staff. Campaigns in the 1990s need to expend more of their energies soliciting the support of an uncommitted electorate....[k]

Unfortunately, Rosenstone and Hansen had no data directly measuring mobilization of voters by political leaders and were forced to rely primarily on survey responses to the question whether individuals had been contacted by a political party. Even if these responses are assumed to be accurate, these data provide only a crude measure of types and degrees of mobilization that may be affecting voter turnout as well as other forms of political participation. Nevertheless, Rosenstone and Hansen's hypothesis—that the changing political environment has channeled political leaders into electoral strategies and techniques with diminishing emphasis on voter mobilization, resulting in lower voter turnout—is a plausible one and provides a solution to Brody's "puzzle of participation" that is consistent with the data that Rosenstone and Hansen had to work with, such as they are.

One aspect of their hypothesis is particularly worth underlining for the student of election law and electoral institutions. Rosenstone and Hansen suggest that voter turnout cannot be considered in isolation but is closely intertwined with other aspects of the electoral system, including the role played by parties and the nature of election campaigns. Similar themes will emerge elsewhere in this book, especially in Chapter 7, which considers legal controversies emerging from differing conceptions of political parties, and in the second half of the book, dealing with campaign finance and related questions. Legislators, lawyers, judges, scholars, and anyone concerned with particular election practices must consider how these practices are influenced by the broader changes that are affecting elec-

k. Id. at 232–33.

toral politics, but must also consider how changes in the particular practices may affect, for better or for worse, the broader patterns.

Notes and Questions

1. Most public discussions of turnout assume that increasing the rate of voting is a desirable public goal. Why should this be so? Research indicates that the registration barriers that currently exist screen out people who are less well informed and have less education, without actually preventing anyone from voting who is highly motivated to do so. Might this be regarded as a desirable state of affairs? Would the quality of public decisionmaking be improved by the participation of people who are less interested and less informed? If not, does it follow that higher turnout is a goal that ought to be abandoned?

2. If increasing turnout is a goal that should be supported, is it because higher turnout is a means to the goal of improving public policy, or because it is an end in itself? To the extent that it is an end in itself, how important is it compared to other political ends? As an aid to thinking about these questions, if you are a Republican, answer questions A and C below, and if you are a Democrat, answer questions B and C. Note that the factual assumptions you are asked to make in these questions are hypothetical and not necessarily realistic.

A. As we saw, Republicans in Congress forced a removal from the Motor Voter bill of a provision that would have required unemployment offices to serve as voter registration agencies. Suppose that after studying the facts, you are persuaded that this provision would result in a significant infusion of new voters who would be predominantly Democratic. The likelihood of retaining the Republican control of Congress that was finally attained in 1994 would be reduced and the probability of future Democratic presidents being elected would be enhanced. The provision would therefore contribute to the future prospect of policies you oppose such as more taxes, more spending, and more regulation. Under these circumstances, would you approve of the 1993 action of congressional Republicans, forcing the deletion of the unemployment office provision?

B. Suppose the Republicans had held firm for a bill that would be limited to the motor voter provision. In other words, the only new facilitation of registration would occur at the time an individual applies for or renews a driver's license. Suppose further that you were convinced that such a bill would significantly increase the number of voters, but among a disproportionately Republican group. The predictable consequence would be a greater likelihood of Republican presidents and reduced prospects for the Democrats' regaining control of Congress, resulting in greatly reduced prospects for policies you favor such as environmental protection, aid for urban and other depressed areas, and increased reproductive rights for women. Under these circumstances, would you favor the Motor Voter bill?

C. Suppose a third party emerges that openly espouses racist and totalitarian views. The party has won almost no elections, but surveys show that a disproportionately large number of nonvoters would support the third party if they voted. This enhanced support would assure the election of numerous members of the third party to Congress and, because of the enhanced credi-

bility the party would receive, would make the election of the party's leader as president of the United States a realistic possibility at some time in the future. Under these circumstances, would you support a law likely to result in universal registration and greatly increased turnout?

Chapter 3

Voting and Representation

In Chapter 2 we saw that the United States Constitution does not directly grant the right to vote to individuals but that numerous amendments to the Constitution have barred denying the franchise on a variety of grounds and that the right to vote has been further extended by statutes and by court decisions. In this chapter and the two that follow, the right to vote is considered in its relationship to the system of representation of which it is a part.

We begin with a different type of right-to-vote case, in which individuals who are generally qualified to vote are excluded from particular elections. Emphasizing the first of these cases, *Kramer v. Union Free School District No. 15*, we consider challenges to local elections in which the vote is limited to taxpayers, property owners, or persons with a variety of particular qualifications. Although most of these cases have had relatively small practical importance, they bring into question the nature of representation and its relation to interest group influence and political power. Among other issues, they raise the question whether government must always represent an undifferentiated public interest or, alternatively, it may represent specialized constituencies without losing its "public" character.

Cases involving the equal *weighting* of votes have had practical as well as theoretical importance. In *Reynolds v. Sims* the Supreme Court imposed the "one person, one vote" standard and thereby required the restructuring of at least one house of the state legislature in nearly every state. Although we shall limit ourselves to relatively brief excerpts from *Reynolds* and its companion cases, the reader should not draw the implication that it is an unimportant case. To the contrary, most people would list it as one of the landmark decisions in Supreme Court history. The excerpts we shall consider express conflicting theoretical perspectives with which Chief Justice Warren and Justice Stewart addressed the question of "malapportionment" (i.e., unequally populated legislative districts). The reason for not dwelling on the many issues and sub-issues making up the malapportionment debate is that *Reynolds* has been so successful that these issues, though still of intellectual interest, are no longer alive as a practical matter. The desire to extend *Reynolds* in different directions has generated many additional issues, and these will provide the focus of our study.

In this chapter, we proceed to extension of the one person, one vote rule to local government. When this was accomplished in *Avery v. Midland County*, the theoretical issues began to resemble those in the *Kramer* line of cases. Finally, the two lines converged in *Salyer Land Co. v. Tulare Lake Basin Water Stor-*

age District and *Ball v. James*. Voting schemes in which only property owners could vote and votes were weighted on a one dollar (or one acre), one vote basis were upheld by the Supreme Court in the case of local districts with specialized functions.

I. Voting and Interest Representation

Kramer v. Union Free School District No. 15

395 U.S. 621 (1969)

Mr. Chief Justice WARREN delivered the opinion of the Court.

In this case we are called on to determine whether § 2012 of the New York Education Law is constitutional. The legislation provides that in certain New York school districts residents who are otherwise eligible to vote in state and federal elections may vote in the school district election only if they (1) own (or lease) taxable real property within the district, or (2) are parents (or have custody of) children enrolled in the local public schools. Appellant, a bachelor who neither owns nor leases taxable real property, filed suit in federal court claiming that § 2012 denied him equal protection of the laws in violation of the Fourteenth Amendment....

I.

New York law provides basically three methods of school board selection. In some large city districts, the school board is appointed by the mayor or city council. On the other hand, in some cities, primarily those with less than 125,000 residents, the school board is elected at general or municipal elections in which all qualified city voters may participate. Finally, in other districts such as the one involved in this case, which are primarily rural and suburban, the school board is elected at an annual meeting of qualified school district voters.

The challenged statute is applicable only in the districts which hold annual meetings....

Appellant is a 31-year-old college-educated stockbroker who lives in his parents' home in the Union Free School District No. 15, a district to which § 2012 applies. He is a citizen of the United States and has voted in federal and state elections since 1959. However, since he has no children and neither owns nor leases taxable real property, appellant's attempts to register for and vote in the local school district elections have been unsuccessful....

II.

At the outset, it is important to note what is *not* at issue in this case. The requirements of § 2012 that school district voters must (1) be citizens of the United States, (2) be bona fide residents of the school district, and (3) be at least 21 years of age are not challenged.... The sole issue in this case is whether the *additional* requirements of § 2012—requirements which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections—violate the Fourteenth

Amendment's command that no State shall deny persons equal protection of the laws.

"In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). And, in this case, we must give the statute a close and exacting examination. "[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, [*infra*]. This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court. *Reynolds*. No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. And, the assumption is no less under attack because the legislature which decides who may participate at the various levels of political choice is fairly elected. Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting....

Nor is the need for close judicial examination affected because the district meetings and the school board do not have 'general' legislative powers. Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not....

III.

Besides appellant and others who similarly live in their parents' homes, the statute also disenfranchises the following persons (unless they are parents or guardians of children enrolled in the district public school): senior citizens and others living with children or relatives; clergy, military personnel, and others who live on tax-exempt property; boarders and lodgers; parents who neither own nor lease qualifying property and whose children are too young to attend school; parents who neither own nor lease qualifying property and whose children attend private schools.

Appellant asserts that excluding him from participation in the district elections denies him equal protection of the laws. He contends that he and others of his class are substantially interested in and significantly affected by the school meeting decisions. All members of the community have an interest in the quality and structure of public education, appellant says, and he urges that "the decisions taken by local boards... may have grave consequences to the entire population." Appellant also argues that the level of property taxation affects him, even though he does not own property, as property tax levels affect the price of goods and services in the community.

We turn therefore to question whether the exclusion is necessary to promote a compelling state interest. First appellees argue that the State has a legitimate interest in limiting the franchise in school district elections to "members of the community of interest"—those "primarily interested in such elections." Second, appellees urge that the State may reasonably and permissibly conclude that "property taxpayers" (including lessees of taxable property who share the tax burden through rent payments) and parents of the children enrolled in the district's schools are those "primarily interested" in school affairs.

We do not understand appellees to argue that the State is attempting to limit the franchise to those "subjectively concerned" about school matters. Rather, they appear to argue that the State's legitimate interest is in restricting a voice in school matters to those "directly affected" by such decisions. The State apparently reasons that since the schools are financed in part by local property taxes, persons whose out-of-pocket expenses are "directly" affected by property tax changes should be allowed to vote. Similarly, parents of children in school are thought to have a "direct" stake in school affairs and are given a vote.

Appellees argue that it is necessary to limit the franchise to those "primarily interested" in school affairs because "the ever increasing complexity of the many interacting phases of the school system and structure make it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operations of the school system." Appellees say that many communications of school boards and school administrations are sent home to the parents through the district pupils and are "not broadcast to the general public"; thus, nonparents will be less informed than parents. Further, appellees argue, those who are assessed for local property taxes (either directly or indirectly through rent) will have enough of an interest "through the burden on their pocketbooks, to acquire such information as they may need."

We need express no opinion as to whether the State in some circumstances might limit the exercise of the franchise to those "primarily interested" or "primarily affected." Of course, we therefore do not reach the issue of whether these

particular elections are of the type in which the franchise may be so limited. For, assuming, *arguendo*, that New York legitimately might limit the franchise in these school district elections to those "primarily interested in school affairs," close scrutiny of the § 2012 classifications demonstrates that they do not accomplish this purpose with sufficient precision to justify denying appellant the franchise.

Whether classifications allegedly limiting the franchise to those resident citizens "primarily interested" deny those excluded equal protection of the laws depends, *inter alia*, on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Section 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. The classifications in § 2012 permit inclusion of many persons who have, at best, a remote and indirect interest, in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions.[15]

Nor do appellees offer any justification for the exclusion of seemingly interested and informed residents—other than to argue that the § 2012 classifications include those "whom the State could understandably deem to be the most intimately interested in actions taken by the school board," and urge that "the task of... balancing the interest of the community in the maintenance of orderly school district elections against the interest of any individual in voting in such elections should clearly remain with the Legislature." But the issue is not whether the legislative judgments are rational. A more exacting standard obtains. The issue is whether the § 2012 requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class. The requirements of § 2012 are not sufficiently tailored to limiting the franchise to those "primarily interested" in school affairs to justify the denial of the franchise to appellant and members of his class.

Mr. Justice STEWART, with whom Mr. Justice BLACK, and Mr. Justice HARLAN join, dissenting.

In *Lassiter v. Northampton County Election Bd.*, 360 U.S. 45 (1959), this Court upheld against constitutional attack a literacy requirement, applicable to voters in all state and federal elections, imposed by the State of North Carolina. Writing for a unanimous Court, Mr. Justice Douglas said:

> The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns.

Believing that the appellant in this case is not the victim of any "discrimination which the Constitution condemns," I would affirm the judgment of the District Court....

15. For example, appellant resides with his parents in the school district, pays state and federal taxes and is interested in and affected by school board decisions; however, he has no vote. On the other hand, an uninterested unemployed young man who pays no state or federal taxes, but who rents an apartment in the district, can participate in the election.

Although at times variously phrased, the traditional test of a statute's validity under the Equal Protection Clause is a familiar one: a legislative classification is invalid only "if it rest[s] on grounds wholly irrelevant to achievement of the regulation's objectives." It was under just such a test that the literacy requirement involved in *Lassiter* was upheld. The premise of our decision in that case was that a State may constitutionally impose upon its citizens voting requirements reasonably "designed to promote intelligent use of the ballot." A similar premise underlies the proposition, consistently endorsed by this Court, that a State may exclude nonresidents from participation in its elections. Such residence requirements, designed to help ensure that voters have a substantial stake in the outcome of elections and an opportunity to become familiar with the candidates and issues voted upon, are entirely permissible exercises of state authority. Indeed, the appellant explicitly concedes, as he must, the validity of voting requirements relating to residence, literacy, and age. Yet he argues—and the Court accepts the argument—that the voting qualifications involved here somehow have a different constitutional status. I am unable to see the distinction.

Clearly a State may reasonably assume that its residents have a greater stake in the outcome of elections held within its boundaries than do other persons. Likewise, it is entirely rational for a state legislature to suppose that residents, being generally better informed regarding state affairs than are nonresidents, will be more likely than nonresidents to vote responsibly. And the same may be said of legislative assumptions regarding the electoral competence of adults and literate persons on the one hand, and of minors and illiterates on the other. It is clear, of course, that lines thus drawn can not infallibly perform their intended legislative function. Just as "[i]lliterate people may be intelligent voters," nonresidents or minors might also in some instances be interested, informed, and intelligent participants in the electoral process. Persons who commute across a state line to work may well have a great stake in the affairs of the State in which they are employed; some college students under 21 may be both better informed and more passionately interested in political affairs than many adults. But such discrepancies are the inevitable concomitant of the line drawing that is essential to law making. So long as the classification is rationally related to a permissible legislative end, therefore—as are residence, literacy, and age requirements imposed with respect to voting—there is no denial of equal protection.

Thus judged, the statutory classification involved here seems to me clearly to be valid. New York has made the judgment that local educational policy is best left to those persons who have certain direct and definable interests in that policy: those who are either immediately involved as parents of school children or who, as owners or lessees of taxable property, are burdened with the local cost of funding school district operations. True, persons outside those classes may be genuinely interested in the conduct of a school district's business—just as commuters from New Jersey may be genuinely interested in the outcome of a New York City election. But unless this Court is to claim a monopoly of wisdom regarding the sound operation of school systems in the 50 States, I see no way to justify the conclusion that the legislative classification involved here is not rationally related to a legitimate legislative purpose....

With good reason, the Court does not really argue the contrary. Instead, it strikes down New York's statute by asserting that the traditional equal protection standard is inapt in this case, and that a considerably stricter standard—under

which classifications relating to "the franchise" are to be subjected to "exacting judicial scrutiny"—should be applied. But the asserted justification for applying such a standard cannot withstand analysis.

The Court is quite explicit in explaining why it believes this statute should be given "close scrutiny":

> The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

I am at a loss to understand how such reasoning is at all relevant to the present case. The voting qualifications at issue have been promulgated, not by Union Free School District No. 15, but by the New York State Legislature, and the appellant is of course fully able to participate in the election of representatives in that body. There is simply no claim whatever here that the state government is not "structured so as to represent fairly all the people," including the appellant.

In any event, it seems to me that under *any* equal protection standard, short of a doctrinaire insistence that universal suffrage is somehow mandated by the Constitution, the appellant's claim must be rejected. First of all, it must be emphasized—despite the Court's undifferentiated references to what it terms "the franchise"—that we are dealing here, not with a general election, but with a limited, special-purpose election. The appellant is eligible to vote in all state, local, and federal elections in which general governmental policy is determined. He is fully able, therefore, to participate not only in the processes by which the requirements for school district voting may be changed, but also in those by which the levels of state and federal financial assistance to the District are determined. He clearly is not locked into any self-perpetuating status of exclusion from the electoral process....

Notes and Questions

1. The argument of the school district, according to the majority opinion, is that the franchise may be limited to those with an "interest" in decisions of the district, in the sense of being "directly affected" by the decisions as opposed to being "subjectively concerned." In which of these senses is the Court using the term in the next-to-last paragraph of the majority opinion?

2. In footnote 15, the Court describes a hypothetical individual with supposedly less of a stake in school district elections than Kramer, but who is eligible to vote because he is a tenant. Is the Court correct in assuming that a person who is a tenant is unaffected by fiscal decisions of the school district? Compare *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 210 (1970), in which the Court wrote:

> Property taxes may be paid initially by property owners, but a significant part of the ultimate burden of each year's tax on rental property will very likely be borne by the tenant rather than the landlord since... the landlord will treat the property tax as a business expense and normally will be

able to pass all or a large part of this cost on to the tenants in the form of higher rent.

3. How would you expect James Madison to react to *Kramer*? Which of the three New York methods of school board selection would he prefer?

4. (a) Suppose Paula is a 31-year-old who resides with her parents just outside the boundaries of District No. 15. She does most of her shopping in the district and has recently completed a doctoral dissertation on the operations of District No. 15. Will the Court order the District to let her vote in District elections? Would it make any difference if she owns commercial property in the District and runs a business there, and if her school-age children reside with her former husband within the District and attend the public schools? See *Hill v. Stone*, 421 U.S. 289, 302, 306 (1975) (Rehnquist, J., dissenting); *Reeder v. Bd. of Supervisors of Elections*, 305 A.2d 132 (Md. 1973). See also *Millis v. Bd. of Cy. Com'rs. of Larimer Cy.*, 626 P.2d 652 (Colo. 1981) (fact that in-state nonresidents of a district were allowed to vote did not preclude the district from denying the vote to out-of-staters).

(b) Would it make any difference if Paula proves that the District boundaries were drawn to exclude her neighborhood because most of the residents are African-American? Cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Because of a belief that voters in her neighborhood would tend to vote in a particular manner, *e.g.*, for higher (or lower) school budgets? Cf. *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

(c) Suppose the New York statute were amended to permit non-residents who own property subject to property taxation in the District to vote in school board elections. Would the Court hold that the votes of residents had been diluted unconstitutionally? See *Spahos v. Mayor and Councilmen of Savannah Beach*, 207 F.Supp 688 (S.D.Ga. 1962), aff'd. per curiam 371 U.S. 206 (1962); *Brown v. Bd. of Com'rs. of Chattanooga*, 722 F.Supp. 379, 397–400 (M.D.Tenn. 1989).

5. Would it be desirable to eliminate all voter qualifications, including age, residency, and citizenship, on the theory that only those who have a genuine (subjective) interest would bother to vote in any given election? Should such an approach be constitutionally required? See Rex E. Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School District No. 15*, 15 ARIZONA LAW REVIEW 457, 468 (1973).

6. The majority in *Kramer* argues that the usual presumption of constitutionality assumes that everyone is represented in the governmental process that leads to the policy in question. Therefore, the presumption of constitutionality should not apply in a case where the complainant is denied the right to vote. Justice Stewart attempts to rebut this contention by pointing out that the voting restriction was enacted by the New York State Legislature, in which Kramer was fully represented. Are you persuaded by Justice Stewart's argument? Would Justice Stewart's position be undermined if it can be shown that as a practical matter, Kramer's chances of getting the legislature to change the rules regarding school district voting were nil? See Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE LAW JOURNAL 1037, 1048–51 (1980).

7. In a 9–0 decision issued the same day as *Kramer*, the Court in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), struck down a Louisiana statute which permitted only property owners to vote in elections to approve *revenue* bond issues

for municipally-owned utilities. The next term a 5–3 majority reached the same conclusion in a case involving Arizona provisions which gave only property owners the right to vote in elections to approve *general obligation* bonds. *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970).

When a government issues bonds, it borrows money from the purchasers of the bonds. In the case of revenue bonds, the loans will be repaid only from revenues of the project (for example, a municipal parking garage) for which the bonds are issued. General obligation bonds give the bondholders a right to be repaid from the jurisdiction's general revenues and are backed by the full faith and credit of the jurisdiction. Can you see why some justices concurred in *Cipriano* but dissented in *Kolodziejski*?

8. In *Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977), the Court upheld a New York statute that required for approval of a county charter revision a majority vote of *both* city residents *and* non-city residents. Under the statute a revision was defeated although it received a majority of all votes, because a majority of non-city residents voted no. The Court distinguished *Kramer*, *Cipriano*, and *Kolodziejski*, saying that here the discrepant effects on city and non-city voters justified the discrimination.

II. The Right to an Equally Weighted Vote

It has long been recognized that severe population disparity between different districts which elect representatives to a legislative or other governmental assembly creates a serious theoretical and practical inequality between voters in the respective districts. *E.g.*, John Locke, TWO TREATISES ON GOVERNMENT 390–91 (Peter Laslett, ed., 2d ed., 1964). Yet until the 1960's, the Supreme Court refused to rule on matters of legislative apportionment, regarding them as nonjusticiable political questions. See *Colegrove v. Green*, 328 U.S. 549 (1946) (Frankfurter, J., plurality opinion).

Two landmark cases in the 1960's dramatically changed the Court's posture regarding legislative apportionment. The first landmark, *Baker v. Carr*, 369 U.S. 186 (1962), held that challenges to malapportioned districts under the Equal Protection Clause *were* justiciable in federal courts, but did not decide whether such districts were in fact unconstitutional. ("Malapportionment" is the term commonly used to describe a districting plan whose districts are improperly unequal in population. A district is described as "underrepresented" if its population is greater than the mean, and as "overrepresented" if its population is less than the mean.)

The second landmark case, *Reynolds v. Sims*, 377 U.S. 533 (1964), was presaged by *Gray v. Sanders*, 372 U.S. 368 (1963), striking down unequal weighting of votes within a single constituency, and by *Wesberry v. Sanders*, 376 U.S. 1 (1964), requiring that Congressional districts be drawn on an equal population basis. *Gray* prevented states from using a system analogous to the electoral college in electing statewide officials and did not involve the more common question of a multi-member governmental body. *Wesberry* was not decided under the Equal Protection Clause but under Article I, §§ 2 and 4 of the Constitution, and was thus applicable only to the United States House of Representatives. The constitutional requirements that would be applicable to the state legislatures and to elected local government bodies remained undecided—but not for long.

In *Reynolds v. Sims*, Alabama voters challenged unequally populated state legislative districts as violative of the Equal Protection Clause. The Supreme Court struck down the Alabama legislative districts and, in companion cases decided on the same day, struck down state legislative districts in New York, Maryland, Virginia, Delaware, and Colorado. In these cases, the Court required that seats in both houses of a bicameral state legislature be apportioned on a substantially equal population basis—in short, "one person, one vote." Following are excerpts from Chief Justice Warren's opinion for the Court in *Reynolds*, and from Justice Stewart's dissent in the Colorado case.

Reynolds v. Sims

377 U.S. 533 (1964).

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court....

III.

A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. As stated by the Court in *United States v. Bathgate*, 246 U.S. 220, 227 (1918), "[t]he right to vote is personal...." While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote.... Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized....

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or

10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids "sophisticated as well as simpleminded modes of discrimination." ...

State legislatures are, historically, the fountainhead of representative government in this country.... But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status. Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.

We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us....

To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "government of the people, by the people, [and] for the people." The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.

Lucas v. 44th General Assembly of Colorado

377 U.S. 713, 744 (1964) (dissenting opinion)

MR. JUSTICE STEWART, whom MR. JUSTICE CLARK joins, dissenting.

It is important to make clear at the outset what these cases are not about. They have nothing to do with the denial or impairment of any person's right to vote. Nobody's right to vote has been denied. Nobody's right to vote has been restricted. Nobody has been deprived of the right to have his vote counted. The voting right cases which the Court cites are, therefore, completely wide of the mark. Secondly, these cases have nothing to do with the "weighting" or "diluting" of votes cast within any electoral unit. The rule of *Gray v. Sanders* is, therefore, completely without relevance here....

The question involved here in these cases is quite a different one. Simply stated, the question is to what degree, if at all, the Equal Protection Clause of the Fourteenth Amendment limits each sovereign State's freedom to establish appropriate electoral constituencies from which representatives to the State's bicameral legislative assembly are to be chosen. The Court's answer is a blunt one, and, I think, woefully wrong. The Equal Protection Clause, says the Court, "requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."

After searching carefully through the Court's opinions..., I have been able to find but two reasons offered in support of this rule. First, says the Court, it is "established that the fundamental principle of representative government in this

country is one of equal representation for equal numbers of people...." With all respect, I think that this is not correct, simply as a matter of fact. It has been unanswerably demonstrated before now that this "was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the States at the time of adoption of the Fourteenth Amendment, it is not predominantly practiced by the States today."[6] Secondly, says the Court, unless legislative districts are equal in population, voters in the more populous districts will suffer a "debasement" amounting to a constitutional injury. As the Court explains it, "To the extent that a citizen's right to vote is debased, he is that much less a citizen." We are not told how or why the vote of a person in a more populated legislative district is "debased," or how or why he is less a citizen, nor is the proposition self-evident. I find it impossible to understand how or why a voter in California, for instance, either feels or is less a citizen than a voter in Nevada, simply because, despite their population disparities, each of those States is represented by two United States Senators.

To put the matter plainly, there is nothing in all the history of this Court's decisions which supports this constitutional rule. The Court's draconian pronouncement, which makes unconstitutional the legislatures of most of the 50 States, finds no support in the words of the Constitution, in any prior decision of this Court, or in the 175-year political history of our Federal Union. With all respect, I am convinced these decisions mark a long step backward into that unhappy era when a majority of the members of this Court were thought by many to have convinced themselves and each other that the demands of the Constitution were to be measured not by what it says, but by their own notions of wise political theory. The rule announced today is at odds with long-established principles of constitutional adjudication under the Equal Protection Clause, and it stifles values of local individuality and initiative vital to the character of the Federal Union which it was the genius of our Constitution to create.

I.

What the Court has done is to convert a particular political philosophy into a constitutional rule, binding upon each of the 50 States, from Maine to Hawaii, from Alaska to Texas, without regard and without respect for the many individualized and differentiated characteristics of each State, characteristics stemming from each State's distinct history, distinct geography, distinct distribution of population, and distinct political heritage. My own understanding of the various theories of representative government is that no one theory has ever commanded unanimous assent among political scientists, historians, or others who have considered the problem. But even if it were thought that the rule announced today by the Court is, as a matter of political theory, the most desirable general rule which can be devised as a basis for the make-up of the representative assembly of a typical State, I could not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution, and forever denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions, so as to accommodate within a system of representative government the interests and aspiration of

6. *Baker v. Carr*, 369 U.S. at 301 (Frankfurter, J., dissenting).

diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority.

Representative government is a process of accommodating group interests through democratic institutional arrangements. Its function is to channel the numerous opinions, interests, and abilities of the people of a State into the making of the State's public policy. Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation in the State's legislature, in cooperation with other organs of political power, of the various groups and interests making up the electorate. In practice, of course, this ideal is approximated in the particular apportionment system of any State by a realistic accommodation of the diverse and often conflicting political forces operating within the State.

I do not pretend to any specialized knowledge of the myriad of individual characteristics of the several States, beyond the records in the cases before us today. But I do know enough to be aware that a system of legislative apportionment which might be best for South Dakota, might be unwise for Hawaii with its many islands, or Michigan with its Northern Peninsula. I do know enough to realize that Montana with its vast distances is not Rhode Island with its heavy concentrations of people. I do know enough to be aware of the great variations among the several States in their historic manner of distributing legislative power—of the Governors' Councils in New England, of the broad powers of initiative and referendum retained in some States by the people, of the legislative power which some States give to their Governors, by the right of veto or otherwise, of the widely autonomous home rule which many States give to their cities. The Court today declines to give any recognition to these considerations and countless others, tangible and intangible, in holding unconstitutional the particular systems of legislative apportionment which these States have chosen. Instead, the Court says that the requirements of the Equal Protection Clause can be met in any State only by the uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic.

But legislators do not represent faceless numbers. They represent people, or, more accurately, a majority of the voters in their districts—people with identifiable needs and interests which require legislative representation, and which can often be related to the geographical areas in which these people live. The very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests. Yet if geographical residence is irrelevant, as the Court suggests, and the goal is solely that of equally "weighted" votes, I do not understand why the Court's constitutional rule does not require the abolition of districts and the holding of all elections at large.

The fact is, of course, that population factors must often to some degree be subordinated in devising a legislative apportionment plan which is to achieve the important goal of ensuring a fair, effective, and balanced representation of the regional, social, and economic interests within a State. And the further fact is that throughout our history the apportionments of State Legislatures have reflected the strongly felt American tradition that the public interest is composed of many diverse interests, and that in the long run it can better be expressed by a medley of component voices than by the majority's monolithic command. What constitutes a rational plan reasonably designed to achieve this objective will vary from

State to State, since each State is unique, in terms of topography, geography, demography, history, heterogeneity and concentration of population, variety of social and economic interests, and in the operation and interrelation of its political institutions. But so long as a State's apportionment plan reasonably achieves, in the light of the State's own characteristics, effective and balanced representation of all substantial interests, without sacrificing the principle of effective majority rule, that plan cannot be considered irrational.

Notes and Questions

1. Not surprisingly, *Baker*, *Reynolds*, and the other redistricting cases prompted a flood of commentary. Among the better writings in the 1960's were Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUPREME COURT REVIEW 1 (1964), and Phil C. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUPREME COURT REVIEW 252 (1962). A prolific and highly regarded commentator on the redistricting cases was the late Robert G. Dixon, whose views in the 1960's were synthesized in his book, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968). More recent commentary may be found in two excellent anthologies, REAPPORTIONMENT IN THE 1970'S (Nelson W. Polsby, ed., 1971), and REPRESENTATION AND REDISTRICTING ISSUES (Bernard Grofman et al., eds., 1982).

2. Chief Justice Warren emphasizes that individuals and not economic or geographic interests elect representatives, whereas Justice Stewart sees the process as an accommodation of group interests. Do they differ in their views as to how the political system in fact operates, or as to how it ought to operate? Are their views on this point inconsistent with one another? What difference, if any, does it make whether we think of elected officials as representing individuals or groups?

3. Whose position, as between Chief Justice Warren and Justice Stewart, would be preferred by James Madison? By a pluralist? In A PREFACE TO DEMOCRATIC THEORY (1956), Robert A. Dahl emphasized that the minority should prevail over the majority when and only when its preference is more intense than the majority's.

Some writers in the pluralist tradition have sharply criticized the one person, one vote rule. Consider, for example, John Moeller, *The Supreme Court's Quest for Fair Politics*, 1 CONSTITUTIONAL COMMENTARY 203, 213 (1984):

> The solution the courts have imposed ignores our Madisonian political tradition. Most Americans identify with one or more groups, and those groups, representing varying constituencies, compete with each other for advantage. One consequence of Madisonian politics is an inherent tension in the scheme of representation. It calls for majoritarian government, which requires that most of the time most of the people will rule. But it also calls for reflective representation, which means that the institutions will "reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices... were brought to bear on the decision-making process."

See also Alexander M. Bickel, THE SUPREME COURT AND THE IDEA OF PROGRESS 108–13 (1978). But consider Daniel Hays Lowenstein, *Bandemer's Gap: Gerry-*

mandering and Equal Protection, in POLITICAL GERRYMANDERING AND THE COURTS 64, 107 n.15 (Bernard Grofman, ed., 1990):

> [The] assertion that the majoritarianism reflected in *Reynolds* constitutes a rejection of the Madisonian principle of countervailing groups and factions is without foundation. Compelled redistricting on an equal population basis might have been expected to have some effect on the balance of power among the groups and factions, but what possible reason could there have been to imagine that it would displace the pluralistic system of interest group politics? It would be difficult to maintain, with the benefit of hindsight, that it has had any such effect.

4. Whether or not districts are equal in population, they are likely to group together those interests that are geographically concentrated (e.g., farmers, poor people), but not groups that are dispersed (e.g., dentists, veterans). Is a group better off politically if it is concentrated or diverse? What would be the consequences of significantly increasing or decreasing the extent to which constituencies consist of single interest groups? See generally James M. Buchanan & Gordon Tullock, THE CALCULUS OF CONSENT 217–20 (1962).

5. The phrase "fair and effective representation," appearing in the next-to-last paragraph of Part III of Chief Justice Warren's opinion in *Reynolds*, has been repeated innumerable times. What does "fair and effective representation" mean as it is used in that passage? What facts would suggest a lack of fair and effective representation? Does Chief Justice Warren say there is a constitutional right to fair and effective representation? If so, is such a right enforceable? By whom? If Chief Justice Warren did not say there is a constitutional right to fair and effective representation, should he have? For discussion of some of these questions, see Lowenstein, *supra*, at 70–73.

6. *Reynolds v. Sims* left open many questions. One was whether and to what extent its doctrine was applicable to local government. Consider the following cases, and observe the degree to which the argument over extending *Reynolds* parallels the arguments in the *Kramer* line of cases, *supra*.

Avery v. Midland County
390 U.S. 474 (1968)

Mr. Justice WHITE delivered the opinion of the Court.

[Petitioner challenged electoral districts of drastically unequal population, asserting that the one person, one vote rule should be applied to the Midland County, Texas, Commissioners Court, the governing body of the county.]

Midland County has a population of about 70,000. The Commissioners Court is composed of five members. One, the County Judge, is elected at large from the entire county, and in practice casts a vote only to break a tie. The other four are Commissioners chosen from districts. The population of those districts, according to the 1963 estimates that were relied upon when this case was tried, was respectively 67,906; 852; 414; and 828. This vast imbalance resulted from placing in a single district virtually the entire city of Midland, Midland County's only urban center, in which 95% of the county's population resides.

The Commissioners Court is assigned by the Texas Constitution and by various statutory enactments with a variety of functions. According to the commentary to Vernon's Texas Statutes, the court:

> is the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer, fills vacancies in the county offices, lets contracts in the name of the county, builds roads and bridges, administers the county's public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as a board of equalization for tax assessments.

The court is also authorized, among other responsibilities, to build and run a hospital, an airport, and libraries. It fixes boundaries of school districts within the county, may establish a regional public housing authority, and determines the districts for election of its own members....

In *Reynolds v. Sims*, the Equal Protection Clause was applied to the apportionment of state legislatures. Every qualified resident, *Reynolds* determined, has the right to a ballot for election of state legislators of equal weight to the vote of every other resident, and that right is infringed when legislators are elected from districts of substantially unequal population. The question now before us is whether the Fourteenth Amendment likewise forbids the election of local government officials from districts of disparate population. As has almost every court which has addressed itself to this question, we hold that it does.

When the State apportions its legislature, it must have due regard for the Equal Protection Clause. Similarly, when the State delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process. If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population. If the five senators representing a city in the state legislature may not be elected from districts ranging in size from 50,000 to 500,000, neither is it permissible to elect the members of the city council from those same districts. In either case, the votes of some residents have greater weight than those of others; in both cases the equal protection of the laws has been denied.

That the state legislature may itself be properly apportioned does not exempt subdivisions from the Fourteenth Amendment. While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decisionmaking to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decisionmaking at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference. In a word, institutions of local government

have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens. We therefore see little difference, in terms of the application of the Equal Protection Clause and of the principles of *Reynolds v. Sims*, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties.[6]

We are urged to permit unequal districts for the Midland County Commissioners Court on the ground that the court's functions are not sufficiently "legislative." The parties have devoted much effort to urging that alternative labels—"administrative" versus "legislative"—be applied to the Commissioners Court. As the brief description of the court's functions above amply demonstrates, this unit of local government cannot easily be classified in the neat categories favored by civics texts. The Texas commissioners courts are assigned some tasks which would normally be thought of as "legislative," others typically assigned to "executive" or "administrative" departments, and still others which are "judicial." In this regard Midland County's Commissioners Court is representative of most of the general governing bodies of American cities, counties, towns, and villages. One knowledgeable commentator has written of "the states' varied, pragmatic approach in establishing government." That approach has produced a staggering number of governmental units—the preliminary calculation by the Bureau of the Census for 1967 is that there are 81,304 "units of government" in the United States—and an even more staggering diversity. Nonetheless, while special-purpose organizations abound and in many States the allocation of functions among units results in instances of overlap and vacuum, virtually every American lives within what he and his neighbors regard as a unit of local government with general responsibility and power for local affairs. In many cases citizens reside within and are subject to two such governments, a city and a county.

The Midland County Commissioners Court is such a unit. While the Texas Supreme Court found that the Commissioners Court's legislative functions are "negligible," the court does have power to make a large number of decisions having a broad range of impacts on all the citizens of the county. It sets a tax rate, equalizes assessments, and issues bonds. It then prepares and adopts a budget for allocating the county's funds, and is given by statute a wide range of discretion in choosing the subjects on which to spend. In adopting the budget the court makes both long-term judgments about the way Midland County should develop—whether industry should be solicited, roads improved, recreation facilities built, and land set aside for schools—and immediate choices among competing needs.

The Texas Supreme Court concluded that the work actually done by the Commissioners Court "disproportionately concern[s] the rural areas." Were the Commissioners Court a special-purpose unit of government assigned the perfor-

6. Inequitable apportionment of local governing bodies offends the Constitution even if adopted by a properly apportioned legislature representing the majority of the State's citizens. The majority of a State—by constitutional provision, by referendum, or through accurately apportioned representatives—can no more place a minority in oversize districts without depriving that minority of equal protection of the laws than they can deprive the minority of the ballot altogether, or impose upon them a tax rate in excess of that to be paid by equally situated members of the majority....

mance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions. That question, however, is not presented by this case, for while Midland County authorities may concentrate their attention on rural roads, the relevant fact is that the powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens, whether they reside inside or outside the city limits of Midland. The Commissioners maintain buildings, administer welfare services, and determine school districts both inside and outside the city. The taxes imposed by the court fall equally on all property in the county. Indeed, it may not be mere coincidence that a body apportioned with three of its four voting members chosen by residents of the rural area surrounding the city devotes most of its attention to the problems of that area, while paying for its expenditures with a tax imposed equally on city residents and those who live outside the city. And we might point out that a decision not to exercise a function within the court's power—a decision, for example, not to build an airport or a library, or not to participate in the federal food stamp program—is just as much a decision affecting all citizens of the county as an affirmative decision....

This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems. Last Term, for example, the Court upheld a procedure for choosing a school board that placed the selection with school boards of component districts even though the component boards had equal votes and served unequal populations. *Sailors v. Board of Education of Kent County*, 387 U.S. 105 (1967). The Court rested on the administrative nature of the area school board's functions and the essentially appointive form of the scheme employed. In *Dusch v. Davis*, 387 U.S. 112 (1967), the Court permitted Virginia Beach to choose its legislative body by a scheme that included at-large voting for candidates, some of whom had to be residents of particular districts, even though the residence districts varied widely in population....

Mr. Justice HARLAN, dissenting.

...The argument most generally heard for justifying the entry of the federal courts into the field of state legislative apportionment is that since state legislatures had widely failed to correct serious malapportionments in their own structure, and since no other means of redress had proved available through the political process, this Court was entitled to step into the picture. While I continue to reject that thesis as furnishing an excuse for the federal judiciary's straying outside its proper constitutional role, and while I continue to believe that it bodes ill for the country and the entire federal judicial system if this Court does not firmly set its face against this loose and short-sighted point of view, the important thing for present purposes is that no such justification can be brought to bear in this instance.

No claim is made in this case that avenues of political redress are not open to correct any malapportionment in elective local governmental units, and it is diffi-

cult to envisage how such a situation could arise. Local governments are creatures of the States, and they may be reformed either by the state legislatures, which are now required to be apportioned according to *Reynolds*, or by amendment of state constitutions. In these circumstances, the argument of practical necessity has no force. The Court, then, should withhold its hand until such a supposed necessity does arise, before intruding itself into the business of restructuring local governments across the country....

The present case affords one example of why the "one man, one vote" rule is especially inappropriate for local governmental units. The Texas Supreme Court held as a matter of Texas law:

> Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But developments during the years have greatly narrowed the scope of the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government... is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers.

Despite the specialized role of the commissioners court, the majority has undertaken to bring it within the ambit of *Reynolds* simply by classifying it as "a unit of local government with general responsibility and power for local affairs." Although this approach is intended to afford "equal protection" to all voters in Midland County, it would seem that it in fact discriminates against the county's rural inhabitants. The commissioners court, as found by the Texas Supreme Court, performs more functions in the area of the county outside Midland City than it does within the city limits. Therefore, each rural resident has a greater interest in its activities than each city dweller. Yet under the majority's formula the urban residents are to have a dominant voice in the county government, precisely proportional to their numbers, and little or no allowance may be made for the greater stake of the rural inhabitants in the county government.

This problem is not a trivial one and is not confined to Midland County. It stems from the fact that local governments, unlike state governments, are often specialized in function. Application of the *Reynolds* rule to such local governments prevents the adoption of apportionments which take into account the effect of this specialization, and therefore may result in a denial of equal treatment to those upon whom the exercise of the special powers has unequal impact. Under today's decision, the only apparent alternative is to classify the governmental unit as other than "general" in power and responsibility, thereby, presumably, avoiding application of the *Reynolds* rule....

A common pattern of development in the Nation's urban areas has been for the less affluent citizens to migrate to or remain within the central city, while the more wealthy move to the suburbs and come into the city only to work. The result has been to impose a relatively heavier tax burden upon city taxpayers and to fragmentize governmental services in the metropolitan area. An oft-proposed solution to these problems has been the institution of an integrated government encompassing the entire metropolitan area. In many instances, the suburbs may be included in such a metropolitan unit only by majority vote of the voters in

each suburb. As a practical matter the suburbanites often will be reluctant to join the metropolitan government unless they receive a share in the government proportional to the benefits they bring with them and not merely to their numbers. The city dwellers may be ready to concede this much, in return for the ability to tax the suburbs. Under the majority's pronouncements, however, this rational compromise would be forbidden: the metropolitan government must be apportioned solely on the basis of population if it is a "general" government....

Mr. Justice FORTAS, dissenting.

I submit that the problem presented by many, perhaps most, county governments (and by Midland County in particular) is precisely the same as those arising from special-purpose units. The functions of many county governing boards, no less than the governing bodies of special-purpose units, have only slight impact on some of their constituents and a vast and direct impact on others. They affect different citizens residing within their geographical jurisdictions in drastically different ways.

Study of county government leaves one with two clear impressions: that the variations from unit to unit are great; and that the role and structure of county government are currently in a state of flux. County governments differ in every significant way: number of constituents, area governed, number of competing or overlapping government units within the county, form, and means of selection of the governing board, services provided, the number and functions of independent county officials, and sources of revenue.

Some generalizations can be made about county governments. First, most counties today perform certain basic functions delegated by the State: assessment of property, collection of property taxes, recording of deeds and other documents, maintenance of rural roads, poor relief, law enforcement, and the administration of electoral and judicial functions. Some counties have begun to do more, especially by the assumption of municipal and policy-making functions. But most counties still act largely as administrative instrumentalities of the State.

Second, "[t]he absence of a single chief executive and diffusion of responsibility among numerous independently elected officials are general characteristics of county government in the United States." Those who have written on the subject have invariably pointed to the extensive powers exercised within the geographical region of the county by officials elected on a countywide basis and by special districts organized to perform specific tasks. Often these independent officials and organs perform crucial functions of great importance to all the people within the county.

These generalizations apply with particular force in this case. The population of Midland County is chiefly in a single urban area. That urban area has its own municipal government which, because of home rule, has relative autonomy and authority to deal with urban problems. In contrast, the Midland County government, like county governments generally, acts primarily as an administrative arm of the State. It provides a convenient agency for the State to collect taxes, hold elections, administer judicial and peace-keeping functions, improve roads, and perform other functions which are the ordinary duties of the State. The powers of the Commissioners Court, which is the governing body of Midland County, are strictly limited by statute and constitutional provision. Although a mere listing of

these authorizing statutes and constitutional provisions would seem to indicate that the Commissioners Court has significant and general power, this impression is somewhat illusory because very often the provisions which grant the power also circumscribe its exercise with detailed limitations.

For example, the petitioner cites [provisions] granting the Commissioners Court authority to levy taxes. Yet, at the time this suit was tried,...no county could levy a tax in excess of 80 cents on $100 property valuation. And...that 80 cents [was allocated] among the four "constitutional purposes"...(not more than 25 cents for general county purposes, not more than 15 cents for the jury fund, not more than 15 cents for roads and bridges, and not more than 25 cents for permanent improvements).

Another example is the authority to issue bonds. It is true, as the majority notes, that the Commissioners Court does have this authority. Yet...a detailed code [regulates] how and for what purposes bonds may be issued. Significantly,... county bonds "shall never be issued for any purpose" unless the bond issue has been submitted to the qualified property-taxpaying voters of the county.

More important than the statutory and constitutional limitations, the limited power and function of the Commissioners Court are reflected in what it actually does. The record and briefs do not give a complete picture of the workings of the Commissioners Court. But it is apparent that the Commissioners are primarily concerned with rural affairs, and more particularly with rural roads....

Substance, not shibboleth, should govern in this admittedly complex and subtle area; and the substance is that the geographical extent of the Commissioners Court is of very limited meaning. Midland County's Commissioners Court has its primary focus in nonurban areas and upon the nonurban people. True, the county's revenues come largely from the City of Midland. But the Commissioners Court fixes the tax rate subject to the specific limitations provided by the legislature. It must spend tax revenues in the categories and percentages which the legislature fixes. Taxes are assessed and collected, not by it, but by an official elected on a countywide basis. It is quite likely that if the city dwellers were given control of the Commissioners Court, they would reduce the load because it is spent primarily in the rural area. This is a state matter. If the State Legislature, in which presumably the city dwellers are fairly represented (*Reynolds v. Sims*), wishes to reduce the load, it may do so. But unless we are ready to adopt the position that the Federal Constitution forbids a State from taxing city dwellers to aid their rural neighbors, the fact that city dwellers pay most taxes should not determine the composition of the county governing body. We should not use tax impact as the sole or controlling basis for vote distribution. It is merely one in a number of factors, including the functional impact of the county government, which should be taken into account in determining whether a particular voting arrangement results in reasonable recognition of the rights and interests of citizens. Certainly, neither tax impact nor the relatively few services rendered within the City of Midland should compel the State to vest practically all voting power in the city residents to the virtual denial of a voice to those who are dependent on the county government for roads, welfare, and other essential services.

Texas should have a chance to devise a scheme which, within wide tolerance, eliminates the gross underrepresentation of the city, but at the same time provides an adequate, effective voice for the nonurban, as well as the urban, areas and peoples.

[Justice STEWART also dissented.]

Notes and Questions

1. In *Board of Estimate v. Morris*, 489 U.S. 688 (1989), the Court struck down the system for selecting the membership of the New York City Board of Estimate, which had significant budgetary and other fiscal authority. Three members of the Board, who cast two votes each, were the mayor and two other officials who were elected citywide. The remaining members were the five borough presidents, each of whom was elected within his or her respective borough. The populations of the boroughs were unequal by a substantial margin. How can *Morris* be distinguished from *Sailors v. Board of Education*, described in the majority opinion in *Avery*?

Should the fact that the members who were elected citywide could control the Board on most issues have led the *Morris* Court to uphold the Board's structure? Justice White, writing for the Court, responded as follows:

> The city... erroneously implies that the Board's composition survives constitutional challenge because the citywide members cast a 6–5 majority of board votes and hence are in position to control the outcome of board actions. The at-large members, however, as the courts below observed, often do not vote together; and when they do not, the outcome is determined by the votes of the borough presidents, each having one vote. Two citywide members, with the help of the presidents of the two least populous boroughs, the Bronx and Staten Island, will prevail over a disagreeing coalition of the third citywide member and the presidents of the three boroughs that contain a large majority of the city's population. Furthermore, because the Mayor has no vote on budget issues, the citywide members alone cannot control board budgetary decisions.

If the Mayor were permitted to vote on budgetary issues and if evidence showed that the citywide members of the Board usually voted as a bloc, would the result in *Morris* be different?

In some states, especially in the South, all state legislators elected from a county are formally or informally constituted as the "delegation" from that county. As a practical matter, these delegations are often given virtually complete control over legislation affecting that county. Because of the need to comply with one person, one vote, the delegation may consist of a mixture of representatives whose districts are entirely or only partially within the county. See generally Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE LAW JOURNAL 105 (1992). Suppose a county contains two legislative districts entirely within the county and one-tenth of an additional district. Could residents of the fully contained districts challenge the make-up of the county's delegation on the ground that in-county residents of the fractional district have ten times more voting power on the delegation than members of the fully contained districts?

2. Do you agree with the *Sailors* exception to the one person, one vote rule for "appointed" bodies? How would you determine if a body is "appointive" or "elective"?

Consider *Cunningham v. Municipality of Metropolitan Seattle*, 751 F.Supp. 885 (W.D.Wash. 1990). The Municipality of Metropolitan Seattle ("Metro") was created to control water pollution in King County, Washington. The 42 members of its governing council were chosen by various methods. 24 were county or city elected officials who automatically became members of the Metro Council. Most of the rest were also elected local officials who did not automatically become members upon election but were chosen by the bodies on which they sat. For example, in a number of cities the mayor and city council selected a representative to the Metro Council from their own number. The *Cunningham* court was willing to assume that those who did not become members of the council automatically on election to their local office could be considered "appointive" rather than "elective." Nevertheless, the court found that the council as a whole was an elective body, because a majority of its members were elective. Since the one person, one vote standard was not satisfied, the Metro Council structure was declared unconstitutional.

The *Cunningham* approach could lead to some odd results. In *Cunningham*, all the members of the Seattle city council were members of the Metro Council, and therefore were regarded as elective rather than appointive members. This fact was decisive, because if the Seattle delegation had been appointive, so would a majority of the Metro Council, so that the council would have been treated as appointive under the *Cunningham* approach. The legislature could have avoided the constitutional violation by reducing the Seattle delegation, thus requiring appointment of some percentage of the Seattle city council members, in which case a majority of the Metro Council would have been appointive. Suppose Seattle voters had been underrepresented on the council, despite the entire city council sitting as Metro Council members.[a] The *Cunningham* court's approach apparently would have permitted the legislature to remedy the problem by aggravating Seattle's underrepresentation!

Does *Cunningham* lend credence to Justice Harlan's concern, expressed in his *Avery* dissent, that application of the one person, one vote rule to local government would discourage the formation of metropolitan government entities like Metro? The *Cunningham* court stated, without citing evidentiary support, that "[t]here is no reason to believe that the vigorous governments and citizens of this region will fail to make Metro a continuing success if a change in the method of selecting its council is required to meet constitutional standards." 751 F.Supp. at 889.

3. The Supreme Court affirmed summarily (i.e., without hearing oral argument or issuing an opinion) a lower-court decision upholding the election of justices to the Louisiana Supreme Court from unequally populated districts. *Wells v. Edwards*, 409 U.S. 1095 (1973). Justices White, Douglas, and Marshall dissented.

4. In *Hadley v. Junior College District*, 397 U.S. 50 (1970), the Court imposed the one person, one vote doctrine on a consolidated junior college district. The Court said constitutional distinctions could not "be drawn on the basis of the purpose of the election.... While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process." 397 U.S. at 55. The Court went on to say that if the purpose of the election were determinative courts would have to distinguish between various elections, and the Court could not "readily

a. In the actual *Cunningham* case, Seattle was over-represented.

perceive judicially manageable standards to aid in such a task." However, the Court also said:

> It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds*,... might not be required.

Id. at 56. Is this last quotation from *Hadley* consistent with the earlier two?

Was the result in *Wells v. Edwards*, Note 3, *supra*, consistent with *Hadley*? Did "judicially manageable standards" for distinguishing elections that are subject to the one person-one vote requirement from those that are not emerge in the *Salyer Land* and *Ball* cases, reprinted below?

Salyer Land Co. v. Tulare Lake Basin Water Storage District

410 U.S. 719 (1973)

Mr. Justice REHNQUIST delivered the opinion of the Court.

... We are here presented with the issue expressly reserved in *Avery*:

> Were the [county's governing body] a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions.

The particular type of local government unit whose organization is challenged on constitutional grounds in this case is a water storage district, organized pursuant to the California Water Storage District Act....

Appellee district consists of 193,000 acres of intensively cultivated, highly fertile farm land located in the Tulare Lake Basin. Its population consists of 77 persons, including 18 children, most of whom are employees of one or another of the four corporations that farm 85% of the land in the district.

Such districts are authorized to plan projects and execute approved projects "for the acquisition, appropriation, diversion, storage, conservation, and distribution of water...." Incidental to this general power, districts may "acquire, improve, and operate" any necessary works for the storage and distribution of water as well as any drainage or reclamation works connected therewith, and the generation and distribution of hydroelectric power may be provided for. They may fix tolls and charges for the use of water and collect them from all persons receiving the benefit of the water or other services in proportion to the services rendered. The costs of the projects are assessed against district land in accordance with the benefits accruing to each tract held in separate ownership. And land that is not benefited may be withdrawn from the district on petition.

Governance of the districts is undertaken by a board of directors. Each director is elected from one of the divisions within the district, and each must take an official oath and execute a bond....

It is the voter qualification for such elections that appellants claim invidiously discriminates against them and persons similarly situated. Appellants are landowners, a landowner-lessee, and residents within the area included in the appellee's water storage district.... They allege that [the procedures for electing board members] unconstitutionally deny to them the equal protection of the laws guaranteed by the Fourteenth Amendment, in that only landowners are permitted to vote in water storage district general elections, and votes in those elections are apportioned according to the assessed valuation of the land....

I

It is first argued that [California Water Code] § 41000, limiting the vote to district landowners, is unconstitutional since nonlandowning residents have as much interest in the operations of a district as landowners who may or may not be residents. Particularly, it is pointed out that the homes of residents may be damaged by floods within the district's boundaries, and that floods may, as with appellant Ellison, cause them to lose their jobs. Support for this position is said to come from the recent decisions of this Court striking down various state laws that limited voting to landowners, *Kolodziejski*, *Cipriano*, and *Kramer*....

Cipriano and *Phoenix* involved application of the "one person, one vote" principle to residents of units of local governments exercising general governmental power, as that term was defined in *Avery*. *Kramer* and *Hadley* extended the "one person, one vote" principle to school districts exercising powers which,

> while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in *Avery* should also be applied here. [*Hadley*.]

But the Court was also careful to state that:

> It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* might not be required, but certainly we see nothing in the present case that indicates that the activities of these trustees fit in that category. Education has traditionally been a vital governmental function and these trustees, whose election the State has opened to all qualified voters, are governmental officials in every relevant sense of that term.

We conclude that the appellee water storage district, by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group, is the sort of exception to the rule laid down in *Reynolds* which the quoted language from *Hadley* and the decision in *Avery* contemplated.

The appellee district in this case, although vested with some typical governmental powers, has relatively limited authority. Its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin. It provides no other general public services such as schools, housing, transportation, utilities, roads, or anything

else of the type ordinarily financed by a municipal body. There are no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundaries, and it does not have a fire department, police, buses, or trains.

Not only does the district not exercise what might be thought of as "normal governmental" authority, but its actions disproportionately affect landowners. All of the costs of district projects are assessed against land by assessors in proportion to the benefits received. Likewise, charges for services rendered are collectible from persons receiving their benefit in proportion to the services. When such persons are delinquent in payment, just as in the case of delinquency in payments of assessments, such charges become a lien on the land. In short, there is no way that the economic burdens of district operations can fall on residents *qua* residents, and the operations of the districts primarily affect the land within their boundaries.

Under these circumstances, it is quite understandable that the statutory framework for election of directors of the appellee focuses on the land benefited, rather than on people as such. California has not opened the franchise to all residents, as Missouri had in *Hadley*, nor to all residents with some exceptions, as New York had in *Kramer*. The franchise is extended to landowners, whether they reside in the district or out of it, and indeed whether or not they are natural persons who would be entitled to vote in a more traditional political election. Appellants do not challenge the enfranchisement of nonresident landowners or of corporate landowners for purposes of election of the directors of appellee. Thus, to sustain their contention that all residents of the district must be accorded a vote would not result merely in the striking down of an exclusion from what was otherwise a delineated class, but would instead engraft onto the statutory scheme a wholly new class of voters in addition to those enfranchised by the statute.

We hold, therefore, that the popular election requirements enunciated by *Reynolds* and succeeding cases are inapplicable to elections such as the general election of appellee Water Storage District.

II

Even though appellants derive no benefit from the *Reynolds* and *Kramer* lines of cases, they are, of course, entitled to have their equal protection claim assessed to determine whether the State's decision to deny the franchise to residents of the district while granting it to landowners was "wholly irrelevant to achievement of the regulation's objectives." No doubt residents within the district may be affected by its activities. But this argument proves too much. Since assessments imposed by the district become a cost of doing business for those who farm within it, and that cost must ultimately be passed along to the consumers of the produce, food shoppers in far away metropolitan areas are to some extent likewise "affected" by the activities of the district. Constitutional adjudication cannot rest on any such "house that Jack built" foundation, however. The California Legislature could quite reasonably have concluded that the number of landowners and owners of sufficient amounts of acreage whose consent was necessary to organize the district would not have subjected their land to the lien of its possibly very substantial assessments unless they had a dominant voice in its control. Since the subjection of the owners' lands to such liens was the basis by which the district was to obtain financing, the proposed district had as a practical matter to attract

landowner support. Nor, since assessments against landowners were to be the sole means by which the expenses of the district were to be paid, could it be said to be unfair or inequitable to repose the franchise in landowners but not residents. Landowners as a class were to bear the entire burden of the district's costs, and the State could rationally conclude that they, to the exclusion of residents, should be charged with responsibility for its operation. We conclude, therefore, that nothing in the Equal Protection Clause precluded California from limiting the voting for directors of appellee district by totally excluding those who merely reside within the district.

III

Appellants assert that even if residents may be excluded from the vote, lessees who farm the land have interests that are indistinguishable from those of the landowners. Like landowners, they take an interest in increasing the available water for farming and, because the costs of district projects may be passed on to them either by express agreement or by increased rentals, they have an equal interest in the costs.

Lessees undoubtedly do have an interest in the activities of appellee district analogous to that of landowners in many respects. But in the type of special district we now have before us, the question for our determination is not whether or not we would have lumped them together had we been enacting the statute in question, but instead whether "if any state of facts reasonably may be conceived to justify" California's decision to deny the franchise to lessees while granting it to landowners.

The term "lessees" may embrace the holders of a wide spectrum of leasehold interests in land, from the month-to-month tenant holding under an oral lease, on the one hand, to the long-term lessee holding under a carefully negotiated written lease, on the other. The system which permitted a lessee for a very short term to vote might easily lend itself to manipulation on the part of large landowners because of the ease with which such landowners could create short-term interests on the part of loyal employees. And, even apart from the fear of such manipulation, California may well have felt that landowners would be unwilling to join in the forming of a water storage district if short-term lessees whose fortunes were not in the long run tied to the land were to have a major vote in the affairs of the district.

The administration of a voting system which allowed short-term lessees to vote could also pose significant difficulties. Apparently, assessment rolls as well as state and federal land lists are used by election boards in determining the qualifications of the voters. Such lists, obviously, would not ordinarily disclose either long- or short-term leaseholds....

Finally, we note that California has not left the lessee without remedy for his disenfranchised state. Sections 41002 and 41005 of the California Water Code provide for voting in the general election by proxy. To the extent that a lessee entering into a lease of substantial duration, thereby likening his status more to that of a landowner, feels that the right to vote in the election of directors of the district is of sufficient import to him, he may bargain for that right at the time he negotiates his lease. And the longer the term of the lease, and the more the interest of the lessee becomes akin to that of the landowner, presumably the more willing the lessor will be to assign his right. Just as the lessee may by contract be

required to reimburse the lessor for the district assessments so he may by contract acquire the right to vote for district directors.

Under these circumstances, the exclusion of lessees from voting in general elections for the directors of the district does not violate the Equal Protection Clause.

IV

The last claim by appellants is that § 41001, which weights the vote according to assessed valuation of the land, is unconstitutional. They point to the fact that several of the smaller landowners have only one vote per person whereas the J. G. Boswell Company has 37,825 votes, and they place reliance on the various decisions of this Court holding that wealth has no relation to resident-voter qualifications and that equality of voting power may not be evaded. See, *e.g.*, *Gray*; *Harper*.

Appellants' argument ignores the realities of water storage district operation. Since its formation in 1926, appellee district has put into operation four multimillion-dollar projects. The last project involved the construction of two laterals from the Basin to the California State Aqueduct at a capital cost of about $2,500,000. Three small landowners having land aggregating somewhat under four acres with an assessed valuation of under $100 were given one vote each in the special election held for the approval of the project. The J. G. Boswell Company, which owns 61,665.54 acres with an assessed valuation of $3,782,220 was entitled to cast 37,825 votes in the election. By the same token, however, the assessment commissioners determined that the benefits of the project would be uniform as to all of the acres affected, and assessed the project equally as to all acreage. Each acre has to bear $13.26 of cost and the three small landowners, therefore, must pay a total of $46, whereas the company must pay $817,685 for its part.[10] Thus, as the District Court found, "the benefits and burdens to each landowner... are in proportion to the assessed value of the land." We cannot say that the California legislative decision to permit voting in the same proportion is not rationally based.

Accordingly, we... hold that the voter qualification statutes for California water storage district elections are rationally based, and therefore do not violate the Equal Protection Clause.

Mr. Justice DOUGLAS, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL concur, dissenting.

The vices of this case are fourfold.

First. Lessees of farmlands, though residents of the district, are not given the franchise.

Second. Residents who own no agricultural lands but live in the district and face all the perils of flood which the district is supposed to control are disfranchised.

10. [S]mall landowners are protected from crippling assessments resulting from the district projects by the dual vote which must be taken in order to approve a project. Not only must a majority of the votes be cast for approval, but also a majority of the voters must approve. In this case, about 189 landowners constitute a majority and 189 of the smallest landowners in the district have only 2.34% of the land.

Third. Only agricultural landowners are entitled to vote and their vote is weighted, one vote for each one hundred dollars of assessed valuation....

Fourth. The corporate voter is put in the saddle.

There are 189 landowners who own up to 80 acres each. These 189 represent 2.34% of the agricultural acreage of the district. There are 193,000 acres in the district. Petitioner Salyer Land Co. is one large operator, West Lake Farms and South Lake Farms are also large operators. The largest is J. G. Boswell Co. These four farm almost 85% of all the land in the district. Of these, J. G. Boswell Co. commands the greatest number of votes, 37,825, which are enough to give it a majority of the board of directors. As a result, it is permanently in the saddle. Almost all of the 77 residents of the district are disfranchised. The hold of J. G. Boswell Co. is so strong that there has been no election since 1947, making little point of the provision in § 41300 of the California Water Code for an election every other year.

The result has been calamitous to some who, though landless, have even more to fear from floods than the ephemeral corporation.

I

...Assuming, *arguendo*, that a State may, in some circumstances, limit the franchise to that portion of the electorate "primarily affected" by the outcome of an election, *Kramer*, the limitation may only be upheld if it is demonstrated that "all those excluded are in fact substantially less interested or affected than those the [franchise] includes." *Ibid.* The majority concludes that "there is no way that the economic burdens of district operations can fall on residents *qua* residents, and the operations of the districts primarily affect the land within their boundaries."

But, with all respect, that is a great distortion. In these arid areas of our Nation a water district seeks water in time of drought and fights it in time of flood. One of the functions of water districts in California is to manage flood control. That is general California statutory policy. It is expressly stated in the Water Code that governs water districts. The California Supreme Court ruled some years back that flood control and irrigation are different but complementary aspects of one problem.

From its inception in 1926, this district has had repeated flood control problems. Four rivers, Kings, Kern, Tule, and Kaweah, enter Tulare Lake Basin. South of Tulare Lake Basin is Buena Vista Lake. In the past, Buena Vista has been used to protect Tulare Lake Basin by storing Kern River water in the former. That is how Tulare Lake Basin was protected from menacing floods in 1952. But that was not done in the great 1969 flood, the result being that 88,000 of the 193,000 acres in respondent district were flooded. The board of the respondent district—dominated by the big landowner J. G. Boswell Co.—voted 6–4 to table the motion that would put into operation the machinery to divert the flood waters to the Buena Vista Lake. The reason is that J. G. Boswell Co. had a long-term agricultural lease in the Buena Vista Lake Basin and flooding it would have interfered with the planting, growing, and harvesting of crops the next season.

The result was that water in the Tulare Lake Basin rose to 192.5 USGS datum. Ellison, one of the appellants who lives in the district, is not an agricultural landowner. But his residence was 15½ feet below the water level of the crest of the flood in 1969.

The appellee district has large levees; and if they are broken, damage to houses and loss of life are imminent.

Landowners—large or small, resident or nonresident, lessees or landlords, sharecroppers or owners—all should have a say. But irrigation, water storage, the building of levees, and flood control, implicate the entire community. All residents of the district must be granted the franchise.

This case, as I will discuss below, involves the performance of vital and important governmental functions by water districts clothed with much of the paraphernalia of government. The weighting of votes according to one's wealth is hostile to our system of government. As a nonlandowning bachelor was held to be entitled to vote on matters affecting education, *Kramer*, so all the prospective victims of mismanaged flood control projects should be entitled to vote in water district elections, whether they be resident nonlandowners, resident or nonresident lessees, and whether they own 10 acres or 10,000 acres. Moreover, their votes should be equal regardless of the value of their holdings, for when it comes to performance of governmental functions all enter the polls on an equal basis.

The majority, however, would distinguish the water storage district from "units of local government having general governmental powers over the entire geographic area served by the body," *Avery*, and fit this case within the exception contemplated for "a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents." *Id.* The Avery test was significantly liberalized in *Hadley*.... We said,

> [S]ince the [junior college] trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college, their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in *Avery*.... [T]hese powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees *perform important governmental functions*... and have *sufficient impact throughout the district* to justify the conclusion that the principle which we applied in *Avery* should also be applied here. (Emphasis added.)

Measured by the *Hadley* test, the Tulare Lake Basin Water Storage District surely performs "important governmental functions" which "have sufficient impact throughout the district" to justify the application of the *Avery* principle.

Water storage districts in California are classified as irrigation, reclamation, or drainage districts. Such state agencies "are considered exclusively governmental," and their property is "held only for governmental purpose," not in the "proprietary sense." They are a "public entity," just as "any other political subdivision." That is made explicit in various ways. The Water Code of California states that "[a]ll waters and water rights" of the State "within the district are given, dedicated, and set apart for the uses and purposes of the district." Directors of the district are "public officers of the state." The district possesses the power of eminent domain. Its works may not be taxed. It carries a governmental immunity against suit. A district has powers that relate to irrigation, storage of water, drainage, flood control, and generation of hydroelectric energy.

Whatever may be the parameters of the exception alluded to in *Avery* and *Hadley*, I cannot conclude that this water storage district escapes the constitutional restraints relative to a franchise within a governmental unit.

II

When we decided *Reynolds* and discussed the problems of malapportionment we thought and talked about people—of population, of the constitutional right of "qualified citizens to vote," of "the right of suffrage," of the comparison of "one man's vote" to that of another man's vote....

It is indeed grotesque to think of corporations voting within the framework of political representation of people. Corporations were held to be "persons" for purposes both of the Due Process Clause of the Fourteenth Amendment and of the Equal Protection Clause. Yet, it is unthinkable in terms of the American tradition that corporations should be admitted to the franchise. Could a State allot voting rights to its corporations, weighting each vote according to the wealth of the corporation? Or could it follow the rule of one corporation, one vote?

It would be a radical and revolutionary step to take, as it would change our whole concept of the franchise. California takes part of that step here by allowing corporations to vote in these water district matters that entail performance of vital governmental functions. One corporation can outvote 77 individuals in this district. Four corporations can exercise these governmental powers as they choose, leaving every individual inhabitant with a weak, ineffective voice. The result is a corporate political kingdom undreamed of by those who wrote our Constitution.

Notes and Questions

1. The majority notes that voting by corporations and non-resident landowners was not challenged. Why do you think this was the case? Would appellants have strengthened or weakened their chances of winning if they had urged that only residents should be permitted to vote?

2. Is Part II of Justice Douglas' dissenting opinion consistent with Part I?

3. California Elections Code § 18521 provides in part:

> A person shall not... receive, agree, or contract for... any money... or other valuable consideration... because he...:
>
> (a) Voted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person....

This section is not expressly applicable to water storage district elections, which are governed by the Water Code. Would such a provision be desirable from the majority's point of view? From Justice Douglas' point of view? From your point of view?

4. Mary is employed by Boswell and has been elected to one of the Water Storage District board seats controlled by Boswell. She asks you for legal advice prior to the vote on whether to divert the flood waters to Buena Vista Lake under circumstances identical to those described by Justice Douglas. Boswell has instructed Mary to vote against diversion. She believes the residents of the district would benefit from diversion and that the benefits of diversion to other compa-

nies with land in the district would be even greater than the very substantial costs diversion will impose on Boswell. How would you advise Mary?

5. Suppose it were the case that diversion of flood waters would benefit Salyer Land but harm Boswell, and that the benefit to Salyer Land would be greater than the loss to Boswell. Would it be proper for Salyer Land to pay Boswell to instruct its representatives on the board to vote for diversion?

6. Is *Salyer* consistent with the Court's earlier decisions? Consider Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 UNIVERSITY OF CHICAGO LAW REVIEW 339, 361–62 (1993):

> The Court in *Salyer* was markedly more deferential to state determinations concerning local arrangements and much less protective of the interest of local residents in voting in local elections than it had been previously. The Court predicated the exception from the model of local democratic government on the "special limited purpose" of the water storage district and the "disproportionate effect of its activities on landowners." But neither "special limited purpose," nor "disproportionate effect" was adequately defined.
>
> From the perspective of residents dependent on the district's water, it is not obvious that water storage is a more limited function than a junior college. Indeed, comparing governmental functions is just the sort of standardless exercise that *Hadley* had warned against in refusing to hinge the standard of review on the "importance" of an office. Furthermore, although the California water storage district legislation established a fairly tight nexus linking receipt of water, assessment for water project costs, and the local vote, the Court did not explain how the water district arrangement differed from the service-payment-franchise relationship in *Kramer*. Much as nonparents and nontaxpayers may be affected by the operations of a local school board, water storage district residents as well as landowners may be affected by district actions.

7. Would it be unconstitutional if only owners of land in the district were eligible for election to the board? In Missouri, the state constitution provided for appointment of a board to recommend to the voters a plan of local government reorganization for the St. Louis area. Membership on this board was limited to landowners. In *Quinn v. Millsap*, 491 U.S. 95 (1989), the Court struck down this requirement as a denial of equal protection to non-landowners who were denied the right to serve. *Salyer Land* and *Ball v. James*, *infra*, were distinguished on the ground that the St. Louis government reorganization plan was not as directly connected to landownership as the water operations of the districts in *Salyer* and *Ball*.

Suppose that landownership within the Tulare Lake Basin Water Storage District were a qualification for service on the board of directors and that this qualification were challenged by Boswell on the ground that none of the persons it wished to "elect" to the board owned land in the district. What result?

8. In BALL v. JAMES, 451 U.S. 355 (1981), the Court rejected a challenge to the one acre, one vote system used to elect the board of the Salt River Project Agricultural Improvement and Power District, which stored and delivered water to landowners in a large part of central Arizona. The district had begun as a private association of farmers in the late 19th century, though it had received federal assistance since 1903. In 1906, it began supporting its water operations by gener-

ating and selling hydroelectric power. It converted into a public district under Arizona law to obtain relief from financial difficulties during the Depression. By converting, the District's bonds became exempt from federal taxation. However, the conversion was not accomplished until the Arizona statutes were amended to permit the acreage-based voting system.

By the time of this law suit, the district included almost half Arizona's population and provided electric power to a large part of Phoenix and other cities. Furthermore, although the landowners who voted and received subsidized water were theoretically subject to assessments on their land to support the district, since 1951 no assessments had been needed because of the revenues from the sale of electricity. Excerpts from Justice Stewart's opinion for the Court follow:

"First, the District simply does not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*. The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services.

"Second..., the District's water functions, which constitute the primary and originating purpose of the District, are relatively narrow. The District and Association do not own, sell, or buy water, nor do they control the use of any water they have delivered. The District simply stores water behind its dams, conserves it from loss, and delivers it through project canals....[A]ll water delivered by the Salt River District, like the water delivered by the Tulare Lake Basin Water Storage District, is distributed according to land ownership, and the District does not and cannot control the use to which the landowners who are entitled to the water choose to put it. As repeatedly recognized by the Arizona courts, though the state legislature has allowed water districts to become nominal public entities in order to obtain inexpensive bond financing, the districts remain essentially business enterprises, created by and chiefly benefiting a specific group of landowners. As in *Salyer*, the nominal public character of such an entity cannot transform it into the type of governmental body for which the Fourteenth Amendment demands a one-person, one-vote system of election.

"Finally, neither the existence nor size of the District's power business affects the legality of its property-based voting scheme. [T]he provision of electricity is not a traditional element of governmental sovereignty, and so is not in itself the sort of general or important governmental function that would make the government provider subject to the doctrine of the *Reynolds* case. In any event, since the electric power functions were stipulated to be incidental to the water functions which are the District's primary purpose, they cannot change the character of that enterprise. The Arizona Legislature permitted the District to generate and sell electricity to subsidize the water operations which were the beneficiaries intended by the statute. A key part of the *Salyer* decision was that the voting scheme for a public entity like a water district may constitutionally reflect the narrow primary purpose for which the district is created. In this case, the parties have stipulated that the primary legislative purpose of the District is to store, conserve, and deliver water for use by District landowners, that the sole legislative reason for making water projects public entities was to enable them to raise revenue through interest-free bonds, and that the development and sale of electric power was undertaken not for the primary purpose of providing electricity to the

public, but 'to support the primary irrigation functions by supplying power for reclamation uses and by providing revenues which could be applied to increase the amount and reduce the cost of water to Association subscribed lands.'

"...[N]o matter how great the number of nonvoting residents buying electricity from the District, the relationship between them and the District's power operations is essentially that between consumers and a business enterprise from which they buy. Nothing in the *Avery*, *Hadley*, or *Salyer* cases suggests that the volume of business or the breadth of economic effect of a venture undertaken by a government entity as an incident of its narrow and primary governmental public function can, of its own weight, subject the entity to the one-person, one-vote requirements of the *Reynolds* case.

"The functions of the Salt River District are therefore of the narrow, special sort which justifies a departure from the popular-election requirement of the *Reynolds* case. And as in *Salyer*, an aspect of that limited purpose is the disproportionate relationship the District's functions bear to the specific class of people whom the system makes eligible to vote. The voting landowners are the only residents of the District whose lands are subject to liens to secure District bonds. Only these landowners are subject to the acreage-based taxing power of the District, and voting landowners are the only residents who have ever committed capital to the District through stock assessments charged by the Association.[19] The *Salyer* opinion did not say that the selected class of voters for a special public entity must be the only parties at all affected by the operations of the entity, or that their entire economic well-being must depend on that entity. Rather, the question was whether the effect of the entity's operations on them was disproportionately greater than the effect on those seeking the vote.

"As in the *Salyer* case, we conclude that the voting scheme for the District is constitutional because it bears a reasonable relationship to its statutory objectives. Here, according to the stipulation of the parties, the subscriptions of land which made the Association and then the District possible might well have never occurred had not the subscribing landowners been assured a special voice in the conduct of the District's business. Therefore, as in *Salyer*, the State could rationally limit the vote to landowners. Moreover, Arizona could rationally make the weight of their vote dependent upon the number of acres they own, since that number reasonably reflects the relative risks they incurred as landowners and the distribution of the benefits and the burdens of the District's water operations."

Justice Powell, who joined in the majority opinion, wrote a separate concurrence emphasizing that the district's electoral system was controlled by the state legislature, which of course was elected on a one person, one vote basis. Justice White wrote a dissenting opinion, joined by Brennan, Marshall, and Blackmun.

(a) Is mosquito abatement a "normal" function of government? Running a library? Operation of day care centers? How would you decide? Would the "normality" of such government activities be relevant to deciding whether single pur-

19. The Court of Appeals found it significant that 98% of the District's revenues come from sales of electricity, and only 2% from charges assessed for water deliveries. This fact in no way affects the constitutionality of the voting scheme. When the consumers of electricity supply those power revenues, they are simply buying electricity; they are neither committing capital to the District nor committing any of their property as security for the credit of the District.

pose districts to carry them out are subject to the one person-one vote rule? Should it be?

(b) Suppose the Salt River District began to operate a garbage disposal service, at a profit, to help finance its water distribution services. The majority lists sanitation services as a "normal" government function, but in many places recently this function has been handed over to private enterprise. Would the result in *Ball v. James* be affected?

Consider Briffault, *supra*, 60 UNIVERSITY OF CHICAGO LAW REVIEW at 374–75:

> [It is not] obvious why "sanitation, health, or welfare services" are more normal functions of government than the storage and distribution of water. There are more than 3,000 local governments specially created to address water management functions. How can a governmental activity so widespread not be a normal function of government? It may be that the existence of private providers of water undercuts the appreciation of the extent of public water storage and distribution activity, but surely the determination of whether a public service is a normal function of government cannot turn on the absence of private sector alternatives, lest the role of private security forces, private carting services, and private schools undermine the "governmentalness" of the traditional governmental functions concerning public safety, sanitation, and primary education.

9. In William H. Riker, *Democracy and Representation: A Reconciliation of Ball v. James and Reynolds v. Sims*, 1 SUPREME COURT ECONOMIC REVIEW 39 (1982), a well-known political scientist and public choice theorist first argues (controversially) that *Reynolds* and the other one person-one vote cases had very little effect on policies pursued by the state legislatures. He then writes:

> [M]y generalization about this line of cases from *Reynolds* to *Ball* is that, if the elimination of trivial (in terms of public policy) restrictions on voting [i.e., the *Reynolds* rule applied to state legislatures] did not hurt anyone, then the Court proceeded with the elimination; but when the elimination came to mean an arbitrary transfer of significant rights in and values of property [i.e., when one person-one vote was proposed in the circumstances of *Ball*], the Court refused to continue the process.

Id. at 59. Professor Riker approved of *Ball v. James*. Laurence Tribe has written of *Ball* and *Salyer Land* that they rest "on the most problematic of foundations," but his explanation of the cases—that "the Burger Court was evidently unwilling to divest wealthy landowners of the political power they wielded by virtue of their land-holdings"—is not very different from Riker's explanation of *Ball*. Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1088, 1670 (2nd ed., 1988).

10. The majority and the dissent in *Ball* differed over the significance of the fact that the state legislature, in which the appellees were represented, had control over the structure of the Salt River District. Was the dissent correct in arguing that this fact is no more relevant here than in the earlier cases in which the Court extended one person-one vote to local government entities? If so, could it follow that the earlier cases and not *Ball v. James* were wrongly decided? What arguments can you make on both sides of this question? See Alexander Bickel, THE

SUPREME COURT AND THE IDEA OF PROGRESS 152–56 (1978). Is the question related in any way to the debate between the pluralists and their critics, referred to in Chapter 1? For a broad theoretical framework that may be relevant, see Frank Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models for Local Government Legitimacy*, 53 INDIANA LAW JOURNAL 145 (1977–78). Several cases, including *Salyer* and *Ball*, are analyzed in terms of Michelman's framework in Phillip S. Althoff & William H. Greig, *The United States Supreme Court on Rights and/or Participation: The "Deviant" Voting and Redistricting Cases*, 13 JOURNAL OF CONTEMPORARY LAW 31 (1987).

Michelman himself addressed *Ball* in a more recent article, finding the decision more consistent with a communitarian conception of government than with a pluralist, interest-based conception. From a pluralist standpoint, it is hard to justify the exclusion of the consumers of electricity, who are so obviously interested in the affairs of the district. But, Michelman continues:

> What might begin to explain (if not justify) the majority's conclusion, and its accompanying rhetoric of denial that the Salt River District constituted a government in the full sense, is the thought that instrumental protection of extra-political interests neither exhausts the value of a voting right to its holder nor alone suffices to explain the first-magnitude status of such rights in the constitutional firmament. For insofar as rights of admission to political participation were esteemed on constitutive, perhaps in addition to instrumental grounds, the Salt River District and its ilk—unlike the cities in *Cipriano* and *Kolodziejski* and the school district in *Kramer*—might easily have been perceived as *fora non conveniens* for the realization of the self-constitutive values of citizenship. Apparently required for such realization is participation in the affairs of a "political community." Perhaps the majority Justices doubted...that the Salt River District, given its history and the accompanying understandings about its place in the lives of the people, defined or constituted any such thing.

Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLORIDA LAW REVIEW 443, 469 (1989).

11. Another line of cases has been compared with the *Kramer-Avery-Salyer-Ball* line. In *Carrington v. Rash*, 380 U.S. 89 (1965), the Court struck down a Texas prohibition on voting by members of the Armed Services whose Texas residence began after they had joined the military. Likewise, in *Evans v. Cornman*, 398 U.S. 419 (1970), the Court struck down Maryland's denial of the vote to persons who resided on the grounds of the National Institutes of Health, a federal enclave located within Maryland.

In *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), plaintiffs lived within the "police jurisdiction" of Tuscaloosa, Alabama, which consisted of the area outside but within three miles of the city limits. Under Alabama law, city criminal ordinances were applicable and the jurisdiction of the municipal courts extended to the police jurisdiction. In addition, businesses located within the police jurisdiction had to pay a license tax half the amount they would be required to pay if they were within the city. However, the city's powers of zoning, eminent domain, and ad valorem taxation did not extend to the police jurisdiction. The Supreme Court majority rejected plaintiffs' claim that they

were denied equal protection because they were denied the vote in Tuscaloosa city elections.

Melvyn R. Durschlag, in *Salyer, Ball, and Holt: Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 CASE WESTERN RESERVE LAW REVIEW 1 (1982), argues that in cases where Group A lacks a sufficient "interest" in the matters voted upon, it would dilute unconstitutionally the votes of Group B, which does have such an interest, to extend the franchise to Group A. He therefore contends that in all the cases we have been considering, constitutional problems are presented whether the franchise is extended or contracted. The decisive consideration, in his view, is whether the powers of the public entity are such that it can directly redistribute wealth to or from the group in question. Applying his standard, Professor Durschlag concludes that *Salyer* was correctly decided, but that *Ball* and *Holt* were in error.

A simpler view, rejected by Professor Durschlag, would place great importance on the nominal boundaries of the public entity under state law. It might be presumed that these boundaries reflect the "community" that makes up the entity, without regard to anyone's "interests." On this view, *Holt* would have been rightly decided, but *Salyer* and *Ball* would have been in error.

12. News item, shortly before this book went to press:

> CORCORAN, Calif.—The Boswells and the Salyers, two of the richest and most powerful farming families in America, have ended decades of rivalry and rancor over their San Joaquin Valley empires with a huge land deal in which one colossus will swallow the other.
>
> Fred Salyer, 72, has agreed to sell his cotton and grain empire—about 25,000 acres of fertile San Joaquin Valley soil—to J.G. Boswell for tens of millions of dollars, according to business associates and employees....

Mark Arax, "2 Farm Giants End Decades of Rivalry With Land Deal," *Los Angeles Times*, February 10, 1995, p. A1, col. 5.

Chapter 4

Legislative Districting

I. One Person, One Vote: How Equal Is Equal?

One issue left open by *Reynolds v. Sims* was precisely how equal the population of districts must be. In *Swann v. Adams*, 385 U.S. 440 (1967), the Court struck down a Florida legislative apportionment when the largest deviation from the mean population for any one district was 18 percent and the ratios of the largest to the smallest district in each house were, respectively, 1.41 to 1 and 1.30 to 1. The Court said such discrepancies could not be upheld without a showing of some rational basis, which could not include "deference to area and economic or other group interests." In subsequent cases the Court was willing to find that adherence to municipal boundaries can in some circumstances justify moderate deviation from exact equality (up to at least about 17%) in state and local districting. See *Abate v. Mundt*, 403 U.S. 182 (1971); *Mahan v. Howell*, 410 U.S. 315 (1973); *Voinovich v. Quilter*, 113 S.Ct. 1149, 1159 (1993). Small deviations (up to 10%) at the state level require no justification at all. *Gaffney v. Cummings*, 412 U.S. 735 (1973). In the case of congressional districting, which under *Wesberry v. Sanders* is governed by Art. I, § 2 and not by the Equal Protection Clause, the Court has not tolerated any avoidable deviation from mathematical equality. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *White v. Weiser*, 412 U.S. 783 (1973).[a]

The Supreme Court's latest word on these questions is contained in two 5–4 decisions handed down on the same day in 1983. In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court struck down a New Jersey congressional districting plan on population grounds, when the population difference between the largest and smallest districts amounted to 0.6984 percent. Relying on *Kirkpatrick*, the Court refused to set any percentage below which population inequality in Congressional districts would be regarded as de minimis. In *Brown v. Thomson*, 462 U.S. 835

a. Neither Art. I, § 2, which governs elections for the House of Representatives, nor the Equal Protection Clause contains an explicit requirement of "one person, one vote," much less an indication of how equal the districts must be. Accordingly, many commentators have been unimpressed with the Court's reliance on the two constitutional provisions as an explanation for the dramatically different population standards the Court has imposed. A different justification is proposed by Charles Black, *Representation in Law and Equity*, 10 NOMOS: REPRESENTATION 131 (1968).

(1983), a case whose unusual factual and procedural background may or may not prevent it from having important precedential effect, the Court validated a Wyoming state legislative plan in which the maximum population deviation amounted to 89 percent.

Justice Sandra Day O'Connor, concurring in *Brown v. Thomson*, commented: "As a Member of the majority in both cases, I feel compelled to explain the reasons for my joinder in these apparently divergent decisions." 462 U.S. at 848. Readers are invited to search through Justice O'Connor's opinion and all the other opinions delivered that day in search of a satisfactory explanation.

Though *Wesberry* and *Reynolds* were fiercely controversial when they were decided, the one person, one vote standard has become widely accepted in the United States. For that reason, and because legislative bodies do not wish to jeopardize their districting plans by straying too near the boundaries of the equal population standards that have been staked out by the Supreme Court, serious challenges to legislative districts on grounds of population have become relatively unusual. In the remainder of this chapter, we shall consider aspects of redistricting other than population equality that courts have been required to address in the years since *Reynolds*. In Chapter 5, we shall consider claims that districting plans and related electoral arrangements dilute the votes of racial, ethnic, and language minorities.

II. Beyond Equality: Non-Arithmetic Considerations in Districting

Even if absolute equality down to the last individual were required, it would still be possible to design districts within a state or municipality in a virtually infinite number of ways. The way that is chosen has important consequences for elected officeholders, for political parties and for the various interests that exist within the population.[b]

To illustrate this, consider a simplified hypothetical jurisdiction with 300 residents, all voters, and with three legislative districts. 160 residents always vote Democratic, and 140 always vote Republican. Consider the makeup of the legislature under each of the following plans, each of which complies perfectly with the one person, one vote rule.

		Democrats	Republicans
Plan 1:	District 1	90	10
	District 2	35	65
	District 3	35	65
Plan 2:	District 1	60	40
	District 2	60	40
	District 3	40	60

b. For a thoughtful discussion of the political consequences of redistricting and the political environment within which redistricting plans are enacted, see Bruce E. Cain, THE REAPPORTIONMENT PUZZLE (1984).

Under Plan 1 the Republicans will control the legislature, whereas under Plan 2 the Democrats will prevail. It is not obvious, even in principle, what is the fairest, most just or most democratic basis on which to draw district lines. For example, in our hypothetical case it might be assumed that Plan 2 is preferable because it assures that the Democrats, who are in the majority, will control the legislature. But suppose District 1 in Plan 1 (which votes 90–10 Democratic) consists of a predominantly African-American, low-income central city area, and Districts 2 and 3 in that plan consist of predominantly white, middle-class suburbs with a modest Republican majority distributed fairly evenly throughout the two districts. Plan 1 might then be preferred by some, since it assures effective representation to the central city residents, who comprise a substantial minority with distinctive political needs.

Perhaps a third possibility exists. District 1 of Plan 1 might be preserved to assure a district in which African-American voters can select a candidate of their choice, but the other two districts might be rearranged so that the Democrats, with a majority of the total vote, would be assured a majority of the seats.

		Democrats	Republicans
Plan 3:	District 1	90	10
	District 2	10	90
	District 3	60	40

Suppose that in order to create the outcome in Plan 3, it is necessary that Districts 2 and 3 consist of fantastic shapes that divide numerous suburban cities between the two districts. Which of the three plans do you think is best? Which is worst? Of course, any real-life redistricting situation involves a vastly more complicated set of choices between large numbers of political and interest group concerns.

The legislature (or in some states an administrative agency) must adopt a new plan at least after each decennial federal census. Whatever criteria one thinks *should* be employed in drawing district lines, few would deny that most often in legislatures the two overriding criteria are first, the political well-being of the incumbents, and second, the well-being of the controlling party. To control the process, in most states in which redistricting is carried out by the legislature, a party must have either a majority in both houses and the governorship, or a sufficient majority in both houses so that a gubernatorial veto can be overridden.

The criteria for redistricting can come up in judicial proceedings in three different settings. The first situation arises when the state has adopted a plan that the court finds insufficient under the population standards or on some other ground. In this situation, courts have been directed not to disturb the state's plan more than necessary to bring it into compliance with the one person, one vote rule, at least where the state's plan is only slightly deficient and can be corrected with a few minor changes. *White v. Weiser*, 412 U.S. 783, 794–97 (1973). See also *Upham v. Seamon*, 456 U.S. 37 (1982), which reached a similar result where certain lines in a redistricting plan were disapproved by the Attorney General under Section 5 of the Voting Rights Act. The United States District Court could adjust the lines in question but had no basis for modifying other parts of the statutory plan.

Second, the state may have failed to adopt any plan, or one that even approximates population equality. In this case the court will have to devise its own plan.

The Supreme Court has given little guidance, except to state that the lower courts should avoid both multimember districts and minor population discrepancies, even where they would be upheld in a legislatively-adopted plan. *Chapman v. Meier*, 420 U.S. 1 (1975).[c] In *Legislature v. Reinecke*, *infra*, we shall examine the criteria that the California Supreme Court accepted for devising a plan when it was placed in this situation in 1973.

Finally, the court may be faced with a plan adopted by the state that satisfies the one person, one vote rule but that is challenged as unconstitutional because it is unfair to some group within the electorate. Although the Supreme Court has never held that compliance with one person, one vote assures satisfaction of the Equal Protection Clause, it has set a very high standard for plaintiffs challenging districting schemes on non-population grounds under the Constitution. *Gaffney v. Cummings*, 412 U.S. 735, 751–54 (1973). In the final section of this chapter, we shall consider how the courts have responded to attacks on districting plans on the ground that they are partisan gerrymanders. In Chapter 5, we shall consider claims by racial, ethnic, and language minorities that their votes are diluted by districting plans or other electoral mechanisms. As we shall see in Chapter 5, the 1982 amendments to the Voting Rights Act provide a strong basis for many such claims.

Aside from population equality, many criteria have been proposed for legislative districting. Most of them have been controversial. One set of criteria was authoritatively adopted in California in 1973, after a lengthy struggle between a Democratic legislature and Republican Governor Ronald Reagan had resulted in a failure to adopt a redistricting plan. See *Legislature v. Reinecke*, 9 Cal.3d 166, 107 Cal. Rptr. 18, 507 P.2d 626 (1973). The following is a portion of the report of the Special Masters, whose recommendations were adopted with minor changes by the state Supreme Court and governed California elections through the 1980 election. *Legislature v. Reinecke*, 10 Cal.3d 396, 110 Cal. Rptr. 718, 516 P.2d 6 (1973).[d] Consider carefully those criteria the Masters adopt and those they reject. Do you agree with their choice of criteria to guide a court that is forced to create a districting plan? Do you think any or all of these criteria should be constitutionally mandatory for legislatures that adopt districting plans? Whether or not they are required constitutionally, do you believe these criteria embody the public interest and that a legislature that fails to follow them may justly be criticized? Would you want to add additional criteria that were not considered by the Special Masters?

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c. Plans devised by courts are not subject to preclearance under Section 5 of the Voting Rights Act. However, if the plan approved by a court was submitted to it by a legislative agency, then preclearance is required if the jurisdiction is "covered" by Section 5. *McDaniel v. Sanchez*, 452 U.S. 130 (1981). For analysis and criticism of *McDaniel*, see Katharine Inglis Butler, *Reapportionment, the Courts and the Voting Rights Act: A Resegregation of the Political Process?*, 56 UNIVERSITY OF COLORADO LAW REVIEW 1, 42–55, 71–78 (1984).

d. Following the 1990 census, California again had a Democratic legislature and a Republican governor (Pete Wilson), with the result, again, that the California Supreme Court had to design redistricting plans. The court instructed its masters to use the same criteria that were described by the masters in 1973. See *Wilson v. Eu*, 1 Cal.4th 707, 4 Cal.Rptr. 379, 823 P.2d 545 (1992).

Legislature v. Reinecke

10 Cal.3d 396, 110 Cal.Rptr. 718, 516 P.2d 6 (1973)

APPENDIX

REPORT AND RECOMMENDATIONS OF SPECIAL MASTERS ON REAPPORTIONMENT

The Special Masters appointed by the Court in these cases were directed as follows:

"The Masters shall hold public hearings to permit the presentation of evidence and argument with respect to the possible criteria of reapportionment and of proposed plans to carry out such criteria.

"Following such hearings the Masters shall recommend to the Court for possible adoption reapportionment plans which shall provide for 43 single member congressional districts, 40 single member Senate districts and 80 single member Assembly districts. The Masters shall set forth the criteria underlying the plans they recommend for adoption and the reasons for their recommendations." ...

The oral and written presentations covered a wide range of subjects, some relevant to the issues at hand and others irrelevant or beyond the scope of the Court's directive to the Masters....

The most frequently voiced objection to all plans recommended by the Legislature, including the reapportionment plan for the Senate that the Governor found tolerable, was that those plans were designed primarily to favor incumbents and to obtain partisan advantage for one or the other of the major political parties. It was evident that there was widespread public cynicism about the political process, and it was frequently stated that the Masters were in a singularly advantageous position unavailable to legislators, who cannot escape the inevitable force of self-interest. Many who appeared expressed the belief that any plans promulgated by the Court or by the Masters would be less incumbent-oriented or politically motivated than the plans recommended by the Legislature or others with special interests in reapportionment.

After the hearings began, the Legislature passed and the Governor vetoed Senate Bill 195, which contained congressional and legislative reapportionment plans. Both houses of the Legislature and 41 members of the congressional delegation urged that the plans set forth in Senate Bill 195 should be recommended to the Court because those plans represent reapportionments most nearly approximating appropriate political solutions. The Senate in particular urged that its plan contained in the bill should be recommended on the ground that the Governor had indicated that he would have approved that plan had it been presented to him in a separate bill. Certain minority assemblymen urged that as much of the assembly plan as did not meet with the Governor's disapproval be recommended, and they offered modifications of the rest of that plan designed to meet the Governor's objections. Similarly, 41 members of Congress offered modifications of the congressional plan contained in Senate Bill 195 to meet the Governor's objections. Underlying all of these proposals was the basic premise that "reapportionment is primarily a matter for the legislative branch of the government to resolve," and the recently reiterated position of the United States Supreme Court that political solutions to reapportionment problems are not only entirely proper but indeed

inevitable. *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Weiser*, 412 U.S 783 (1973).

Unlike the situation in the *Gaffney* and *White* cases, however, in these proceedings there are no duly enacted political solutions to be recommended to the Court but only "plans that are at best truncated products of the legislative process." Accordingly, in making their recommendations to the Court the Masters cannot escape the political thicket by seeking a compromise between legislative and gubernatorial views, a compromise that the Legislature and the Governor were unable to achieve. It is therefore concluded that the plans contained in Senate Bill 195 and in the proposed modifications thereof mentioned above cannot properly command any preferential consideration but must be measured for recommendation or rejection in whole or in part by the following criteria that the Masters determine to be appropriate for reapportionment. All other plans submitted by individuals or groups must likewise be measured by the objective criteria deemed to be appropriate.

CRITERIA FOR REAPPORTIONMENT

Having considered the oral and written presentations, pertinent provisions of the Constitution of the United States and the Constitution and Statutes of California, the case law expressed in judicial decisions, and authoritative sources in the field of political science, the following are recommended as the criteria to be used in formulating plans for reapportionment of legislative districts in California:

1. As required by the federal Constitution, the districts in each plan should be numerically equal in population as nearly as practicable, with strict equality in the case of congressional districts and reasonable equality in the case of state legislative districts. The population of Senate and assembly districts should be within 1% of the ideal except in unusual circumstances, and in no event should a deviation greater than 2% be permitted.

Although a greater percentage variation has been permitted in the reapportionment plans of other states, the populations of districts in such states were relatively small. Legislative districts in California are large, so that even a 1% or 2% variance in population affects a large number of persons. The variance in the number of persons more directly relates to the practical attainment of numerical equality than does a percentage figure, and districts can be formulated in California pursuant to other criteria recommended without deviating from the ideal by more than 1%, except in unusual circumstances.

2. The territory included within a district should be contiguous and compact, taking into account the availability and facility of transportation and communication between the people in a proposed district, between the people and candidates in the district, and between the people and their elected representatives.

3. Counties and cities within a proposed district should be maintained intact, insofar as practicable.

4. The integrity of California's basic geographical regions (coastal, mountain, desert, central valley and intermediate valley regions), should be preserved insofar as practicable.

5. The social and economic interests common to the population of an area which are probable subjects of legislative action, generally termed a "community of interests" should be considered in determining whether the area should be included within or excluded from a proposed district in order that all of the citi-

zens of the district might be represented reasonably, fairly and effectively. Examples of such interests, among others, are those common to an urban area, a rural area, an industrial area or an agricultural area, and those common to areas in which the people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access to the same media of communication relevant to the election process.

Most of the people making oral or written presentations urged consideration of the foregoing criteria in formulating proposed reapportionment plans. Many presentations were made urging adherence to the criteria of maintaining the integrity of counties and cities, and deploring needless division thereof in the formation of districts. It is clear that in many situations county and city boundaries define political, economic and social boundaries of population groups. Furthermore, organizations with legitimate political concerns are constituted along local political subdivision lines. Therefore, unnecessary division of counties and cities in reapportionment districting should be avoided.

6. State senatorial districts should be formed by combining adjacent assembly districts, and, to the degree practicable, assembly district boundaries should be used as congressional district boundaries.

Cogent reasons exist for the formation of senate districts from assembly districts. If assembly districts are formed logically and in compliance with the criteria recommended herein, then senate districts created by combining such districts are also likely to comply. This is particularly so if such an eventual pairing is kept in mind when forming the various legislative districts. The resulting legislative districts will be more comprehensible to the electorate and the task of administering elections would be considerably simplified, thus saving money and insuring greater accuracy.

Similarly, use of assembly district boundaries to the degree feasible in formation of congressional districts will promote all of these advantages. Obviously, it is impossible to make all congressional district lines congruent with assembly district lines, since there are 43 congressional districts and 80 assembly districts, but in larger counties it is possible to use common boundaries in a substantial number of instances.

7. The basis for reapportionment should be the 1970 census. In counties for which the U.S. Census Bureau has established census tracts, such tracts should be used as the basic unit for district formation, with division of such tracts being made only when necessary for population equality or to improve substantially compliance with other recommended criteria.

Census tracts are the basic unit used by the Census Bureau for measuring the characteristics of the population. Tracts average approximately 4,000 persons in size, and an effort has been made by the Census Bureau to make them homogeneous as to social characteristics and to use prominent natural or manmade geographical features as boundaries. Thus, following, rather than disregarding, census tracts will aid in establishing natural, well defined legislative districts and will aid in obtaining valid pertinent socio-economic data about such districts.[8]

8. Moreover, the population data available on the computer used by the Masters was on a census tract basis....[Because of improved technology, it is now nearly as simple to use census units below the level of tracts, the smallest of which are usually called blocks. —Ed.]

The use of whole census tracts makes it difficult to comply literally with another recommended criterion, that of maintaining the integrity of city boundaries. Some cities have exceedingly irregular boundaries with an odd assortment of "fingers" and "peninsulas" jutting out from the basic part of the city. In many such cases, the boundaries as of the date of the census do not reflect the present boundaries or what they are likely to be during the balance of the decade. Often census tract boundaries do not correspond exactly with the boundaries of such cities. In such instances, census tract boundaries which preserve the bulk of the city in one district have been followed even though it resulted in trimming off small peninsulas or other such extensions of territory. This has been done only where the population affected was relatively small.

As to all of the recommended criteria, their applicability, priority and scope, other than population equality, depend on circumstances indigenous to the area under consideration. To the extent required by the federal Constitution, population equality controls.

CONSIDERATION OF PLANS SUBMITTED BY THE LEGISLATURE AND OTHERS

As has been noted before, legislative plans for reapportionment, passed by the Legislature but vetoed by the Governor, were submitted for consideration. In addition, various individual legislators, local governmental groups and private groups or individuals submitted plans for reapportioning all or a portion of the state.

The plans submitted by the Legislature cannot be recommended for adoption.

The assembly plan and the congressional plan needlessly depart from the criteria of compactness and maintenance of county line and city line integrity. A cursory examination of the assembly plan reveals numerous peculiarly shaped districts that very frequently cut city and county lines, often linking distant population areas together while disregarding more proximate populations that could have been included. Governor Reagan's veto message cites many examples of particularly objectionable districts which are not compact and which needlessly cut city and county lines.

Like the assembly plan, the congressional plan contained in Senate Bill 195 violates the recommended criteria of compactness and respect for city and county lines. Some districts contain appendages linking distant population areas while frequently cutting city and county lines. Again, the Governor's veto message cites specific examples of the most objectionable districts. 41 members of the congressional delegation have also submitted a plan which they refer to as a "modification" of Senate Bill 195. While this plan does modify the congressional plan approved by the Legislature, and improves upon it in a number of aspects by cutting fewer county lines and city lines and increasing compactness, it was not passed by the Legislature and does not reflect the Legislature's approval of the modification. Furthermore, the Legislature is responsible for enacting a reapportionment plan, and this responsibility cannot be assumed by the congressional delegation.

Special consideration was given to the senate plan because the Governor has indicated that he deems it acceptable and would have approved it had it been presented to him in a separate bill. The plan, however, needlessly departs from the recommended criteria of reasonable population equality, compactness and respect for county and city lines.

Furthermore, the senate plan raises grave constitutional questions involving population deviations and dilutions of voting strength of black and Spanish-surnamed persons. It is true that *Mahan v. Howell* upheld a population variance of 16.4% in a legislative redistricting plan where that variance was justified by a consistently applied state policy of preserving county lines. Nevertheless, the senate plan, which has a population variance of 16.5%, with 21 of the 40 districts deviating by more than 5% from the ideal, does not appear to meet the constitutional requirements implicit in *Mahan v. Howell* and in *White v. Regester,* 412 U.S. 755 (1973). The senate plan cannot be justified under *White* because it has substantially greater population variances than were allowed in *White.* Even under *Mahan* the plan is suspect because of the absence of a rationally and consistently applied state policy such as preservation of county lines. While the Senate claims to have employed criteria such as county and city line preservation and community of interest recognition, it has not done so. The districts in the plan unnecessarily split cities and counties, often combine whole or partial counties across mountain ranges or bodies of water and disregard travel patterns, geography, common economic activities and other "community of interest" indicators.

There is also evidence that the senate plan dilutes the voting strength of blacks and persons of Spanish-surname by dividing homogeneous ethnic groups into a number of districts or by 'packing' too many members of an ethnic group into a single district. Despite assertions that the senate plan was not deliberately designed to discriminate or foster racialism, the Masters are persuaded that the senate plan is constitutionally suspect and should not be recommended to the Court.

Finally, the Masters have concluded that the factor of overriding importance in each plan in Senate Bill 195 was the goal of incumbent reelection. While protection of incumbents may be desirable to assure a core of experienced legislators, the objective of reapportionment should not be the political survival or comfort of those already in office.[16] It is best if an incumbent's continuation in office depended upon effectiveness and responsiveness to constituents rather than upon the design of district boundaries. Extensive changes in constituencies necessitated by decennial redistricting are bound to affect most incumbents, who naturally value stability and predictability, and any reapportionment plan will make it necessary for some to work harder to become known to constituents.

All of the other reapportionment plans submitted have been carefully considered by the Masters. It is recognized that for each legislative body there are many potential plans that may pass constitutional muster and reflect roughly comparable apportionment wisdom. With one exception, the plans presented for statewide redistricting dealt only with one legislative body. Since one recommended criterion calls for an integrated approach to formation of assembly, senate and congressional districts, no plan for either house of the Legislature or for Congress was a particularly suitable vehicle for complying with this criterion. Further, lurking within proposed statewide plans may be dubious political considerations or implications that are not readily apparent and which may be difficult to detect and

16. A plan that seriously jeopardizes most incumbents would not necessarily be in the public interest, but the advantage enjoyed by incumbents accruing from their former service and from name recognition makes it highly unlikely that most would be in serious jeopardy solely because of redistricting.

evaluate. Because of these and other problems no statewide plan submitted for adoption is recommended. Several such plans contained valuable suggestions for resolving specific problems and all plans submitted were considered carefully in connection with the preparation of the recommendations.

Proposed plans that have been presented dealing with specific limited areas of the state have also been carefully considered. Proper weight was given to the reasons underlying such proposals. However, innumerable districts ideal for particular communities can be constructed if each is considered in isolation but when the entire state is divided into a specified number of districts, that which may appear ideal for one place or another must be subordinated to the goal of fair and reasonable reapportionment of the whole state. That is the goal sought and upon which the recommendations to the Court are based.[18]

PLANS RECOMMENDED FOR ADOPTION

Having concluded that plans presented either by the Legislature or others should not be recommended for adoption, the Masters formulated original plans in accordance with the criteria recommended herein....

In formulating these plans the Masters were aware of the observations of the United States Supreme Court that "Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task," *Weiser*, and that "Politics and political considerations are inseparable from districting and apportionment," and districting without regard for political impact "may produce, whether intended or not, the most grossly gerrymandered results." *Gaffney*. It is also true that political fairness is an appropriate goal of reapportionment, *Gaffney*, and that there are legitimate interests to be served by allowing incumbents and their constituents to maintain existing relationships and in affording incumbents fair opportunities to seek reelection. Accordingly, it was deemed appropriate to consider whether the recommended plans are politically fair and whether they needlessly prejudice the legitimate interests of incumbents and their constituents.

Testing for political fairness is at best an imprecise endeavor. Techniques employed in other states and mentioned in some decisions are not practical in California where there have been major population shifts and where traditionally and historically voters have demonstrated more political independence than voters elsewhere. However, with general measuring devices such as party registration and such electoral data as [are] available it should be possible to detect a redistricting plan likely to produce a manifestly unfair political result. On the basis of such testing it appears that the proposed and recommended plans are neither politically unfair nor unfair to incumbents, but may result in fewer "safe seats" and more "competitive seats."

Political science literature suggests that the most effective means of avoiding the creation of constituencies that unduly favor one of the political parties is to create an appropriate number of competitive districts. The typical legislative approach is to maximize safe seats for both parties. Ideal districting should

18. Any person with even a passing acquaintance with reapportionment becomes aware of what is known as the "ripple effect," whereby the casting of one district on the water produces ripples felt throughout the state. If uncontrolled, this effect may result in the initial choice of a perfect district in one place leading to intolerably imperfect districts elsewhere.

accommodate shifting political trends, allowing electoral majorities to be represented by legislative majorities. The central rationale of two party politics is that it offers voters alternative choices of candidates and programs. According to democratic theory, parties should contest for public support through electoral mechanisms that translate predominant public opinion into public policy. This involves the ability of popularly elected majorities to govern, while insuring the representation of the minority party, temporarily out of power, as a check on a usually transitory majority party.

The Masters are aware that there are instances where the places of residence of some incumbents under the recommended plans will not be located within the districts they formerly represented in large part and it will be necessary for them to change their residences if they wish to seek reelection in the areas encompassed within their former districts. This is because the increase in population and shift in the centers of population have caused a change in the size and configuration of districts. It is an unfortunate but necessary result that population shifts and adherence to objective criteria bring about inconvenience to some incumbents in order that the citizens generally may benefit.

If it turns out that the new district lines are not announced by the Court in time for incumbent legislators and other candidates to select a residence and become an elector in a district "for one year...immediately preceding" the election (Cal.Const., Art. IV, sec. 2, subd. (c)), it is recommended that the Court give consideration to an interpretation that the cited section is inapplicable to such tardily formed districts so as to permit candidates to file for election if they are residents of the district at the time of filing and otherwise comply with election law requirements.

Notes and Questions

1. In 1980, article 21 was added to the California Constitution requiring that districting at the state level be performed in conformance with the following standards:

> (a) Each member of the Senate, Assembly, Congress, and the Board of Equalization shall be elected from a single-member district.[e]
>
> (b) The population of all districts of a particular type shall be reasonably equal.
>
> (c) Every district shall be contiguous.
>
> (d) Districts of each type shall be numbered consecutively commencing at the northern boundary of the state and ending at the southern boundary.
>
> (e) The geographical integrity of any city, county, or city and county, or of any geographical region shall be respected to the extent possible without violating the requirements of any other subdivision of this section.

In what ways does article 21 follow the Masters' criteria? In what ways do they differ? Are there criteria missing from the Masters' report and from article

e. In the past, a few states have used multi-member districts for the election of members of Congress. Currently, states are required by 2 U.S.C. § 2c to use single-member districts for the House of Representatives.

21 that you believe should be considered? Are the criteria of article 21 sufficient to satisfy federal statutory and constitutional requirements?

2. As the Masters indicated, the Supreme Court has taken the position that redistricting is a political process and that federal courts therefore should interfere as little as possible with plans enacted under state law, except as necessary to conform to federal constitutional and statutory requirements. However, the Masters refused to give any preferred consideration to Senate Bill 195, which had been passed by both houses of the legislature but vetoed by the governor.

Under similar circumstances, most federal courts have at least been willing to give "careful consideration" to a vetoed legislative plan, but without necessarily giving it preferred consideration over plans that may be submitted by other parties. *Carstens v. Lamm*, 543 F.Supp. 68, 78–9 (D. Colo. 1982); *O'Sullivan v. Brier*, 540 F.Supp. 1200, 1202 (D.Kans. 1982). Other federal courts have been more deferential to plans that made it part of the way through the legislative process. One such court stated it could not "simply embrace" the plan that went furthest through the process, but indicated that it would try to incorporate in its own plan features common to those plans that came closest to being enacted. *Shayer v. Kirkpatrick*, 541 F.Supp. 922, 932 (W.D.Mo. 1982). In *Donnelly v. Meskill*, 345 F.Supp. 962, 964 (D.Conn. 1972), the fact that one of the plans submitted to the court was similar to a vetoed plan passed by both houses of the legislature "tip[ped] the scales" in favor of that plan. In *Skolnick v. State Electoral Board*, 336 F.Supp. 839, 846 (N.D.Ill. 1971), the court adopted a plan in part because it received "overwhelming approval" in the lower house of the Illinois legislature, although it was never voted upon in the upper house.

If the Supreme Court's premise is accepted that in districting cases, courts should defer as much as possible to the political process, does this militate for or against deference to plans that have made it part but not all the way through the state's legislative process? Should it matter how far through the process the plan went? Whether the plan received bipartisan support or was supported only by one party? What the reasons were for the plan's failure to be enacted? How well the plan comports with constitutional and statutory requirements and with other public interest criteria? Which criteria?

3. Many state constitutions allow the *referendum*, which is a procedure whereby bills enacted by the legislature and signed by the governor (or receiving enough legislative votes to override the governor's veto) may be submitted to voter approval. In California, a referendum petition that receives signatures of five percent of the electorate within ninety days after enactment of a bill is sufficient to submit the bill to the voters under art. II, §§ 9 and 10 of the California Constitution. If the bill is approved by the voters it goes into effect the day after the election. If the voters reject it, it does not go into effect at all.

In 1981, the California legislature, controlled by Democrats, passed redistricting bills that were signed by Democratic Governor Jerry Brown. Republicans successfully circulated referendum petitions objecting to the bills, which thus could not go into effect, if at all, until the day after the election. However, the referendum elections were to be held at the 1982 primary, by which time districts were needed so that congressional and state legislative candidates could be nominated.

Under these circumstances, should a court, in deciding on districts to govern the 1982 elections, defer to the plan adopted by the legislature and signed by the governor? What arguments can you make in support of deference to the legisla-

tive plan to distinguish the cases where the legislature has passed a plan that has been vetoed by the governor? How can you respond to these arguments, and thereby oppose judicial deference to the legislative plan? See *Assembly v. Deukmejian*, 30 Cal.3d 638, 180 Cal.Rptr. 297, 639 P.2d 939 (1982).

4. Granted that federal courts have been instructed by the Supreme Court to defer to state political determinations on redistricting, so long as these are consistent with federal constitutional and statutory requirements, should federal courts also defer to state *judicial* determinations? Since *Reynolds*, the majority of redistricting litigation has occurred in federal rather than state courts.[f] Nevertheless, state courts are equally empowered and obligated to enforce federal law. In *Scott v. Germano*, 381 U.S. 407 (1965), the Supreme Court stated that federal courts should defer to state courts when parallel redistricting cases were pending in both. In the years that followed, this instruction may often have been overlooked or honored in the breach. However, *Germano* was strongly reaffirmed by a unanimous Court in *Growe v. Emison*, 113 S.Ct. 1075, 1080–83 (1993).

We have seen that in many situations, especially when the legislative process has broken down, a court has considerable discretion to shape a redistricting plan as it sees fit. Many litigants in redistricting controversies believe that the exercise of this discretion tends to be influenced by foreseeable partisan or other political predilections on the part of judges. See Randall P. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AMERICAN POLITICAL SCIENCE REVIEW 413 (1995) (finding that federal judges are far more likely to strike down plans adopted by the opposing party than by their own party, but also finding, perhaps more surprisingly, that the judges are more likely to strike down a plan adopted by their own party than one adopted with neither party having sole control). Will *Growe* encourage recourse to the state judiciary by litigants who believe they have a sympathetic majority on the state supreme court? If so, will this be a good thing?

III. Gerrymandering

A. Defining and Identifying Gerrymanders

Districting criteria may be proposed on the ground that they have intrinsic merit, or on the ground that they will help prevent "gerrymandering." Gerrymandering has received various definitions, which tend to fall into either of two categories. The first type of definition refers to plans drafted with an improper intent. The second consists of plans that have unfair effects. Consider the following:

> Those who favor judicial policing of gerrymandering are fond of quoting Chief Justice Warren's statement in *Reynolds v. Sims*, that "fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." For such writers the "gerrymander" is the antithesis of "fair and effective representation," and their definitions of "gerrymander" tend to be just as broad and vague as Chief Justice War-

f. California has been a conspicuous exception. The districting plans for the 1970s and the 1990s were formulated by the California Supreme Court.

ren's phrase with which they are so enamored. Thus, they define "gerrymandering" as "dilut[ing] the voting strength" of groups of voters,[22] as "excessive manipulation" of the shapes of districts,[23] as creation of an "unjustifiable advantage" for one party over others,[24] as "discriminat[ion] against" one group compared to others,[25] or in more down-to-earth language, as "the dishing of one political party by another."[26]

Now, it is hard to defend dilution of voting strength, manipulation (especially *excessive* manipulation), unjustifiable advantages, discrimination, and dishing of political parties. On the other hand, voting strength cannot be characterized as diluted unless it can be compared to a level of strength that is agreed to be normal; the drawing of lines cannot be characterized as manipulative (in a pejorative sense) unless there is a method of drawing lines that is agreed to be nonmanipulative; an advantage cannot be characterized as unjustifiable unless there is an agreed-upon standard of justification and, equally importantly, a state of affairs cannot be characterized as an "advantage" unless there is an agreed-upon state of affairs regarded as neutral; a state of affairs agreed to be nondiscriminatory is necessary before we can say a group is discriminated against; and one person's dishing may be another's self-defense.

In short, definitions of "gerrymandering" of the sort just canvassed raise questions but do not answer them. The questions are: What, if anything, constitutes a "neutral" districting plan, and how can we recognize a neutral plan when we see one? To find concrete meanings for the various writers' conceptions of gerrymandering we must consider the specific criteria they have proposed for legislative districting. If those criteria cannot be demonstrated to be neutral and cannot be employed to distinguish neutral from nonneutral plans, they have no legitimate claim to the public interest label and they should not serve in court or elsewhere to identify gerrymanders.

Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?* 33 UCLA LAW REVIEW 1, 9–11 (1985).

Now consider the following rejoinder:

The fundamental premise on which Lowenstein and Steinberg build is that something cannot be constitutionally unfair, unequal, and wrong

22. Richard L. Engstrom, *Post-Census Representational Districting: The Supreme Court, "One Person, One Vote," and the Gerrymandering Issue*, 7 SOUTHERN UNIVERSITY LAW REVIEW 173, 207 (1981).

23. Charles Backstrom, Leonard Robins & Scott Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINNESOTA LAW REVIEW 1121, 1122 n.7 (1978); see also Robert Erikson, *Malapportionment, Gerrymandering and Party Fortunes in Congressional Elections*, 66 AMERICAN POLITICAL SCIENCE REVIEW 1234, 1237 (1972).

24. *Id.* at 1129.

25. Bernard Grofman & Howard A. Scarrow, *Current Issues in Reapportionment*, 4 LAW & POLICY QUARTERLY 435, 454 (1982).

26. David Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts*, in REAPPORTIONMENT IN THE 1970'S 249, 274 (Nelson Polsby ed., 1971).

> unless there is a standard or measure of what is fair, equal, and right. They believe, therefore, that once they have shown that there is no single, objective, neutral set of electoral district boundaries for a given state with a given geography and demography, they will have shown that courts should not concern themselves with the constitutionality of district boundaries.
>
> The fundamental premise is not, however, jurisprudentially sound nor does it reflect the actual, historical behavior of the Supreme Court....
>
> [J]udges, and indeed all those called upon to make ethical decisions, are often in a position to identify *a* wrong without being able to define *the* right.

Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA LAW REVIEW 227, 227–28 (1985).

Notes and Questions

1. Most of the districting criteria put forth by the California Supreme Court's masters and contained in article 21 of the California Constitution are of the type known as "formal" criteria. These are criteria that look to the characteristics of individual districts, such as their shapes (compactness and contiguousness) and the areas they enclose (conformity to municipal boundaries, community of interest). Many reformers have favored a different type of criterion, sometimes referred to as "result-oriented." Result-oriented criteria take into account the expected political consequences of the districts. Examples are that the districts should promote partisan competition, that they should (depending on the reformer) protect incumbents or avoid protection of incumbents, and that they should yield proportional results.

For a sampling of the extensive literature proposing various districting criteria, see Bruce Adams, *A Model State Reapportionment Statute Process: The Continuing Quest for Fair and Effective Representation*, 14 HARVARD JOURNAL OF LEGISLATION 825 (1977); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA LAW REVIEW 77 (1985); Gordon E. Baker, *Judicial Determination of Political Gerrymandering: A "Totality of Circumstances" Approach*, 3 JOURNAL OF LAW & POLITICS 1 (1986). For a skeptical view of many of the proposed criteria, see Lowenstein & Steinberg, *supra*.

2. Of the "formal" criteria, the one most often pointed to, especially in popular debate, is compactness. For most people, the surest sign of a gerrymander is an oddly-shaped district. However, it is not easy to articulate persuasive reasons why a compact district is superior to a noncompact district. Skepticism of compactness as a criterion is cogently expressed in *Shaw v. Hunt*, 861 F.Supp. 408, 472 n.60 (E.D.N.Car. 1994):

> [Districts'] perceived "ugliness"—their extreme irregularity of shape—is entirely a function of an artificial perspective unrelated to the common goings and comings of the citizen-voter. From the mapmaker's wholly imaginary vertical perspective at 1:25,000 or so range, a citizen may well find his district's one-dimensional, featureless shape aesthetically "bizarre," "grotesque," or "ugly." But back down at ground or eye-level, viewing things from his normal closely-bounded horizontal perspec-

> tive, the irregularity of outline or exact volume of the district in which he resides is not a matter of any great practical consequence to his conduct as citizen-voter. In the earth-bound, horizontal workaday world of his political and other lives, it surely never occurs to him—until aroused to dislike something else about his district or his representative—that the lines that include him with others in a particular electoral district wander irregularly rather than evenly to enclose them. What happens is that after every re-drawing of the lines of any of the various overlapping electoral districts in which he resides, he learns quickly enough (if interested enough), either by official notice or unofficially, that he is now in the same or a new district that is identified by a number. He has no idea where exactly on the earth's surface the lines of the district—mostly invisible from this live perspective—run throughout their course. Nor does he need to know in order to conduct his political affairs effectively as a citizen of the district. In due course he learns that candidates A and B are contending for his vote, learns what he wants to about them, re-learns where his present voting location is, casts his vote, and thereafter has whatever contact he wants with his representative, completely unaffected either by where exactly his district boundaries lie, his lack of exact knowledge of their location, or by any "ugliness" that may from the mapmaker's perspective result from their irregular shape.

Defenders of the criterion often counter that compactness should be required, not because a compact district is necessarily inherently superior, but because compactness is a relatively objective criterion whose requirement, like that of equal population, will restrict the ability of line-drawers to gerrymander. For a forceful statement of this viewpoint, see Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE LAW & POLICY REVIEW 301 (1991).

3. The United States inherited from Britain the so-called Westminster system of elections, in which legislators are elected, usually one apiece, from geographically defined districts, with the candidate receiving the most votes declared the winner. This system may have been inevitable in the Colonial and Revolutionary periods, when neither full-fledged political parties nor modern devices of transportation and communication existed.[a] Since a separate winner-take-all election occurs in each district, when the elections are run along party lines there is no assurance that the statewide vote for a given party will be proportionate to the number of legislative seats it wins. For example, a minority party that is outvoted by a small margin in a large number of districts might win 45% of the vote and only win 30% of the seats. Very few democratic countries in the world other than those inheriting their political institutions from Great Britain use the Westminster system. To varying degrees, most systems used in other countries are more likely than the Westminster system to

a. Aside from such practical considerations, the district representational system may also have origins in medieval notions of corporate and group representation. See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEXAS LAW REVIEW 1589, 1603–5 (1993).

yield proportional results. For commentary on a variety of systems, see CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES (Arend Lijphart & Bernard Grofman eds. 1984).

Just as the one person, one vote rule provided a relatively simple and far-reaching solution to the complex difficulties that seemed to be created by *Baker v. Carr*'s decision that malapportionment questions are justiciable, some have urged that the constitutional solution to the gerrymandering problem should be a requirement of proportional representation. See Ronald Rogowski, *Representation in Political Theory and in Law*, 91 ETHICS 395 (1981); John R. Low-Beer, Comment, *The Constitutional Imperative of Proportional Representation*, 94 YALE LAW JOURNAL 163 (1984). Others have seen the prospect that there is no stopping point short of proportional representation as a good reason for the courts to avoid the question of gerrymandering. See Martin Shapiro, *supra*, 33 UCLA LAW REVIEW at 252–56; Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUMBIA LAW REVIEW 1325 (1987).

Most reformers, recognizing that it is difficult to assure proportional results so long as the Westminster system is in use, have sought anti-gerrymandering criteria that do not require proportionality. One such proposal is that "symmetry" be required rather than proportionality. Symmetry may be satisfied even if one party receives a disproportionately large number of seats, so long as any other party receiving the same percentage of the vote would have received the same disproportionately large number of seats. For example, if Republicans win 60% of the seats with only 52% of the statewide vote, the results would be symmetrical so long as the Democrats would also be likely to win 60% of the seats if they won 52% of the votes. See, e.g., Richard G. Niemi & John Deegan, Jr., *A Theory of Political Districting*, 72 AMERICAN POLITICAL SCIENCE REVIEW 1304 (1978). For criticism of symmetry as a criterion, see Lowenstein & Steinberg, *supra*, 33 UCLA LAW REVIEW at 55–60.

The question of proportional representation is placed in a theoretical and historical framework in Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?* 33 UCLA LAW REVIEW 257 (1985).

4. A party's "seats/votes" ratio is often used in discussions of districting, whether to test a plan against criteria such as proportionality or symmetry, or simply to see how well a party seems to be treated by a particular districting plan. Indeed, the ratio is commonly used as a rhetorical device in political debate, as a plan is shown to be a partisan gerrymander because a given party received only x percent of the seats when it received x plus y percent of the votes. The seats/votes ratio is certainly relevant to the evaluation of a districting plan, but it must be examined with caution, for a number of reasons. One is that American legislative elections are only partly conducted on a party basis. As we shall see in Chapter 7, American voters are increasingly inclined to vote for the candidates they prefer, regardless of party. Thus, normally Republican voters might vote for Democratic state legislators because of the personalities and issues at stake between the candidates in particular districts. Mechanical application of a seats/votes ratio would imply that those voters wanted a Democratic state legislature, which might not reflect their intent at all.

A second reason for caution in interpreting a seats/votes ratio is more technical. In *Reynolds v. Sims*, the Court spoke interchangeably about equal numbers of *people* in districts and equal numbers of *voters*. Although it might seem at first that there would be little difference between the two, in fact they can vary enormously. Some areas have much higher percentages of people not eligible to vote, especially because they are too young or are not citizens. Furthermore, as we saw in Chapter 2, people of lower socioeconomic status are less likely to register and vote than those who are wealthier and, especially, better educated. By and large, lower income areas with a large immigrant population and with large families—the areas likely to have the lowest ratio of voters to population—are likely to be the most Democratic areas, while wealthier areas with few immigrants are more likely to be Republican. Comparison of two California congressional districts shows how significant these disparities can be. In the 33rd District, located in central Los Angeles and containing a population that is 84% Latino, a total of 50,779 votes were cast in the 1992 House race, which was won by Democrat Lucille Roybal-Allard. In the suburban areas of northern San Diego that make up the 51st District, 252,995 people voted in a House race won by Republican Randy "Duke" Cunningham. Yet the populations of these districts, based on the 1990 census, were nearly identical: 570,893 and 572,850 respectively.[b]

This tendency for more voters in suburban areas is compounded by another phenomenon. Though districts are designed to be equal in population as of the time of the census, as the decade wears on, districts grow in population at different rates. The most rapidly growing areas, typically characterized by new suburban development, are often populated disproportionately by Republicans. The most Democratic areas, in inner cities, typically have little growth, or may even be declining in population.[c] See generally Bruce Cain, THE REAPPORTIONMENT PUZZLE 75–76 (1984).

The number of actual voters changes enough from election to election that it would be difficult to draw district lines to equalize the number of votes, but the theoretical argument is sometimes made that a measure closer to actual voters than population should be used. See, *e.g.*, *Garza v. County of Los Angeles*, 918 F.2d 763, 778, 779–86 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part). Although the Supreme Court has upheld redistricting on a basis other than population, it has stated a preference for equal population, see *Burns v. Richardson*, 384 U.S. 73 (1966), and population is nearly the universal basis for districting in the United States.

A seats/votes ratio that does not take these circumstances into account may be misleading. For example, suppose a state is divided into three equally populated congressional districts, one with 200,000 voters, all of whom vote for the Republican candidate, and two with 100,000 voters, in each of which the Democratic candidate receives all of the votes. A naive seats/votes approach would find

b. Vote totals and information about the districts are taken from Michael Barone & Grant Ujifusa, THE ALMANAC OF AMERICAN POLITICS 1994.

c. This phenomenon gives the Democrats an advantage as a decade proceeds. However, it is offset by the fact that the census is imperfect, and the Census Bureau itself readily acknowledges that a disproportionately high number of the people who are "missed" live in low income or minority areas that are usually heavily Democratic.

that the Republicans received only a third of the seats despite winning half of the votes. But the disparity results from the population-based districting rule, not from gerrymandering.

This distortion can easily be avoided, though the necessary adjustment is rarely made when seats/votes ratios are deployed in public discussion of redistricting. The usual method of computing a party's vote percentage is simply to add up the votes for the party's candidates in all the districts, and divide that total by the statewide total of votes cast for major party candidates. The adjusted method is to calculate the party's vote percentage *within* each district, and then take the average of the party's district percentages. In the above example, Republicans received a third of the adjusted total (the average of 100%, 0%, and 0%), exactly the same as their percentage of the seats. See generally Graham Gudgin & P.J. Taylor, SEATS, VOTES, AND THE SPATIAL ORGANIZATION OF ELECTIONS 56–57 (1979).

5. Some supporters of reform propose modifying the procedures by which redistricting is done instead of or in addition to imposing substantive criteria. See Bruce E. Cain, THE REAPPORTIONMENT PUZZLE (1984). Some reform procedures are internal to the state legislatures, such as requirements for public hearings, provision of adequate staff and data to the minority party, or requirement of a legislative supermajority to pass a districting bill. The latter proposal would tend to give each of the major parties an effective veto in states with a fairly close partisan balance.

Alternatively, the districting power may be taken away from the legislature, usually in favor of a commission. The method of choosing members has varied in different proposals and, in some states, commissions actually created. A sharp distinction is sometimes drawn between "bipartisan" commissions, on which the assent of both major parties would be needed for adoption of a plan, and "nonpartisan" commissions, which are directed to adopt a plan either without regard to political consequences or that will be "neutral" politically.

An unusual process has had considerable impact in Illinois. In that state, if the legislative process fails, redistricting is referred to a Legislative Redistricting Commission, which contains four Republicans and four Democrats. By a random drawing, one member of the commission is given a tie-breaking vote. In 1981, this lottery occurred, and the Democrats won. Under the resulting plan, the Democrats were able to control both houses of the legislature for the rest of the decade. In 1991, when the Republicans won the lottery, there arose "[u]nrestrained shouts of joy, seldom heard from the GOP side of the House during the last decade." A Republican leader predicted it was "reasonable to expect that the Senate will become Republican and that there will be [GOP] gains in the House." Rick Pearson & Hugh Dellios, "Republicans hit jackpot in legislative remap," *Chicago Tribune*, September 6, 1991, at 1, col. 1.

For an overview of practices and procedures followed in the states for drawing U.S. House districts, see David Butler & Bruce Cain, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 91–107 (1992).

6. A different kind of "procedural" change that is espoused by some is to entrust the districting process to the automatic processes of a computer. One possibility would be to program the computer to create equally populated districts in a random manner. A variation on this idea is to test the partisan consequences of a plan adopted by the legislature or some other institution by considering the

probability of these consequences resulting from a randomly-devised plan. See Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZONA STATE LAW JOURNAL 277, 314–18. Randomly-generated plans would be subject to the objection that they would preclude proponents of formal criteria such as those set forth in the California Masters' report from seeking assurance that their favored criteria would be reflected in the plan. Randomness as a method for creating districts or as a test against which a districting plan should be measured is subject to the further objection that there is no assurance that the results most likely to be generated in a random process are the fairest. See Lowenstein & Steinberg, *supra*, 33 UCLA LAW REVIEW, at 61–64.

The objections to randomness as a methodology or test for redistricting may be summarized in the idea that it would take the politics out of a decision that many people believe involve the kind of competing interests and values that should be resolved politically. One proposal that attempts to avoid this objection is to require that districts be drawn automatically by a computer but to allow the legislature to decide on any number of general criteria that should be built into the program that guides the computer.

> What is intriguing about computer technology is its ability to force decisionmakers into the position of fully obligating themselves before the fact to a verifiable program explicitly stating the aims and objectives of redistricting.
>
> If the technology indeed existed to run multiattribute problems so as to achieve globally optimal solutions to the reapportionment puzzle, then the material basis for forcing legislators into an externally constrained precommitment strategy would be at hand. The courts could obligate states to reduce their reapportionment objectives to a computer program before the final census data became available and to live with the consequences of the computer-automated redistricting. The controlling computer algorithm would make explicit and obvious the policy choices of the states in ways that would allow courts to review reasonably and intelligently the relevant choices for unconstitutional attributes. Reapportionment decisions could then be challenged on the basis of the constitutional legitimacy of the considerations taken into account in the program, rather than the claimed unfairness of the electoral outcomes.

Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEXAS LAW REVIEW 1643, 1699 (1993). One difficulty, which Issacharoff readily acknowledges, is that current and immediately foreseeable technology may not permit such an automated process that would take into account more than a very small number of criteria. Even if technological limitations are overcome, not everyone would agree with Issacharoff that the "politics" of districting consists of the adoption of general criteria that can be implemented mechanically. Instead, some would argue, the political process consists of accommodating different interests and values through a mixed process of electoral competition and negotiation. Such a process could be expected to reflect, to varying degrees, the different criteria that are espoused within the jurisdiction, but neither

the process nor the outcome would be bound by any consistent ordering of such criteria.

7. That redistricting can have a dramatic effect on the electoral prospects of individual incumbents and other aspirants for legislative office is beyond question. Nor does anyone doubt that a party has at least the opportunity to enhance its prospects if it controls the redistricting process. However, the magnitude and durability of this partisan advantage are matters of controversy and uncertainty. Some studies have found surprisingly few partisan effects of districting, while others have found at least moderate gains in some, but not all, of the states in which gerrymanders are said to have occurred. Most of the studies that have found partisan gains have found them to be short-lived. For two recent studies that contain references to the earlier research, see Peverill Squire, *The Partisan Consequences of Congressional Redistricting,* 23 AMERICAN POLITICS QUARTERLY 229 (1995); Harry Basehart & John Comer, *Redistricting and Incumbent Reelection Success in Five State Legislatures*, 23 AMERICAN POLITICS QUARTERLY 241 (1995).

In *Davis v. Bandemer*, which follows, the Supreme Court considered whether, and under what circumstances, a partisan gerrymander violates the Equal Protection Clause. What relevance, if any, does the empirical question of the magnitude and durability of partisan effects from districting have for the constitutional issue presented in *Bandemer*?

B. Gerrymandering and the Constitution

Davis v. Bandemer
478 U.S. 109 (1986)

Justice WHITE announced the judgment of the Court and delivered the opinion of the Court as to Part II and an opinion as to Parts I, III, and IV, in which Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join.

In this case, we review a judgment from a three-judge District Court, which sustained an equal protection challenge to Indiana's 1981 state apportionment on the basis that the law unconstitutionally diluted the votes of Indiana Democrats. Although we find such political gerrymandering to be justiciable, we conclude that the District Court applied an insufficiently demanding standard in finding unconstitutional vote dilution. Consequently, we reverse.

I

The Indiana Legislature, also known as the "General Assembly," consists of a House of Representatives and a Senate. There are 100 members of the House of Representatives, and 50 members of the Senate. The members of the House serve 2-year terms, with elections held for all seats every two years. The members of the Senate serve 4-year terms, and Senate elections are staggered so that half of the seats are up for election every two years. The members of both Houses are elected from legislative districts; but, while all Senate members are elected from single-member districts, House members are elected from a mixture of single-member and multimember districts. The division of the State into districts is

accomplished by legislative enactment, which is signed by the Governor into law....

In early 1981, the General Assembly initiated the process of reapportioning the State's legislative districts pursuant to the 1980 census. At this time, there were Republican majorities in both the House and the Senate, and the Governor was Republican. Bills were introduced in both Houses, and a reapportionment plan was duly passed and approved by the Governor.[2] This plan provided 50 single-member districts for the Senate; for the House, it provided 7 triple-member, 9 double-member, and 61 single-member districts. In the Senate plan, the population deviation between districts was 1.15%; in the House plan, the deviation was 1.05%. The multimember districts generally included the more metropolitan areas of the State, although not every metropolitan area was in a multimember district. Marion County, which includes Indianapolis, was combined with portions of its neighboring counties to form five triple-member districts. Fort Wayne was divided into two parts, and each part was combined with portions of the surrounding county or counties to make two triple-member districts. On the other hand, South Bend was divided and put partly into a double-member district and partly into a single-member district (each part combined with part of the surrounding county or counties). Although county and city lines were not consistently followed, township lines generally were. The two plans, the Senate and the House, were not nested; that is, each Senate district was not divided exactly into two House districts. There appears to have been little relation between the lines drawn in the two plans.[d]

In early 1982, this suit was filed by several Indiana Democrats (here the appellees) against various state officials (here the appellants), alleging that the 1981 reapportionment plans constituted a political gerrymander intended to disadvantage Democrats. Specifically, they contended that the particular district lines that were drawn and the mix of single-member and multimember districts were intended to and did violate their right, as Democrats, to equal protection under the Fourteenth Amendment....

In November 1982, before the case went to trial, elections were held under the new districting plan. All of the House seats and half of the Senate seats were up for election. Over all the House races statewide, Democratic candidates received 51.9% of the vote. Only 43 Democrats, however, were elected to the House. Over all the Senate races statewide, Democratic candidates received 53.1% of the vote. Thirteen (of twenty-five) Democrats were elected. In Marion and Allen Counties, both divided into multi-member House districts, Democratic

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2. These bills were "vehicle bills"—bills that had no real content. Both bills were passed and were then referred to the other House and eventually to a Conference Committee, which consisted entirely of Republican members. Four Democratic "advisers" to the Committee were appointed, but they had no voting powers. Further, they were excluded from the substantive work of the Committee: The Republican State Committee funded a computerized study by an outside firm that produced the districting map that was eventually used, and the Democratic "advisers" were not allowed access to the computer or to the results of the study. They nevertheless attempted to develop apportionment proposals of their own using the 1980 census data....The majority plan was passed in both Houses with voting along party lines and was signed into law by the Governor.

d. Recall that the California masters plan "nested" two Assembly districts into each Senate district? Why would a politically drawn plan, such as Indiana's, not follow this principle?

candidates drew 46.6% of the vote, but only 3 of the 21 House seats were filled by Democrats.

On December 13, 1984, a divided District Court issued a decision declaring the reapportionment to be unconstitutional, enjoining the appellants from holding elections pursuant to the 1981 redistricting, ordering the General Assembly to prepare a new plan, and retaining jurisdiction over the case....

The defendants appealed, seeking review of the District Court's rulings that the case was justiciable and that, if justiciable, an equal protection violation had occurred....

[In Part II, the only part in which Justice White was writing for a majority, the Court concluded that the gerrymandering claim presented a justiciable issue under the Equal Protection Clause.]

III

Having determined that the political gerrymandering claim in this case is justiciable, we turn to the question whether the District Court erred in holding that the appellees had alleged and proved a violation of the Equal Protection Clause.

A

Preliminarily, we agree with the District Court that the claim made by the appellees in this case is a claim that the 1981 apportionment discriminates against Democrats on a statewide basis. Both the appellees and the District Court have cited instances of individual districting within the State which they believe exemplify this discrimination, but the appellees' claim, as we understand it, is that Democratic voters over the State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination. Although the statewide discrimination asserted here was allegedly accomplished through the manipulation of individual district lines, the focus of the equal protection inquiry is necessarily somewhat different from that involved in the review of individual districts.

We also agree with the District Court that in order to succeed the Bandemer plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group. See, *e.g.*, *Mobile v. Bolden*, 446 U.S. 55 (1980). Further, we are confident that if the law challenged here had discriminatory effects on Democrats, this record would support a finding that the discrimination was intentional. Thus, we decline to overturn the District Court's finding of discriminatory intent as clearly erroneous.

Indeed, quite aside from the anecdotal evidence, the shape of the House and Senate Districts, and the alleged disregard for political boundaries, we think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win....The very essence of districting is to produce a different—a more "politically fair"—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by

precinct, ward by ward.... [I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences. "It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended." *Gaffney*.

As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.[11]

B

We do not accept, however, the District Court's legal and factual bases for concluding that the 1981 Act visited a sufficiently adverse effect on the appellees' constitutionally protected rights to make out a violation of the Equal Protection Clause. The District Court held that because any apportionment scheme that purposely prevents proportional representation is unconstitutional, Democratic voters need only show that their proportionate voting influence has been adversely affected. Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be. *Whitcomb v. Chavis*, 403 U.S. 124 (1974); *White v. Regester*.

The typical election for legislative seats in the United States is conducted in described geographical districts, with the candidate receiving the most votes in each district winning the seat allocated to that district. If all or most of the districts are competitive—defined by the District Court in this case as districts in which the anticipated split in the party vote is within the range of 45% to 55%—even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature. This consequence, however, is inherent in winner-take-all, district-based elections, and we cannot hold that such a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the statewide vote received by their party candidates. As we have said: "[W]e are unprepared to hold that district-based elections decided by plural-

11. That discriminatory intent may not be difficult to prove in this context does not, of course, mean that it need not be proved at all to succeed on such a claim.

ity vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them." *Whitcomb*. This is true of a racial as well as a political group. *Regester*. It is also true of a statewide claim as well as an individual district claim.

To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit. This in turn would leave the minority in each safe district without a representative of its choice. We upheld this "political fairness" approach in *Gaffney* despite its tendency to deny safe district minorities any realistic chance to elect their own representatives. But *Gaffney* in no way suggested that the Constitution requires the approach that Connecticut had adopted in that case.

In cases involving individual multimember districts, we have required a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution. Only where there is evidence that excluded groups have "less opportunity to participate in the political processes and to elect candidates of their choice" have we refused to approve the use of multimember districts. *Rogers v. Lodge*, 458 U.S. 613, 624 (1982). See also *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, [*infra*, Chapter 5]; *Regester*; *Whitcomb*. In these cases, we have also noted the lack of responsiveness by those elected to the concerns of the relevant groups.[12]

These holdings rest on a conviction that the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters. This is true even in a safe district where the losing group loses election after election. Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause. See *Mobile v. Bolden*, 446 U.S., at 111, n.7 (Marshall, J., dissenting).

As with individual districts, where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. Again, without specific supporting evidence, a court cannot presume in such a case that

12. Although these cases involved racial groups, we believe that the principles developed in these cases would apply equally to claims by political groups in individual districts. We note, however, that the elements necessary to a successful vote dilution claim may be more difficult to prove in relation to a claim by a political group. For example, historical patterns of exclusion from the political processes, evidence which would support a vote dilution claim, are in general more likely to be present for a racial group than for a political group.

those who are elected will disregard the disproportionately underrepresented group. Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.

Although this is a somewhat different formulation than we have previously used in describing unconstitutional vote dilution in an individual district, the focus of both of these inquiries is essentially the same.[13] In both contexts, the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process. In a challenge to an individual district, this inquiry focuses on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate. Statewide, however, the inquiry centers on the voters' direct or indirect influence on the elections of the state legislature as a whole. And, as in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Based on these views, we would reject the District Court's apparent holding that any interference with an opportunity to elect a representative of one's choice would be sufficient to allege or make out an equal protection violation, unless justified by some acceptable state interest that the State would be required to demonstrate. In addition to being contrary to the above-described conception of an unconstitutional political gerrymander, such a low threshold for legal action would invite attack on all or almost all reapportionment statutes. District-based elections hardly ever produce a perfect fit between votes and representation. The one-person, one-vote imperative often mandates departure from this result as does the no-retrogression rule required by § 5 of the Voting Rights Act.[e] Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. We decline to take a major step toward that end, which would be so much at odds with our history and experience.

The view that a prima facie case of illegal discrimination in reapportionment requires a showing of more than a de minimis effect is not unprecedented. Reapportionment cases involving the one person, one vote principle such as *Gaffney* and *Regester* provide support for such a requirement. In the present, considerably more complex context, it is also appropriate to require allegations and proof that the challenged legislative plan has had or will have effects that are sufficiently

13. Although this opinion relies on our cases relating to challenges by racial groups to individual multimember districts, nothing herein is intended in any way to suggest an alteration of the standards developed in those cases for evaluating such claims.

e. The no-retrogression rule is described in Chapter 5.

serious to require intervention by the federal courts in state reapportionment decisions.[14]

C

The District Court's findings do not satisfy this threshold condition to stating and proving a cause of action. In reaching its conclusion, the District Court relied primarily on the results of the 1982 elections: Democratic candidates for the State House of Representatives had received 51.9% of the votes cast statewide and Republican candidates 48.1%; yet, out of the 100 seats to be filled, Republican candidates won 57 and Democrats 43. In the Senate, 53.1% of the votes were cast for Democratic candidates and 46.9% for Republicans; of the 25 Senate seats to be filled, Republicans won 12 and Democrats 13. The court also relied upon the use of multimember districts in Marion and Allen Counties, where Democrats or those inclined to vote Democratic in 1982 amounted to 46.6% of the population of those counties but Republicans won 86%—18 of 21—seats allocated to the districts in those counties. These disparities were enough to require a neutral justification by the State, which in the eyes of the District Court was not forthcoming.[15]

Relying on a single election to prove unconstitutional discrimination is unsatisfactory. The District Court observed, and the parties do not disagree, that Indiana is a swing State. Voters sometimes prefer Democratic candidates, and sometimes Republican. The District Court did not find that because of the 1981 Act the Democrats could not in one of the next few elections secure a sufficient vote to take control of the assembly. Indeed, the District Court declined to hold that the 1982 election results were the predictable consequences of the 1981 Act and expressly refused to hold that those results were a reliable prediction of future ones. The District Court did not ask by what percentage the statewide Democratic vote would have had to increase to control either the House or the Senate. The appellants argue here, without a persuasive response from the appellees, that had the Democratic candidates received an additional few percentage points of the votes cast statewide, they would have obtained a majority of the seats in both houses. Nor was there any finding that the 1981 reapportionment would consign the Democrats to a minority status in the Assembly throughout the 1980s or that the Democrats would have no hope of doing any better in the reapportionment

14. The requirement of a threshold showing is derived from the peculiar characteristics of these political gerrymandering claims. We do not contemplate that a similar requirement would apply to our Equal Protection cases outside of this particular context.

15. The District Court apparently thought that the political group suffering discrimination was all those voters who voted for Democratic Assembly candidates in 1982. Judge Pell, in dissent, argued that the allegedly disfavored group should be defined as those voters who could be counted on to vote Democratic from election to election, thus excluding those who vote the Republican ticket from time to time. He would have counted the true believers by averaging the Democratic vote cast in two different elections for those statewide offices for which party-line voting is thought to be the rule and personality and issue-oriented factors are relatively unimportant. Although accepting Judge Pell's definition of Democratic voters would have strongly suggested that the 1981 reapportionment had no discriminatory effect at all, there was no response to his position. The appellees take up the challenge in this Court, claiming that Judge Pell chose the wrong election years for the purpose of averaging the Democratic votes. The dispute need not now be resolved.

that would occur after the 1990 census. Without findings of this nature, the District Court erred in concluding that the 1981 Act violated the Equal Protection Clause.

The District Court's discussion of the multimember districts created by the 1981 Act does not undermine this conclusion. For the purposes of the statewide political gerrymandering claim, these districts appear indistinguishable from safe Republican and safe Democratic single-member districts. Simply showing that there are multimember districts in the State and that those districts are constructed so as to be safely Republican or Democratic in no way bolsters the contention that there has been statewide discrimination against Democratic voters. It could be, were the necessary threshold effect to be shown, that multimember districts could be demonstrated to be suspect on the ground that they are particularly useful in attaining impermissibly discriminatory ends; at this stage of the inquiry, however, the multi-member district evidence does not materially aid the appellees' case.

Furthermore, in determining the constitutionality of multi-member districts challenged as racial gerrymanders, we have rejected the view that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute a single-member district." *Whitcomb*. Rather, we have required that there be proof that the complaining minority "had less opportunity...to participate in the political processes and to elect legislators of their choice." Id. In *Whitcomb*, we went on to observe that there was no proof that blacks were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when candidates were chosen, or to be included among the candidates slated by the Democratic Party. Against this background, we concluded that the failure of the minority "to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls." Id. *Whitcomb* accordingly rejected a challenge to multimember districts in Marion County, Indiana. A similar challenge was sustained in *Regester*, but only by employing the same criterion, namely, that the plaintiffs must produce evidence to support a finding "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."

This participatory approach to the legality of individual multimember districts is not helpful where the claim is that such districts discriminate against Democrats, for it could hardly be said that Democrats, any more than Republicans, are excluded from participating in the affairs of their own party or from the processes by which candidates are nominated and elected. For constitutional purposes, the Democratic claim in this case, insofar as it challenges *vel non* the legality of the multimember districts in certain counties, is like that of the Negroes in *Whitcomb* who failed to prove a racial gerrymander, for it boils down to a complaint that they failed to attract a majority of the voters in the challenged multimember districts.

D

[Justice White gives his reasons for rejecting Justice Powell's dissenting position.]

IV

In sum, we hold that political gerrymandering cases are properly justiciable under the Equal Protection Clause. We also conclude, however, that a threshold showing of discriminatory vote dilution is required for a prima facie case of an equal protection violation. In this case, the findings made by the District Court of an adverse effect on the appellees do not surmount the threshold requirement. Consequently, the judgment of the District Court is

Reversed.

[A separate opinion by Burger, C.J., who also joined the opinion of O'Connor, J., is omitted.]

Justice O'CONNOR, with whom THE CHIEF JUSTICE and Justice REHNQUIST join, concurring in the judgment.

Today the Court holds that claims of political gerrymandering lodged by members of one of the political parties that make up our two-party system are justiciable under the Equal Protection Clause of the Fourteenth Amendment. Nothing in our precedents compels us to take this step, and there is every reason not to do so. I would hold that the partisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended....

The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change. The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out—by the very parties that are responsible for this process—present a political question in the truest sense of the term.

To turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues. It is predictable that the courts will respond by moving away from the nebulous standard a plurality of the Court fashions today and toward some form of rough proportional representation for all political groups. The consequences of this shift will be as immense as they are unfortunate. I do not believe, and the Court offers not a shred of evidence to suggest, that the Framers of the Constitution intended the judicial power to encompass the making of such fundamental choices about how this Nation is to be governed. Nor do I believe that the proportional representation towards which the Court's expansion of equal protection doctrine will lead is consistent with our history, our traditions, or our political institutions....

I

The step taken today is a momentous one, which if followed in the future can only lead to political instability and judicial malaise. If members of the major political parties are protected by the Equal Protection Clause from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims. Federal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups. Even if there were some way of limiting such claims to organized political parties, the fact remains that the losing party or the losing group of legislators in every reapportionment will now be invited to fight the battle anew in federal court. Apportionment is so important to legislators and political parties that the burden of proof the plurality places on political gerrymandering plaintiffs is unlikely to deter the routine lodging of such complaints. Notwithstanding the plurality's threshold requirement of discriminatory effects, the Court's holding that political gerrymandering claims are justiciable has opened the door to pervasive and unwarranted judicial superintendence of the legislative task of apportionment. There is simply no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group....

In my view, where a racial minority group is characterized by "the traditional indicia of suspectness" and is vulnerable to exclusion from the political process, individual voters who belong to that group enjoy some measure of protection against intentional dilution of their group voting strength by means of racial gerrymandering. As a matter of past history and present reality, there is a direct and immediate relationship between the racial minority's group voting strength in a particular community and the individual rights of its members to vote and to participate in the political process. In these circumstances, the stronger nexus between individual rights and group interests, and the greater warrant the Equal Protection Clause gives the federal courts to intervene for protection against racial discrimination, suffice to render racial gerrymandering claims justiciable. Even so, the individual's right is infringed only if the racial minority group can prove that it has "essentially been shut out of the political process."

Clearly, members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties are the dominant groups, and the Court has offered no reason to believe that they are incapable of fending for themselves through the political process. Indeed, there is good reason to think that political gerrymandering is a self-limiting enterprise. See B. Cain, The Reapportionment Puzzle 151–159 (1984). In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat—risks they may refuse to accept past a certain point. Similarly, an overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious. More generally, each major party presumably has ample weapons at its dis-

posal to conduct the partisan struggle that often leads to a partisan apportionment, but also often leads to a bipartisan one. There is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves. Absent such proof, I see no basis for concluding that there is a need, let alone a constitutional basis, for judicial intervention.

[T]he new group right created by today's decision is particularly unjustifiable in the context of the claim here, which is founded on a supposed diminution of the *statewide* voting influence of a political group. None of the elections for the Indiana Legislature are statewide. Voters in each district elect their representatives from that district. To treat the loss of candidates nominated by the party of a voter's choice as a harm to the individual voter, when that voter cannot vote for such candidates and is not represented by them in any direct sense, clearly exceeds the limits of the Equal Protection Clause. On the Court's reasoning, members of a political party in one State should be able to challenge a congressional districting plan adopted in any other State, on the grounds that their party is unfairly represented in that State's congressional delegation, thus injuring them as members of the national party....

II

The standard the plurality proposes exemplifies the intractable difficulties in deriving a judicially manageable standard from the Equal Protection Clause for adjudicating political gerrymandering claims. The plurality rejects any standard that would require drawing "district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be," and states that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." In my view, this standard will over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality. Cf. Shapiro, Gerrymandering, Unfairness, and the Supreme Court, 33 UCLA L.Rev. 227, 252–256 (1985). Either outcome would be calamitous for the federal courts, for the States, and for our two-party system.

Vote dilution analysis is far less manageable when extended to major political parties than if confined to racial minority groups. First, an increase in the number of competing claims to equal group representation will make judicial review of apportionment vastly more complex. Designing an apportionment plan that does not impair or degrade the voting strength of several groups is more difficult than designing a plan that does not have such an effect on one group for the simple reason that, as the number of criteria the plan must meet increases, the number of solutions that will satisfy those criteria will decrease. Even where it is not impossible to reconcile the competing claims of political, racial, and other groups, the predictable result will be greater judicial intrusion into the apportionment process.

Second, while membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates from both parties. Consequently, the difficulty of measuring voting strength is heightened in the case of a major political party. It is difficult enough to measure "a voter's or a group of voters' influence on the political process as a whole," when the group is a racial minority in a particular district or community. When

the group is a major political party the difficulty is greater, and the constitutional basis for intervening far more tenuous.

Moreover, any such intervention is likely to move in the direction of proportional representation for political parties. This is clear by analogy to the problem that arises in racial gerrymandering cases: "in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Thornburg v. Gingles*, [*infra*] (O'CONNOR, J., concurring in judgment). Any such norm must make some reference, even if only a loose one, to the relation between the racial minority group's share of the electorate and its share of the elected representatives. In order to implement the plurality's standard, it will thus be necessary for courts to adopt an analogous norm, in order to assess whether the voting strength of a political party has been "degraded" by an apportionment, either on a statewide basis or in particular districts. Absent any such norm, the inquiry the plurality proposes would be so standardless as to make the adjudication of political gerrymandering claims impossible.

Implicit in the plurality's opinion today is at least some use of simple proportionality as the standard for measuring the normal representational entitlements of a political party.... To be sure, the plurality has qualified its use of a standard of proportional representation in a variety of ways so as to avoid a requirement of proportional representation. The question is whether these qualifications are likely to be enduring in the face of the tremendous political pressures that courts will confront when called on to decide political gerrymandering claims. Because the most easily measured indicia of political power relate solely to winning and losing elections, there is a grave risk that the plurality's various attempts to qualify and condition the group right the Court has created will gradually pale in importance....

Of course, in one sense a requirement of proportional representation, whether loose or absolute, is judicially manageable. If this Court were to declare that the Equal Protection Clause required proportional representation within certain fixed tolerances, I have no doubt that district courts would be able to apply this edict. The flaw in such a pronouncement, however, would be the use of the Equal Protection Clause as the vehicle for making a fundamental policy choice that is contrary to the intent of its Framers and to the traditions of this Republic....

Justice POWELL, with whom Justice STEVENS joins, concurring in part and dissenting in part.

This case presents the question whether a state legislature violates the Equal Protection Clause by adopting a redistricting plan designed solely to preserve the power of the dominant political party, when the plan follows the doctrine of "one person, one vote" but ignores all other neutral factors relevant to the fairness of redistricting....

The plurality argues... that appellees failed to establish that their voting strength was diluted statewide despite uncontradicted proof that certain key districts were grotesquely gerrymandered to enhance the election prospects of Republican candidates. This argument appears to rest solely on the ground that the legislature accomplished its gerrymander consistent with "one person, one vote," in the sense that the legislature designed voting districts of approximately

equal population and erected no direct barriers to Democratic voters' exercise of the franchise. Since the essence of a gerrymandering claim is that the members of a political party as a group have been denied their right to "fair and effective representation," *Reynolds*, I believe that the claim cannot be tested solely by reference to "one person, one vote." Rather, a number of other relevant neutral factors must be considered. Because the plurality ignores such factors and fails to enunciate standards by which to determine whether a legislature has enacted an unconstitutional gerrymander, I dissent....

Gerrymandering is "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." *Kirkpatrick v. Preisler* (Fortas, J., concurring). As Justice STEVENS correctly observed, gerrymandering violates the Equal Protection Clause only when the redistricting plan serves "no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular time, or to disadvantage a politically weak segment of the community." *Karcher v. Daggett* (concurring opinion).

The term "gerrymandering," however, is also used loosely to describe the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls. An intent to discriminate in this sense may be present whenever redistricting occurs. Moreover, since legislative bodies rarely reflect accurately the popular voting strength of the principal political parties, the effect of any particular redistricting may be perceived as unfair. Consequently, only a sensitive and searching inquiry can distinguish gerrymandering in the "loose" sense from gerrymandering that amounts to unconstitutional discrimination....

I am convinced that appropriate judicial standards can and should be developed. Justice Fortas' definition of unconstitutional gerrymandering properly focuses on whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends. Under this definition, the merits of a gerrymandering claim must be determined by reference to the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting. In this case, the District Court examined the redistricting in light of such factors and found, among other facts, that the boundaries of a number of districts were deliberately distorted to deprive Democratic voters of an equal opportunity to participate in the State's legislative processes. The plurality makes no reference to any of these findings of fact. It rejects the District Court's ultimate conclusion with no explanation of the respects in which appellees' proof fell short of establishing discriminatory effect....

Since the contours of a voting district powerfully may affect citizens' ability to exercise influence through their vote, district lines should be determined in accordance with neutral and legitimate criteria. When deciding where those lines will fall, the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation....

The Court's decision in *Reynolds* illustrates two concepts that are vitally important in evaluating an equal protection challenge to redistricting. First, the Court recognized that equal protection encompasses a guarantee of equal representation, requiring a State to seek to achieve through redistricting "fair and effective representation for all citizens." The concept of "representation" necessarily applies to groups: groups of voters elect representatives, individual voters do

not. Gross population disparities violate the mandate of equal representation by denying voters residing in heavily populated districts, as a group, the opportunity to elect the number of representatives to which their voting strength otherwise would entitle them. While population disparities do dilute the weight of individual votes, their discriminatory effect is felt only when those individual votes are combined. Thus, the fact that individual voters in heavily populated districts are free to cast their ballot has no bearing on a claim of malapportionment.

Second, at the same time that it announced the principle of "one person, one vote" to compel States to eliminate gross disparities among district populations, the Court plainly recognized that redistricting should be based on a number of neutral criteria, of which districts of equal population was only one. *Reynolds* identified several of the factors that should guide a legislature engaged in redistricting. For example, the Court observed that districts should be compact and cover contiguous territory, precisely because the alternative, "[i]ndiscriminate districting," would be "an open invitation to partisan gerrymandering." Similarly, a State properly could choose to give "independent representation" to established political subdivisions. Adherence to community boundaries, the Court reasoned, would both "deter the possibilities of gerrymandering," and allow communities to have a voice in the legislature that directly controls their local interests. Thus, *Reynolds* contemplated that "one person, one vote" would be only one among several neutral factors that serve the constitutional mandate of fair and effective representation. It was not itself to be the only goal of redistricting.[5]

[A]s this case illustrates, and as *Reynolds* anticipated, exclusive or primary reliance on "one person, one vote" can betray the constitutional promise of fair and effective representation by enabling a legislature to engage intentionally in clearly discriminatory gerrymandering....

In light of the foregoing principles, I believe that the plurality's opinion is seriously flawed in several respects....

The plurality...erroneously characterizes the harm members of the losing party suffer as a group when they are deprived, through deliberate and arbitrary distortion of district boundaries, of the opportunity to elect representatives of their choosing. It may be, as the plurality suggests, that representatives will not "entirely ignore the interests" of opposition voters. But it defies political reality to suppose that members of a losing party have as much political influence over state government as do members of the victorious party....

The...most basic flaw in the plurality's opinion is its failure to enunciate any standard that affords guidance to legislatures and courts. Legislators and judges are left to wonder whether compliance with "one person, one vote" completely insulates a partisan gerrymander from constitutional scrutiny, or whether a fairer but as yet undefined standard applies. The failure to articulate clear doctrine in this area places the plurality in the curious position of inviting further litigation

5. The doctrine of "one person, one vote" originally was regarded as a means to prevent discriminatory gerrymandering since "opportunities for gerrymandering are greatest when there is freedom to construct unequally populated districts." *Kirkpatrick*. Advances in computer technology achieved since the doctrine was announced have drastically reduced its deterrent value by permitting political cartographers to draw districts of equal population that intentionally discriminate against cognizable groups of voters.

even as it appears to signal the "constitutional green light" to would-be gerrymanderers....

The most important of [the factors that should guide legislators and judges] are the shapes of voting districts and adherence to established political subdivision boundaries.[12] Other relevant considerations include the nature of the legislative procedures by which the apportionment law was adopted and legislative history reflecting contemporaneous legislative goals. To make out a case of unconstitutional partisan gerrymandering, the plaintiff should be required to offer proof concerning these factors, which bear directly on the fairness of a redistricting plan, as well as evidence concerning population disparities and statistics tending to show vote dilution. No one factor should be dispositive.[13]

In this case, appellees offered convincing proof of the ease with which mapmakers, consistent with the "one person, one vote" standard, may design a districting plan that purposefully discriminates against political opponents as well as racial minorities.

[T]his case presents a paradigm example of unconstitutional discrimination against the members of a political party that happened to be out of power. The well-grounded findings of the District Court to this effect have not been, and I believe cannot be, held clearly erroneous.

Accordingly, I would affirm the judgment of the District Court.[25]

Notes and Questions

1. What is the nature of the inequality or discrimination that Justice White holds could violate the Equal Protection Clause? Is it an inequality in the weighting of votes? If so, why are most of the precedents to which Justice White refers race discrimination cases rather than the non-racial right to vote cases such as *Reynolds*, *Kramer*, and their progeny?

2. Is Justice O'Connor correct when she says that Justice White's opinion calls for "at least some use of simple proportionality as the standard for measuring the normal representational entitlement of a political party"? For the view that this is the likely outcome of the *Bandemer* decision, see Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUMBIA LAW REVIEW 1325 (1987).

3. Justice White's opinion has prompted divergent interpretations. Perhaps the most common is that the opinion contains inadequate standards and thus provides little or no guidance to lower courts.

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12. In some cases, proof of grotesque district shapes may, without more, provide convincing proof of unconstitutional gerrymandering.

13. Groups may consistently fail to elect representatives under a perfectly neutral election scheme. Thus, a test that turns only on election results, as the plurality's standard apparently does, likely would identify an unconstitutional gerrymander where none existed. The test that I would adopt requires consideration of all the circumstances surrounding the plan....

25. As is evident from the several opinions filed today, there is no "Court" for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander. The standard proposed by the plurality is explicitly rejected by two Justices, and three Justices also have expressed the view that the plurality's standard will "prove unmanageable and arbitrary."

> Neither Justice White's nor Justice Powell's approach to the question of partisan apportionment gives any real guidance to lower courts forced to adjudicate this issue; thus, Justice O'Connor's apprehension that courts will resort to a standard of rough proportional representation appears well-founded.... Of course, the results that *Bandemer* will spawn remain uncertain, but the Court may well come to regret involving the judiciary so deeply in this delicate political sphere.

Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1083–84 (2d ed. 1988).

A second interpretation is based on one of the defects Justice White identified in the plaintiffs' showing:

> Disproportionality remains the underlying test of constitutionality; the plurality merely adds the requirement that any such disproportion obtain over the long term, not just in a single election. This added requirement, in turn, creates practical difficulties. Lacking prescience, and recognizing that political winds may shift in unpredictable directions, courts adjudicating political gerrymandering claims will need to consider the results of two or more elections before finding consistent degradation. In combination with the inherent delays of litigation, the amount of time needed for such evidence to accrue may preclude relief for any given gerrymander before the next decennial apportionment.

Note, *The Supreme Court, 1985 Term*, 100 HARVARD LAW REVIEW 100, 161 (1986). However, Justice White had written in footnote 17 to his opinion (not reprinted above) that Justice Powell "incorrectly asserts that more than one election must pass before a successful racial or political gerrymandering claim may be brought.... *Projected* election results based on district boundaries and past voting patterns may certainly support this type of claim, even where *no* election has yet been held under the challenged districting."

Another interpretation maintains that the standard for partisan gerrymandering established in *Bandemer* is one of degree.

> [T]here *is* a clear and manageable standard in *Davis v. Bandemer*—one offered in the plurality opinion. Under it, for partisan gerrymandering to be unlawful, it must be (1) intentional, (2) severe, and (3) predictably nontransient in its effects.
>
> ... The Supreme Court plurality in *Bandemer* was walking a tightrope. It wanted to set standards high enough to strongly discourage frivolous suits but low enough so that the most egregious partisan gerrymanders could be overturned by the courts. In my view the Supreme Court has succeeded admirably in that balancing act.

Bernard Grofman, *Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg*, in POLITICAL GERRYMANDERING AND THE COURTS 29, 30–31 (Bernard Grofman ed. 1990).

Yet another proposed interpretation maintains that the gerrymandering claim recognized in *Bandemer* will rarely be available to the major political parties, because it is not gerrymandering per se that is prohibited, but gerrymandering aimed at groups that need particular protection under the Fourteenth Amendment.

> A gerrymandering claim brought by a group not constituted by race or by some other classification that has been recognized as "suspect" for equal protection purposes must demonstrate that the group is the victim of pervasive discrimination in the political process to such a degree that it is reasonable to suppose a districting plan contrary to their interests is the result of prejudice and an animus well beyond the usual bounds of political opposition in our system.
>
> There is one other possibility. If a case should arise in which a partisan gerrymander between established political parties should be so effective as to virtually guarantee a minority group permanent dominance over state government, comparable to the situation that existed in *Baker v. Carr* and some of the other malapportionment cases, that might be unconstitutional as well. It [was] not necessary [in *Bandemer*] to determine whether gerrymandering really is a powerful enough tool to produce such a result, nor to decide exactly what the theory supporting judicial intervention in such a case would be.

Daniel Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, in POLITICAL GERRYMANDERING AND THE COURTS 64, 89–90 (Bernard Grofman ed. 1990). Dean Alfange, *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUPREME COURT REVIEW 175, reaches a somewhat similar conclusion, but is highly critical of the *Bandemer* decision thus interpreted.

Some impetus was given to the last of these interpretations when it was adopted by a California federal court rejecting a challenge to the congressional districting plan in that state. The Supreme Court summarily affirmed the lower court's action. *Badham v. Eu*, 109 S.Ct. 829 (1989). This action validated the result, but does not necessarily commit the Supreme Court to the lower court's reasoning.

4. What does Justice Powell mean by "neutral factors"? What is the difference, for Justice Powell, between "gerrymandering in the 'loose' sense [and] gerrymandering that amounts to unconstitutional discrimination?"

5. Does Justice O'Connor's opinion reach the merits?

6. Suppose you are an advisor to the legislative leaders in a state in which both houses of the legislature and the governorship are controlled by the party of your choice. The leadership would like to enact districting plans for both houses of the legislature and for the state's congressional delegation that will maximize your party's seat percentage. However, they do not want to undergo any serious risk of the plan being overruled in court. What advice would you give?

7. There do not appear to have been a large number of challenges based on *Bandemer* to districting plans adopted after the 1990 census. Those that have been brought have met with little success. See *Fund for Accurate & Informed Representation v. Weprin*, 796 F.Supp. 662, 668–69 (N.D.N.Y.), *aff'd mem.* 113 S.Ct. 650 (1992); *Illinois Legislative Redistricting Commission v. LaPaille*, 782 F.Supp. 1272, 1275–76 (N.D.Ill. 1991); *Republican Party of Virginia v. Wilder*, 774 F.Supp. 400, 403–6 (W.D.Va. 1991).

8. In *Republican Party of North Carolina v. Martin*, 980 F.2d 943 (4th Cir. 1992), reh. denied 991 F.2d 1202 (1993), cert. denied 114 S.Ct. 93 (1993), plaintiffs challenged the system of electing superior court judges in North Carolina. Nominees were selected in partisan primaries in the judicial districts in question,

but the party nominees then ran against each other in statewide elections. Although some judicial districts had majorities of Republican voters or were competitive between Democratic and Republican voters, the statewide electorate was safely Democratic in low level elections. Consequently, only one Republican superior court judge had been elected in North Carolina since 1900. Does this system deny equal protection to Republican voters? Is *Davis v. Bandemer* applicable?

LaPorte County Republican Central Committee v. Board of Commissioners

43 F.3d 1126 (7th Cir. 1994)

EASTERBROOK, Circuit Judge.

The legislature of La Porte County, Indiana, is a three-member Board of Commissioners. Although the County has three districts, all elections are held at large, for staggered four-year terms. The districts therefore affect only the residence of the Commissioners (each of whom must live in a different district); all residents of the County may vote for each of the three positions. Because voters may cast ballots for each position, the residence districts need not have identical (or even similar) populations. *Dallas County v. Reese*, 421 U.S. 477 (1975). While electoral districts must be reapportioned after each census, residence districts may stay the same indefinitely.

La Porte County nonetheless redrew the lines separating residence districts in 1987, 1991, and 1993. Each map has more filigree than its predecessor, with an arm of District 1 protruding into District 3, and a tentacle of District 3 winding through District 1. Nothing of the kind is necessary to equalize the population of the districts—and anyway no rule of law requires the County to do so. Plaintiffs believe that they know the reason for the protean cartography: the incumbent Commissioners' drive for self-preservation. The Board of Commissioners draws the maps. According to the complaint (whose allegations we must accept), the Board redrew the map in 1991 so that Stephen Wurster, who was planning to run for Commissioner from District 2, would find himself in District 3 facing a different opponent. The 1993 revisions had several purposes, leading to a more complex set of borders. The Board wanted to enable Marlow Harmon to run from District 1 rather than District 3, where the 1987 and 1991 maps placed him; it also wanted to prevent Charles W. Morgan and Henry J. Kintzele from running against Harmon, so the precincts where Morgan and Kintzele live were shifted to District 3. One "natural" way to accomplish all of these ends would have put Bart Lombard in District 1, but the Board did not want him as a candidate either, so the mapmaker's quill excised his precinct from the area being added to District 1. The upshot is that Morgan and Kintzele were knocked out of the election for the seat from District 1 in 1994 and must wait until 1996 to run for the post from District 3. Because the commissioners serve staggered terms (two elected in the years of Presidential elections, and one in the remaining even-numbered years), exclusion from the District 1 post being contested in 1994 was exclusion from an opportunity to run for the Board that year. The staggered terms also make it possible for the Board to draw a new map in 1995 putting Morgan and Kintzele back in District 1 and banishing them from the field eligible to contest the 1996 election. Morgan, Lombard, and the Republican Central Committee of La Porte

County filed this suit under 42 U.S.C. § 1983, contending that the County Board's use of peripatetic boundaries violates the rights of both candidates and voters under the fourteenth amendment to the Constitution.

Plaintiffs argued in the district court that the 1993 map is a form of political gerrymandering, actionable under *Davis v. Bandemer*. That did not impress the district judge, who dismissed the suit on the pleadings. It does not persuade us, either. *Davis* permits relief if and only if the "electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding... must be supported by evidence of continued frustration of the will of a majority of voters or effective denial to a minority of voters of a fair chance to influence the political process." Plaintiffs have not offered to prove that the districts in La Porte County have frustrated the will of a majority (or even a minority) of voters, for even one election. No surprise here; because La Porte County elects Commissioners at large, no voter or group could be frustrated by the location of the line separating one residence district from another. Only candidates could be affected. And although knocking out the voters' favorite candidate may shift the election to the other party, this did not happen in 1994: Jim Kruse, a Republican, defeated Harmon for the District 1 post. Plaintiffs have not offered to prove that the oscillation of district borders affected the balance between parties in earlier years. Kintzele, one of the three "victims" of the 1993 remapping, is a Democrat (as is Wurster, the loser in the 1991 alteration)....

Instead of seeking an opportunity to make a demonstration that would be acceptable to the plurality in *Davis*, plaintiffs ask us to disregard its criteria and adopt the view of Justice Powell, whose separate opinion in *Davis* treats as unconstitutional any redistricting "motivated solely by partisan considerations." Yet the reason Justice Powell was *dissenting* is that seven members of the Court disapproved his views. The plurality adopted the approach we have quoted, and three other justices concluded that claims of political gerrymandering are not justiciable. When the Court spreads out along a spectrum, without a majority opinion, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." The plurality opinion in *Davis* fits the bill, and we must apply it.

Not that it is necessary to reconstruct a majority from the shards in *Davis*. As we have emphasized, that case is about gerrymandering of voting districts. Plaintiffs complain about the gerrymandering of residence districts. That subject reached the Court before *Davis*, and in *Dallas County v. Reese* the Court concluded that a challenge to the borders requires proof that "a plan in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population." That formulation calls for the same sort of proof as does the plurality opinion in *Davis*.

As a "political gerrymandering" case, therefore, this suit is going nowhere. Just as a complaint need not plead facts, however, it also need not plead law, and it is not tied to one legal theory. Plaintiffs Morgan and Lombard allege that the County Board knocked them, personally, out of the 1994 race for political reasons, and given a generous reading the complaint also alleges that the Board has adopted a practice of manipulating the list of eligible persons to enhance its members' prospects for reelection. Rules curtailing eligibility to run for office may violate the Constitution even if they have nothing to do with the outcome—even if,

for example, they exclude only candidates who are unlikely to prevail. See *Norman v. Reed*, 502 U.S. 279 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). La Porte County could not disestablish the Libertarian Party, or disqualify its candidates, just because no libertarian has been elected in a very long time. It may apply neutral criteria for access to the ballot, but these criteria must be justified by important public interests. Just how important is a subject open to debate, but shadings among "strict scrutiny," "compelling importance," and "important regulatory interests"—all of which find some support in recent cases, see *Burdick v. Takushi*, 112 S.Ct. 2059 (1992) (collecting authority)—do not matter. Defendants do not argue that a desire to avoid challenge by the rivals most popular with the voters satisfies even the least demanding standard.

No one could doubt that a law reading "Charles W. Morgan is ineligible to run for the La Porte County Board" would violate the rights of both Morgan and the voters who want him as their representative. A plan to move the border separating Districts 1 and 3 every two years, so that Morgan always lives in a district that does not elect a representative in that cycle, would fail for the same reason. Similarly, although a governmental body may require a candidate to gather enough signatures to show a modicum of political support, it could not change that level every two years immediately after seeing how much support had been garnered by the incumbents' most serious rival, always setting the minimum at 1% more than the rival obtained. Application of these principles does not depend on proof that the incumbents' machinations favor one political party (or other group) over another; the practices would be equally obnoxious if the Board knocked out a Jewish Republican in 1994, a female Democrat in 1996, and a black Libertarian in 1998.

What would be troubling—to us as well as to the majority in *Reese* and seven Justices (albeit in two groups) in *Davis*—is the prospect of judicial management of a process that is necessarily political. Every 10 years the census requires reapportionment of electoral districts, and it is impossible to exclude politics from the remapping. Even a compactness rule would not do so (for there are many ways to draw compact districts, with different winners and losers). Forbidding the political branches to think about who is likely to gain from one map rather than another would be a fool's errand. Mixed motives are inevitable. Attempting to banish thoughts of political advantage from the minds of incumbents would (if taken seriously) move all redistricting to the judiciary, where mortals wearing robes would indulge their own political views to some extent no matter how hard they sought to put such matters out of mind. No wonder the Court has insisted that political decisions be left in the main to the political (elected) branches of government rather than to the judiciary, even when the political decisions affect elections.

Given *Reese*, however, there is nothing inevitable about redrawing residence districts frequently. Political officials change these maps not because they must do so every decade, but because they want to do so. When they act, they need a valid reason. So far as this case is concerned, defendants redrew the map in 1993 for one reason and one reason only: to prevent three popular persons from standing for election. If that is indeed the only reason, the result should not be distinguished from a law disqualifying those three persons by name.

We appreciate the norm that legislative intent does not make an otherwise-proper law invalid. *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968);

Fletcher v. Peck, 10 U.S. 87, 130–31 (1810). We assess the law and not the legislator. But the law is full of situations in which knowledge of intent is essential to understand and evaluate the law. E.g., *Washington v. Davis*, 426 U.S. 229 (1976). When the Constitution forbids the political branches to do something directly (for example, to disqualify blacks from public employment or to favor Episcopalian applicants for unemployment benefits), it becomes necessary to curtail the use of proxies—seemingly neutral criteria adopted only because they approximate a more desired (but strictly forbidden) scheme of classification. A motive to decide on racial or religious grounds leads the court to lump the "neutral" law with the discriminatory one. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S.Ct. 2217, 2230–31 (1993). This approach makes mixed-motive cases decidedly more complex than single-motive cases. We understand the complaint as offering to prove that striking a few names from the list of eligible candidates was not just a reason but the only reason for the changes of 1993, and we do not express an opinion on what happens if the evidence shows that the Board had legitimate reasons for changing the map, and that the effect on these potential candidates was just a welcome byproduct.

Reversed and Remanded.

Chapter 5

Minority Vote Dilution

Fairness to racial, ethnic, and language minorities is a criterion for redistricting that has loomed so large over the last two decades, that we must devote an entire chapter to it. Other representational arrangements besides districting—especially the selection of officials in at-large elections or from multi-member districts—have also been challenged as discriminating against minority groups, and in this chapter we shall consider such questions as well.

I. Beyond the Right to Cast a Ballot

In Chapter 2, we saw that the Voting Rights Act of 1965 had the dramatic effect of breaking down the barriers that prevented African Americans from voting in the deep South. In the "covered" states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and much of North Carolina, the most important provisions that accomplished this result were the temporary ban on literacy tests (later made permanent and extended to the entire country), the appointment of federal registrars where necessary, and the "preclearance" requirement in Section 5. Preclearance meant that when a covered jurisdiction adopted or changed any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," the change could not go into effect until it had been approved by either the attorney general (who, as a practical matter, receives virtually all preclearance requests) or the U.S. District Court for the District of Columbia.

No one doubts that the immediate and primary purpose of the 1965 act was to assure the right to vote to African Americans, nor that the Act was spectacularly successful in accomplishing this goal. A much more controversial question is whether the act was intended to extend to a situation in which blacks were able to vote, but by chance or design the system of representation had the effect of minimizing the influence of their votes.

This important question reached the Supreme Court in 1968, in four separate cases consolidated in the following decision.

Allen v. State Board of Elections
393 U.S. 544 (1969)

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court....

In these four cases, the States have passed new laws or issued new regulations. The central issue is whether these provisions fall within the prohibition of § 5 that prevents the enforcement of [changes in voting qualifications and procedures] unless the State first complies with one of the section's approval procedures.

[In the first and most important of the cases, Mississippi amended its statutes to permit county boards of supervisors to change election procedures so that board members would be elected at-large (i.e., each member would be elected by the entire county) rather than from districts. In the second case, a Mississippi statute changed the office of county superintendent of education in eleven specified counties from elective to appointive. In the third case, Mississippi changed the requirements for independent candidates in general elections. In the fourth case, Virginia changed procedures for assisting illiterate voters who sought to vote for write-in candidates.]

[W]e turn to a consideration of whether these state enactments are subject to the approval requirements of § 5. These requirements apply to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting...." The Act further provides that the term "voting" "shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing...or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." § 14(c)(1). Appellees in the Mississippi cases maintain that § 5 covers only those state enactments which prescribe who may register to vote. While accepting that the Act is broad enough to insure that the votes of all citizens should be cast, appellees urge that § 5 does not cover state rules relating to the qualification of candidates or to state decisions as to which offices shall be elective....

We must reject a narrow construction that appellees would give to § 5. The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation to the right to vote, recognizing that voting includes "all action necessary to make a vote effective." We are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant cases be subject to the § 5 approval requirements.

[The Court's review of the legislative history is omitted.]

The weight of the legislative history and an analysis of the basic purposes of the Act indicate that the enactment in each of these cases constitutes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of § 5.

[The first of the four cases] involves a change from district to at-large voting for county supervisors. The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds*. Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

In [the second case] an important county officer in certain counties was made appointive instead of elective. The power of a citizen's vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters. Such a change could be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such changes to scrutiny.

The changes in [the third case] appear aimed at increasing the difficulty for an independent candidate to gain a position on the general election ballot. These changes might also undermine the effectiveness of voters who wish to elect independent candidates....

The [last case involves] new procedures for casting write-in votes. As in all these cases, we do not consider whether this change has a discriminatory purpose or effect. It is clear, however, that the new procedure with respect to voting is different from the procedure in effect when the State became subject to the Act; therefore, the enactment must meet the approval requirements of § 5 in order to be enforceable....

All four cases are remanded to the District Courts with instructions to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with § 5....

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

[T]he Court's construction ignores the structure of the complex regulatory scheme created by the Voting Rights Act. The Court's opinion assumes that § 5 may be considered apart from the rest of the Act. In fact, however, the provision is clearly designed to march in lock-step with § 4—the two sections cannot be understood apart from one another. Section 4 is one of the Act's central provisions, suspending the operation of all literacy tests and similar "devices" for at least five years in States whose low voter turnout indicated that these "tests" and "devices" had been used to exclude Negroes from the suffrage in the past. Section 5, moreover, reveals that it was not designed to implement new substantive policies but that it was structured to assure the effectiveness of the dramatic step that Congress had taken in § 4. The federal approval procedure found in § 5 only applies to those States whose literacy tests or similar "devices" have been suspended by § 4. As soon as the State regains the right to apply a literacy test or similar "device" under § 4, it also escapes the commands of § 5....

As soon as it is recognized that § 5 was designed solely to implement the policies of § 4, it becomes apparent that the Court's decision today permits the tail to wag the dog. For the Court has now construed § 5 to require a revolutionary innovation in American government that goes far beyond that which was accomplished by § 4. The fourth section of the Act had the profoundly important purpose of permitting the Negro people to gain access to the voting booths of the South once and for all. But the action taken by Congress in § 4 proceeded on the

premise that once Negroes had gained free access to the ballot box, state governments would then be suitably responsive to their voice, and federal intervention would not be justified. In moving against "tests and devices" in § 4, Congress moved only against those techniques that prevented Negroes from voting at all. Congress did not attempt to restructure state governments. The Court now reads § 5, however, as vastly increasing the sphere of federal intervention beyond that contemplated by § 4, despite the fact that the two provisions were designed simply to interlock. The District Court for the District of Columbia is no longer limited to examining any new state statute that may tend to deny Negroes their right to vote, as the "tests and devices" suspended by § 4 had done. The decision today also requires the special District Court to determine whether various systems of representation favor or disfavor the Negro voter—an area well beyond the scope of § 4....Moreover, it is not clear to me how a court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have *some* influence in the election of *all* officers; under the other, minority groups have *more* influence in the selection of *fewer* officers. If courts cannot intelligently compare such alternatives, it should not be readily inferred that Congress has required them to undertake the task....

Section 5, then, should properly be read to require federal approval only of those state laws that change either voter qualifications or the manner in which elections are conducted. This does not mean, however, that the District Courts in the four cases before us were right in unanimously concluding that the Voting Rights Act did not apply. Rather, it seems to me that only the judgment in [the first case] should be affirmed, as that case involves a state statute which simply gives each county the right to elect its Board of Supervisors on an at-large basis.

[Justice Harlan concluded that in the remaining three cases the changes were within § 5, as he interpreted it. Justices Marshall and Douglas joined Justice Harlan in dissenting on a remedial question, the discussion of which is omitted in the above excerpts. Justice Black dissented from the Court's entire decision because he believed § 5 was unconstitutional.]

Notes and Questions

1. Whether Congress contemplated in 1965 that Section 5 would extend to structural aspects of elections beyond the right to vote itself remains a controversial issue. However, its primary interest is historical. Most people would agree that Congress' extensions and amendments of the Voting Rights Act in 1970, 1975, and 1982, without inserting language seeking to overrule *Allen*, constitute a ratification of that decision. But see Justice Thomas' concurring opinion in *Holder v. Hall*, reprinted later in this chapter.

2. Challenges to at-large electoral systems in local jurisdictions have been the most common type of case brought under the Voting Rights Act since the 1970s, but the logic of *Allen* extended to other aspects of the electoral system. The Court recognized this in *Perkins v. Matthews*, 400 U.S. 379 (1971), holding that annexations of new areas into cities were subject to preclearance, because the new voters added to the city could affect the voting power of prior residents, including protected minority groups; and in *Georgia v. United States*, 411 U.S. 526 (1973), holding that the adoption of legislative districting plans were subject to preclearance.

These decisions had a big practical impact. See, *e.g.*, Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING 7, 28–29 (1992):

> Until *Allen*, section 5 had been little used. The Justice Department, in the three and one-half years between passage of the act and the *Allen* decision, had objected to only six proposed changes in election procedure in covered jurisdictions, and none of these concerned vote dilution. In the three and one-half years following *Allen*, there were 118 objections, of which 88 involved dilution schemes. These included attempts to replace single-member district systems with multimember ones, to replace plurality rules by majority-vote requirements, to create numbered-place systems and staggered terms, and to annex disproportionately white suburbs. A tally at the end of 1989 revealed that 2,335 proposed changes had been objected to under section 5. The great majority of objections involved proposals that would have diluted the votes of racial groups or language minorities. Had it not been for section 5 and the *Allen* decision, almost all the proposals would have become law. Moreover, white officials in the South would surely have implemented a much larger number of dilutionary changes had there been no section 5 to deter them.

At the same time, the *percentage* of preclearance requests that have been denied has been small, well under two percent of the total. See Timothy G. O'Rourke, *The 1982 Amendments and the Voting Rights Paradox*, in *id.*, 85, 86–87.

3. As has been pointed out by Katharine Inglis Butler, *Reapportionment, the Courts, and the Voting Rights Act: A Resegregation of the Political Process?*, 56 UNIVERSITY OF COLORADO LAW REVIEW 1, 28–29 (1984), preclearance decisions of the Attorney General are often final, as a practical matter.

> The Attorney General's decision to deny preclearance is not subject to judicial review and can be overturned only through a burdensome declaratory judgment action in the District of Columbia District Court—a remedy not often pursued. The vast majority of election law changes are submitted by local political subdivisions, e.g., counties, cities, and school boards. Many cannot afford the declaratory judgment action, and for most others, challenging the Attorney General's objection is not worth the effort. Thus, virtually all submissions are made initially to the Attorney General, and few of his decisions are ever challenged. Consequently, many of the Attorney General's substantive preclearance standards have never been subjected to judicial scrutiny.

In a recent decision, a three-judge federal court expressed strong disapproval of the procedures the Justice Department used in preclearing a congressional plan for Georgia in 1991 and 1992:

> One of the "third party" redistricting proposals submitted to the legislature in 1991 would later earn the ominous moniker, "the max-black plan." That plan, created by Ms. Kathleen Wilde, then an attorney with

the American Civil Liberties Union and in her capacity as advocate for the Black Caucus of the Georgia General Assembly, provided for three "majority-minority" congressional districts in Georgia....

During the redistricting process, Ms. Wilde was in constant contact with both Keith Borders and Thomas Armstrong, the DOJ line attorneys overseeing preclearance of Georgia's redistricting efforts. There were countless communications, including notes, maps, and charts, by phone, mail and facsimile, between Wilde and the DOJ team; those transactions signified close cooperation between Wilde and DOJ during the preclearance process. The Court was presented with a sampling of these communiques, and we find them disturbing.

It is obvious from a review of the materials that Ms. Wilde's relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities. DOJ was more accessible—and amenable—to the opinions of the ACLU than to those of the Attorney General of the State of Georgia. It is clear from our proceedings that Ms. Wilde discussed with DOJ lawyers the smallest details of her plan, constantly sending revisions, updates, and data throughout the period from October, 1991 to April, 1992; she occasionally sent documents to DOJ lawyers "per your request." Ms. Wilde worked with DOJ in other ways: During the reapportionment process for Georgia's House districts, DOJ attorney Nancy Sardison told Mark Cohen, the Senior Assistant Attorney General for Georgia, to meet with Ms. Wilde to revise a majority-black House district. Mr. Cohen had presumptuously thought the district satisfactory, but was dutifully informed by Ms. Sardison that Ms. Wilde was "still having some problems with it."

Contrary to Mr. Armstrong's claims at trial, the max-black proposal was not merely "one of the alternatives [DOJ] considered," and Ms. Wilde was not simply one of various advocates. Her work was of particular importance to DOJ lawyers, whose criteria for and opinions of Georgia's submissions were greatly influenced by Ms. Wilde and her agenda....

During our hearings it became clear that the Department of Justice had cultivated a number of partisan "informants" within the ranks of the Georgia legislature, including at least one State Senator—a congressional candidate no less—and an aide to [the] Lieutenant Governor.... DOJ regularly received from them information on the General Assembly's redistricting sessions.... DOJ used that information even to question the integrity of State legislators who could not know their accusers....

It is unclear whether DOJ's maximization policy was driven more by Ms. Wilde's advocacy or DOJ's own misguided reading of the Voting Rights Act. This much, however, is clear: the close working relationship between Ms. Wilde and the Voting Section, the repetition of Ms. Wilde's ideas in [objection letters sent by the Assistant Attorney General for Civil Rights], and the slow convergence of size and shape between the max-black plan and the plan DOJ finally precleared, bespeak a direct link between the max-black plan formulated by the ACLU and the preclearance requirements imposed by DOJ.

> Succinctly put, the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment.

Johnson v. Miller, 864 F.Supp. 1354, 1360–68 (S.D.Ga. 1994), prob. juris. noted, 115 S.Ct. 713 (1995). The court's description of the preclearance process in the Georgia case may or may not be a fair one, and to the extent it is accurate it may or may not be representative of the process in other cases. To the extent that it is accurate and representative, are you as troubled by it as the court was? Presumably, interested groups play an influential role in the implementation of policy throughout the federal government. Is such influence less appropriate in the implementation of the Voting Rights Act than in other policy areas? Is it relevant to these questions that Ms. Wilde was employed by a non-profit organization and was representing one of the groups the Voting Rights Act is intended to protect?

II. Race-Conscious Districting and the Constitution: Round I

Allen and the subsequent reenactments of the Voting Rights Act firmly established the principle that the act extends to electoral mechanisms that affect the ability of minority voters as a group to make their votes count. However, the establishment of this principle did not, by itself, provide answers to questions raised by Justice Harlan in his *Allen* dissent regarding how the attorney general and the courts should decide which electoral procedures impermissibly discriminate against minority groups.

An early effort by the Supreme Court to provide guidance was the "nonretrogression" principle set forth in *Beer v. United States*, 425 U.S. 130 (1976). This principle declared that a districting plan should be precleared by the Justice Department unless it appeared that under the new plan, fewer districts would be subject to electoral control by a protected minority group than under the plan that was being replaced. A more detailed account of *Beer* and of the nonretrogression principle is contained in *United Jewish Organizations v. Carey*, reprinted below.

Many voting rights activists were dissatisfied with the nonretrogression principle, because they believed it provided no relief to protected groups who had been treated unfairly all along. They began to challenge districting plans and, especially, at-large voting arrangements under Section 2 of the Voting Rights Act and under the Fourteenth and Fifteenth Amendments.[b] Success in such cases would permit the bypassing of the preclearance system of Section 5, meaning that an electoral mechanism could be challenged even when there had been no change.

At the same time, in *United Jewish Organizations*, an adversely affected group not protected by the Voting Rights Act challenged the constitutionality of a plan adopted to benefit protected minority groups. As we shall see in this section, efforts to employ the Constitution and Section 2, whether by those who wished to extend the degree of voting power guaranteed to protected minorities or by those

b. Prior to the 1982 amendments, Section 2 was generally regarded as a restatement of the Fifteenth Amendment.

who wished to limit the protection extended by law to such groups, had relatively little success.

Voting rights activists had recourse to Congress, which in 1982 amended Section 2 to allow relief in circumstances the Supreme Court had held did not offend the Constitution. In Section III of this chapter, we shall consider the Supreme Court's most important decision interpreting the amended Section 2, *Thornburg v. Gingles*. *Gingles* left many questions open, some of which are reviewed in Section III, but for several years after the 1982 amendments and *Gingles*, minority voting rights seemed to be a field that, for almost all practical purposes, was statutory rather than constitutional. That may have changed in 1993, when the Supreme Court held that *United Jewish Organizations* did not rule out a constitutional attack on a districting plan designed to maximize the number of districts that could be controlled electorally by African Americans. *Shaw v. Reno*, the decision that thus reopened the constitutional questions relating to minority voting rights, is reprinted in Section IV of this chapter.

United Jewish Organizations v. Carey

430 U.S. 144 (1977)

Mr. Justice WHITE announced the judgment of the Court and filed an opinion in which Mr. Justice STEVENS joined; Parts I, II, and III of which are joined by Mr. Justice BRENNAN and Mr. Justice BLACKMUN; and Parts I and IV of which are joined by Mr. Justice REHNQUIST.

...The question presented is whether, in the circumstances of this case, the use of racial criteria by the State of New York in its attempt to comply with § 5 of the Voting Rights Act and to secure the approval of the Attorney General violated the Fourteenth or Fifteenth Amendment.

I

Kings County, N.Y., together with New York (Manhattan) and Bronx Counties, became subject to §§ 4 and 5 of the Act, by virtue of a determination by the Attorney General that a literacy test was used in these three counties as of November 1, 1968, and a determination by the Director of the Census that fewer than 50% of the voting-age residents of these three counties voted in the Presidential election of 1968.... On January 31, 1974, the provisions of the statute districting these counties for congressional, state senate, and state assembly seats were submitted to the Attorney General.... On April 1, 1974, the Attorney General concluded that, as to certain districts in Kings County covering the Bedford-Stuyvesant area of Brooklyn, the State had not met the burden placed on it by § 5 and the regulations thereunder to demonstrate that the redistricting had neither the purpose nor the effect of abridging the right to vote by reason of race or color.[6]

6. The basis for the Attorney General's conclusion that "the proscribed effect may exist" as to certain state assembly and senate districts in Kings County was explained in a letter to the New York State authorities as follows:

> Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to

[T]he State sought to meet what it understood to be the Attorney General's objections and to secure his approval in order that the 1974 primary and general elections could go forward under the 1972 statute. A revised plan, submitted to the Attorney General on May 31, 1974, in its essentials did not change the number of districts with nonwhite majorities, but did change the size of the nonwhite majorities in most of those districts. Under the 1972 plan, Kings County had three state senate districts with nonwhite majorities of approximately 91%, 61%, and 53%; under the revised 1974 plan, there were again three districts with nonwhite majorities, but now all three were between 70% and 75% nonwhite. [Similar changes were made in the assembly districts.] The report of the legislative committee on reapportionment stated that these changes were made "to overcome Justice Department objections" by creating more "substantial nonwhite majorities" in two assembly districts and two senate districts.

One of the communities affected by these revisions in the Kings County reapportionment plan was the Williamsburgh area, where about 30,000 Hasidic Jews live. Under the 1972 plan, the Hasidic community was located entirely in one assembly district (61% nonwhite) and one senate district (37% nonwhite); in order to create substantial nonwhite majorities in these districts, the 1974 revisions split the Hasidic community between two senate and two assembly districts. A staff member of the legislative reapportionment committee testified that in the course of meetings and telephone conversations with Justice Department officials, he "got the feeling...that 65 percent would be probably an approved figure" for the nonwhite population in the assembly district in which the Hasidic community was located, a district approximately 61% nonwhite under the 1972 plan. To attain the 65% figure, a portion of the white population, including part of the Hasidic community, was reassigned to an adjoining district.

Shortly after the State submitted this revised redistricting plan for Kings County to the Attorney General, petitioners sued on behalf of the Hasidic Jewish community of Williamsburgh, alleging that the 1974 plan "would dilute the value of each plaintiff's franchise by halving its effectiveness," solely for the purpose of achieving a racial quota and therefore in violation of the Fourteenth Amendment. Petitioners also alleged that they were assigned to electoral districts solely on the basis of race, and that this racial assignment diluted their voting power in violation of the Fifteenth Amendment....

II[c]

Petitioners argue that the New York Legislature, although seeking to comply with the Voting Rights Act as construed by the Attorney General, has violated the Fourteenth and Fifteenth Amendments by deliberately revising its reapportionment plan along racial lines. In rejecting petitioners' claim, we address four propositions: First, that whatever might be true in other contexts, the use of racial criteria in districting and apportionment is never permissible; second, that even if

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be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts.... [W]e know of no necessity for such configuration and believe other rational alternatives exist....

c. Recall that Parts II and III have the assent of four justices: White, Stevens, Brennan, and Blackmun.

racial considerations may be used to redraw district lines in order to remedy the residual effects of past unconstitutional reapportionments, there are no findings here of prior discriminations that would require or justify as a remedy that white voters be reassigned in order to increase the size of black majorities in certain districts; third, that the use of a "racial quota" in redistricting in never acceptable; and fourth, that even if the foregoing general propositions are infirm, what New York actually did in this case was unconstitutional, particularly its use of a 65% nonwhite racial quota for certain districts. The first three arguments, as we now explain, are foreclosed by our cases construing and sustaining the constitutionality of the Voting Rights Act; the fourth we address in Parts III and IV.

It is apparent from the face of the Act, from its legislative history, and from our cases that the Act itself was broadly remedial in the sense that it was "designed by Congress to banish the blight of racial discrimination in voting...." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)....

[Because the 1970 amendments brought the three New York counties within § 5,] it is evident that the Act's prohibition against instituting new voting procedures without the approval of the Attorney General or the three-judge District Court is not dependent upon proving past unconstitutional apportionments and that in operation the Act is aimed at preventing the use of new procedures until their capacity for discrimination has been examined by the Attorney General or by a court. Although recognizing that the "stringent new remedies," including § 5, were "an uncommon exercise of congressional power," we nevertheless sustained the Act as a "permissibly decisive" response to "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetrating voting discrimination in the face of adverse federal court decrees." *Katzenbach*.

It is also clear that under § 5, new or revised reapportionment plans are among those voting procedures, standards or practices that [require preclearance. *Allen*.]

In *Beer v. United States*, 425 U.S. 130 (1976), the Court considered the question of what criteria a legislative reapportionment must satisfy under § 5 of the Voting Rights Act to demonstrate that it does not have the "effect" of denying or abridging the right to vote on account of race. *Beer* established that the Voting Rights Act does not permit the implementation of a reapportionment that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." This test was satisfied where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority. But if this test were not met, clearance by the Attorney General or the District Court for the District of Columbia could not be given, and the reapportionment could not be implemented....

Implicit in *Beer*..., then, is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. That proposition must be rejected and § 5 held unconstitutional to that extent if we are to accept petitioners' view that racial criteria may never be used in redistricting or that they may be used, if at all, only as a specific remedy for past unconstitutional apportionments. We are unwilling to overturn our prior cases, however. Section 5 and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color are constitutional. Contrary to petitioners' first argument, neither the

Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment. Nor is petitioners' second argument valid. The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment.

Moreover, in the process of drawing black majority districts in order to comply with § 5, the State must decide how substantial those majorities must be in order to satisfy the Voting Rights Act. The figure used in drawing the *Beer* plan, for example, was 54% of registered voters. At a minimum and by definition, a "black majority district" must be more than 50% black. But whatever the specific percentage, the State will inevitably arrive at it as a necessary means to ensure the opportunity for the election of a black representative and to obtain approval of its reapportionment plan. Unless we adopted an unconstitutional construction of § 5 in *Beer*..., a reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts. Our cases under § 5 stand for at least this much.

III

Having rejected these three broad objections to the use of racial criteria in redistricting under the Voting Rights Act, we turn to the fourth question, which is whether the racial criteria New York used in this case—the revision of the 1972 plan to create 65% nonwhite majorities in two additional senate and two additional assembly districts—were constitutionally infirm. We hold they are not, on two separate grounds. The first is addressed in this Part III, the second in Part IV.

The first ground is that petitioners have not shown, or offered to prove, that New York did more than the Attorney General was authorized to require it to do under the non-retrogression principle of *Beer*.... Under *Beer*, the acceptability of New York's 1972 reapportionment for purposes of § 5 depends on the change in nonwhite voting strength in comparison with the previous apportionment, which occurred in 1966. Yet there is no evidence in the record to show whether the 1972 plan increased or decreased the number of senate or assembly districts with substantial nonwhite majorities of 65%. For all that petitioners have alleged or proved, the 1974 revisions may have accomplished nothing more than the restoration of nonwhite voting strength to 1966 levels. To be successful in their constitutional challenge to the racial criteria used in New York's revised plan, petitioners must show at a minimum that minority voting strength was increased under the 1974 plan in comparison with the 1966 apportionment; otherwise the challenge amounts to a constitutional attack on compliance with the statutory rule of nonretrogression.

In the absence of any evidence regarding nonwhite voting strength under the 1966 apportionment, the creation of substantial nonwhite majorities in approximately 30% of the senate and assembly districts in Kings County was reasonably related to the constitutionally valid statutory mandate of maintaining nonwhite voting strength. The percentage of districts with nonwhite majorities was less than the percentage of nonwhites in the county as a whole (35%). The size of the nonwhite majorities in those districts reflected the need to take account of the substantial difference between the nonwhite percentage of the total population in a district and the nonwhite percentage of the voting-age population. Because, as

the Court said in *Beer*, the inquiry under § 5 focuses ultimately on "the position of racial minorities with respect to their effective exercise of the electoral franchise," the percentage of eligible voters by district is of great importance to that inquiry.... We think it was reasonable for the Attorney General to conclude in this case that a substantial nonwhite population majority in the vicinity of 65% would be required to achieve a nonwhite majority of eligible voters.

Petitioners have not shown that New York did more than accede to a position taken by the Attorney General that was authorized by our constitutionally permissible construction of § 5. New York adopted the 1974 plan because it sought to comply with the Voting Rights Act. [Therefore, it is not necessary to address] the additional argument by New York and by the United States that, wholly aside from New York's obligation under the Voting Rights Act to preserve minority voting strength in Kings County, the Constitution permits it to draw district lines deliberately in such a way that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county.

IV[d]

This additional argument, however, affords a second, and independent, ground for sustaining the particulars of the 1974 plan for Kings County. Whether or not the plan was authorized by or was in compliance with § 5 of the Voting Rights Act, New York was free to do what it did as long as it did not violate the Constitution, particularly the Fourteenth and Fifteenth Amendments; and we are convinced that neither Amendment was infringed.

There is no doubt that in preparing the 1974 legislation the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment.

It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength. Petitioners have not objected to the impact of the 1974 plan on the representation of white voters in the county or in the State as a whole. As the Court of Appeals observed, the plan left white majorities in approximately 70% of the assembly and senate districts in Kings County, which had a countywide population that was 65% white. Thus, even if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population.

In individual districts where nonwhite majorities were increased to approximately 65%, it became more likely, given racial bloc voting, that black candidates would be elected instead of their white opponents, and it became less likely that white voters would be represented by a member of their own race; but as long as whites in Kings County, as a group, were provided with fair representation, we

d. Part IV has the assent of three justices: White, Stevens, and Rehnquist.

cannot conclude that there was a cognizable discrimination against whites or an abridgment of their right to vote on the grounds of race. Furthermore, the individual voter in the district with a nonwhite majority has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote. Some candidate, along with his supporters, always loses.

Where it occurs, voting for or against a candidate because of his race is an unfortunate practice. But it is not rare; and in any district where it regularly happens, it is unlikely that any candidate will be elected who is a member of the race that is in the minority in that district. However disagreeable this result may be, there is no authority for the proposition that the candidates who are found racially unacceptable by the majority, and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process. Their position is similar to that of the Democratic or Republican minority that is submerged year after year by the adherents to the majority party who tend to vote a straight party line.

It does not follow, however, that the State is powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court upheld a districting plan "drawn with the conscious intent to...achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." We there recognized that districting plans would be vulnerable under our cases if "racial or political groups have been fenced out of the political process and their voting strength invidiously minimized"; but that was not the case there, and no such purpose or effect may be ascribed to New York's 1974 plan. Rather, that plan can be viewed as seeking to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters in Kings County.

In this respect New York's revision of certain district lines is little different in kind from the decision by a State in which a racial minority is unable to elect representatives from multimember districts to change to single-member districting for the purpose of increasing minority representation. This change might substantially increase minority representation at the expense of white voters, who previously elected all of the legislators but who with single-member districts could elect no more than their proportional share. If this intentional reduction of white voting power would be constitutionally permissible, as we think it would be, we think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.

As the Court said in *Gaffney*:

> [C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

New York was well within this rule when, under the circumstances present in Kings County, it amended its 1972 plan.[e]

Mr. Justice BRENNAN, concurring in part.

I join Parts I, II, and III of Mr. Justice WHITE's opinion.

[I]f the racial redistricting involved here, imposed with the avowed intention of clustering together 10 viable nonwhite majorities at the expense of preexisting white groupings, is not...to be prohibited, the [avoidance of] this prohibition must arise from either or both of two considerations: the permissibility of affording preferential treatment to disadvantaged nonwhites generally, or the particularized application of the Voting Rights Act in this instance.

The first and broader of the two plausible distinctions rests upon the general propriety of so-called benign discrimination.... Unlike Part IV of Mr. Justice WHITE's opinion, I am wholly content to leave this thorny question until another day, for I am convinced that the existence of the Voting Rights Act makes such a decision unnecessary and alone suffices to support an affirmance of the judgment before us....

This leaves, of course, the objection expressed by a variety of participants in this litigation: that this reapportionment worked the injustice of localizing the direct burdens of racial assignment upon a morally undifferentiated group of whites, and, indeed, a group that plausibly is peculiarly vulnerable to such injustice. This argument has both normative and emotional appeal, but for a variety of reasons I am convinced that the Voting Rights Act drains it of vitality.

First, it is important to recall that the Attorney General's oversight focuses upon jurisdictions whose prior practices exhibited the purpose or effect of infringing the right to vote on account of race, thereby triggering § 4 of the Act. This direct nexus to localities with a history of discriminatory practices or effects enhances the legitimacy of the Attorney General's remedial authority over individuals within those communities who benefited (as whites) from those earlier discriminatory voting patterns. Moreover, the obvious remedial nature of the Act and its enactment by an elected Congress that hardly can be viewed as dominated by nonwhite representatives belie the possibility that the decisionmaker intended a racial insult or injury to those whites who are adversely affected by the operation of the Act's provisions. Finally, petitioners have not been deprived of their right to vote, a consideration that minimizes the detrimental impact of the remedial racial policies governing the § 5 reapportionment. True, petitioners are denied the opportunity to vote as a group in accordance with the earlier districting configuration, but they do not press any legal claim to a group voice as Hasidim. In terms of their voting interests, then, the burden that they claim to suffer must be attributable solely to their relegation to increased nonwhite-dominated districts. Yet, to the extent that white and nonwhite interests and sentiments are polarized in Brooklyn, the petitioners still are indirectly "protected" by the remaining white assembly and senate districts within the county, carefully preserved in accordance with the white proportion of the total county population. While these considerations obviously do not satisfy petitioners, I am persuaded that they reinforce the legitimacy of this remedy.

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e. Justice Marshall did not participate in this case.

Since I find nothing in the first three parts of Mr. Justice WHITE's opinion that is inconsistent with the views expressed herein, I join those parts.

Mr. Justice STEWART, with whom Mr. Justice POWELL joins, concurring in the judgment.

The question presented for decision in this case is whether New York's use of racial criteria in redistricting Kings County violated the Fourteenth or Fifteenth Amendment. The petitioners' contention is essentially that racial awareness in legislative reapportionment is unconstitutional per se. Acceptance of their position would mark an egregious departure from the way this Court has in the past analyzed the constitutionality of claimed discrimination in dealing with the elective franchise on the basis of race.

The petitioners have made no showing that a racial criterion was used as a basis for denying them their right to vote, in contravention of the Fifteenth Amendment. They have made no showing that the redistricting scheme was employed as part of a "contrivance to segregate"; to minimize or cancel out the voting strength of a minority class or interest; or otherwise to impair or burden the opportunity of affected persons to participate in the political process.

Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. Disproportionate impact may afford some evidence that an invidious purpose was present. But the record here does not support a finding that the redistricting plan undervalued the political power of white voters relative to their numbers in Kings County. That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent. The clear purpose with which the New York Legislature acted in response to the position of the United States Department of Justice under the Voting Rights Act forecloses any finding that it acted with the invidious purpose of discriminating against white voters.

Having failed to show that the legislative reapportionment plan had either the purpose or the effect of discriminating against them on the basis of their race, the petitioners have offered no basis for affording them the constitutional relief they seek. Accordingly, I join the judgment of the Court.

Mr. Chief Justice BURGER, dissenting.

The question presented in this difficult case is whether New York violated the rights of the petitioners under the Fourteenth and Fifteenth Amendments by direct reliance on fixed racial percentages in its 1974 redistricting of Kings County. For purposes of analysis I will treat this in two steps: (1) Is the state legislative action constitutionally permissible absent any special considerations raised by the Federal Voting Rights Act; and (2) does New York's obligation to comply with the Voting Rights Act permit it to use these means to achieve a federal statutory objective?

(1)

...If *Gomillion* teaches anything, I had thought it was that drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution. The record before

us reveals and it is not disputed that this is precisely what took place here. In drawing up the 1974 reapportionment scheme, the New York Legislature did not consider racial composition as merely one of several political characteristics; on the contrary, race appears to have been the one and only criterion applied....

The words "racial quota" are emotionally loaded and must be used with caution. Yet [the] undisputed testimony shows that the 65% figure was viewed by the legislative reapportionment committee as so firm a criterion that even a fractional deviation was deemed impermissible. I cannot see how this can be characterized otherwise than a strict quota approach and I must therefore view today's holding as casting doubt on the clear-cut principles established in *Gomillion*.

(2)

My second inquiry is whether the action of the State of New York becomes constitutionally permissible because it was taken to comply with the remedial provisions of the federal Voting Rights Act....

Faced with the straightforward obligation to redistrict so as to avoid "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer*, the state legislature mechanically adhered to a plan designed to maintain without tolerance for even a 1.6% deviation a "nonwhite" population of 65% within several of the new districts. There is no indication whatever that use of this rigid figure was in any way related much less necessary to fulfilling the State's obligation under the Voting Rights Act as defined in *Beer*.

The plurality opinion...assumes that the 1974 reapportionment was undertaken in compliance with *Beer*. The lack of evidence on this subject is, of course, not surprising, since petitioners' case was dismissed at the pleading stage. If this kind of racial redistricting is to be upheld, however, it should, at the very least, be done on the basis of record facts, not suppositions. If the Court seriously considers the issue in doubt, I should think that a remand for further factual determinations would be the proper course of action.

[I]t would make no sense to assure nonwhites a majority of 65% in a voting district unless it were assumed that nonwhites and whites vote in racial blocs, and that the blocs vote adversely to, or independently of, one another. Not only is the record in this case devoid of any evidence that such bloc voting has taken or will take place in Kings County, but such evidence as there is points in the opposite direction: We are informed that four out of the five "safe" (65%) nonwhite districts established by the 1974 plan have since elected white representatives.

The assumption that "whites" and "nonwhites" in the County form homogeneous entities for voting purposes is entirely without foundation. The "whites" category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations. It simply cannot be assumed that the legislative interests of all "whites" are even substantially identical. In similar fashion, those described as "nonwhites" include, in addition to Negroes, a substantial portion of Puerto Ricans. The Puerto Rican population, for whose protection the Voting Rights Act was "triggered" in Kings County, has expressly disavowed any identity of interest with the Negroes, and, in fact, objected to the 1974 redistricting scheme because it did not establish a Puerto Rican controlled district within the county.

(3)

[R]igid adherence to quotas, especially in a case like this, deprives citizens such as petitioners of the opportunity to have the legislature make a determination free from unnecessary bias for or against any racial, ethnic, or religious group. I do not quarrel with the proposition that the New York Legislature may choose to take ethnic or community union into consideration in drawing its district lines. Indeed, petitioners are members of an ethnic community which, without deliberate purpose so far as shown on this record, has long been within a single assembly and senate district. While petitioners certainly have no constitutional right to remain unified within a single political district, they do have, in my view, the constitutional right not to be carved up so as to create a voting bloc composed of some other ethnic or racial group through the kind of racial gerrymandering the Court condemned in *Gomillion v. Lightfoot.*

If districts have been drawn in a racially biased manner in the past (which the record does not show to have been the case here) the proper remedy is to reapportion along neutral lines. Manipulating the racial composition of electoral districts to assure one minority or another its "deserved" representation will not promote the goal of a racially neutral legislature....

The result reached by the Court today in the name of the Voting Rights Act is ironic.... It suggests to the voter that only a candidate of the same race, religion, or ethnic origin can properly represent that voter's interests, and that such candidate can be elected only from a district with a sufficient minority concentration. The device employed by the State of New York and endorsed by the Court today, moves us one step farther away from a truly homogeneous society. This retreat from the ideal of the American "melting pot" is curiously out of step with recent political history and indeed with what the Court has said and done for more than a decade. The notion that Americans vote in firm blocs has been repudiated in the election of minority members as mayors and legislators in numerous American cities and districts overwhelmingly white. Since I cannot square the mechanical racial gerrymandering in this case with the mandate of the Constitution, I respectfully dissent from the affirmance of the judgment of the Court of Appeals.

Notes and Questions

1. What is the conception of representation that informs Justice White's opinion in *Carey*? Do you share this conception? Would Edmund Burke? See generally Hanna Pitkin, *The Concept of Representation* (1967).

2. Are the grounds given by Justices Stewart and Powell for ruling for defendants different from the grounds given in Part IV of Justice White's decision?

3. As Justice Brennan indicates, the plaintiffs did "not press any legal claim to a group voice as Hasidim." Should they have? If they had, would the outcome have been affected? See generally T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICHIGAN LAW REVIEW 588, 595–96 (1993).

4. Suppose there is an area of 500 voters that must be divided into five legislative districts of 100 voters each. Racially, the voters break down as follows: 280 white, 120 African-American, and 100 Latino. The old plan, which must be replaced because of a new census, consists of five districts, each with a white

majority. Initially the legislature enacts Plan I, below. However, in response to pressure from African-American organizations, Plan I is repealed, and Plan II is adopted. The racial composition of the districts under the two plans is as follows:[f]

Plan I

	Dist. 1	Dist. 2	Dist. 3	Dist. 4	Dist. 5
White	70	70	70	70	0
African-American	25	25	25	25	20
Latino	5	5	5	5	80

Plan II

	Dist. 1	Dist. 2	Dist. 3	Dist. 4	Dist. 5
White	80	80	80	20	20
African-American	0	0	0	60	60
Latino	20	20	20	20	20

What result if Latino voters sue to have Plan I restored, on the ground that Plan II unconstitutionally dilutes Latino votes? Will these plaintiffs have a better chance if, instead of seeking to restore Plan I, they ask the court to impose a new plan, Plan III, whose districts' racial compositions are as follows?

Plan III

	Dist. 1	Dist. 2	Dist. 3	Dist. 4	Dist. 5
White	95	95	35	35	20
African-American	0	0	60	60	0
Latino	5	5	5	5	80

Would the white voters have a constitutional objection if Plan III is adopted? Would your answer be affected if it were shown that white voters in this area nearly always vote for Republican candidates and African-American and Latino voters nearly always vote for Democrats?

In thinking about this problem, bear in mind that it involves a constitutional claim. In the next section we shall consider the 1982 amendments to the Voting Rights Act, which would probably have a major bearing on the hypothetical situation. In thinking about the constitutional issues, consider the two cases decided subsequent to *UJO* that are summarized briefly in Note 7, below.

5. Unlike *United Jewish Organizations v. Carey*, most "racial gerrymandering" cases have been initiated by non-white plaintiffs—usually African-Americans or Latinos—seeking to enhance their representation. Many such cases have challenged either at-large elections or multi-member districts. At-large elections occur, usually at the local level, when each office is voted upon throughout the jurisdiction, rather than the jurisdiction being divided into districts. Election of officers such as governors and mayors who do not sit in collegial bodies are almost inevitably at-large. The controversy arises when members of a collegial body, such as a city council, are elected at-large. In the United States, at-large elections usually are run according to one of two methods. In the first, there is a separate juris-

f. For purposes of simplification, we make the unrealistic assumption that all residents are voters. Thus, each of the plans perfectly satisfies the one person, one vote rule.

diction-wide election for each seat.[g] In the second, all candidates for office run against each other, each voter may cast a number of votes equal to the number of offices to be filled, and the top vote-getters are elected. For example, in an election to fill three seats on a city council, all voters in the city could vote for up to three candidates, and the top three candidates would be elected. In multi-member districts, which often occur in state legislative elections as well as some local elections,[h] more than one member but fewer than all the members of a collegial body are elected from the same district.

The controversy over multi-member districts and at-large districts stems from the fact that they often result in preventing the election of representatives of a minority group or faction that might be able to elect some representatives in single-member district elections. At-large elections sometimes are defended on the ground that the representatives elected are more likely to serve the community as a whole rather than the parochial interests of a particular locality. A similar defense of multi-member districts can be made, but is more attenuated. Indeed, it has been contended that the inconsistent use of multi-member districts "is almost surely a discriminatory practice." Charles Backstrom et al., *Establishing a Statewide Effects Baseline*, in POLITICAL GERRYMANDERING AND THE COURTS 145, 152 (B. Grofman, ed., 1990).

6. The existence of possible conflicts between groups, whether between nonwhites and a subgroup of whites as in *UJO* or between two racial or ethnic minorities, has caused some commentators to express skepticism of the vote dilution principle. See Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in CONTROVERSIES IN MINORITY VOTING, *supra*, at 177, 193–94:

> Although statutory language continues to disclaim any goal of proportional representation for protected minorities, enforcement practices tend to affirm it. Hispanic immigrants are protected, but Russian immigrants are not. Minority rights leaders claim a right to vote for candidates of their "first choice," but it is not clear from what principle this right derives, or how it is defined, or whether nonminority voters (or women) also possess it. Protected classes are given rights to nondilution, but other voters, including women and many minorities, possess no such rights.
>
> Indeed the theory of nondilution is so tactically selective that it risks incoherence as a general proposition. It does not apply to women, whose history of political discrimination and electoral underrepresentation equals and arguably exceeds that of blacks and Hispanics. Furthermore, it is not clear upon what principle the right of nondilution rests. If redistricting in contiguous neighborhoods of black and Hispanic voters brings competing claims to protection against nondilution in newly drawn districts, as is increasingly likely between blacks and Hispanics in Miami, Houston, and Los Angeles, then whose claims should be vindicated and why? Will blacks, as the target beneficiaries of the Voting Rights Act dur-

g. Sometimes this system includes "residential districts." The overall jurisdiction is divided into districts, and candidates for a given seat must reside within the corresponding district. However, the candidates are elected by voters throughout the jurisdiction.

h. In the past, elections for the House of Representatives occasionally were conducted in multi-member districts. Currently, federal law requires single-member districts. 2 U.S.C. § 2c.

> ing its first decade, have a superior claim to nondilution in the coming electoral clashes with neighboring Hispanics? Upon what principles are federal judges to award nondilution preference?

Others continue to regard the existence of legal protection against minority vote dilution as essential so long as bloc voting white majorities can nullify the votes of racial or language minorities. For example, one such writer acknowledges that the idea of "more-or-less permanent, racially defined factions locked in electoral battle over the spoils of the political system runs contrary to a number of currently fashionable theories of politics." Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICHIGAN LAW REVIEW 1833, 1872 (1992). Nevertheless, he defends judicial remedies against vote dilution in these terms:

> The focus on racially polarized voting patterns forced the judiciary to confront the actual operation of challenged electoral systems in order to identify precisely the discriminatory mechanisms that frustrated minority political aspirations. By redirecting focus to the bloc voting practices of majority white communities and the resulting exclusion of minority-supported candidates from public office, the new voting rights jurisprudence identified two fundamental distortions in the electoral arena. First, electoral systems that fail to curb the deleterious consequences of racial bloc voting reward a racially defined majority faction with disproportionate political power and, consequently, with disproportionate access to the goods and services distributed through the legislative process. Second, the emergence of a racially defined majority faction compounds the potential for continued social and economic subordination of historically disadvantaged minorities.

Id. at 1836–37.

7. In *Mobile v. Bolden*, 446 U.S. 55 (1980), a challenge to an at-large system of electing members to the City Commission of Mobile, Alabama, the Court held that racial and ethnic minorities challenging voting systems as discriminatory under either the Constitution or the Voting Rights Act had to demonstrate that the system was intentionally discriminatory. Discriminatory effects alone were not sufficient. In *Rogers v. Lodge*, 458 U.S. 613 (1982), another challenge to an at-large system, the harshness of the *Bolden* decision for plaintiffs may have been mitigated by a holding that discriminatory intent could be inferred from the totality of circumstances. But by that time Congress had amended Section 2 of the Voting Rights Act to allow challenges based on discriminatory effects.[i] Most subsequent racial gerrymandering litigation has involved application of the Voting Rights Act rather than the Constitution. *Bolden* and the 1982 Voting Rights Act amendments are described in greater detail in *Thornburg v. Gingles*, *infra*, the

i. The 1982 amendments also extended the preclearance requirements to the year 2007. The covered jurisdictions now include nine complete states: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, and parts of seven other states.

first case to reach the Court testing the meaning of the revised Section 2, and still the Court's major pronouncement on Section 2.

III. Minority Vote Dilution Under the 1982 Amendments

Thornburg v. Gingles
478 U.S. 30 (1986)

Justice BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III-A, III-B, IV-A, and V, and an opinion with respect to Part III-C, in which Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, and an opinion with respect to Part IV-B, in which Justice WHITE joins.

This case requires that we construe for the first time § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. The specific question to be decided is whether the three-judge District Court, convened in the Eastern District of North Carolina..., correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters "to participate in the political process and to elect representatives of their choice." § 2(b).

I

BACKGROUND

In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, challenged seven districts, one single-member and six multimember districts, alleging that the redistricting scheme impaired black citizens' ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and of § 2 of the Voting Rights Act.

After appellees brought suit, but before trial, Congress amended § 2. The amendment was largely a response to this Court's plurality opinion in *Mobile v. Bolden*, 446 U.S. 55, (1980), which had declared that, in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the "results test," applied by this Court in *White v. Regester*.

Section 2, as amended, reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or

color, or in contravention of the guarantees set forth in section 4(f)(2)[j], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

The Senate Judiciary Committee majority Report accompanying the bill that amended § 2, elaborates on the circumstances that might be probative of a § 2 violation, noting the following "typical factors":[4]

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

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j. Section 4(f)(2), added to the act in 1975, extends coverage to members of specified language minorities.—ED.

4. These factors were derived from the analytical framework of *White v. Regester*, as refined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (1973) (en banc), aff'd *sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam). [Because of this derivation, these "totality of circumstances" factors are often referred to as *Zimmer* factors in Voting Rights Act cases and commentary.—ED.]

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

The District Court applied the "totality of the circumstances" test set forth in § 2(b) to appellees' statutory claim, and, relying principally on the factors outlined in the Senate Report, held that the redistricting scheme violated § 2 because it resulted in the dilution of black citizens' votes in all seven disputed districts. In light of this conclusion, the court did not reach appellees' constitutional claims.

[At this point, Justice Brennan summarizes the findings of the District Court to the effect that most of the factors set forth in the Senate Report were present to a significant extent in the relevant North Carolina districts.]

Based on these findings, the court declared the contested portions of the 1982 redistricting plan violative of § 2 and enjoined appellants from conducting elections pursuant to those portions of the plan. Appellants, the Attorney General of North Carolina and others, took a direct appeal to this Court...with respect to five of the multimember districts—House Districts 21, 23, 36, and 39, and Senate District 22....We...now affirm with respect to all of the districts except House District 23. With regard to District 23, the judgment of the District Court is reversed.

II

SECTION 2 AND VOTE DILUTION THROUGH USE OF MULTIMEMBER DISTRICTS

An understanding both of § 2 and of the way in which multimember districts can operate to impair blacks' ability to elect representatives of their choice is prerequisite to an evaluation of appellants' contentions. First, then, we review amended § 2 and its legislative history in some detail. Second, we explain the theoretical basis for appellees' claim of vote dilution.

A

SECTION 2 AND ITS LEGISLATIVE HISTORY

...The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations. First and foremost, the Report dispositively rejects the position of the plurality in *Mobile v. Bolden*, which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters. The intent test was repudiated for three principal reasons—it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question." The "right" question, as the Report emphasizes repeatedly, is whether "as a result of the chal-

lenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[9]

In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities "on the basis of objective factors." [Here, Justice Brennan summarizes the factors from the Senate Report, quoted above.] The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered. Furthermore, the Senate Committee observed that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Rather, the Committee determined that "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,'" and on a "functional" view of the political process.

Although the Senate Report espouses a flexible, fact-intensive test for § 2 violations, it limits the circumstances under which § 2 violations may be proved in three ways. First, electoral devices, such as at-large elections, may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.

B

VOTE DILUTION THROUGH THE USE OF MULTIMEMBER DISTRICTS

Appellees contend that the legislative decision to employ multimember, rather than single-member, districts in the contested jurisdictions dilutes their votes by submerging them in a white majority,[11] thus impairing their ability to elect representatives of their choice.[12]

The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the oppor-

9. The Senate Committee found that "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination."

11. Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority.

12. The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability to elect the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections.

We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

tunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multimember districts and at-large voting schemes may "'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'"[13] *Burns v. Richardson*, 384 U.S. 73, 83 (1966) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)). The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.[14] Multimember districts and at-large election schemes, however, are not *per se* violative of minority voters' rights. Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates.

While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice.[15] Stated succinctly, a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group. These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representa-

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13. Commentators are in widespread agreement with this conclusion. [Justice Brennan cites several secondary authorities. Readers seeking references to the pre-Gingles literature on vote dilution will find copious references in this footnote and elsewhere in Justice Brennan's opinion.—ED.].

14. Not only does "[v]oting along racial lines" deprive minority voters of their preferred representative in these circumstances, it also "allows those elected to ignore [minority] interests without fear of political consequences," *Rogers v. Lodge*, leaving the minority effectively unrepresented.

15. Under a "functional" view of the political process mandated by § 2, the most important Senate Report factors bearing on § 2 challenges to multimember districts are the "extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political subdivision is racially polarized." If present, the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists—for example antibullet voting laws and majority vote requirements, are supportive of, but *not essential to*, a minority voter's claim.

In recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others, the Court effectuates the intent of Congress. It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability "to elect." § 2(b). And, where the contested electoral structure is a multimember district, commentators and courts agree that in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters. Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district. By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that § 2 plaintiffs prove their claim before they may be awarded relief.

tives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.[16] If it is not, as would be the case in a substantially integrated district, the multi-member form of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed,—usually to defeat the minority's preferred candidate. In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Finally, we observe that the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election. Cf. *Bandemer*.

III

RACIALLY POLARIZED VOTING

Having stated the general legal principles relevant to claims that § 2 has been violated through the use of multimember districts, we turn to the arguments of appellants and of the United States as *amicus curiae* addressing racially polarized voting....

A

THE DISTRICT COURT'S TREATMENT OF RACIALLY POLARIZED VOTING

...The District Court found that blacks and whites generally preferred different candidates and, on that basis, found voting in the districts to be racially correlated....[k]

The court then considered the relevance to the existence of legally significant white bloc voting of the fact that black candidates have won some elections. It determined that in most instances, special circumstances, such as incumbency and lack of opposition, rather than a diminution in usually severe white bloc voting, accounted for these candidates' success. The court also suggested that black voters' reliance on bullet voting was a significant factor in their successful efforts to elect candidates of their choice....

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16. In this case appellees allege that within each contested multimember district there exists a minority group that is sufficiently large and compact to constitute a single-member district. In a different kind of case, for example a gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote.

k. For a description of the statistical techniques employed by the District Court to reach this conclusion and approved by the Supreme Court, see Bernard Grofman, Lisa Handley & Richard G. Niemi, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 82–108 (1992).

B

THE DEGREE OF BLOC VOTING THAT IS LEGALLY SIGNIFICANT UNDER § 2

...

2

The Standard for Legally Significant Racial Bloc Voting

...The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim and, consequently, establishes minority bloc voting within the context of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. The amount of white bloc voting that can generally "minimize or cancel" black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of registered voters in the district who are members of the minority group; the size of the district; and, in multimember districts, the number of seats open and the number of candidates in the field.

Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election.... Also for this reason, in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.[1]

As must be apparent, the degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will vary according to a variety of factual cir-

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1. Suppose the elections used by the plaintiffs to show the *presence* of racially polarized voting involve challengers from a racial or language minority who are defeated by white anglo incumbents. Can the defendants point to incumbency as a "special circumstance" to defeat what otherwise would be evidence establishing racially polarized voting? See *Nipper v. Smith*, 1 F.3d 1171, 1180–82 (11th Cir. 1993), reversed on other grounds on rehearing en banc, 39 F.3d 1494 (11th Cir. 1994), cert. denied 115 S.Ct. 1795 (1995).

cumstances. Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting. However, the foregoing general principles should provide courts with substantial guidance in determining whether evidence that black and white voters generally prefer different candidates rises to the level of legal significance under § 2.

3

Standard Utilized by the District Court

The District Court clearly did not employ the simplistic standard identified by North Carolina—legally significant bloc voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate. And, although the District Court did utilize the measure of "substantive significance" that the United States ascribes to it—"the results of the individual election would have been different depending on whether it had been held among only the white voters or only the black voters,"—the court did not reach its ultimate conclusion that the degree of racial bloc voting present in each district is legally significant through mechanical reliance on this standard. [A] fair reading of the court's opinion reveals that the court's analysis conforms to our view of the proper legal standard....

C[m]

EVIDENCE OF RACIALLY POLARIZED VOTING

1

Appellants' Argument

North Carolina and the United States also contest the evidence upon which the District Court relied in finding that voting patterns in the challenged districts were racially polarized. They argue that the term "racially polarized voting" must, as a matter of law, refer to voting patterns for which the *principal cause* is race. They contend that the District Court utilized a legally incorrect definition of racially polarized voting by relying on bivariate statistical analyses which merely demonstrated a correlation between the race of the voter and the level of voter support for certain candidates, but which did not prove that race was the primary determinant of voters' choices. According to appellants and the United States, only multiple regression analysis, which can take account of other variables which might also explain voters' choices, such as "party affiliation, age, religion, income[,] incumbency, education, campaign expenditures," "media use measured by cost,... name, identification, or distance that a candidate lived from a particular precinct," can prove that race was the primary determinant of voter behavior.

[W]e disagree: For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates. As we demonstrate below, appellants' theory of racially polarized voting would thwart the goals Congress sought to achieve when

m. Recall that this section is joined by only four justices: Brennan, Marshall, Blackmun, and Stevens.

it amended § 2 and would prevent courts from performing the "functional" analysis of the political process and the "searching practical evaluation of the 'past and present reality'" mandated by the Senate Report.

2

Causation Irrelevant to Section 2 Inquiry

The first reason we reject appellants' argument that racially polarized voting refers to voting patterns that are in some way *caused by race*, rather than to voting patterns that are merely *correlated with the race of the voter*, is that the reasons black and white voters vote differently have no relevance to the central inquiry of § 2. By contrast, the correlation between race of voter and the selection of certain candidates is crucial to that inquiry.

Both § 2 itself and the Senate Report make clear that the critical question in a § 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. As we explained [above], multimember districts may impair the ability of blacks to elect representatives of their choice where blacks vote sufficiently as a bloc as to be able to elect their preferred candidates in a black majority, single-member district and where a white majority votes sufficiently as a bloc usually to defeat the candidates chosen by blacks. It is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, we conclude that under the "results test" of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.

The irrelevance to a § 2 inquiry of the reasons why black and white voters vote differently supports, by itself, our rejection of appellants' theory of racially polarized voting. However, their theory contains other equally serious flaws that merit further attention. As we demonstrate below, the addition of irrelevant variables distorts the equation and yields results that are indisputably incorrect under § 2 and the Senate Report.

3

Race of Voter as Primary Determinant of Voter Behavior

Appellants and the United States contend that the legal concept of "racially polarized voting" refers not to voting patterns that are merely *correlated with the voter's race*, but to voting patterns that are *determined primarily by the voter's race*, rather than by the voter's other socioeconomic characteristics.

The first problem with this argument is that it ignores the fact that members of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth.... Where such characteristics are shared, race or ethnic group not only denotes color or place of origin, it also functions as a shorthand notation for common social and economic characteristics. Appellants' definition of racially polarized voting is even more pernicious where shared characteristics are causally related to race or ethnicity. The opportunity to achieve high employment status and income, for

example, is often influenced by the presence or absence of racial or ethnic discrimination. A definition of racially polarized voting which holds that black bloc voting does not exist when black voters' choice of certain candidates is most strongly influenced by the fact that the voters have low incomes and menial jobs—when the reason most of those voters have menial jobs and low incomes is attributable to past or present racial discrimination—runs counter to the Senate Report's instruction to conduct a searching and practical evaluation of past and present reality and interferes with the purpose of the Voting Rights Act to eliminate the negative effects of past discrimination on the electoral opportunities of minorities....

4

Race of Candidate as Primary Determinant of Voter Behavior

North Carolina's and the United States' suggestion that racially polarized voting means that voters select or reject candidates *principally* on the basis of the *candidate's race* is also misplaced.

First, both the language of § 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate *per se* is irrelevant to racial bloc voting analysis. Section 2(b) states that a violation is established if it can be shown that members of a protected minority group "have less opportunity than other members of the electorate to... elect representatives *of their choice*." (Emphasis added.) Because both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites. Indeed, the facts of this case illustrate that tendency—blacks preferred black candidates, whites preferred white candidates. Thus, as a matter of convenience, we and the District Court may refer to the preferred representative of black voters as the "black candidate" and to the preferred representative of white voters as the "white candidate." Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. Under § 2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important....

5

Racial Animosity as Primary Determinant of Voter Behavior

Finally, we reject the suggestion that racially polarized voting refers only to white bloc voting which is caused by white voters' *racial hostility* toward black candidates. To accept this theory would frustrate the goals Congress sought to achieve by repudiating the intent test of *Mobile v. Bolden*, and would prevent minority voters who have clearly been denied an opportunity to elect representatives of their choice from establishing a critical element of a vote dilution claim.

In amending § 2, Congress rejected the requirement announced by this Court in *Bolden*, that § 2 plaintiffs must prove the discriminatory intent of state or local governments in adopting or maintaining the challenged electoral mechanism. Appellants' suggestion that the discriminatory intent of individual white voters must be proved in order to make out a § 2 claim must fail for the very reasons Congress rejected the intent test with respect to governmental bodies....

The grave threat to racial progress and harmony which Congress perceived from requiring proof that racism caused the adoption or maintenance of a challenged electoral mechanism is present to a much greater degree in the proposed requirement that plaintiffs demonstrate that racial animosity determined white voting patterns. Under the old intent test, plaintiffs might succeed by proving only that a limited number of elected officials were racist; under the new intent test plaintiffs would be required to prove that most of the white community is racist in order to obtain judicial relief. It is difficult to imagine a more racially divisive requirement.

A second reason Congress rejected the old intent test was that in most cases it placed an "inordinately difficult burden" on § 2 plaintiffs. The new intent test would be equally, if not more, burdensome. In order to prove that a specific factor—racial hostility—determined white voters' ballots, it would be necessary to demonstrate that other potentially relevant causal factors, such as socioeconomic characteristics and candidate expenditures, do not correlate better than racial animosity with white voting behavior....

The final and most dispositive reason the Senate Report repudiated the old intent test was that it "asks the wrong question." Amended § 2 asks instead "whether minorities have equal access to the process of electing their representatives."

Focusing on the discriminatory intent of the voters, rather than the behavior of the voters, also asks the wrong question. All that matters under § 2 and under a functional theory of vote dilution is voter behavior, not its explanations....

6

Summary

In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.

IV

THE LEGAL SIGNIFICANCE OF SOME BLACK CANDIDATES' SUCCESS

A[n]

North Carolina and the United States maintain that the District Court failed to accord the proper weight to the success of some black candidates in the challenged districts. Black residents of these districts, they point out, achieved improved representation in the 1982 General Assembly election. They also note that blacks in House District 23 have enjoyed proportional representation consistently since 1973 and that blacks in the other districts have occasionally enjoyed nearly proportional representation. This electoral success demonstrates conclusively, appellants and the United States argue, that blacks in those districts do not have "less opportunity than other members of the electorate to participate in the

n. In this section, Justice Brennan speaks for the Court.

political process and to elect representatives of their choice." Essentially, appellants and the United States contend that if a racial minority gains proportional or nearly proportional representation in a single election, that fact alone precludes, as a matter of law, finding a § 2 violation.

Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office... is one circumstance which may be considered." The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. However, the Senate Report expressly states that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,'" noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate."... Thus, the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim.

[T]he District Court could appropriately take account of the circumstances surrounding recent black electoral success in deciding its significance to appellees' claim. In particular..., the court could properly notice the fact that black electoral success increased markedly in the 1982 election—an election that occurred after the instant lawsuit had been filed—and could properly consider to what extent "the pendency of this very litigation [might have] worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting." 590 F.Supp., at 367, n.27.

Nothing in the statute or its legislative history prohibited the court from viewing with some caution black candidates' success in the 1982 election, and from deciding on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections. Consequently, we hold that the District Court did not err, as a matter of law, in refusing to treat the fact that some black candidates have succeeded as dispositive of appellees' § 2 claim. Where multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters.

B[o]

The District Court did err, however, in ignoring the significance of the *sustained* success black voters have experienced in House District 23. In that district, the last six elections have resulted in proportional representation for black residents. This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.

In some situations, it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to

o. This section is joined only by Justices Brennan and White. However, as may be seen below in Part IV of the O'Connor concurring opinion, four additional justices reached a similar conclusion.

elect its preferred representatives, but appellees have not done so here. Appellees presented evidence relating to black electoral success in the last three elections; they failed utterly, though, to offer any explanation for the success of black candidates in the previous three elections.[p] Consequently, we believe that the District Court erred, as a matter of law, in ignoring the sustained success black voters have enjoyed in House District 23, and would reverse with respect to that District.

V[q]

ULTIMATE DETERMINATION OF VOTE DILUTION

Finally, appellants and the United States dispute the District Court's ultimate conclusion that the multimember districting scheme at issue in this case deprived black voters of an equal opportunity to participate in the political process and to elect representatives of their choice.

A

[The Court concluded that the District Court's findings of vote dilution should be affirmed if not clearly erroneous.]

B

The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion. Excepting House District 23, with respect to which the District Court committed legal error, we affirm the District Court's judgment. We cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in the districts other than House District 23 to have less opportunity than white voters to elect representatives of their choice.

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p. This assertion has been criticized on the ground that the Court "did not discuss the fact that in District 23 black voters had to employ 'bullet voting' to elect the black candidate and thus forfeited their chance to influence which whites would be elected. Nor did the Court address the evidence that the black who was elected was actually chosen by the white voters and had to 'sail trim' his legislative positions accordingly." Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEXAS LAW REVIEW 1589, 1636–37 (1993).

q. In Part V, Justice Brennan speaks for the Court.

The judgment of the District Court is

Affirmed in part and reversed in part.

Justice WHITE, concurring.

I join Parts I, II, III-A, III-B, IV-A, and V of the Court's opinion and agree with Justice BRENNAN's opinion as to Part IV-B. I disagree with Part III-C of Justice BRENNAN's opinion.

Justice BRENNAN states in Part III-C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree. Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under Justice BRENNAN's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did, and it seems quite at odds with the discussion in *Whitcomb v. Chavis*....

Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice POWELL, and Justice REHNQUIST join, concurring in the judgment.

...In construing this compromise legislation, we must make every effort to be faithful to the balance Congress struck. This is not an easy task. We know that Congress intended to allow vote dilution claims to be brought under § 2, but we also know that Congress did not intend to create a right to proportional representation for minority voters. There is an inherent tension between what Congress wished to do and what it wished to avoid, because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large. In addition, several important aspects of the "results" test had received little attention in this Court's cases or in the decisions of the Courts of Appeals employing that test on which Congress also relied. Specifically, the legal meaning to be given to the concepts of "racial bloc voting" and "minority voting strength" had been left largely unaddressed by the courts when § 2 was amended.

The Court attempts to resolve all these difficulties today. First, the Court supplies definitions of racial bloc voting and minority voting strength that will apparently be applicable in all cases and that will dictate the structure of vote dilution litigation. Second, the Court adopts a test, based on the level of minority electoral success, for determining when an electoral scheme has sufficiently diminished minority voting strength to constitute vote dilution. Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of

minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts. In so doing, the Court has disregarded the balance struck by Congress in amending § 2 and has failed to apply the results test as described by this Court in *Whitcomb* and *White*.

I

...Although § 2 does not speak in terms of "vote dilution," I agree with the Court that proof of vote dilution can establish a violation of § 2 as amended. The phrase "vote dilution," in the legal sense, simply refers to the impermissible discriminatory effect that a multimember or other districting plan has when it operates "to cancel out or minimize the voting strength of racial groups." *White*. This definition, however, conceals some very formidable difficulties. Is the "voting strength" of a racial group to be assessed solely with reference to its prospects for electoral success, or should courts look at other avenues of political influence open to the racial group? Insofar as minority voting strength is assessed with reference to electoral success, how should undiluted minority voting strength be measured? How much of an impairment of minority voting strength is necessary to prove a violation of § 2? What constitutes racial bloc voting and how is it proved? What weight is to be given to evidence of actual electoral success by minority candidates in the face of evidence of racial bloc voting?

The Court resolves the first question summarily: minority voting strength is to be assessed solely in terms of the minority group's ability to elect candidates it prefers. Under this approach, the essence of a vote dilution claim is that the State has created single-member or multimember districts that unacceptably impair the minority group's ability to elect the candidates its members prefer.

In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2, however, it is also necessary to construct a measure of "undiluted" minority voting strength....Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it "should" be for minority voters to elect their preferred candidates under an acceptable system.

Several possible measures of "undiluted" minority voting strength suggest themselves. First, a court could simply use proportionality as its guide: if the minority group constituted 30% of the voters in a given area, the court would regard the minority group as having the potential to elect 30% of the representatives in that area. Second, a court could posit some alternative districting plan as a "normal" or "fair" electoral scheme and attempt to calculate how many candidates preferred by the minority group would probably be elected under that scheme. There are...a variety of ways in which even single-member districts could be drawn, and each will present the minority group with its own array of electoral risks and benefits; the court might, therefore, consider a range of acceptable plans in attempting to estimate "undiluted" minority voting strength by this method. Third, the court could attempt to arrive at a plan that would maximize feasible minority electoral success, and use this degree of predicted success as its measure of "undiluted" minority voting strength. If a court were to employ this

third alternative, it would often face hard choices about what would truly "maximize" minority electoral success. An example is [a scenario] in which a minority group could be concentrated in one completely safe district or divided among two districts in each of which its members would constitute a somewhat precarious majority.

The Court today has adopted a variant of the third approach, to wit, undiluted minority voting strength means the maximum feasible minority voting strength. In explaining the elements of a vote dilution claim, the Court first states that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." If not, apparently the minority group has no cognizable claim that its ability to elect the representatives of its choice has been impaired. Second, "the minority group must be able to show that it is politically cohesive," that is, that a significant proportion of the minority group supports the same candidates. Third, the Court requires the minority group to "demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances...—usually to defeat the minority's preferred candidate." If these three requirements are met, "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." That is to say, the minority group has proved vote dilution in violation of § 2.

The Court's definition of the elements of a vote dilution claim is simple and invariable: a court should calculate minority voting strength by assuming that the minority group is concentrated in a single-member district in which it constitutes a voting majority. Where the minority group is not large enough, geographically concentrated enough, or politically cohesive enough for this to be possible, the minority group's claim fails. Where the minority group meets these requirements, the representatives that it could elect in the hypothetical district or districts in which it constitutes a majority will serve as the measure of its undiluted voting strength. Whatever plan the State actually adopts must be assessed in terms of the effect it has on this undiluted voting strength. If this is indeed the single, universal standard for evaluating undiluted minority voting strength for vote dilution purposes, the standard is applicable whether what is challenged is a multimember district or a particular single-member districting scheme.

The Court's statement of the elements of a vote dilution claim also supplies an answer to another question posed above: *how much* of an impairment of undiluted minority voting strength is necessary to prove vote dilution. The Court requires the minority group that satisfies the threshold requirements of size and cohesiveness to prove that it will *usually* be unable to elect as many representatives of its choice under the challenged districting scheme as its undiluted voting strength would permit. This requirement, then, constitutes the true test of vote dilution. Again, no reason appears why this test would not be applicable to a vote dilution claim challenging single-member as well as multimember districts.

This measure of vote dilution, taken in conjunction with the Court's standard for measuring undiluted minority voting strength, creates what amounts to a right to *usual, roughly* proportional representation on the part of sizable, compact, cohesive minority groups. If, under a particular multimember or single-member district plan, qualified minority groups usually cannot elect the representatives they would be likely to elect under the most favorable single-member districting plan, then § 2 is violated. Unless minority success under the challenged electoral

system regularly approximates this rough version of proportional representation, that system dilutes minority voting strength and violates § 2....

To be sure, the Court also requires that plaintiffs prove that racial bloc voting by the white majority interacts with the challenged districting plan so as usually to defeat the minority's preferred candidate. In fact, however, this requirement adds little that is not already contained in the Court's requirements that the minority group be politically cohesive and that its preferred candidates usually lose. As the Court acknowledges, under its approach, "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." But this is to define legally significant bloc voting by the racial majority in terms of the extent of the racial minority's electoral success. If the minority can prove that it could constitute a majority in a single-member district, that it supported certain candidates, and that those candidates have not usually been elected, then a finding that there is "legally significant white bloc voting" will necessarily follow. Otherwise, by definition, those candidates would usually have won rather than lost.

As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the "*Zimmer* factors" that were developed by the Fifth Circuit to implement *White*'s results test and which were highlighted in the Senate Report. If a minority group is politically and geographically cohesive and large enough to constitute a voting majority in one or more single-member districts, then unless white voters usually support the minority's preferred candidates in sufficient numbers to enable the minority group to elect as many of those candidates as it could elect in such hypothetical districts, it will routinely follow that a vote dilution claim can be made out, and the multimember district will be invalidated. There is simply no need for plaintiffs to establish [the remaining factors from the Senate Report.] Of course, these other factors may be supportive of such a claim, because they may strengthen a court's confidence that minority voters will be unable to overcome the relative disadvantage at which they are placed by a particular districting plan, or suggest a more general lack of opportunity to participate in the political process. But the fact remains that electoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims, and that the elements of a vote dilution claim create an entitlement to roughly proportional representation within the framework of single-member districts.

II

In my view, the Court's test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2....

In my view, we should refrain from deciding in this case whether a court must invariably posit as its measure of "undiluted" minority voting strength single-member districts in which minority group members constitute a majority. There is substantial doubt that Congress intended "undiluted minority voting strength" to mean "maximum feasible minority voting strength." Even if that is the appropriate definition in some circumstances, there is no indication that Congress intended to mandate a single, universally applicable standard for measuring undiluted minority voting strength, regardless of local conditions and regardless

of the extent of past discrimination against minority voters in a particular State or political subdivision. Since appellants have not raised the issue, I would assume that what the District Court did here was permissible under § 2, and leave open the broader question whether § 2 *requires* this approach.

[T]he District Court concluded that there was a severe diminution in the prospects for black electoral success in each of the challenged districts, as compared to single-member districts in which blacks could constitute a majority, and that this severe diminution was in large part attributable to the interaction of the multimember form of the district with persistent racial bloc voting on the part of the white majorities in those districts. But the District Court's extensive opinion clearly relies as well on a variety of the other *Zimmer* factors...

If the District Court had held that the challenged multi-member districts violated § 2 solely because blacks had not consistently attained seats in proportion to their presence in the population, its holding would clearly have been inconsistent with § 2's disclaimer of a right to proportional representation.... A requirement that minority representation usually be proportional to the minority group's proportion in the population is not quite the same as a right to strict proportional representation, but it comes so close to such a right as to be inconsistent with § 2's disclaimer and with the results test that is codified in § 2. In the words of Senator Dole, the architect of the compromise that resulted in passage of the amendments to § 2:

> The language of the subsection explicitly rejects, as did *White* and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, and is not dispositive.

On the same reasoning, I would reject the Court's test for vote dilution....

In enacting § 2, Congress codified the "results" test this Court had employed, as an interpretation of the Fourteenth Amendment, in *White* and *Whitcomb*.... In my view, therefore, it is to *Whitcomb* and *White* that we should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of § 2.

The "results" test as reflected in *Whitcomb* and *White* requires an inquiry into the extent of the minority group's opportunities to participate in the political processes. While electoral success is a central part of the vote dilution inquiry, *White* held that to prove vote dilution, "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential," and *Whitcomb* flatly rejected the proposition that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single member district." To the contrary, the results test as described in *White* requires plaintiffs to establish "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." By showing both "a history of disproportionate results" and "strong indicia of lack of political power and the denial of fair repre-

sentation," the plaintiffs in *White* met this standard, which, as emphasized just today, requires "a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution." *Davis v. Bandemer* (plurality opinion).

When Congress amended § 2 it intended to adopt this "results" test, while abandoning the additional showing of discriminatory intent required by *Bolden*. The vote dilution analysis adopted by the Court today clearly bears little resemblance to the "results" test that emerged in *Whitcomb* and *White*.

[A] court should consider all relevant factors bearing on whether the minority group has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The court should not focus solely on the minority group's ability to elect representatives of its choice. Whatever measure of undiluted minority voting strength the court employs in connection with evaluating the presence or absence of minority electoral success, it should also bear in mind that "the power to influence the political process is not limited to winning elections." *Bandemer*. Of course, the relative lack of minority electoral success under a challenged plan, when compared with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution. Moreover, the minority group may in fact lack access to or influence upon representatives it did not support as candidates. Nonetheless, a reviewing court should be required to find more than simply that the minority group does not usually attain an undiluted measure of electoral success. The court must find that even substantial minority success will be highly infrequent under the challenged plan before it may conclude, on this basis alone, that the plan operates "to cancel out or minimize the voting strength of [the] racial grou[p]." *White*.

III

...Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree [with the plurality in Part III-C of the Brennan opinion] that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is

absent although the interests of racial groups diverge....Similarly, I agree with Justice WHITE that Justice BRENNAN's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with *Whitcomb* and is not necessary to the disposition of this case.

IV

Having made usual, roughly proportional success the sole focus of its vote dilution analysis, the Court goes on to hold that proof that an occasional minority candidate has been elected does not foreclose a § 2 claim. But Justice BRENNAN, joined by Justice WHITE, concludes that "persistent proportional representation" will foreclose a § 2 claim unless the plaintiffs prove that this "sustained success does not accurately reflect the minority group's ability to elect its preferred representatives." I agree with Justice BRENNAN that consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. Moreover, I agree that this case presents no occasion for determining what would constitute proof that such success did not accurately reflect the minority group's actual voting strength in a challenged district or districts.

[Though her specific analysis of some of the North Carolina multimember districts diverges in detail from Brennan's, Justice O'Connor agrees with Brennan and White that the history of black success in District 23 required reversal, but not in the other districts.]

V

When members of a racial minority challenge a multimember district on the grounds that it dilutes their voting strength, I agree with the Court that they must show that they possess such strength and that the multimember district impairs it. A court must therefore appraise the minority group's undiluted voting strength in order to assess the effects of the multimember district. I would reserve the question of the proper method or methods for making this assessment. But once such an assessment is made, in my view the evaluation of an alleged impairment of voting strength requires consideration of the minority group's access to the political processes generally, not solely consideration of the chances that its preferred candidates will actually be elected. Proof that white voters withhold their support from minority-preferred candidates to an extent that consistently ensures their defeat is entitled to significant weight in plaintiffs' favor. However, if plaintiffs direct their proof solely towards the minority group's prospects for electoral success, they must show that substantial minority success will be highly infrequent under the challenged plan in order to establish that the plan operates to "cancel out or minimize" their voting strength. *White.*

Compromise is essential to much if not most major federal legislation, and confidence that the federal courts will enforce such compromises is indispensable to their creation. I believe that the Court today strikes a different balance than Congress intended to when it codified the results test and disclaimed any right to proportional representation under § 2. For that reason, I join the Court's judgment but not its opinion.

Justice STEVENS, with whom Justice MARSHALL and Justice BLACKMUN join, concurring in part and dissenting in part.

In my opinion, the findings of the District Court...adequately support the District Court's judgment concerning House District 23 as well as the balance of that judgment.

Notes and Questions

1. The effects of the Voting Rights Act on the number of minority elected officials has been as dramatic as its effect on voting by African Americans in the southern states.

> The number of black elected officials increased from fewer than 100 in 1965 in the seven originally targeted states to 3,265 in 1989. In 1989 blacks in these states comprised 9.8 percent of all elected officials as compared with about 23 percent of the voting-age population. While no estimates for Hispanic officeholders in 1965 are available, their number in six states with especially large Hispanic concentrations—Arizona, California, Florida, New Mexico, New York, and Texas—increased from 1,280 in 1973 to 3,592 in 1990. Hispanic officials thus constitute about 4 percent of the elected officials in those states, as compared with the Hispanic voting-age population of approximately 17 percent.[r]

Some of this increase may have been a simple consequence of the right to vote and have occurred before the 1982 amendments. However, it seems clear that the 1982 amendments stimulated the growth. Certainly, the amendments have prompted an increase in litigation under the Voting Rights Act, from a pre-1982 rate of about 150 cases per year in federal courts to a post-1982 rate of about 225 per year.[s] In the largest category of litigation—challenges to at-large elections in local jurisdictions—plaintiffs have enjoyed, by one count, a success rate of over 75 percent.[t]

Thornburg v. Gingles answered some of the questions that were being presented to the courts, but it left many questions unresolved and undoubtedly opened some new ones. The following notes survey some of the questions that have been raised in post-*Thornburg* litigation. The notes also summarize some of the viewpoints that have been expressed in the heated post-*Thornburg* public debate on race-conscious districting.

2. *Section 2 and Section 5.* Prior to the 1982 amendments, Section 2 had little independent significance, as it was regarded as largely a restatement of the 15th Amendment. Particularly after the Supreme Court's decision in *Bolden*, giving a

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r. Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 1, 43 (1992).

s. See Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, in *id.* at 66, 71. McDonald also points out that a more than doubling of the number of jurisdictions seeking preclearance for election changes in the years immediately after 1982 probably reflects the efforts of many jurisdictions to bring themselves into compliance with the revised Section 2 without the expense of litigation.

t. See Katharine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 PACIFIC LAW JOURNAL 619, 621 n.4 (1990).

narrow construction to both the 15th Amendment and Section 2 as they applied to districting questions, most controversies under the Voting Rights Act arose under Section 5. The preclearance requirement in Section 5 requires a showing that the voting procedure in question "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or membership in a language minority]." As we have seen, the primary guide to application of Section 5 was the "nonretrogression" principle, set forth by the Supreme Court in *Beer v. United States*, 425 U.S. 130 (1976).

Did the 1982 amendments and their interpretation by the Supreme Court in *Thornburg* affect Section 5? If Section 5 were still governed solely by the nonretrogression principle, then many changes in electoral procedures might be entitled to preclearance under Section 5 but be vulnerable to attack under Section 2. To avoid this anomaly, the Justice Department adopted the following regulation:

> (a)...In making a [preclearance] determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, [Section 2 of the VRA,] and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.
>
> (b)(1) [This paragraph permits the Justice Department to bring a legal action challenging a change under Section 2 despite having previously precleared the change, "if implementation of the change subsequently demonstrates that such action is appropriate."]
>
> (2) In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold section 5 preclearance.

28 C.F.R. § 51.55. Does this regulation mean that preclearance should necessarily be denied to a change with a retrogressive effect? Does it mean preclearance should necessarily be denied to a change that fails to comply with Section 2? Does it mean that the Justice Department must grant preclearance to a nonretrogressive change that complies with Section 2? See Drew S. Days III, *Section 5 and the Role of the Justice Department*, in CONTROVERSIES IN MINORITY VOTING 52, 57 (Bernard Grofman & Chandler Davidson, eds., 1992) (CONTROVERSIES).

Under the Justice Department's regulation, even if there are possible cases in which a change might pass muster under Section 2 but not under Section 5, or vice versa, undoubtedly in most cases the result will be the same under both sections. But it would be a mistake to conclude on this ground that the two sections are redundant. Section 5 applies only to "covered" jurisdictions and to election procedures that have been changed since 1965. Section 2 thus provides the opportunity to challenge longstanding procedures or procedures adopted in uncovered jurisdictions. It also provides an opportunity for plaintiffs to object to a preclearance that has been granted. On the other hand, where it is applicable, Section 5 places the burden of justification on the jurisdiction that adopted the change, and

may block a change even where there is no plaintiff group with the resources or the desire to challenge it.

The previous paragraph assumes the validity of the regulation—an assumption that may be doubtful. A lower court recently ruled that the nonretrogression principle still governs Section 5 preclearance, because when Congress amended Section 2 in 1982, it left Section 5 unchanged. The court therefore found the Justice Department's regulation inconsistent with the statute and invalid. *Georgia v. Reno*, 881 F.Supp. 7 (D.D.C. 1995). The same court earlier had reached the same interpretation of Section 5 without referring to the regulation. See, e.g., *New York v. United States*, 874 F.Supp. 394 (D.D.C. 1994).

3. *Totality of Circumstances.* Does the three-pronged test adopted in *Thornburg* effectively displace the "totality of circumstances" test (whose components are also referred to as the *Zimmer* or Senate Report factors)? If plaintiffs satisfy the three-pronged test, may a court nevertheless decide for the defendant on the basis of the totality of the circumstances? Alternatively, may a court rely on the totality of the circumstances to rule in favor of plaintiffs who are unable to satisfy the three-pronged test?

Early decisions of lower courts expressed a variety of views. For example, in *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 498 (5th Cir. 1987), the court could not agree "that the Supreme Court in *Gingles* made the *Zimmer* analysis obsolete." However, in *Solomon v. Liberty County*, 899 F.2d 1012, 1017 (11th Cir. 1990), Judge Kravitch, writing for half of a divided court, regarded satisfaction of the three-pronged test as sufficient, stating that although a court "may consider the totality of the circumstances, those circumstances must be examined for the light they shed on the existence of the three core *Gingles* factors." The court in *McNeil v. Springfield Park District*, 851 F.2d 937, 942 (7th Cir. 1988), cert. denied 490 U.S. 1031 (1989), regarded the three *Thornburg* factors as "threshold criteria," which plaintiffs must meet as a prerequisite to the totality of circumstances test, which they must also meet.

The Supreme Court endorsed the last of these views in *Johnson v. De Grandy*, 114 S.Ct. 2647, 2657 (1994):

> [I]f *Gingles* so clearly identified the three [prongs] as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination.... This was true not only because bloc voting was a matter of degree, with a variable legal significance depending on other facts, but also because the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited canvassing of relevant facts. Lack of electoral success is evidence of vote dilution, but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes.

4. *The Gingles Test—Compactness.* The *Gingles* majority identified three "necessary preconditions" that plaintiffs must establish to show that multimember districts violate Section 2:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-

> member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it... usually to defeat the minority's preferred candidate.

Early decisions after *Gingles* did not treat the requirement that minority voters reside in a geographically compact area as a major obstacle to a Section 2 claim. Thus, writing in 1992, Grofman et al. reported that

> lower courts have, almost without exception, interpreted [the compactness portion] of the first prong to mean only contiguity.... Thus, the courts have tended not to separate the question of geographic compactness from the question of whether the minority group is numerous enough to constitute a majority; if the plaintiffs are able to draw a (contiguous) plan in which they comprise a majority in at least one district, then they have met the first prong, regardless of the shape of the district.

Bernard Grofman, Lisa Handley & Richard G. Niemi, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 54–60 (1992) (MINORITY REPRESENTATION). However, in some more recent decisions, the compactness requirement has been a more serious hurdle for Section 2 plaintiffs. For a review of the case law, see Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICHIGAN LAW REVIEW 483, 532–36 (1993).

We shall see in the next section of this chapter that in *Shaw v. Reno*, the Supreme Court ruled that in some circumstances, the drawing of non-compact districts for the purpose of increasing minority representation may be unconstitutional. It is therefore possible that the "compactness" portion of the first prong will be an even more important issue in future Section 2 litigation.

5. *Influence Districts.* Is the requirement that the minority group be large enough to constitute a majority in a single-member district necessary for a Section 2 claim? Apparently so, according to Justice Brennan's statement of the first "prong." But consider note 12, in which he says *Gingles* is an action based on a minority group's inability to *elect* representatives of their choice, as distinct from one in which the ability to *influence* elections is sought. Could the first *Gingles* prong be applicable in such an action? If not, are there any other differences between the two types of action? If there are no other differences, what is the point of distinguishing the two types and establishing the ability of the group to elect a candidate as a requirement for one type but not the other?

Should there be an ability-to-elect requirement? Yes, according to two authors whose writings appear to have influenced the *Gingles* majority:

> Black voters are injured by at-large elections only if the election returns show that districted elections satisfying the one person, one vote rule would likely have required a more favorable result. To demonstrate this, the black voters must be residentially concentrated enough and politically cohesive enough that a putative districting plan would contain majority-black districts whose clear electoral choices were in fact defeated by at-large voting. If blacks' residences are substantially integrated throughout the jurisdiction, even if they vote as a bloc for unsuccessful candidates, the at-large district can't be blamed for their defeat.

James Blacksher & Larry Menefee, *At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution*, in MINORITY VOTE DILUTION 203, 233–34 (Chandler Davidson, ed., 1989) (orig. pub. 1984). Compare Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. LAW REVIEW 449, 466–67 (1988):

> While the vagaries of "political influence" are difficult to capture in numerical terms, and may vary from district to district, we can quantify with relative consistency and precision a group that is "large and compact" enough to win a single member district election. Once courts have established a showing of the latter as the centerpiece of a section 2 violation—even in the multi-member district context—one might think it risky and conceptually unnecessary to venture beyond the solid ground of this standard into the murky seas of "political influence." Yet it is far from clear that this is the appropriate resolution of the issue. The emphasis on quantifiability implicit in the *Gingles* standard obscures the fact that elections are rarely won by a single voting group, and that electoral influence is often a crucial step on the path to electoral victory.

For better or for worse, and despite the Supreme Court's disclaimer in note 12 of *Gingles*, lower courts have been unreceptive to claims by minority groups that Section 2 requires the drawing of influence districts where possible. See, e.g., *McNeil v. Springfield Park District*, 851 F.2d 937, 947 (7th Cir. 1988), cert. denied 490 U.S. 1031 (1989):

> We cannot accept the appellants' contention that they can avoid the *Gingles* criteria by arguing that the multi-member districts impair their ability to influence elections. Given the Court's decision to draw a bright line for summary judgment purposes, it seems counterproductive to permit plaintiffs who cannot satisfy the threshold *Gingles* tests to make alternative claims that would obliterate the bright line. If allowed, the "ability to influence" claim would severely undermine whatever good purpose is served by the threshold factors.
>
> Courts might be flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections. While Congress intended to make it easier for minorities to show that their vote has been diluted, it presumably did not intend to require courts to entertain claims by a tiny segment of a multi-member district's population that the group's inescapably minimal influence has been impaired by the electoral arrangements.

6. *Political Cohesiveness.* The second *Gingles* prong requires the plaintiff minority group to show that it is "politically cohesive." Does this mean anything more than that the members of the group tend to vote as a bloc, in a manner distinct from the majority? Most lower courts have regarded evidence of bloc voting by the minority group as sufficient to satisfy the second prong. E.g., *Gomez v. City of Watsonville*, 863 F.2d 1407, 1414–16 (9th Cir. 1988), cert. denied 489 U.S. 1080 (1989).

The factual determination whether the minority group has voted cohesively requires complex and somewhat controversial statistical techniques that need not

be reviewed here. For a thorough discussion, see MINORITY REPRESENTATION, at 82–108. One basic issue is which past elections should be chosen for analysis of voting patterns. For example, can the plaintiffs rely on bloc voting in "exogenous" elections, i.e., elections held in jurisdictions that include but are larger than the jurisdiction in question. See, e.g., *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201, 1207–10 (5th Cir. 1989) (holding that plaintiffs challenging at-large elections for the Board of Aldermen in a small city could rely on voting patterns within the city in statewide and parishwide elections).

7. *Majority Bloc Voting.* The third *Gingles* prong is that the white majority must usually vote as a bloc for candidates different from those supported by minority voters. How one-sided does the white majority's voting need to be? If white voters typically oppose candidates supported by most African-Americans by a 60–40 majority, is that sufficient? It appears from Justice Brennan's discussion that there is no particular percentage that must be exceeded to constitute bloc voting. Rather, the one-sided voting must be sufficient "usually to defeat the minority's preferred candidate." Thus, the degree of bloc voting that is necessary to establish a Section 2 violation would depend on the relative size and political cohesiveness of the minority electorate. See generally MINORITY REPRESENTATION, at 73.

Another issue related to the third prong is whether it is sufficient that the white majority *actually* votes as a bloc to a degree sufficient to defeat candidates preferred by the minority group. Can the defendant jurisdiction defend on the ground that the bloc voting is attributable to causes—such as political party or ideology—other than race?[u] A number of lower courts have held that it is the fact of polarized voting along racial lines and not the reasons for that polarized voting that is of legal significance. See MINORITY REPRESENTATION, at 74–75. However, the opposite conclusion was reached in *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993), cert. denied, 114 S.Ct. 878 (1994), in which the defendants contended

> that the district court erred in refusing to consider the nonracial causes of voting preferences they offered at trial. Unless the tendency among minorities and whites to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race, defendants argue, plaintiffs' attempt to establish legally significant white bloc voting, and thus their vote dilution claim under § 2, must fail. When the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens in the contested counties, defendants conclude, the district court's judgment must be reversed.
>
> We agree. The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters "on account of race or color." Without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense "discrimina-

u. For statisticians, the issue is whether to use a bivariate analysis (considering only race as an independent variable) or a multivariate analysis (considering a variety of independent variables).

> tory," and any distinction between deprivation and mere losses at the polls becomes untenable. In holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat.

Is this ruling consistent with *Gingles*? Two judges argued at considerable length for a similar conclusion in *Nipper v. Smith,* 39 F.3d 1494, 1514–27 (11th Cir. 1994) (en banc). Two judges vigorously disagreed. Id. at 1547, 1548–56.

8. *Are There Only Two Prongs? Only One?* The second and third *Gingles* prongs can easily be conflated, and described by the single requirement for a Section 2 claim of "polarized voting." Is it possible to go further and consider the first prong—the requirement of a minority community large enough to constitute a majority in one single-member district—together with the polarized voting requirement as part of a single test. J. Morgan Kousser, *Beyond* Gingles: *Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 UNIVERSITY OF SAN FRANCISCO LAW REVIEW 551 (1993), argues that it is not only possible to do so, but necessary in order to give full meaning to Section 2. He also argues that a unified understanding of the *Gingles* test can help dissolve some of the controversy over influence districts (see Note 5, *supra*). It is worth considering Kousser's analysis at some length.

> As has often been noted, the term "majority" [in the first *Gingles* prong] by itself conceals problems: Does it mean a majority of the total population? Of the voting age population? Of voting age citizens? Of registered voters? Of those who actually turn out to vote? What is the legal or logical basis for choosing one of these definitions?[v]
>
> Without minimizing these difficulties, the first *Gingles* prong is more logically understood when it is combined with the other two, that is, with variations in the cohesiveness of both majority and minority group voters over a series of different elections. Considered as one coherent standard, the *Gingles* test is not an abstract, mechanical criterion, but necessarily a flexible, practical one. As minority group cohesiveness increases and majority group cohesiveness declines, the level of minority group concentration necessary to elect the choice of that group declines, and vice versa. No single point of concentration which is much less than 100% guarantees minority or majority voters an ability to elect. No fixed, situation-free definition of a "majority" or "political majority" is possible.

Id. at 562–63. Kousser gives a number of illustrations. For example, if a minority group made up half the voters in a district and if 70% of white voters supported candidate *A*, while 60% of the minority voters supported candidate *B*, then *B*

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v. There is considerable case law on these questions that Kousser raises. See, e.g., *Brewer v. Ham*, 876 F.2d 448, 452 (5th Cir. 1989) (voting age population, not total population, should be used); *Romero v. City of Pomona* 883 F.2d 1418, 1425–26 (9th Cir. 1989) (eligible voters, not total population, should be used). See generally Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 LAW & POLICY 43 (1988).

would lose with 45% of the total vote. However, if the minority group constituted only 30% of the voters, *B* could win with a 55% vote total if only 60% of white voters supported *A* while 90% of minority voters supported *B*. Indeed, minority voters could make up as little as 10% of the electorate and *B* could still win with a 51% vote total if white voters supported *A* by only 52% while minority voters supported *B* by 80%.

Kousser continues:

> As a matter of logic, the statement in the lower court opinion in *Gingles* that "no aggregation of less than 50% of an area's voting age population can possibly constitute an effective voting majority" is simply false. [Furthermore], there is no bright line, to use legal terminology, or no "natural cutting-point," to adopt the jargon of social science, to differentiate "control districts" from "influence districts." Fifty percent of the voters is no magic number, nor is forty or thirty or twenty or even ten. The outcome, even in [the above] very simple example[s], depends on the relative cohesion of the two groups, and not just their proportions of the electorate. If the example were complicated in an attempt to mimic the real world—including differential registration and turnout rates, different age structures, more than two ethnic groups, and variations in cohesion rates in different elections—the results would be even less determinant.[w] If the point of the *Gingles* standard is to assure that members of minority groups have a fair opportunity to elect candidates of their choice, and if it is outcomes, not just demographic goals that matter, then it is not a mechanical set of criteria.

Id. at 565. Finally, Kousser attempts to defend his proposed contextual method of applying Section 2:

> Those who favor a bright line standard to create heavily minority districts err for the same reason as those who oppose any judicial or administrative intervention in matters of electoral structure at all. Both treat racism or racial discrimination as categorical, rather than as interval-level variables. But the history of inter-ethnic attitudes and behavior in the United States and elsewhere shows that racism or ethnocentrism is not like a simple light switch, either off or on, but like a more sophisticated dimmer switch. Proponents of control districts think that in the vast majority of places, the racist light is still completely on: their opponents, that it is usually completely off. Racism has faded markedly, but by no means totally, in the United States since the 1940s. Promoting judicial and administrative procedures that require practical, particularized

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w. As Kousser later points out, another factor that can have a large effect on the ability of the minority group to elect the candidates of its choice is the party structure:

> In partisan contests, the proportion of the dominant minority group necessary to have a high probability of effectively controlling the district might well be lower than in nonpartisan elections, because a percentage well below 50% of the voters could comprise a majority of the dominant political party. In such an instance, the crucial question would be the likely extent of white or other group defection from minority-endorsed party nominees in the general election.

Kousser, *supra* at 578.

> appraisals and remedies that include districts in which minorities will enjoy various degrees of influence recognizes that racism is a variable phenomenon and treats it with a measured and serious response.

Id. at 587.

Whether or not you agree with Kousser's interpretation of *Gingles*, how would you resolve this problem? A rural county in a southern state has a population approximately 60% African American and 40% white. The five members of the County Board of Supervisors are elected at large. Because the turnout of African American voters has been slightly lower than whites, the electorate in recent county elections has been about 55% African American and 45% white. In several recent elections a white candidate has run against an African American candidate. About 80% of the African American voters have voted for the African American candidates, while about 95% of the white voters have voted for the white candidates. The result in every case has been a victory for the white candidate, usually with an overall total of 53–55%. If African American voters claim that Section 2 has been violated and seek as a remedy the creation of districts, at least three of which will have "safe" African American majorities, how would you rule? Cf. *Smith v. Brunswick County, Virginia, Board of Supervisors*, 984 F.2d 1393 (4th Cir. 1993).

9. *"Rainbow Coalitions."* Suppose there is no single minority community that is large enough to satisfy the first *Gingles* prong, but that two such communities—African-Americans and Latinos, for example, or Latinos and Asian-Americans—would together be large enough, if combined in a district. Is the first prong satisfied?

Most courts that have considered this question have admitted the possibility that a "rainbow coalition" can establish a Section 2 claim, but only if the component minorities can show that they in fact constitute an electoral coalition. See, e.g., *Nixon v. Kent County*, 34 F.3d 369 (6th Cir. 1994); *Brewer v. Ham*, 876 F.2d 448, 454 (5th Cir. 1989); *Romero v. City of Pomona*, 883 F.2d 1418, 1426–27 (9th Cir. 1989). The Supreme Court conditionally endorsed this approach in *Growe v. Emison*, 113 S.Ct. 1075, 1085 (1993):

> Assuming (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2, when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential.

Would "political cohesion" be demonstrated by a history of voting for the same candidates, or would more be required. Katharine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 PACIFIC LAW JOURNAL 619, 623–24 (1990), believing that application of Section 2 to jurisdictions with more than one minority community presents a "veritable quagmire," propose a more demanding standard:

> [T]he dilution suit, which was conceived initially to provide some measure of political participation for groups excluded by racism from the normal coalition-building essential to electoral success, should be extended to protect a 'minority coalition' only in the most unusual of circum-

> stances. A coalition dilution suit should be available only if the two groups can establish that they are so bound together by a common history of exclusion, that their political interests are so similar, and their past political behavior so uniform as to make the two groups one for purposes of the group-based relief available under Section 2. As a practical matter, such a merger of interests has rarely, if ever, been documented.

Even under a looser standard that only requires cohesive voting, such cohesion is much less common across minority communities than it is within minority communities. Indeed, even if two minority communities together comprise a majority, their unwillingness to support the same candidates may prevent either community from electing its favored candidates. If so, can either community establish a Section 2 claim? See *Meek v. Metropolitan Dade County*, 908 F.2d 1540, 1545–46 (11th Cir. 1990), cert. denied 499 U.S. 907 (1991):

> The district court was aware that the "multi-ethnic" nature of Dade County differed from the simple majority/minority context contemplated by *Gingles*. The district court, noting the hostility between Blacks and Hispanics, implicitly recognized that the hostility created a permanent anti-minority majority in Dade County, with Blacks siding with Non Latin Whites against Hispanic candidates, and Hispanics siding with Non Latin Whites against Black candidates. The district court, however, did not attribute to this phenomenon the appropriate legal significance.
>
> ...Here the social reality is that Black and Hispanic voters are hostile toward each other in the electoral arena. Similarly, Non Latin Whites are politically cohesive and tend not to vote for Hispanics or Blacks. The district court concluded that because Non Latin Whites by themselves could not block the electoral success of Blacks, Blacks had not succeeded in proving that Non Latin Whites caused the defeat of "minority" voters. The district court erred in failing to recognize that coalitions can form a legally significant voting bloc, and that a coalition of Hispanics and Non Latin Whites could form the relevant majority voting bloc for the purpose of the third *Gingles* factor.

10. *Intent.* The 1982 amendments to Section 2 were largely motivated to avoid the intent requirement that had been imposed in *Bolden* for both constitutional and statutory claims. Although intent has not been an issue in most of the Voting Rights Act litigation since that time, it has not become irrelevant. Preclearance will be denied to a change in the electoral system that is motivated by discriminatory purposes, without regard to the effects. See *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987). Furthermore, it was held in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), that if plaintiffs can show discriminatory intent, they may be able to establish a Section 2 violation even if their showing in other respects falls short of the *Gingles* requirements. The court wrote:

> [T]he plaintiffs' claim is not, as in *Gingles*, merely one alleging disparate impact of a seemingly neutral electoral scheme. Rather, it is one in which the plaintiffs have made out a claim of intentional dilution of their voting strength.

> The County cites a number of cases in support of its argument that *Gingles* requires these plaintiffs to demonstrate that they could have constituted a majority in a single-member district as of 1981. None dealt with evidence of intentional discrimination.
>
> To impose the requirement the County urges would prevent any redress for districting which was deliberately designed to prevent minorities from electing representatives in future elections governed by that districting. This appears to us to be a result wholly contrary to Congress' intent in enacting Section 2 of the Voting Rights Act and contrary to the equal protection principles embodied in the fourteenth amendment.

918 F.2d at 770–71. In *Garza*, the single-member districts for the Los Angeles County Board of Supervisors were found to violate Section 2. The trial court's finding of intent, affirmed by the Court of Appeals, was based in large part on the expert testimony of an historian, J. Morgan Kousser, to the effect that over a long period supervisorial district lines had been adjusted to divide growing Latino areas in order to protect white incumbents. The substance of Kousser's testimony, together with his suggestions on how the presence or absence of discriminatory intent in redistricting can be determined, is set forth in J. Morgan Kousser, *How to Determine Intent: Lessons from L.A.*, 7 JOURNAL OF LAW & POLITICS 591 (1991).

11. *Single-Member Districts.* Does the *Gingles* analysis apply to claims that single-member district plans dilute the votes of a protected minority? Footnote 12 of the *Gingles* opinion expressly leaves this question open. However, if *Gingles* does *not* apply to single-member districts, then apparently it would be possible for a jurisdiction to violate Section 2 by creating a multi-member district in an area where at least one majority-minority district could have been created, but to avoid violating Section 2 by creating single-member districts *without* creating any such majority-minority district. It is difficult to see how such an interpretation could be regarded as consistent.

In *Growe v. Emison*, 113 S.Ct. 1075, 1084 (1993), the Supreme Court wrote:

> Our precedent requires that, to establish a vote dilution claim with respect to a multimember districting plan (and hence to justify a supermajority districting remedy), a plaintiff must [satisfy the *Gingles* test]. We have, however, stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts—which is why we have strongly preferred single-member districts for federal-court-ordered reapportionment. It would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district. Certainly the reasons for the three *Gingles* prerequisites continue to apply.... Unless these points are established, there neither has been a wrong nor can be a remedy.

Although *Growe* thus said that the showing required in a challenge to single-member districts is *at least* as great as the showing required in *Gingles*, in *Johnson v. De Grandy*, 114 S.Ct. 2647, 2654–55, the Court seems to apply the same test, subject to the proviso that "the *Gingles* factors cannot be applied mechani-

cally and without regard to the nature of the claim," quoting from *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). In *De Grandy*, the trial court had struck down district lines for the Florida House of Representatives in the Miami area because additional compact districts in which Latinos would have comprised the majority could have been drawn. The Supreme Court reversed, regarding it as decisive under the circumstances of the case, that the percentage of Miami Latino-majority districts in the plan was proportional to the percentage of Latino population in Miami. However, the Supreme Court refused to declare that a state's creation of a proportional number of majority-minority districts would provide a "safe harbor" that would assure compliance with Section 2 by a single-member district plan.

12. *Judges.* Does the anti-dilution provision of Section 2 apply to the election of judges? That is, are judges "representatives" within the meaning of Section 2's assurance of equal opportunity for protected groups "to elect representatives of their choice"? The Supreme Court answered these questions in the affirmative by a 6–3 majority in *Chisom v. Roemer*, 111 S.Ct. 2354 (1991). The majority opinion by Justice Stevens emphasized that the Court was ruling on the scope of the coverage of Section 2 and was not addressing "the elements that must be proved to establish a violation of the Act or the remedy that might be appropriate to redress a violation if proved."

In *Houston Lawyers' Association v. Attorney General of Texas*, 111 S.Ct. 2376 (1991), a companion case to *Chisom*, Justice Stevens wrote for the majority that "we believe that the State's interest in maintaining an electoral system—in this case, Texas' interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters—is a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred." Is a county-wide or other at-large system of electing judges violative of Section 2 if plaintiffs prove the presence of polarized voting that prevents a protected minority from electing judges of their choice? See *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 868–76 (5th Cir. 1993), cert. denied 114 S.Ct. 878 (1994); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994), cert. denied 115 S.Ct. 1795 (1995).

13. *Small Assemblies and "Single-Member" Offices.* Suppose in a municipality with a three-member elected governing body, there is a minority community that is too small to satisfy the first *Gingles* prong but would be large enough if the governing body were expanded to five members. Does the failure to expand violate Section 2? Similarly, does a municipality violate Section 2 by electing a single individual to carry out functions that could be carried out by an elected board on which minorities could expect representation?

A divided Supreme Court answered these questions in the negative in *Holder v. Hall*, 114 S.Ct. 2581 (1994). Justice Kennedy, writing for himself, Chief Justice Rehnquist and Justice O'Connor, reasoned from the premise that any claim of vote dilution implies some non-dilutive benchmark against which the challenged system can be measured.

> [T]he search for a benchmark is quite problematic when a §2 dilution challenge is brought to the size of a government body. There is no principled reason why one size should be picked over another as the benchmark for comparison. Respondents here argue that we should compare Bleckley County's sole commissioner system to a hypothetical five-mem-

> ber commission in order to determine whether the current system is dilutive. [Several reasons had been advanced for selecting a five-member body for comparison, including that a Georgia statute authorized counties to replace single commissioners with five-member commissions and that Bleckley County itself had recently switched from a single superintendent of education to a five-member school board.]
>
> That Bleckley County was authorized by the State to expand its commission, and that it adopted a five-member school board, are... irrelevant considerations in the dilution inquiry. At most, those facts indicate that Bleckley County could change the size of its commission with minimal disruption. But the county's failure to do so says nothing about the effects the sole commissioner system has on the voting power of Bleckley County's citizens. Surely a minority group's voting strength would be no more or less diluted had the State not authorized the county to alter the size of its commission, or had the county not enlarged its school board. One gets the sense that respondents and the United States have chosen a benchmark for the sake of having a benchmark. But it is one thing to say that a benchmark can be found, quite another to give a convincing reason for finding it in the first place.

Justice Thomas, joined by Justice Scalia, concurred in the judgment but selected *Holder* for the statement of much broader views, as we shall see shortly. Four justices dissented.

Holder was consistent with earlier decisions by lower courts upholding single-member offices against Section 2 challenges. One such decision, *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), cert. denied 478 U.S. 1021 (1986), was particularly disfavored by some voting rights advocates, because it upheld not only a single-member office but a provision for a run-off primary if no candidate received more than 40 percent in the initial primary. Critics argued that "a majority-vote requirement has the effect of creating a *de facto* 'white primary': In the first election, white party members choose among the white candidates, and in the runoff they unite behind the surviving white candidate." Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VIRGINIA LAW REVIEW 1, 26–27 (1991). More generally, Karlan concluded that "the single-member office doctrine expresses a deeply felt, if unconscious, need to maintain white political control in the guise of protecting democratic values." *Id.* at 41. Thus, she argued that courts have been willing to implement Section 2 to facilitate election of minority-group members to multi-member bodies where a white majority will retain control, but that they are reluctant to enforce Section 2 when doing so might result in governing authority being vested entirely in a nonwhite representative. Is Karlan's criticism applicable to *Holder v. Hall*?

14. *Gingles and Proportional Representation.* Is *Gingles* sound as statutory interpretation? In particular, is it consistent with the proviso in Section 2 that proportional representation is not required? Consider the following analysis:

> The right to be un-"submerged" is the vindication that the statute promises. And therein lies the paradox, for the amendments also note that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." But unsubmergence that entails a minority's right to an electoral

> structure that will deliver its "preferred candidate" is semantically equivalent to a right to be represented separately and distinctly "in numbers equal to their proportion in the population." This is an extraordinary convolution. How did it occur?
>
> This paradox arose because those members of Congress who wanted proportional representation for racial minorities did not have the votes to make the change in the law they preferred, while those who were satisfied with the outcome in *Bolden* did not have the votes to protect the status quo they preferred. The result is an amended section 2 whose parts seem to conflict.
>
> The plurality in *Gingles* effectively resolved this tension by deciding that the VRA established a limited right on behalf of minorities to some measure of proportional representation. The Justices did not come right out and say this, but, tracking through their analysis of how racially polarized voting is supposed to be proved, it is hard to avoid the inference that this is what they meant....
>
> The *Gingles* plurality infuses the VRA with a bias toward proportional representation because state legislatures that wish to follow the precept of the plurality can realistically conclude that they have a duty to alter any electoral system in which racial bloc voting has *prevented* proportional racial representation. A cause of action appears to exist whenever a plaintiff can argue that proportional representation could have been achieved, but was not.

Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry Into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICHIGAN LAW REVIEW 652, 657–59 (1993).

15. *Is Gingles a Dead End?* A vigorous theoretical and political debate rages around Section 2 and the legal assault on dilution of the votes of racial, ethnic, and language minority group members. This chapter cannot hope to do justice to that debate, but at least one portion of it can be examined by considering three divergent responses to Karlan's point described above, that in many situations, precisely because such groups *are* minorities, *Gingles*-type anti-dilutive measures will be unable to prevent white majorities from controlling government policy.

(a) *The view that Gingles does not go far enough.* One view is most famously set forth in the writings of Lani Guinier. Guinier contends that the *Gingles* anti-dilution framework represents the "second generation" of the voting rights movement, the first generation having been the successful fight for the basic right to vote in the 1960s.

> On the assumption that racial bloc voting by a white electoral majority will invariably result in the defeat of black representatives, second-generation voting rights litigants seek to integrate the legislature primarily through the subdivision of predominantly white electorates into single-member districts. The second-generation remedial agenda is premised on the notion that black representatives, elected from majority-black subdistricts and electorally accountable only to black voters, will represent those voters' concerns from their newly established legislative seats. Once integrated, legislative bodies will deliberate more effectively and will be "legitimated" as a result of their more inclusive character.

Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VIRGINIA LAW REVIEW 1413, 1415 (1991). Guinier does not doubt the value of the "authentic black representation" that the "second generation" has sought, with considerable success, to accomplish:

> Authenticity reflects the group consciousness, group history, and group perspective of a disadvantaged and stigmatized minority. Authenticity recognizes that black voters are a discrete "social group" with a distinctive voice.... [A]uthentic representation also facilitates black voter mobilization, participation, and confidence in the process of self-government.

Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICHIGAN LAW REVIEW 1077, 1108 (1991).

Nevertheless, Guinier believes that the "black electoral success theory" underlying the second-generation efforts inevitably will fail to accomplish the idealistic goals of the Voting Rights Act, because of its acceptance of districting as the central mechanism of representation.

> I conclude that the districting model, at least at the local county and municipal level, fails to achieve the political equality and political empowerment objectives of the Voting Rights Act, although it permits physical access to the representative body for minority representatives. First, districting ignores the role of prejudice at the legislative level. Even though such prejudice remains a pervasive problem, the districting model defends majoritarian principles without constraining representatives of the majority to represent, reflect, or accommodate minority interests within local legislative decisionmaking. Second, districting uses a delegate model of representation but fails to ensure substantive accountability to constituents' policy preferences, not just service needs. Third, by focusing on geographic, rather than political, interests, districting depresses the level of political competition and discourages the interactive political organization necessary to mobilize voters to participate meaningfully throughout the political process. In this way, districting fails to realize the moral proposition implicit in the statute's political equality and political empowerment norms that each citizen should have the same chance as every other citizen to influence legislative outcomes.

No Two Seats, at 1433. Thus, Guinier believes the "black electoral success theory" needs to be supplemented by her own theory of "proportionate interest representation."

> Proportionate interest representation disavows the pluralist conception of fairness, which falsely assumes equal bargaining power simply based on access, or numerically proportionate electoral success for all groups. Fairness and responsiveness should be related objectives. Yet, in a racially polarized environment, some systems may be procedurally fair but fundamentally unresponsive. For example, while improving the prospects of black electoral success, black single-member districts may undermine the possibility of effecting true policy change. In a system shaped by irrational, majority prejudice, remedial mechanisms that elimi-

nate pure majority rule and enforce principles of interest proportionality may provide better proxies for political fairness.

Triumph of Tokenism, at 1136–37.

The realization of proportionate interest representation would require basic changes in both the electoral and legislative systems. Guinier summarizes her arguments for electoral change as follows:

> Winner-take-all territorial districting imperfectly distributes representation based on group attributes and disproportionately rewards those who win the representational lottery. Territorial districting uses an aggregating rule that inevitably groups people by virtue of some set of externally observed characteristics such as geographic proximity or racial identity. In addition, the winner-take-all principle inevitably wastes some votes. The dominant group within the district gets all the power; the votes of supporters of nondominant groups or disaffected voters within the dominant group are wasted. Their votes lose significance because they are consistently cast for political losers.
>
> The essential unfairness of districting is a result, therefore, of two assumptions: (1) that a majority of voters within a given geographic community can be configured to constitute a "group"; and (2) that incumbent politicians, federal courts, or some other independent set of actors can fairly determine which group to advantage by giving it all the power within the district. When either of these assumptions is not accurate, as is most often the case, the districting is necessarily unfair.
>
> Another effect of these assumptions is gerrymandering, which results from the arbitrary allocation of disproportionate political power to one group. Districting breeds gerrymandering as a means of allocating group benefits; the operative principle is deciding whose votes get wasted. Whether it is racially or politically motivated, gerrymandering is the inevitable by-product of an electoral system that aggregates people by virtue of assumptions about their group characteristics and then inflates the winning group's power by allowing it to represent *all* voters in a regional unit.
>
> Given a system of winner-take-all territorial districts and working within the limitations of this particular election method, the courts have sought to achieve political fairness for racial minorities. As a result, there is some truth to the assertion that minority groups, unlike other voters, enjoy a special representational relationship under the Voting Rights Act's 1982 amendments to remedy their continued exclusion from effective political participation in some jurisdictions. But the proper response is not to deny minority voters that protection. The answer should be to extend that special relationship to *all* voters by endorsing *the equal opportunity to vote for a winning candidate* as a universal principle of political fairness.
>
> I use the term "one-vote, one-value" to describe the principle of political fairness that as many votes as possible should count in the election of representatives. One-vote, one-value is realized when everyone's vote counts for someone's election. The only system with the potential to realize this principle for *all* voters is one in which the unit of representa-

> tion is political rather than regional, and the aggregating rule is proportionality rather than winner-take-all. Semiproportional systems, such as cumulative voting, can approximate the one-vote, one-value principle by minimizing the problem of wasted votes.

Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEXAS LAW REVIEW 1589, 1592–94 (1993).

There is an extensive literature debating the pros and cons of the "semiproportional systems" that Guinier recommends. For a useful description of some of these systems by an articulate exponent of views similar to Guinier's, see Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 173, 221–36 (1989). See also MINORITY REPRESENTATION 124–28. To date, courts have not been inclined to order proportional or semiproportional devices as remedies for Section 2 violations. See, e.g., *Cane v. Worcester County*, 35 F.3d 921 (4th Cir. 1994), holding that is was an abuse of discretion for a United States District Court to impose cumulative voting as a remedy for a Section 2 violation without giving the county the opportunity to submit a single-member district plan. However, in at least a few places in Maryland and Alabama, cumulative voting has been instituted as a means of settling Voting Rights Act litigation. See *Maryland County to Use Cumulative Voting*, BALLOT ACCESS NEWS, May 3, 1994, at 1.

Guinier's call for change in the legislative system is aimed primarily at local government and is necessitated by the existence of "deliberative gerrymandering."

> Although efforts to increase black representation have an independent value, prejudice may simply transfer the "gerrymandering" problem from the electorate to the legislature. Black electoral visibility is useless if district-based electoral arrangements gerrymander legislative decisionmaking and reproduce in the legislature a mirror image of a racially skewed electorate. With few exceptions, the litigation and activist strategy has thus far failed to anticipate the inevitable third-generation problem: the deliberative gerrymander.

Triumph of Tokenism, at 1126. Various remedial devices would be used against deliberative gerrymandering.

> Where majority representatives refuse to bargain with representatives of the minority, simple majority vote rules would be replaced. "A minority veto" for legislation of vital importance to minority interests would respond to evidence of gross "deliberative gerrymanders." Alternatively, depending on the proof of disproportionate majority power, plaintiffs might seek minority assent through other supermajority arrangements, concurrent legislative majorities, consociational arrangements, or rotation in office.

Id. at 1140.

The hopes of Guinier and others that the Voting Rights Act would be applied to legislative procedures received an apparently fatal blow in *Presley v. Etowah County Commission*, 112 S.Ct. 820 (1992), which held that changes in voting

procedures of local governing bodies and in the powers of their members were not changes "with respect to voting" that required preclearance under Section 5. Justice Kennedy wrote for a six-member majority:

> Were we to accept the appellants' proffered reading of § 5, we would work an unconstrained expansion of its coverage. Innumerable state and local enactments having nothing to do with voting affect the power of elected officials. When a state or local body adopts a new governmental program or modifies an existing one it will often be the case that it changes the powers of elected officials....
>
> Appellants and the United States fail to provide a workable standard for distinguishing between changes in the routine organization and functioning of government. Some standard is necessary, for in a real sense every decision taken by government implicates voting. This is but the felicitous consequence of democracy, in which power derives from the people. Yet no one would contend that when Congress enacted the Voting Rights Act it meant to subject all or even most decisions of government in covered jurisdictions to federal supervision. Rather, the Act by its terms covers any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."

Is the difficulty of finding a "workable standard" an adequate justification for interpreting the statute to provide no protection to minority groups at the legislative stage? Not according to Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEXAS LAW REVIEW 1705, 1725–26 (1993):

> [The proper adjudication of *Presley*] required an intimate, functional appraisal of political reality. If the Court were not forced to confront such fundamentally political and intractable claims, it would have every incentive to exclude them from its definition of voting.
>
> The 1982 amendments to the Voting Rights Act, however, require precisely this form of judicial engagement. Congress has expressly directed courts to consider whether racial and ethnic minority groups have an equal opportunity "to *participate in the political process* and to elect representatives of their choice." And while the statute does not provide a clear benchmark for assessing aggregation claims, let alone governance issues, its "political process" language forces courts to address these question on the merits.

(b) *The view that Gingles goes too far.* Soon after *Gingles* was issued, it received influential criticism in a book by Abigail M. Thernstrom, WHOSE VOTES COUNT? (1987).[x] Thernstrom reviews the history of the Voting Rights Act from its adoption through the 1982 amendments and the *Gingles* decision, and concludes that its original, widely-supported goals of extending the right to vote and eliminating abusive practices in the South were quietly transmuted into anticompetitive policies that enjoy little public support.

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x. Thernstrom's book has been controversial. For sharp criticism, see J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in CONTROVERSIES 135, 166–76; Pamela S. Karlan & Peyton McCrary, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act*, 4 JOURNAL OF LAW AND POLITICS 751 (1988).

> [O]ur sensitivity to the special significance of black officeholding in the South, where blacks were disfranchised before 1965, has shaded into a belief in the entitlement of black and Hispanic candidates everywhere to extraordinary protection from white competition.

Id. at 235. Many of the criticisms of the race-conscious districting mandated by *Gingles* that have been advanced by Thernstrom and others are summarized in the concurring opinion of Justice Thomas in *Holder v. Hall*, reprinted below.

Some commentators who believe *Gingles* goes "too far" begin from the same recognition expressed by Lani Guinier that in a country in which minority groups are, after all, minorities, only so much can be accomplished by providing such groups with the opportunity to elect their own representatives. Thus, Carol Swain writes:

> When African Americans question the common strategy of drawing legislative districts with large black majorities, they are sometimes viewed by other blacks with suspicion and regarded as "enemies of the group." Yet the electoral demography of the United States favors such a policy. The statistics on the distribution and concentration of blacks in the population reveal a need to look beyond the creation of majority-black political units as a way to increase political representation of African Americans. Blacks have already made the most of their opportunities to elect black politicians in congressional districts with black majorities....Some experts suggest that African Americans and Hispanics might be able to find twelve to fifteen new districts for themselves after the 1990s redistricting. Beyond that, and in years to come, we can expect severe limitations on what can be achieved by relying on the creation of black districts to ensure the election of black politicians.

Carol M. Swain, BLACK FACES, BLACK INTERESTS 200 (1993). Swain does not respond to these limitations by demanding institutional change to obtain what Guinier calls "proportionate interest representation." Instead, Swain believes minority groups should welcome districts in which they fall short of a majority but constitute a significant element. Swain argues that a strategy of coalition-building with progressive white voters and politicians offers the best hope for minority groups.

> Black districts with smaller percentages of black voters would give more African-American candidates an incentive to build multiracial coalitions. Lowering the threshold of black voters has other implications: blacks dispersed over more districts might encourage greater responsiveness from white elected officials. No politician can afford to concentrate on one racial or ethnic group to the exclusion of others. Most representatives know that ignoring a significant minority population can be political suicide, because an opponent can build a coalition of disaffected groups. Less overwhelmingly black districts would also undoubtedly make their own representatives feel less secure. Many of the representatives would become more attentive and vigilant, and therefore their constituents would profit.
>
> Much of the future growth of black substantive and descriptive representation will depend on coalition building with other racial and ethnic

> groups. The issue of biracial coalitions between whites and blacks has been intensely debated since the 1960s, when Stokely Carmichael and Charles V. Hamilton wrote their classic book on black power[, *Black Power: The Politics of Liberation in America*]. Carmichael and Hamilton warned against coalitions with whites until blacks had had the opportunity to develop independent bases of power that would allow them to be more than junior partners. Now, in the 1990s, it can be argued that the time has come.

Id. at 210–11.[y]

But has that time come, at least in the specific sense that minority group candidates can realistically hope to be elected in majority-white districts? Swain devotes much of her book to attempting to show that this question may be answered in the affirmative. The same answer is given by Timothy G. O'Rourke, *The 1982 Amendments and the Voting Rights Paradox*, in CONTROVERSIES, 85, 109:

> In Virginia, one of the half dozen southern states targeted by the 1965 act, minority candidates running at large have since the late 1960s regularly won seats on local councils. Fredericksburg and Roanoke—overwhelmingly white cities—have elected and reelected black mayors. Both parties have run black candidates for statewide office, and in recent years a black candidate has been elected lieutenant governor and then governor. These developments are most assuredly attributable to the Voting Rights Act. But they are not successes attributable to section 5 or section 2. Instead they are attributable to the gradual workings of the original law—the enrollment of minority voters, the large-scale entry of minority voters into the rank and file of the political parties, the entry of minority candidates into politics, and a growing receptiveness of a predominantly white electorate to minority candidates.
>
> Yet it is a measure of the fantastical quality of the contemporary discussions of voting rights law that such successes are so easily explained away.... [F]or instance, Laughlin McDonald dismisses L. Douglas Wilder's election of Virginia as exceptional and as an example of "racially polarized voting" (since Wilder received only two-fifths of the white vote). Such successes, of course, must be explained away to preserve the legal momentum for creating safe minority districts.

(c) *The view that Gingles is about right.* Despite the criticism it has received, the *Gingles* regime also has numerous defenders. Among the more prominent are Bernard Grofman, Lisa Handley & Richard G. Niemi, the authors of MINORITY REPRESENTATION, and we shall consider their views in some detail. Responding

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y. See also Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CALIFORNIA LAW REVIEW 893, 926 (1994):

> To be effective, African American representatives must form coalitions with other minority and white legislators who share their interests. However, it may be difficult to develop coalitions if African Americans are realigned to form new majority-minority districts since the representatives from their former districts will have less motivation, based on present constituents, to consider African American interests. Whether the net result would be an increase in African American legislative power is unclear.

to the view of some critics that *Gingles* reflects a group-based theory of politics that is contrary to the idea of a "color-blind" society, they write:

> We would emphasize, first, that the rights provided by the act are contingent, appropriate only when a significant liability threshold has been met. Only when African-Americans or Hispanics are made a "permanent minority" as a result of racial bloc voting by the majority or by various practices and procedures is there intervention under the Voting Rights Act. Intervention in such circumstances is, we believe, in accord with the Madisonian tradition..., which condemns factions, even majority factions, and seeks to design constitutional rules that serve as safeguards against the pernicious consequences of such factionalism.
>
> Because the rights are contingent, the applicability of Section 2 of the Voting Rights Act, like Section 5, is, in principle, "self-liquidating."... Moreover, the three conditions—residential segregation sufficient to allow the drawing of districts in which minority group members are a majority, racially polarized voting, and a "usual" lack of minority electoral success—are conditions that few people wish to see perpetuated. Thus, if minority assimilation proceeds in such a fashion that residential segregation becomes a thing of the past, minority groups will be unable to launch successful voting rights suits. Or if voting in a jurisdiction is no longer polarized along racial or linguistic/ethnic lines—or even if it is, but the level of white crossover voting permits significant and repeated minority access—the Voting Rights Act will become a dead letter in that jurisdiction.
>
> Second, though it is true that most other voting rights violations (e.g., of the one-person, one-vote standard) are customarily defined in terms of the violation of individual rights, clearly there are types of discrimination directed against individuals as a function of their status as members of a minority community. In such situations it seems foolish to think that liability and remedies cannot be race conscious. In the present context, because racially polarized voting is a prerequisite for a voting rights violation and residential segregation a prerequisite for submergence, it is not plausible to attempt only "color-blind" tests and solutions.
>
> Furthermore, to argue that policies in the voting rights area must be free of all considerations of race and ethnicity is like blaming the messenger for the message.

MINORITY REPRESENTATION at 131–32. Grofman et al. acknowledge the force behind some of the complaints of critics as divergent as Guinier and Swain, but they do not regard those complaints as decisive.

> To be sure, blacks have sometimes been elected in majority-white areas, but such situations are not that common, despite various well-publicized cases. And when they do occur, they can often be attributed to overwhelming support from black voters combined with limited support from Hispanics, Asians, or whites (e.g., the mayoral elections of David Dinkins in New York City and Harold Washington in Chicago, the gubernatorial election of Douglas Wilder in Virginia), or to plurality vic-

tories against a divided opposition (Wilder's initial legislative victory against a field of white candidates)....

In a similar vein, we agree with Swain that in the long run, major additional gains in black (or Hispanic) representation can come only by building coalitions that make possible the election of minority candidates from districts that are not majority or near majority minority, but we do not see this as a reason to stop trying to create black or Hispanic majority seats where there is evidence of vote dilution. We also differ with Swain and other scholars who look to multiracial coalition building as the primary direction for future black (or Hispanic) politics, so severe, in our perception, is the level of present-day racial polarization.

At the same time, we share with Swain and others the concern that there is only a limited prospect for further gains in African-American representation in Congress or the state legislatures from the creation of additional majority-black districts. Patterns of black geographic distribution are such that only a relatively small number of additional black majority legislative and congressional seats can be created. Moreover, there are also limits to the foreseeable gains in black representation from further shifts from at-large to single-member district representation at the municipal level, although there are greater prospects for gains in black representation at the level of school boards. For Hispanics, however, there are still great gains in representation possible at the local level with the elimination of at-large city council and school board elections (e.g., in Texas and California), and further gains to be made in Congress and the state legislatures because of the dramatic increase in the Hispanic population over the last decade....

Although revisionist critics of the Voting Rights Act...see it as accentuating the importance of racial and linguistic cleavages, we see it as forcing an assessment, on the basis of case-specific evidence, of the reality of those cleavages and an effort to give minorities a full opportunity to be part of the political process when those divisions are especially strong. Rather than fearing the election of minority candidates from largely minority constituencies, we ask whether we would really prefer the most likely alternative—the lack of minority electoral success still characteristic of majority-white jurisdictions in the South, especially those at the state legislative and congressional level. Whereas some revisionist critics see the success of the Voting Rights Act threatening our aspirations for a color-blind society, we see it as a necessary evil in a color-conscious world—admittedly the "politics of second best."

Yet our view of the "politics of second best" is ultimately an optimistic one. Though we may agree with Guinier that the increase in the number of black elected officials "has not visibly altered the disadvantaged socio-economic condition or social isolation of black voters" and that sustained black mobilization has not emerged despite some black electoral success, we would also say that too much is being expected of the franchise. Some suffragettes, it is said, thought that achieving the vote would bring an end to war. That they were wrong does not make us want to repeal the Nineteenth Amendment. Similarly, the fact that the rhetoric concerning what was to be expected from black enfranchisement now

seems dramatically overstated ought not to lead us to dismiss the real gains that have resulted from that enfranchisement—the change, for example, from fewer than 1,500 elected officials in 1970 to over 7,300 in 1990....

Still another reason for optimism over a broad interpretation of the Voting Rights Act is that majority-minority districts are serving as a necessary "port of entry" for minorities into pluralist politics. The opportunity to hold office and to make a record while in office is perhaps the most important means whereby minority candidates can establish a reputation that will earn them considerable crossover support. Even Governor Wilder, one of the most celebrated examples of black success in a majority-white constituency, was initially elected in the state legislature as a plurality victor in a district with a significant black population and was reelected to the legislature from a district that had been reconfigured to have a clear black majority. As with whites/Anglos, success of minority politicians at one level can be parleyed into higher office. But the important difference is that minority politicians are often able to get started because of majority-minority districts.

Finally, we would emphasize that cross-racial coalitions may be easier to achieve at the level of political elites than at the mass level....But of course, multiracial/ethnic elite interaction demands that minorities as well as majorities be elected in the first place....

We do not presume, of course, that racial prejudice vanishes within legislative halls. There are surely instances in which the influence of minority elected officials on outcomes appears to have been minimal.... But there is considerable evidence for political change and accomplishment, as well....

[A]t some point, we hope the argument will be correct that the act has outlived its usefulness and is no longer necessary. For now, however, we are convinced that by ensuring that the right to vote is not an empty ritual but that minorities will be involved in decision-making bodies as well as in campaigns, the Voting Rights Act serves to integrate minorities into the American political process and helps ameliorate the alienation that came from their previous exclusion. If that is so, the act will be seen as one of the most important and successful pieces of legislation of this century, and its broad interpretation one of the most important achievements of the courts.

MINORITY REPRESENTATION at 134–37.

16. *Partisan Politics and Section 2.* The foregoing notes—and the following one—show that the demand of Section 2, as interpreted in *Gingles*, for race-conscious districting raises numerous legal, policy, and theoretical questions. It should not be imagined, however, that the public debate has been unaffected by partisan and other political concerns.

A majority-minority district will usually be an overwhelmingly Democratic district.[z] The concentration of Democrats in a number of such districts is likely

z. An exception is likely to be a Latino district in Florida. Cuban-Americans, unlike other Latinos and unlike African-Americans, have been predominantly Republican in their voting.

to leave a disproportionate number of Republican voters in the rest of the state or jurisdiction. Given typical patterns of political geography in the United States, a districting plan that has a high number of majority-minority districts is likely to be one that benefits Republicans in the jurisdiction as a whole. For more detailed analysis and empirical confirmation, see Kimball Brace, Bernard Grofman & Lisa Handley, *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?*, 49 JOURNAL OF POLITICS 169 (1987).

Political partisans have not been oblivious to this phenomenon. In many instances, Democratic politicians have resisted the creation of majority-minority districts, especially white Democratic incumbents whose own electoral prospects may be adversely affected. Democrats may feel constrained to create majority-minority districts, whether because of the Voting Rights Act, a liberal ideology, or the need to respond to minority groups who make up an important part of the Democratic electoral coalition. In this case, Democrats are likely to draw odd-shaped districts to accommodate the need for majority-minority districts without the Democrats having to "pay" for them by a reduction of the total number of Democratic-leaning districts. It was just such efforts by Democrats in North Carolina that led to the controversy in *Shaw v. Reno*, featured in the next section.

Republicans, despite an ideology that usually opposes compensatory race policies, often react very differently. As Carol Swain writes:

> Republican leaders have zealously urged the creation of the maximum number of "safe" black and Hispanic districts.... The Republican position on minority districts may seem surprising, given that Republicans have gained so much political mileage by opposing affirmative action quotas. Why would Republicans want more minority-elected officials, if most are likely to be Democrats? Why do Republicans care about the number and size of black districts?
>
> The answers would appear to be simple. It is in the Republican interest to want large black districts. To the extent that the black Democrats are concentrated in legislative districts, it is easier for Republican candidates to win more seats overall. The creation of a newly black district is likely to drain black voters from other districts, many of them represented by white Democrats. The more "lily-white" the districts so drained become, the easier it is for Republicans to win them. In short, by adopting such a redistricting strategy, Republicans give African Americans the opportunity to increase their descriptive representation but, quite possibly, at the expense of their substantive representation.

Swain, *supra*, at 205. Some writers believe Republican benefits from the Voting Rights Act can be even more far-reaching, because of heightened tensions within the Democratic coalition:

> Legislative districts were redrawn for the 1992 elections under circumstances that increasingly strained the fragile alliance between Hispanics and blacks. According to Raul Yzaguirre, president of the National Council of La Raza, relations between the two "have not been particularly wholesome or happy" in the past twenty years. Redistricting under these circumstances threatens to split the alliance and further

> fragment the Democratic coalition. Republicans, determined to accelerate this process, have pressed for strict voting rights enforcement with the zeal of new converts. Under these circumstances it is no surprise that tensions within the voting rights policy community should rise, especially at its Democratic core among party professionals, committee staff, and practitioner academics.

Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in CONTROVERSIES 177, 195.

The dramatic Republican victory in the 1994 election has sparked increased interest in these issues. Many journalistic commentaries on the election have identified the creation of majority-minority districts, especially in the South, as a cause of the Republican gains in the House of Representatives. Such explanations should not be accepted uncritically. The equally dramatic Republican gains in the Senate and in governorships were accomplished without the benefit of race-conscious districting. Careful analysis of whether and to what extent the Voting Rights Act influenced the 1994 change in control of the House will provide an important research agenda for political scientists over the next few years.

17. *A Salvo from the Court's Conservatives.* We have seen that in *Holder v. Hall* the Court ruled that a Section 2 claim could not be based on a contention that a single official was elected rather than a multi-member body. The plurality opinion by Justice Kennedy and a concurring opinion by Justice O'Connor worked within the *Gingles* framework. Justice Thomas, joined by Justice Scalia, made up the remainder of the majority in *Holder*, but concurred on much broader grounds. As Justice Thomas wrote, "I would hold that the size of a governing body is not a 'standard, practice, or procedure' within the terms of the Act. In my view, however, the only principle limiting the scope of the terms 'standard, practice, or procedure' that can be derived from the text of the Act would exclude, not only the challenge to size advanced today, but also challenges to allegedly dilutive election methods that we have considered within the scope of the Act in the past."

As Justice Thomas recognized, his approach would require overruling *Gingles* and several subsequent cases. His dissent in *Holder* consists primarily of two long parts. Part II could be described as the "statutory" or "legal" portion of his opinion, in which he attempts to show that his narrow reading of Section 2 is justified by normal procedures of statutory interpretation. Justice Harlan's dissenting opinion in *Allen* had demonstrated that it was at least plausible to believe that the similar language in Section 5 of the original Voting Rights Act did not include electoral systems that allegedly could dilute minority votes. However, in attempting to demonstrate that the current Section 2 is similarly limited, Justice Thomas faced the formidable challenge of the text and background of the 1982 amendments. Interested readers can consult Justice Thomas' full opinion and determine for themselves how successfully he fared against that challenge.

Reprinted below are substantial excerpts from Part I of Justice Thomas' opinion, in which he addresses many of the broader issues raised by the attempt to proscribe minority vote dilution. It may provide a suitably provocative note on which to conclude this section.

Holder v. Hall

114 S.Ct. 2581 (1994) (concurring opinion)

Justice THOMAS, with whom Justice SCALIA joins, concurring in the judgment....

I

If one surveys the history of the Voting Rights Act, one can only be struck by the sea change that has occurred in the application and enforcement of the Act since it was passed in 1965. The statute was originally perceived as a remedial provision directed specifically at eradicating discriminatory practices that restricted blacks' ability to register and vote in the segregated South. Now, the Act has grown into something entirely different. In construing the Act to cover claims of vote dilution, we have converted the Act into a device for regulating, rationing, and apportioning political power among racial and ethnic groups. In the process, we have read the Act essentially as a grant of authority to the federal judiciary to develop theories on basic principles of representative government, for it is only a resort to political theory that can enable a court to determine which electoral systems provide the "fairest" levels of representation or the most "effective" or "undiluted" votes to minorities.

Before I turn to an analysis of the text of § 2 to explain why, in my view, the terms of the statute do not authorize the project that we have undertaken in the name of the Act, I intend first simply to describe the development of the basic contours of vote dilution actions under the Voting Rights Act. An examination of the current state of our decisions should make obvious a simple fact that for far too long has gone unmentioned: vote dilution cases have required the federal courts to make decisions based on highly political judgments—judgments that courts are inherently ill-equipped to make. A clear understanding of the destructive assumptions that have developed to guide vote dilution decisions and the role we have given the federal courts in redrawing the political landscape of the Nation should make clear the pressing need for us to reassess our interpretation of the Act.

A

As it was enforced in the years immediately following its enactment, the Voting Rights Act of 1965 was perceived primarily as legislation directed at eliminating literacy tests and similar devices that had been used to prevent black voter registration in the segregated South....

The Act was immediately and notably successful in removing barriers to registration and ensuring access to the ballot....

The Court's decision in *Allen*, however, marked a fundamental shift in the focal point of the Act....The decision in *Allen*...ensured that the terms "standard, practice, or procedure" would extend to encompass a wide array of electoral practices or voting systems that might be challenged for reducing the potential impact of minority votes.

As a consequence, *Allen* also ensured that courts would be required to confront a number of complex and essentially political questions in assessing claims of vote dilution under the Voting Rights Act. The central difficulty in any vote dilution case, of course, is determining a point of comparison against which dilu-

tion can be measured. As Justice Frankfurter observed several years before *Allen*, "[t]alk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth." *Baker v. Carr* (Frankfurter, J., dissenting). But in setting the benchmark of what "undiluted" or fully "effective" voting strength should be, a court must necessarily make some judgments based purely on an assessment of principles of political theory. As Justice Harlan pointed out in his dissent in *Allen*, the Voting Rights Act supplies no rule for a court to rely upon in deciding, for example, whether a multimember at-large system of election is to be preferred to a single-member district system; that is, whether one provides a more "effective" vote than another.... The choice is inherently a political one, and depends upon the selection of a theory for defining the fully "effective" vote—at bottom, a theory for defining effective participation in representative government. In short, what a court is actually asked to do in a vote dilution case is "to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy." *Baker* (Frankfurter, J., dissenting).

Perhaps the most prominent feature of the philosophy that has emerged in vote dilution decisions since *Allen* has been the Court's preference for single-member districting schemes, both as a benchmark for measuring undiluted minority voting strength and as a remedial mechanism for guaranteeing minorities undiluted voting power. Indeed, commentators surveying the history of voting rights litigation have concluded that it has been the objective of voting rights plaintiffs to use the Act to attack multimember districting schemes and to replace them with single-member districting systems drawn with majority-minority districts to ensure minority control of seats.

It should be apparent, however, that there is no principle inherent in our constitutional system, or even in the history of the Nation's electoral practices, that makes single-member districts the "proper" mechanism for electing representatives to governmental bodies or for giving "undiluted" effect to the votes of a numerical minority. On the contrary, from the earliest days of the Republic, multimember districts were a common feature of our political systems. The Framers left unanswered in the Constitution the question whether congressional delegations from the several States should be elected on a general ticket from each State as a whole or under a districting scheme and left that matter to be resolved by the States or by Congress. It was not until 1842 that Congress determined that Representatives should be elected from single-member districts in the States....

The obvious advantage the Court has perceived in single-member districts, of course, is their tendency to enhance the ability of any numerical minority in the electorate to gain control of seats in a representative body. But in choosing single-member districting as a benchmark electoral plan on that basis the Court has made a political decision and, indeed, a decision that itself depends on a prior political choice made in answer to Justice Harlan's question in *Allen*. Justice Harlan asked whether a group's votes should be considered to be more "effective" when they provide *influence* over a greater number of seats, or *control* over a lesser number of seats. In answering that query, the Court has determined that the purpose of the vote—or of the fully "effective" vote—is controlling seats. In other words, in an effort to develop standards for assessing claims of dilution, the Court has adopted the view that members of any numerically significant minority are

denied a fully effective use of the franchise unless they are able to control seats in an elected body. Under this theory, votes that do not control a representative are essentially wasted; those who cast them go unrepresented and are just as surely disenfranchised as if they had been barred from registering. Such conclusions, of course, depend upon a certain theory of the "effective" vote, a theory that is not inherent in the concept of representative democracy itself.

In fact, it should be clear that the assumptions that have guided the Court reflect only one possible understanding of effective exercise of the franchise, an understanding based on the view that voters are "represented" only when they choose a delegate who will mirror their views in the legislative halls. But it is certainly possible to construct a theory of effective political participation that would accord greater importance to voters' ability to influence, rather than control, elections. And especially in a two-party system such as ours, the influence of a potential "swing" group of voters composing 10%–20% of the electorate in a given district can be considerable. Even such a focus on practical influence, however, is not a necessary component of the definition of the "effective" vote. Some conceptions of representative government may primarily emphasize the formal value of the vote as a mechanism for participation in the electoral process, whether it results in control of a seat or not. Under such a theory, minorities unable to control elected posts would not be considered essentially without a vote; rather, a vote duly cast and counted would be deemed just as "effective" as any other. If a minority group is unable to control seats, that result may plausibly be attributed to the inescapable fact that, in a majoritarian system, numerical minorities lose elections.

In short, there are undoubtedly an infinite number of theories of effective suffrage, representation, and the proper apportionment of political power in a representative democracy that could be drawn upon to answer the questions posed in *Allen*. I do not pretend to have provided the most sophisticated account of the various possibilities; but such matters of political theory are beyond the ordinary sphere of federal judges. And that is precisely the point. The matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law. As such, they are not readily subjected to any judicially manageable standards that can guide courts in attempting to select between competing theories.

But the political choices the Court has had to make do not end with the determination that the primary purpose of the "effective" vote is controlling seats or with the selection of single-member districting as the mechanism for providing that control. In one sense, these were not even the most critical decisions to be made in devising standards for assessing claims of dilution, for in itself, the selection of single-member districting as a benchmark election plan will tell a judge little about the number of minority districts to create. Single-member districting tells a court "how" members of a minority are to control seats, but not "how many" seats they should be allowed to control.

But "how many" is the critical issue. Once one accepts the proposition that the effectiveness of votes is measured in terms of the control of seats, the core of any vote dilution claim is an assertion that the group in question is unable to control the "proper" number of seats—that is, the number of seats that the minority's percentage of the population would enable it to control in the benchmark "fair" system. The claim is inherently based on ratios between the numbers of the

minority in the population and the numbers of seats controlled. As Justice O'CONNOR has noted, "any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large." *Gingles* (opinion concurring in judgment). As a result, only a mathematical calculation can answer the fundamental question posed by a claim of vote dilution. And once again, in selecting the proportion that will be used to define the undiluted strength of a minority—the ratio that will provide the principle for decision in a vote dilution case—a court must make a political choice.

The ratio for which this Court has opted, and thus the mathematical principle driving the results in our cases, is undoubtedly direct proportionality. Indeed, four Members of the Court candidly recognized in *Gingles* that the Court had adopted a rule of roughly proportional representation, at least to the extent proportionality was possible given the geographic dispersion of minority populations. (O'CONNOR, J., concurring in judgment). While in itself that choice may strike us intuitively as the fairest or most just rule to apply, opting for proportionality is still a political choice, not a result required by any principle of law.

B

The dabbling in political theory that dilution cases have prompted, however, is hardly the worst aspect of our vote dilution jurisprudence. Far more pernicious has been the Court's willingness to accept the one underlying premise that must inform every minority vote dilution claim: the assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well. Of necessity, in resolving vote dilution actions we have given credence to the view that race defines political interest. We have acted on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own "minority preferred" representatives holding seats in elected bodies if they are to be considered represented at all.

It is true that in *Gingles* we stated that whether a racial group is "politically cohesive" may not be assumed, but rather must be proved in each case. But the standards we have employed for determining political cohesion have proved so insubstantial that this "precondition" does not present much of a barrier to the assertion of vote dilution claims on behalf of any racial group.[12] Moreover, it provides no test—indeed, it is not designed to provide a test—of whether race itself determines a distinctive political community of interest. According to the rule adopted in *Gingles*, plaintiffs must show simply that members of a racial group tend to prefer the same candidates. There is no set standard defining how strong the correlation must be, and an inquiry into the cause for the correlation (to determine, for example, whether it might be the product of similar socioeconomic

12. Cf. *Citizens for a Better Gretna v. Gretna*, 834 F.2d 496, 501-02 (5th Cir. 1987) (emphasizing that political cohesion under *Gingles* can be shown where a "significant number" of minority voters prefer the same candidate, and suggesting that data showing that anywhere from 49% to 67% of the members of a minority group preferred the same candidate established cohesion), cert. denied, 492 U.S. 905 (1989).

interests rather than some other factor related to race) is unnecessary. Thus, whenever similarities in political preferences along racial lines exist, we proclaim that the cause of the correlation is irrelevant, but we effectively rely on the fact of the correlation to assume that racial groups have unique political interests.

As a result, *Gingles'* requirement of proof of political cohesiveness, as practically applied, has proved little different from a working assumption that racial groups can be conceived of largely as political interest groups. And operating under that assumption, we have assigned federal courts the task of ensuring that minorities are assured their "just" share of seats in elected bodies throughout the Nation.

To achieve that result through the currently fashionable mechanism of drawing majority-minority single-member districts, we have embarked upon what has been aptly characterized as a process of "creating racially 'safe boroughs.'" *United States v. Dallas County Comm'n*, 850 F.2d 1433, 1444 (11th Cir. 1988) (Hill, J., concurring specially), cert. denied, 490 U.S. 1030 (1989). We have involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of "political apartheid." *Shaw*, [*infra*]. Blacks are drawn into "black districts" and given "black representatives"; Hispanics are drawn into Hispanic districts and given "Hispanic representatives"; and so on. Worse still, it is not only the courts that have taken up this project. In response to judicial decisions and the promptings of the Justice Department, the States themselves, in an attempt to avoid costly and disruptive Voting Rights Act litigation, have begun to gerrymander electoral districts according to race. That practice now promises to embroil the courts in a lengthy process of attempting to undo, or at least to minimize, the damage wrought by the system we created. See, e.g., *Shaw*; *Hays v. Louisiana*, 839 F.Supp. 1188 (W.D.La.1993), vacated, 114 S.Ct. 2731.

The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution. "The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on." *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting). Despite Justice Douglas' warning sounded 30 years ago, our voting rights decisions are rapidly progressing towards a system that is indistinguishable in principle from a scheme under which members of different racial groups are divided into separate electoral registers and allocated a proportion of political power on the basis of race. Under our jurisprudence, rather than requiring registration on racial rolls and dividing power purely on a population basis, we have simply resorted to the somewhat less precise expedient of drawing geographic district lines to capture minority populations and to ensure the existence of the "appropriate" number of "safe minority seats."

That distinction in the practical implementation of the concept, of course, is immaterial. The basic premises underlying our system of safe minority districts and those behind the racial register are the same: that members of the racial group must think alike and that their interests are so distinct that the group must be provided a separate body of representatives in the legislature to voice its unique point of view. Such a "system, by whatever name it is called, is a divisive

force in a community, emphasizing differences between candidates and voters that are irrelevant." *Id.* Justice Douglas correctly predicted the results of state sponsorship of such a theory of representation: "When racial or religious lines are drawn by the State,... antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan." In short, few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act.

As a practical political matter, our drive to segregate political districts by race can only serve to deepen racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions. "Black-preferred" candidates are assured election in "safe black districts"; white-preferred candidates are assured election in "safe white districts." Neither group needs to draw on support from the other's constituency to win on election day.

[T]he system we have instituted affirmatively encourages a racially based understanding of the representative function. The clear premise of the system is that geographic districts are merely a device to be manipulated to establish "black representatives" whose real constituencies are defined, not in terms of the voters who populate their districts, but in terms of race. The "black representative's" function, in other words, is to represent the "black interest."

Perhaps not surprisingly, the United States has now adopted precisely this theory of racial group representation, as the arguments advanced in another case decided today, *Johnson v. De Grandy*, 114 S.Ct. 2647 (1994), should show. The case involved a claim that an apportionment plan for the Florida Legislature should have provided another Hispanic district in Dade County. Florida responded to the claim of vote dilution by arguing that the plan already provided Dade County Hispanics with seats in proportion to their numbers. According to the Solicitor General, this claim of proportionality should have been evaluated, not merely on the basis of the population in the Dade County area where the racial gerrymandering was alleged to have occurred, but on a statewide basis. It did not matter, in the Solicitor General's view, that Hispanic populations elsewhere in the State could not meet the *Gingles* geographic compactness test and thus could not possibly have controlled districts of their own. After all, the Solicitor General reasoned, the Hispanic legislators elected from Hispanic districts in Dade County would represent, not just the interests of the Dade County Hispanics, but the interests of all the Hispanics in the State. As the argument shows, at least some careful observers have recognized the racial gerrymandering in our vote dilution cases for what it is: a slightly less precise mechanism than the racial register for allocating representation on the basis of race.

C

While the results we have already achieved under the Voting Rights Act might seem bad enough, we should recognize that our approach to splintering the electorate into racially designated single-member districts does not by any means mark a limit on the authority federal judges may wield to rework electoral systems under our Voting Rights Act jurisprudence. On the contrary, in relying on single-member districting schemes as a touchstone, our cases so far have been somewhat arbitrarily limited to addressing the interests of minority voters who

are sufficiently geographically compact to form a majority in a single-member district. There is no reason *a priori*, however, that our focus should be so constrained. The decision to rely on single-member geographic districts as a mechanism for conducting elections is merely a political choice—and one that we might reconsider in the future. Indeed, it is a choice that has undoubtedly been influenced by the adversary process: in the cases that have come before us, plaintiffs have focused largely upon attacking multimember districts and have offered single-member schemes as the benchmark of an "undiluted" alternative.

But as the destructive effects of our current penchant for majority-minority districts become more apparent, courts will undoubtedly be called upon to reconsider adherence to geographic districting as a method for ensuring minority voting power. Already, some advocates have criticized the current strategy of creating majority-minority districts and have urged the adoption of other voting mechanisms—for example, cumulative voting or a system using transferable votes—that can produce proportional results without requiring division of the electorate into racially segregated districts. Cf., *e.g.*, [writings of Guinier, Karlan, and others].

Such changes may seem radical departures from the electoral systems with which we are most familiar. Indeed, they may be unwanted by the people in the several States who purposely have adopted districting systems in their electoral laws. But nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under § 2, or even from establishing a more elaborate mechanism for securing proportional representation based on transferable votes. [G]eographic districting is not a requirement inherent in our political system. Rather, districting is merely another political choice made by the citizenry in the drafting of their state constitutions. Like other political choices concerning electoral systems and models of representation, it too is presumably subject to a judicial override if it comes into conflict with the theories of representation and effective voting that we may develop under the Voting Rights Act.

Indeed, the unvarnished truth is that all that is required for districting to fall out of favor is for Members of this Court to further develop their political thinking. We should not be surprised if voting rights advocates encourage us to "revive our political imagination," Guinier, and to consider "innovative and nontraditional remedies" for vote dilution, Karlan, for under our Voting Rights Act jurisprudence, it is only the limits on our "political imagination" that place restraints on the standards we may select for defining undiluted voting systems. Once we candidly recognize that geographic districting and other aspects of electoral systems that we have so far placed beyond question are merely political choices, those practices, too, may fall under suspicion of having a dilutive effect on minority voting strength. And when the time comes to put the question to the test, it may be difficult indeed for a Court that, under *Gingles*, has been bent on creating roughly proportional representation for geographically compact minorities to find a principled reason for holding that a geographically dispersed minority cannot challenge districting itself as a dilutive electoral practice. In principle, cumulative voting and other non-district-based methods of effecting proportional representation are simply more efficient and straightforward mechanisms for achieving what has already become our tacit objective: roughly proportional allocation of political power according to race.

At least one court, in fact, has already abandoned districting and has opted instead for cumulative voting on a county-wide basis as a remedy for a Voting Rights Act violation. The District Court for the District of Maryland recently reasoned that, compared to a system that divides voters into districts according to race, "[c]umulative voting is less likely to increase polarization between different interests," and that it "will allow the voters, by the way they exercise their votes, to 'district' themselves," thereby avoiding government involvement in a process of segregating the electorate. *Cane v. Worcester County*, 847 F.Supp. 369 (D.Md.1994)[, reversed, 35 F.3d 921 (4th Cir. 1994]. If such a system can be ordered on a county-wide basis, we should recognize that there is no limiting principle under the Act that would prevent federal courts from requiring it for elections to state legislatures as well.

D

Such is the current state of our understanding of the Voting Rights Act. That our reading of the Act has assigned the federal judiciary the task of making the decisions I have described above should suggest to the Members of this Court that something in our jurisprudence has gone awry. We would be mighty Platonic guardians indeed if Congress had granted us the authority to determine the best form of local government for every county, city, village, and town in America. But under our constitutional system, this Court is not a centralized politburo appointed for life to dictate to the provinces the "correct" theories of democratic representation, the "best" electoral systems for securing truly "representative" government, the "fairest" proportions of minority political influence, or, as respondents would have us hold today, the "proper" sizes for local governing bodies. We should be cautious in interpreting any Act of Congress to grant us power to make such determinations....

A full understanding of the authority that our current interpretation of the Voting Rights Act assigns to the federal courts, and of the destructive effects that our exercise of that authority is presently having upon our body politic, compels a single conclusion: a systematic reexamination of our interpretation of the Act is required.

II

...In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day. The disastrous implications of the policies we have adopted under the Act are too grave; the dissembling in our approach to the Act too damaging to the credibility of the federal judiciary. The "inherent tension"—indeed, I would call it an irreconcilable conflict—between the standards we have adopted for evaluating vote dilution claims and the text of the Voting Rights Act [i.e., the proviso in Section 2 that proportional representation is not required,] would itself be sufficient in my view to warrant overruling the interpretation of § 2 set out in *Gingles*. When that obvious conflict is combined with the destructive effects our expansive reading of the Act has had in involving the federal judiciary in the project of dividing the Nation into racially segregated electoral districts, I can see no reasonable alternative to abandoning our current unfortunate understanding of the Act....

IV. Race-Conscious Districting and the Constitution: Round II

Going into the 1990s, the question of minority vote dilution and its remedies seemed to be predominantly a statutory one. *Bolden*, the 1982 amendments to Section 2, and *Gingles* combined to channel claims of minority vote dilution through the Voting Rights Act, and the decisions of legislatures to avoid or courts to remedy dilution seemed insulated from constitutional review by *United Jewish Organizations v. Carey*. The Supreme Court altered this picture in 1993, when it issued its controversial decision in *Shaw v. Reno*.

The political background to *Shaw* is described by Michael Barone & Grant Ujifusa, THE ALMANAC OF AMERICAN POLITICS 1994, at 942 (1993):

> North Carolina's robust growth in the 1980s gave it a new 12th congressional district in the 1990 Census, its first new seat in 60 years. It had one of the most turbulent districting processes in the nation, thanks to application of the Voting Rights Act, whose 1982 amendments were interpreted by the Justice Department as requiring the creation of not one but two black-majority districts in a state that had none before. Thus in December 1991 was struck down the first Democratic plan, which would have created a new black-majority 1st District in east Carolina, but would have left Charlie Rose's 7th District with a large number of blacks and created a Republican-leaning new seat in the central Piedmont.
>
> Republicans chortled, hoping for the creation of a black-Lumbee Indian majority district that would cost Rose his majority, but the last laugh was on them. Clever Democratic districters drew up a plan with a second black district consisting of a thin line of territory, in some places no wider than I-85, linking black precincts from Durham west to Charlotte; the new Republican 12th District disappeared, and the marginal 5th and 8th Districts were made more Democratic—pretty ingenious work. It violated the age-old principle of contiguity, but it was accepted by the Justice Department in 1992. Nevertheless, it was widely attacked for its extremely irregular district lines (its only competitor for this was Texas, a plan also drawn by Democrats to preserve their own seats while complying with the Voting Rights Act), and in June 1993, a case was pending in the U.S. Supreme Court on the future of the plan.

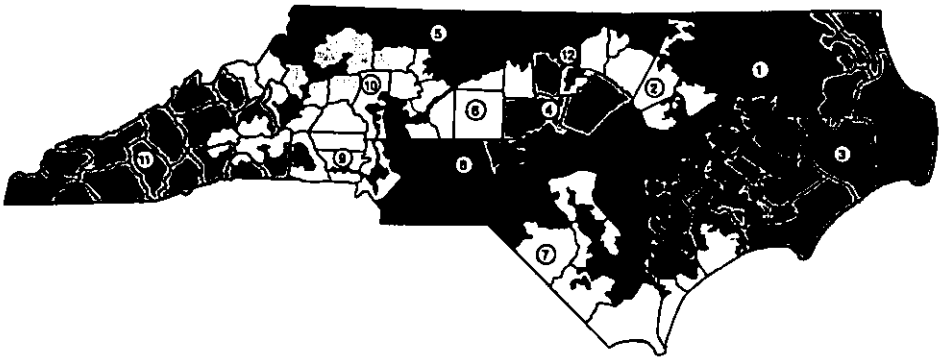
For maps of the North Carolina 12th District and districts from Georgia and Texas that have also been the subject of litigation, see the following two pages.

Shaw v. Reno

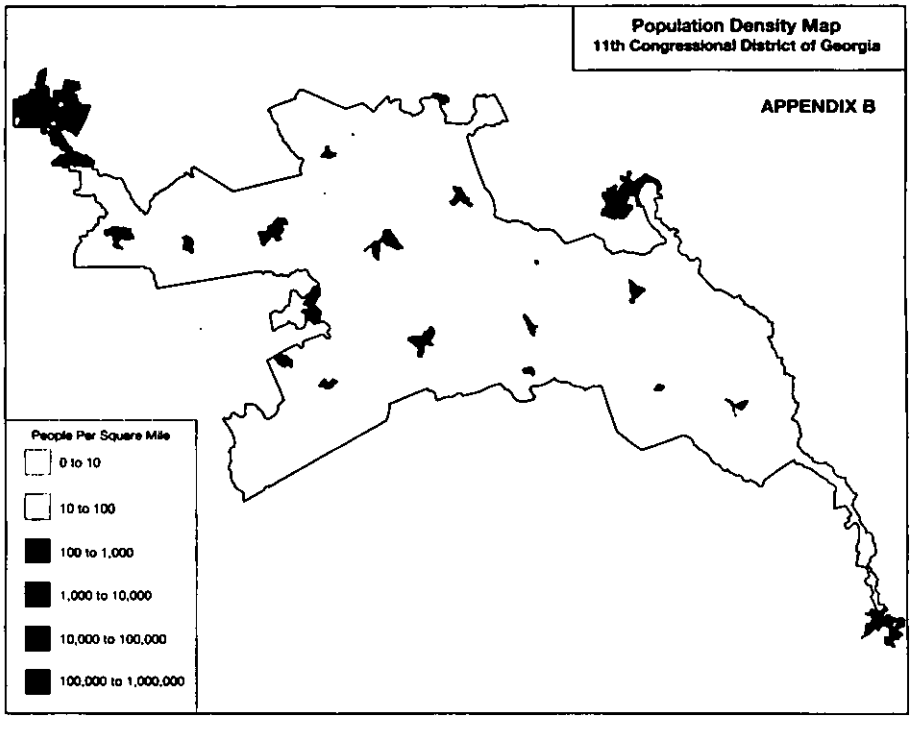
113 S.Ct. 2816 (1993)

Justice O'CONNOR delivered the opinion of the Court.

This case involves two of the most complex and sensitive issues this Court has faced in recent years: the meaning of the constitutional "right" to vote, and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups. As a result of the 1990 census, North Carolina became entitled to a twelfth seat in the United States House of Representatives. The General Assembly enacted a reapportionment plan that included one



North Carolina Congressional Districts, 1991. The 12th District is shown in black.



11th Congressional District of Georgia.

Texas's 10th Congressional District

Texas's 30th Congressional District

majority-black congressional district. After the Attorney General of the United States objected to the plan pursuant to § 5 of the Voting Rights Act of 1965, the General Assembly passed new legislation creating a second majority-black district. Appellants allege that the revised plan, which contains district boundary lines of dramatically irregular shape, constitutes an unconstitutional racial gerrymander. The question before us is whether appellants have stated a cognizable claim.

I

The voting age population of North Carolina is approximately 78% white, 20% black, and 1% Native American; the remaining 1% is predominantly Asian. The black population is relatively dispersed; blacks constitute a majority of the general population in only 5 of the State's 100 counties.... The largest concentrations of black citizens live in the Coastal Plain, primarily in the northern part. The General Assembly's first redistricting plan contained one majority-black district centered in that area of the State.

Forty of North Carolina's one hundred counties are covered by § 5 of the Voting Rights Act of 1965....

The Attorney General... interposed a formal objection to the General Assembly's plan. The Attorney General specifically objected to the configuration of boundary lines drawn in the south-central to southeastern region of the State. In the Attorney General's view, the General Assembly could have created a second majority-minority district "to give effect to black and Native American voting strength in this area" by using boundary lines "no more irregular than [those] found elsewhere in the proposed plan," but failed to do so for "pretextual reasons."

[T]he General Assembly enacted a revised redistricting plan that included a second majority-black district. The General Assembly located the second district not in the south-central to southeastern part of the State, but in the north-central region along Interstate 85.

The first of the two majority-black districts contained in the revised plan, District 1, is somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southern-most part of the State near the South Carolina border. District 1 has been compared [by a judge in the lower court] to a "Rorschach ink-blot test," and [by the *Wall Street Journal* to] a "bug splattered on a windshield."

The second majority-black district, District 12, is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, five are cut into three different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district."...

The Attorney General did not object to the General Assembly's revised plan. But numerous North Carolinians did. The North Carolina Republican Party and individual voters brought suit in Federal District Court alleging that the plan constituted an unconstitutional political gerrymander under *Davis v. Bandemer*. That claim was dismissed, see *Pope v. Blue*, 809 F.Supp. 392 (W.D.N.Car. 1992), and this Court summarily affirmed, 113 S.Ct. 30 (1992).

Shortly after the complaint in *Pope v. Blue* was filed, appellants instituted the present action... Appellants alleged not that the revised plan constituted a political gerrymander, nor that it violated the "one person, one vote" principle, see *Reynolds*, but that the State had created an unconstitutional racial gerrymander. [The lower court dismissed the case, relying heavily on *United Jewish Organizations*. Plaintiffs appealed.]

II...

B

...Our focus is on appellants' claim that the State engaged in unconstitutional racial gerrymandering. That argument strikes a powerful historical chord: It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.

An understanding of the nature of appellants' claim is critical to our resolution of the case. In their complaint, appellants did not claim that the General Assembly's reapportionment plan unconstitutionally "diluted" white voting strength. They did not even claim to be white. Rather, appellants' complaint alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a "color-blind" electoral process.[a]

Despite their invocation of the ideal of a "color-blind" Constitution, appellants appear to concede that race-conscious redistricting is not always unconstitutional. That concession is wise: This Court never has held that race-conscious state decisionmaking is impermissible in all circumstances. What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification. For the reasons that follow, we conclude that appellants have stated a claim upon which relief can be granted under the Equal Protection Clause.

III

A

...Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).... Accordingly,

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a. On what basis do plaintiffs have standing to bring this claim? For discussion, see Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICHIGAN LAW REVIEW 483, 513–16 (1993); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUPREME COURT REVIEW 245, 278–79.

we have held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest. See, *e.g.*, *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277–278 (1986) (plurality opinion).

These principles apply not only to legislation that contains explicit racial distinctions, but also to those "rare" statutes that, although race-neutral, are, on their face, "unexplainable on grounds other than race." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

B

Appellants contend that redistricting legislation that is so bizarre on its face that it is "unexplainable on grounds other than race," *Arlington Heights*, *supra*, demands the same close scrutiny that we give other state laws that classify citizens by race. Our voting rights precedents support that conclusion.

...At issue in [*Wright v. Rockefeller*, 376 U.S. 52 (1964),] were four districts contained in a New York apportionment statute. The plaintiffs alleged that the statute excluded nonwhites from one district and concentrated them in the other three. Every member of the Court assumed that the plaintiffs' allegation that the statute "segregate[d] eligible voters by race and place of origin" stated a constitutional claim. The Justices disagreed only as to whether the plaintiffs had carried their burden of proof at trial. The dissenters thought the unusual shape of the district lines could "be explained only in racial terms." The majority, however, accepted the District Court's finding that the plaintiffs had failed to establish that the districts were in fact drawn on racial lines. Although the boundary lines were somewhat irregular, the majority reasoned, they were not so bizarre as to permit of no other conclusion. Indeed, because most of the nonwhite voters lived together in one area, it would have been difficult to construct voting districts without concentrations of nonwhite voters.

Wright illustrates the difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race. A reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses. Moreover, redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. As *Wright* demonstrates, when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.

The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race. Moreover, it seems clear to us that proof sometimes will not be difficult at all. In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to "segregat[e]...voters" on the basis of race. *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960). *Gomillion*, in which a tortured municipal boundary line was drawn to exclude black

voters, was such a case. So, too, would be a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions. We emphasize that these criteria are important not because they are constitutionally required—they are not, cf. *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973)—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines....

Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy. As Justice Douglas explained in his dissent in *Wright v. Rockefeller* nearly 30 years ago:

> Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on....That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense....
>
> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

For these reasons, we conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification. It is unnecessary for us to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged. Thus, we express no view as to whether "the intentional creation of majority-minority dis-

tricts, without more" always gives rise to an equal protection claim. *Post* (WHITE, J., dissenting). We hold only that, on the facts of this case, plaintiffs have stated a claim sufficient to defeat the state appellees' motion to dismiss.

C

The dissenters consider the circumstances of this case "functionally indistinguishable" from multimember districting and at-large voting systems, which are loosely described as "other varieties of gerrymandering." We have considered the constitutionality of these practices in other Fourteenth Amendment cases and have required plaintiffs to demonstrate that the challenged practice has the purpose and effect of diluting a racial group's voting strength. See, *e.g.*, *Rogers v. Lodge*; *Mobile v. Bolden*; *White v. Regester*; *Whitcomb v. Chavis*. At-large and multimember schemes, however, do not classify voters on the basis of race. Classifying citizens by race, as we have said, threatens special harms that are not present in our vote-dilution cases. It therefore warrants different analysis.

Justice SOUTER apparently believes that racial gerrymandering is harmless unless it dilutes a racial group's voting strength. As we have explained, however, reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. Justice SOUTER does not adequately explain why these harms are not cognizable under the Fourteenth Amendment.

The dissenters make two other arguments that cannot be reconciled with our precedents. First, they suggest that a racial gerrymander of the sort alleged here is functionally equivalent to gerrymanders for nonracial purposes, such as political gerrymanders. This Court has held political gerrymanders to be justiciable under the Equal Protection Clause. See *Davis v. Bandemer*. But nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion.

Second, Justice STEVENS argues that racial gerrymandering poses no constitutional difficulties when district lines are drawn to favor the minority, rather than the majority. We have made clear, however, that equal protection analysis "is not dependent on the race of those burdened or benefited by a particular classification." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (plurality opinion). Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.

Finally, nothing in the Court's highly fractured decision in *UJO*—on which the District Court almost exclusively relied, and which the dissenters evidently believe controls—forecloses the claim we recognize today. *UJO* concerned New York's revision of a reapportionment plan to include additional majority-minority districts in response to the Attorney General's denial of administrative preclearance under § 5. In that regard, it closely resembles the present case. But the cases are critically different in another way. The plaintiffs in *UJO*—members of a

Hasidic community split between two districts under New York's revised redistricting plan—did not allege that the plan, on its face, was so highly irregular that it rationally could be understood only as an effort to segregate voters by race. Indeed, the facts of the case would not have supported such a claim. Three Justices approved the New York statute, in part, precisely because it adhered to traditional districting principles:

> [W]e think it... permissible for a State, *employing sound districting principles such as compactness and population equality*, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous *and whose residential patterns afford the opportunity* of creating districts in which they will be in the majority. ([O]pinion of WHITE, J., joined by STEVENS and REHNQUIST, JJ.).[b]

As a majority of the Justices construed the complaint, the *UJO* plaintiffs made a different claim: that the New York plan impermissibly "diluted" their voting strength. Five of the eight Justices who participated in the decision resolved the case under the framework the Court previously had adopted for vote-dilution cases. Three Justices rejected the plaintiffs' claim on the grounds that the New York statute "represented no racial slur or stigma with respect to whites or any other race" and left white voters with better than proportional representation. Two others concluded that the statute did not minimize or cancel out a minority group's voting strength and that the State's intent to comply with the Voting Rights Act, as interpreted by the Department of Justice, "foreclose[d] any finding that [the State] acted with the invidious purpose of discriminating against white voters." (Stewart, J., joined by Powell, J., concurring in judgment).

The District Court below relied on these portions of *UJO* to reject appellants' claim. In our view, the court used the wrong analysis. *UJO*'s framework simply does not apply where, as here, a reapportionment plan is alleged to be so irrational on its face that it immediately offends principles of racial equality. *UJO* set forth a standard under which white voters can establish unconstitutional vote dilution. But it did not purport to overrule *Gomillion* or *Wright*. Nothing in the decision precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification. Because appellants here stated such a claim, the District Court erred in dismissing their complaint.

IV

Justice SOUTER contends that exacting scrutiny of racial gerrymanders under the Fourteenth Amendment is inappropriate because reapportionment "nearly always require[s] some consideration of race for legitimate reasons.... As

b. The emphasis in this quotation is added by Justice O'Connor.

long as members of racial groups have [a] commonality of interest" and "racial bloc voting takes place," he argues, "legislators will have to take race into account" in order to comply with the Voting Rights Act. Justice SOUTER's reasoning is flawed.

Earlier this Term, we unanimously reaffirmed that racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2. See *Growe v. Emison*. That racial bloc voting or minority political cohesion may be found to exist in some cases, of course, is no reason to treat all racial gerrymanders differently from other kinds of racial classification. Justice SOUTER apparently views racial gerrymandering of the type presented here as a special category of "benign" racial discrimination that should be subject to relaxed judicial review. As we have said, however, the very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is "benign." Thus, if appellants' allegations of a racial gerrymander are not contradicted on remand, the District Court must determine whether the General Assembly's reapportionment plan satisfies strict scrutiny. We therefore consider what that level of scrutiny requires in the reapportionment context.

The state appellees suggest that a covered jurisdiction may have a compelling interest in creating majority-minority districts in order to comply with the Voting Rights Act. The States certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied. But in the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits, and what it requires.

For example, on remand North Carolina might claim that it adopted the revised plan in order to comply with the § 5 "nonretrogression" principle.... In *Beer*, we held that a reapportionment plan that created one majority-minority district where none existed before passed muster under § 5 because it improved the position of racial minorities.

Although the Court concluded that the redistricting scheme at issue in *Beer* was nonretrogressive, it did not hold that the plan, for that reason, was immune from constitutional challenge. The Court expressly declined to reach that question. Indeed, the Voting Rights Act and our case law make clear that a reapportionment plan that satisfies § 5 still may be enjoined as unconstitutional. See 42 U.S.C. § 1973c (neither a declaratory judgment by the District Court for the District of Columbia nor preclearance by the Attorney General "shall bar a subsequent action to enjoin enforcement" of new voting practice); *Allen* (after preclearance, "private parties may enjoin the enforcement of the new enactment... in traditional suits attacking its constitutionality"). Thus, we do not read *Beer* or any of our other § 5 cases to give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression. Our conclusion is supported by the plurality opinion in *UJO*, in which four Justices determined that New York's creation of additional majority-minority districts was constitutional because the plaintiffs had failed to demonstrate that the State "did more than the Attorney General was authorized to *require* it to do under the non-

retrogression principle of *Beer*." ([O]pinion of WHITE, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.) (emphasis added).

Before us, the state appellees contend that the General Assembly's revised plan was necessary not to prevent retrogression, but to avoid dilution of black voting strength in violation of § 2, as construed in *Gingles*....

Appellants maintain that the General Assembly's revised plan could not have been required by § 2. They contend that the State's black population is too dispersed to support two geographically compact majority-black districts, as the bizarre shape of District 12 demonstrates, and that there is no evidence of black political cohesion. They also contend that recent black electoral successes demonstrate the willingness of white voters in North Carolina to vote for black candidates. Appellants point out that blacks currently hold the positions of State Auditor, Speaker of the North Carolina House of Representatives, and chair of the North Carolina State Board of Elections. They also point out that in 1990 a black candidate defeated a white opponent in the Democratic Party run-off for a United States Senate seat before being defeated narrowly by the Republican incumbent in the general election. Appellants further argue that if § 2 did require adoption of North Carolina's revised plan, § 2 is to that extent unconstitutional. These arguments were not developed below, and the issues remain open for consideration on remand.

The state appellees alternatively argue that the General Assembly's plan advanced a compelling interest entirely distinct from the Voting Rights Act. We previously have recognized a significant state interest in eradicating the effects of past racial discrimination. But the State must have a "strong basis in evidence for [concluding] that remedial action [is] necessary." *Croson*, *supra*, 488 U.S., at 500.

The state appellees submit that two pieces of evidence gave the General Assembly a strong basis for believing that remedial action was warranted here: the Attorney General's imposition of the § 5 preclearance requirement on 40 North Carolina counties, and the *Gingles* District Court's findings of a long history of official racial discrimination in North Carolina's political system and of pervasive racial bloc voting. The state appellees assert that the deliberate creation of majority-minority districts is the most precise way—indeed the only effective way—to overcome the effects of racially polarized voting. This question also need not be decided at this stage of the litigation. We note, however, that only three Justices in *UJO* were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the requirements of the Voting Rights Act. And those three Justices specifically concluded that race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the State "employ[s] sound districting principles," and only when the affected racial group's "residential patterns afford the opportunity of creating districts in which they will be in the majority." ([O]pinion of WHITE, J., joined by STEVENS and REHNQUIST, JJ.).

V

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for reme-

dial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

In this case, the Attorney General suggested that North Carolina could have created a reasonably compact second majority-minority district in the south-central to southeastern part of the State. We express no view as to whether appellants successfully could have challenged such a district under the Fourteenth Amendment. We also do not decide whether appellants' complaint stated a claim under constitutional provisions other than the Fourteenth Amendment. Today we hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification. If the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest. Accordingly, we reverse the judgment of the District Court and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice WHITE, with whom Justice BLACKMUN and Justice STEVENS join, dissenting.

The facts of this case mirror those presented in *UJO*, where the Court rejected a claim that creation of a majority-minority district violated the Constitution, either as a *per se* matter or in light of the circumstances leading to the creation of such a district. Of particular relevance, five of the Justices reasoned that members of the white majority could not plausibly argue that their influence over the political process had been unfairly cancelled, (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.), or that such had been the State's intent (Stewart, J., concurring in judgment, joined by Powell, J.). Accordingly, they held that plaintiffs were not entitled to relief under the Constitution's Equal Protection Clause. On the same reasoning, I would affirm the district court's dismissal of appellants' claim in this instance.

The Court today chooses not to overrule, but rather to sidestep, *UJO*. It does so by glossing over the striking similarities, focusing on surface differences, most notably the (admittedly unusual) shape of the newly created district, and imagining an entirely new cause of action. Because the holding is limited to such anomalous circumstances, it perhaps will not substantially hamper a State's legitimate efforts to redistrict in favor of racial minorities. Nonetheless, the notion that North Carolina's plan, under which whites remain a voting majority in a disproportionate number of congressional districts, and pursuant to which the State has sent its first black representatives since Reconstruction to the United States Congress, might have violated appellants' constitutional rights is both a fiction and a departure from settled equal protection principles. Seeing no good reason to engage in either, I dissent.

I

A

The grounds for my disagreement with the majority are simply stated: Appellants have not presented a cognizable claim, because they have not alleged a cognizable injury. To date, we have held that only two types of state voting practices could give rise to a constitutional claim. The first involves direct and outright deprivation of the right to vote, for example by means of a poll tax or literacy test. Plainly, this variety is not implicated by appellants' allegations and need not detain us further. The second type of unconstitutional practice is that which "affects the political strength of various groups," *Bolden* (STEVENS, J., concurring in judgment), in violation of the Equal Protection Clause. As for this latter category, we have insisted that members of the political or racial group demonstrate that the challenged action have the intent and effect of unduly diminishing their influence on the political process. Although this severe burden has limited the number of successful suits, it was adopted for sound reasons.

The central explanation has to do with the nature of the redistricting process. As the majority recognizes, "redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." "Being aware," in this context, is shorthand for "taking into account," and it hardly can be doubted that legislators routinely engage in the business of making electoral predictions based on group characteristics—racial, ethnic, and the like.... Because extirpating such considerations from the redistricting process is unrealistic, the Court has not invalidated all plans that consciously use race, but rather has looked at their impact.

Redistricting plans also reflect group interests and inevitably are conceived with partisan aims in mind. To allow judicial interference whenever this occurs would be to invite constant and unmanageable intrusion. Moreover, a group's power to affect the political process does not automatically dissipate by virtue of an electoral loss. Accordingly, we have asked that an identifiable group demonstrate more than mere lack of success at the polls to make out a successful gerrymandering claim. See, *e.g.*, *White v. Regester*; *Whitcomb v. Chavis*.

...Indeed, as a brief survey of decisions illustrates, the Court's gerrymandering cases all carry this theme—that it is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned....

To distinguish a claim that alleges that the redistricting scheme has discriminatory intent and effect from one that does not has nothing to do with dividing racial classifications between the "benign" and the malicious—an enterprise which, as the majority notes, the Court has treated with skepticism. Rather, the issue is whether the classification based on race discriminates against anyone by denying equal access to the political process....

B

The most compelling evidence of the Court's position prior to this day, for it is most directly on point, is *UJO*. The Court characterizes the decision as "highly fractured," but that should not detract attention from the rejection by a majority in *UJO* of the claim that the State's intentional creation of majority-minority districts transgressed constitutional norms. As stated above, five Justices were of the

view that, absent any contention that the proposed plan was adopted with the intent, or had the effect, of unduly minimizing the white majority's voting strength, the Fourteenth Amendment was not implicated. Writing for three members of the Court, I justified this conclusion as follows:

> It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength.

In a similar vein, Justice Stewart was joined by Justice Powell....

Under either formulation, it is irrefutable that appellants in this proceeding likewise have failed to state a claim. As was the case in New York, a number of North Carolina's political subdivisions have interfered with black citizens' meaningful exercise of the franchise, and are therefore subject to §§ 4 and 5 of the Voting Rights Act.... Like New York, North Carolina failed to prove to the Attorney General's satisfaction that its proposed redistricting had neither the purpose nor the effect of abridging the right to vote on account of race or color.... Finally, like New York, North Carolina reacted by modifying its plan and creating additional majority-minority districts.

In light of this background, it strains credulity to suggest that North Carolina's purpose in creating a second majority-minority district was to discriminate against members of the majority group by "impair[ing] or burden[ing their] opportunity...to participate in the political process." [*UJO*] (Stewart, J., concurring in judgment). The State has made no mystery of its intent, which was to respond to the Attorney General's objections, by improving the minority group's prospects of electing a candidate of its choice. I doubt that this constitutes a discriminatory purpose as defined in the Court's equal protection cases—i.e., an intent to aggravate "the unequal distribution of electoral power." *Post* (STEVENS, J., dissenting). But even assuming that it does, there is no question that appellants have not alleged the requisite discriminatory effects. Whites constitute roughly 76 percent of the total population and 79 percent of the voting age population in North Carolina. Yet, under the State's plan, they still constitute a voting majority in 10 (or 83 percent) of the 12 congressional districts. Though they might be dissatisfied at the prospect of casting a vote for a losing candidate—a lot shared by many, including a disproportionate number of minority voters—surely they cannot complain of discriminatory treatment.

II

The majority attempts to distinguish *UJO* by imagining a heretofore unknown type of constitutional claim. In its words, "*UJO* set forth a standard under which white voters can establish unconstitutional vote dilution.... Nothing in the decision precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification." There is no support for this distinction in *UJO*, and no authority in the cases relied on by the Court either. More importantly, the majority's submission does not withstand

analysis. The logic of its theory appears to be that race-conscious redistricting that "segregates" by drawing odd-shaped lines is qualitatively different from race-conscious redistricting that affects groups in some other way. The distinction is without foundation.

A

The essence of the majority's argument is that *UJO* dealt with a claim of vote dilution—which required a specific showing of harm—and that cases such as *Gomillion v. Lightfoot* and *Wright v. Rockefeller* dealt with claims of racial segregation—which did not. I read these decisions quite differently. Petitioners' claim in *UJO* was that the State had "violated the Fourteenth and Fifteenth Amendments by *deliberately revising its reapportionment plan along racial lines*" (emphasis added). They also stated: "Our argument is...that the history of the area demonstrates that there could be—and in fact was—*no reason other than race* to divide the community at this time" (emphasis in original). Nor was it ever in doubt that "the State deliberately used race in a purposeful manner." In other words, the "analytically distinct claim" the majority discovers today was in plain view and did not carry the day for petitioners. The fact that a demonstration of discriminatory effect was required in that case was not a function of the kind of claim that was made. It was a function of the type of injury upon which the Court insisted.

Gomillion is consistent with this view. To begin, the Court's reliance on that case as the font of its novel type of claim is curious. Justice Frankfurter characterized the complaint as alleging a deprivation of the right to vote in violation of the *Fifteenth* Amendment. Regardless whether that description was accurate, it seriously deflates the precedential value which the majority seeks to ascribe to *Gomillion*: As I see it, the case cannot stand for the proposition that the intentional creation of majority-minority districts, without more, gives rise to an equal protection challenge under the Fourteenth Amendment. But even recast as a Fourteenth Amendment case, *Gomillion* does not assist the majority, for its focus was on the alleged *effect* of the city's action, which was to exclude black voters from the municipality of Tuskegee. As the Court noted, the "inevitable effect of this redefinition of Tuskegee's boundaries" was "to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee."...In *Gomillion*, in short, the group that formed the majority at the state level purportedly set out to manipulate city boundaries in order to remove members of the minority, thereby denying them valuable municipal services. No analogous purpose or effect has been alleged in this case.

The only other case invoked by the majority is *Wright v. Rockefeller*. *Wright* involved a challenge to a legislative plan that created four districts. In the Seventeenth, Nineteenth, and Twentieth Districts, Whites constituted respectively 94.9%, 71.5%, and 72.5% of the population. 86.3% of the population in the Eighteenth District was classified as nonwhite or Puerto Rican. The plaintiffs alleged that the plan was drawn with the intent to segregate voters on the basis of race, in violation of the Fourteenth and Fifteenth Amendments. The Court affirmed the District Court's dismissal of the complaint on the ground that plaintiffs had not met their burden of proving discriminatory intent. I fail to see how a decision based on a failure to establish discriminatory *intent* can support the inference that it is unnecessary to prove discriminatory *effect*.

Wright is relevant only to the extent that it illustrates a proposition with which I have no problem: That a complaint stating that a plan has carved out districts on the basis of race *can*, under certain circumstances, state a claim under the Fourteenth Amendment. To that end, however, there must be an allegation of discriminatory purpose and effect, for the constitutionality of a race-conscious redistricting plan depends on these twin elements. In *Wright*, for example, the facts might have supported the contention that the districts were intended to, and did in fact, shield the Seventeenth District from any minority influence and "pack" black and Puerto Rican voters in the Eighteenth, thereby invidiously minimizing their voting strength. In other words, the purposeful creation of a majority-minority district could have discriminatory effect if it is achieved by means of "packing"—i.e., over-concentration of minority voters. In the present case, the facts could sustain no such allegation.

B

Lacking support in any of the Court's precedents, the majority's novel type of claim also makes no sense. As I understand the theory that is put forth, a redistricting plan that uses race to "segregate" voters by drawing "uncouth" lines is harmful in a way that a plan that uses race to distribute voters differently is not, for the former "bears an uncomfortable resemblance to political apartheid." The distinction is untenable.

Racial gerrymanders come in various shades: At-large voting schemes; the fragmentation of a minority group among various districts "so that it is a majority in none," otherwise known as "cracking"; the "stacking" of "a large minority population concentration... with a larger white population"; and, finally, the "concentration of [minority voters] into districts where they constitute an excessive majority," also called "packing." In each instance, race is consciously utilized by the legislature for electoral purposes; in each instance, we have put the plaintiff challenging the district lines to the burden of demonstrating that the plan was meant to, and did in fact, exclude an identifiable racial group from participation in the political process.

Not so, apparently, when the districting "segregates" by drawing odd-shaped lines.[7] In that case, we are told, such proof no longer is needed. Instead, it is the *State* that must rebut the allegation that race was taken into account, a fact that, together with the legislators' consideration of ethnic, religious, and other group characteristics, I had thought we practically took for granted. Part of the explanation for the majority's approach has to do, perhaps, with the emotions stirred by words such as "segregation" and "political apartheid." But their loose and imprecise use by today's majority has, I fear, led it astray. The consideration of race in "segregation" cases is no different than in other race-conscious districting; from the standpoint of the affected groups, moreover, the line-drawings all act in similar fashion. A plan that "segregates" being functionally indistinguishable from

7. I borrow the term "segregate" from the majority, but, given its historical connotation, believe that its use is ill-advised. Nor is it a particularly accurate description of what has occurred. The majority-minority district that is at the center of the controversy is, according to the State, 54.71% African-American. Even if racial distribution was a factor, no racial group can be said to have been "segregated"—i.e., "set apart" or "isolate[d]." Webster's Collegiate Dictionary 1063 (9th ed. 1983).

any of the other varieties of gerrymandering, we should be consistent in what we require from a claimant: Proof of discriminatory purpose and effect.

The other part of the majority's explanation of its holding is related to its simultaneous discomfort and fascination with irregularly shaped districts. Lack of compactness or contiguity, like uncouth district lines, certainly is a helpful indicator that some form of gerrymandering (racial or other) might have taken place and that "something may be amiss." Disregard for geographic divisions and compactness often goes hand in hand with partisan gerrymandering.

But while district irregularities may provide strong indicia of a potential gerrymander, they do no more than that. In particular, they have no bearing on whether the plan ultimately is found to violate the Constitution. Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snake-like, at least so far as the Constitution is concerned and absent any evidence of differential racial impact. The majority's contrary view is perplexing in light of its concession that "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." *Gaffney*. It is shortsighted as well, for a regularly shaped district can just as effectively effectuate racially discriminatory gerrymandering as an odd-shaped one. By focusing on looks rather than impact, the majority "immediately casts attention in the wrong direction—toward superficialities of shape and size, rather than toward the political realities of district composition." R. Dixon, Democratic Representation: Reapportionment in Law and Politics 459 (1968).

Limited by its own terms to cases involving unusually-shaped districts, the Court's approach nonetheless will unnecessarily hinder to some extent a State's voluntary effort to ensure a modicum of minority representation. This will be true in areas where the minority population is geographically dispersed. It also will be true where the minority population is not scattered but, for reasons unrelated to race—for example incumbency protection—the State would rather not create the majority-minority district in its most "obvious" location.[10] When, as is the case here, the creation of a majority-minority district does not unfairly minimize the

10. This appears to be what has occurred in this instance. In providing the reasons for the objection, the Attorney General noted that "[f]or the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district" and that such a district would have been no more irregular than others in the State's plan. North Carolina's decision to create a majority-minority district can be explained as an attempt to meet this objection. Its decision not to create the more compact southern majority-minority district that was suggested, on the other hand, was more likely a result of partisan considerations. Indeed, in a suit brought prior to this one, different plaintiffs charged that District 12 was "grossly contorted" and had "no logical explanation other than incumbency protection and the enhancement of Democratic partisan interests.... The plan... ignores the directive of the [Department of Justice] to create a minority district in the southeastern portion of North Carolina since any such district would jeopardize the reelection of... the Democratic incumbent." With respect to this incident, one writer has observed that "understanding why the configurations are shaped as they are requires us to know at least as much about the interests of incumbent Democratic politicians, as it does knowledge of the Voting Rights Act." Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L.REV. 1237, 1258 (1993). The District Court in *Pope* [*v. Blue*, 809 F.Supp. 392 (W.D.N.Car. 1992), summ. aff'd 113 S.Ct. 30 (1992),] dismissed appellants' claim, reasoning in part that "plaintiffs do not allege, nor can they, that the state's redistricting plan has caused them to be "shut out of the political process.".

voting power of any other group, the Constitution does not justify, much less mandate, such obstruction. We said as much in *Gaffney*:

> [C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

III

Although I disagree with the holding that appellants' claim is cognizable, the Court's discussion of the level of scrutiny it requires warrants a few comments. I have no doubt that a State's compliance with the Voting Rights Act clearly constitutes a compelling interest. Cf. *UJO*. Here, the Attorney General objected to the State's plan on the ground that it failed to draw a second majority-minority district for what appeared to be pretextual reasons. Rather than challenge this conclusion, North Carolina chose to draw the second district. As *UJO* held, a State is entitled to take such action.

The Court, while seemingly agreeing with this position, warns that the State's redistricting effort must be "narrowly tailored" to further its interest in complying with the law. It is evident to me, however, that what North Carolina did was precisely tailored to meet the objection of the Attorney General to its prior plan. Hence, I see no need for a remand at all, even accepting the majority's basic approach to this case.

Furthermore, how it intends to manage this standard, I do not know. Is it more "narrowly tailored" to create an irregular majority-minority district as opposed to one that is compact but harms other State interests such as incumbency protection or the representation of rural interests? Of the following two options—creation of two minority influence districts or of a single majority-minority district—is one "narrowly tailored" and the other not? Once the Attorney General has found that a proposed redistricting change violates § 5's nonretrogression principle in that it will abridge a racial minority's right to vote, does "narrow tailoring" mean that the most the State can do is preserve the *status quo*? Or can it maintain that change, while attempting to enhance minority voting power in some other manner? This small sample only begins to scratch the surface of the problems raised by the majority's test. But it suffices to illustrate the unworkability of a standard that is divorced from any measure of constitutional harm. In that, State efforts to remedy minority vote dilution are wholly unlike what typically has been labeled "affirmative action." To the extent that no other racial group is injured, remedying a Voting Rights Act violation does not involve preferential treatment. It involves, instead, an attempt to *equalize* treatment, and to provide minority voters with an effective voice in the political process. The Equal Protection Clause of the Constitution, surely, does not stand in the way.

IV

Since I do not agree that petitioners alleged an Equal Protection violation and because the Court of Appeals faithfully followed the Court's prior cases, I dissent and would affirm the judgment below.

Justice BLACKMUN, dissenting.

I join Justice WHITE's dissenting opinion. I did not join Part IV of his opinion in *UJO* because I felt that its "additional argument" was not necessary to decide that case. I nevertheless agree that the conscious use of race in redistricting does not violate the Equal Protection Clause unless the effect of the redistricting plan is to deny a particular group equal access to the political process or to minimize its voting strength unduly. It is particularly ironic that the case in which today's majority chooses to abandon settled law and to recognize for the first time this "analytically distinct" constitutional claim is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction. I dissent.

Justice STEVENS, dissenting.

For the reasons stated by Justice WHITE, the decision of the District Court should be affirmed....

I believe that the Equal Protection Clause is violated when the State creates the kind of uncouth district boundaries seen in *Karcher*, *Gomillion*, and this case, for the sole purpose of making it more difficult for members of a minority group to win an election. The duty to govern impartially is abused when a group with power over the electoral process defines electoral boundaries solely to enhance its own political strength at the expense of any weaker group. That duty, however, is not violated when the majority acts to facilitate the election of a member of a group that lacks such power because it remains underrepresented in the state legislature—whether that group is defined by political affiliation, by common economic interests, or by religious, ethnic, or racial characteristics. The difference between constitutional and unconstitutional gerrymanders has nothing to do with whether they are based on assumptions about the groups they affect, but whether their purpose is to enhance the power of the group in control of the districting process at the expense of any minority group, and thereby to strengthen the unequal distribution of electoral power....

Finally, we must ask whether otherwise permissible redistricting to benefit an underrepresented minority group becomes impermissible when the minority group is defined by its race. The Court today answers this question in the affirmative, and its answer is wrong. If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause. A contrary conclusion could only be described as perverse.

Justice SOUTER, dissenting.

I

Until today, the Court has analyzed equal protection claims involving race in electoral districting differently from equal protection claims involving other forms of governmental conduct, and before turning to the different regimes of analysis it will be useful to set out the relevant respects in which such districting differs from the characteristic circumstances in which a State might otherwise consciously consider race. Unlike other contexts in which we have addressed the State's con-

scious use of race, electoral districting calls for decisions that nearly always require some consideration of race for legitimate reasons where there is a racially mixed population. As long as members of racial groups have the commonality of interest implicit in our ability to talk about concepts like "minority voting strength," and "dilution of minority votes," and as long as racial bloc voting takes place, legislators will have to take race into account in order to avoid dilution of minority voting strength in the districting plans they adopt. One need look no further than the Voting Rights Act to understand that this may be required, and we have held that race may constitutionally be taken into account in order to comply with that Act. *UJO*.

A second distinction between districting and most other governmental decisions in which race has figured is that those other decisions using racial criteria characteristically occur in circumstances in which the use of race to the advantage of one person is necessarily at the obvious expense of a member of a different race....

In districting, by contrast, the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others. All citizens may register, vote, and be represented. In whatever district, the individual voter has a right to vote in each election, and the election will result in the voter's representation.

II

Our different approaches to equal protection in electoral districting and nondistricting cases reflect these differences. There is a characteristic coincidence of disadvantageous effect and illegitimate purpose associated with the State's use of race in those situations in which it has immediately triggered at-least heightened scrutiny (which every Member of the Court to address the issue has agreed must be applied even to race-based classifications designed to serve some permissible state interest). Presumably because the legitimate consideration of race in a districting decision is usually inevitable under the Voting Rights Act when communities are racially mixed, however, and because, without more, it does not result in diminished political effectiveness for anyone, we have not taken the approach of applying the usual standard of such heightened "scrutiny" to race-based districting decisions. To be sure, as the Court says, it would be logically possible to apply strict scrutiny to these cases (and to uphold those uses of race that are permissible). But just because there frequently will be a constitutionally permissible use of race in electoral districting, as exemplified by the consideration of race to comply with the Voting Rights Act (quite apart from the consideration of race to remedy a violation of the Act or the Constitution), it has seemed more appropriate for the Court to identify impermissible uses by describing particular effects sufficiently serious to justify recognition under the Fourteenth Amendment. Under our cases there is in general a requirement that in order to obtain relief under the Fourteenth Amendment, the purpose and effect of the districting must be to devalue the effectiveness of a voter compared to what, as a group member, he would otherwise be able to enjoy. See *UJO*.

A consequence of this categorical approach is the absence of any need for further searching "scrutiny" once it has been shown that a given districting decision has a purpose and effect falling within one of those categories. If a cognizable harm like dilution or the abridgment of the right to participate in the electoral

process is shown, the districting plan violates the Fourteenth Amendment. If not, it does not. Under this approach, in the absence of an allegation of such cognizable harm, there is no need for further scrutiny because a gerrymandering claim cannot be proven without the element of harm. Nor if dilution is proven is there any need for further constitutional scrutiny; there has never been a suggestion that such use of race could be justified under any type of scrutiny, since the dilution of the right to vote can not be said to serve any legitimate governmental purpose.

There is thus no theoretical inconsistency in having two distinct approaches to equal protection analysis, one for cases of electoral districting and one for most other types of state governmental decisions. Nor, because of the distinctions between the two categories, is there any risk that Fourteenth Amendment districting law as such will be taken to imply anything for purposes of general Fourteenth Amendment scrutiny about "benign" racial discrimination, or about group entitlement as distinct from individual protection, or about the appropriateness of strict or other heightened scrutiny....[7]

III

The Court appears to accept this, and it does not purport to disturb the law of vote dilution in any way. Instead, the Court creates a new "analytically distinct" cause of action, the principal element of which is that a districting plan be "so bizarre on its face" or "irrational on its face" or "extremely irregular on its face," that it "rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification." Pleading such an element, the Court holds, suffices without a further allegation of harm, to state a claim upon which relief can be granted under the Fourteenth Amendment.

It may be that the terms for pleading this cause of action will be met so rarely that this case will wind up an aberration. The shape of the district at issue in this case is indeed so bizarre that few other examples are ever likely to carry the unequivocal implication of impermissible use of race that the Court finds here....

Nonetheless, in those cases where this cause of action is sufficiently pleaded, the State will have to justify its decision to consider race as being required by a compelling state interest, and its use of race as narrowly tailored to that interest. Meanwhile, in other districting cases, specific consequential harm will still need to be pleaded and proven, in the absence of which the use of race may be invalidated only if it is shown to serve no legitimate state purpose.

The Court offers no adequate justification for treating the narrow category of bizarrely shaped district claims differently from other districting claims. The only justification I can imagine would be the preservation of "sound districting principles," *UJO*, such as compactness and contiguity. But as Justice WHITE points out and as the Court acknowledges, we have held that such principles are not

7. The Court accuses me of treating the use of race in electoral redistricting as a "benign" form of discrimination. What I am saying is that in electoral districting there frequently are permissible uses of race, such as its use to comply with the Voting Rights Act, as well as impermissible ones. In determining whether a use of race is permissible in cases in which there is a bizarrely-shaped district, we can readily look to its effects, just as we would in evaluating any other electoral districting scheme.

constitutionally required, with the consequence that their absence cannot justify the distinct constitutional regime put in place by the Court today. Since there is no justification for the departure here from the principles that continue to govern electoral districting cases generally in accordance with our prior decisions, I would not respond to the seeming egregiousness of the redistricting now before us by untethering the concept of racial gerrymander in such a case from the concept of harm exemplified by dilution. In the absence of an allegation of such harm, I would affirm the judgment of the District Court. I respectfully dissent.

Notes and Questions

1. A number of writers have criticized *Shaw*, but none more strongly than A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM LAW REVIEW 1593, 1603 (1994):

> With plaintiffs' urging, the Court has created law that could make *Shaw v. Reno* equivalent for the civil rights jurisprudence of our generation to what *Plessy v. Ferguson* and *Dred Scott v. Sandford* were for prior generations.

Critics have questioned not only Justice O'Connor's constitutional doctrine, but her rhetoric.

> However race-conscious the General Assembly had been, and it concededly had drawn the plan with the intent to create two majority-black districts, it had not in fact segregated the races into separate districts. Consider the racial composition of the two districts in which the *Shaw* plaintiffs lived. House District 2's population was 76.23 percent white and 21.94 percent black; House District 12's population was 41.80 percent white and 56.63 percent black. To say that either district even remotely resembles "political apartheid"—especially given that House District 2, where a majority of the *Shaw* plaintiffs lived, was a nearly perfect mirror of the state's overall racial makeup—would be risible if it were not so pernicious.

Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUPREME COURT REVIEW 245, 282. T.Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICHIGAN LAW REVIEW 588, 612 (1993), add that "the pejorative characterization [i.e., "political apartheid"] equates the attempt to ensure representation of underrepresented minority groups with attempts to deny racially dominated groups a role in democratic governance."

Aleinikoff and Issacharoff also challenge a number of the assumptions that underlie Justice O'Connor's reasoning:

> We are also troubled by the casual empirical assumptions of the Court's analysis. What is the evidence that race-conscious districting exacerbates racial bloc voting, or that it sends a message to an elected representative that she need only represent members of her group? There is only rudimentary evidence of the relative quality of representation and

> responsiveness in racially drawn districts, none of which is referred to by the Court, and none of which supports the categorical assertion that representation from such districts is fundamentally different from that afforded other constituent groups who form a majority in a congressional district. The Court's description of democratic legitimacy also seems rather thin. It is certainly arguable that democratic processes are enhanced rather than degraded when previously excluded groups are able to elect representatives of their choice, even if those representatives primarily seek to further the interests of that constituency.

Id. at 612–13.

2. Justice White dissents on the ground that plaintiffs did not allege a "cognizable injury." For a redistricting plan to create such an injury, he says, it must "have the intent and effect of unduly diminishing [plaintiffs'] influence on the political process." The majority responds that plaintiffs have raised a claim under the Equal Protection Clause that is "distinct" from vote dilution claims. What kind of claim is this? One explanation is suggested by Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICHIGAN LAW REVIEW 483, 506–09 (1993):

> One can only understand *Shaw*, we believe, in terms of a view that what we call *expressive* harms are constitutionally cognizable. An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the *meaning* of a governmental action is just as important as what that action *does*. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values. On this unusual conception of constitutional harm, when a governmental action expresses disrespect for such values, it can violate the Constitution.
>
> [*Shaw*] becomes intelligible only if one recognizes that it rests on just this concern for expressive harms. *Shaw* validates such harms as constitutionally cognizable, along with more familiar, concrete, material injuries. Indeed, close attention to the language of Justice O'Connor's opinion reveals a constant struggle to articulate exactly these sorts of expressive harms. Thus, the opinion is laden with references to the social perceptions, the messages, and the governmental reinforcement of values that the Court believes North Carolina's districting scheme conveys. There is simply no way to make sense of these references, which give the opinion its character and are central to its holding, without recognizing that the decision is grounded in concern for expressive harms. This conception of constitutionally cognizable harms explains why the Court is adamant that "reapportionment is one area in which appearances do matter." If they do, it must be because, even apart from any concrete harm to individual voters, such appearances themselves express a value structure that offends constitutional principles.
>
> *Shaw* therefore rests on the principle that, when government appears to use race in the redistricting context in a way that subordinates all

other relevant values, the state has impermissibly endorsed too dominant a role for race. The constitutional harm must lie in this endorsement itself: the very expression of this kind of value reductionism becomes the constitutional violation.

3. Pildes and Niemi's concept of expressive harm may provide one answer to an objection often raised against the analysis in *Shaw*, namely, that if neither race-conscious districting nor noncompact districts are unconstitutional in themselves, it is hard to see why they are unconstitutional in combination. As Justice White states the point in his *Shaw* dissent:

> [D]istrict irregularities...have no bearing on whether the plan ultimately is found to violate the Constitution. Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snake-like, at least so far at the Constitution is concerned and absent any evidence of differential racial impact. The majority's contrary view is perplexing in light of its concession that "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." *Gaffney*.

The concept of expressive harm, if accepted, may justify upholding the race-based district that is regularly shaped and therefore does not "express" a single-minded concern with race while striking down the race-based district that, in Justice O'Connor's words, is "so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e]...voters' on the basis of race."

However, this explanation underlines a different objection to *Shaw*, that it seems to be based on a false premise. Consider the background to the creation of the 12th congressional district, described in the ALMANAC OF AMERICAN POLITICS, set forth above prior to the *Shaw* decision. The race-based decision *whether* to create a second majority-minority district was imposed on North Carolina, but the decision *how* to create that district, by means of the extremely irregular shape, was shaped by partisan political considerations. Thus, the assumption that race was solely responsible for the odd shape is incorrect. As Karlan, 1993 SUPREME COURT REVIEW at 283–84 writes:

> Even if political gerrymandering cannot serve as a justification for race-consciousness, proof that it played a role in the choice among configurations logically negates the first element of the plaintiffs' case, namely, showing that the legislation "rationally cannot be understood as anything other than an effort to separate voters." Given her endorsement of partisan gerrymandering in *Bandemer*, Justice O'Connor, at least, should be reluctant to strike down an apportionment whose irregular lines are the function of political, rather than racial, concerns.

4. *Shaw* is undoubtedly regarded as a "conservative" decision. The five-member majority was composed of the justices generally regarded as conservatives, and the insistence on treating "benign" and malignant racial classifications as equally suspect is consistent with a prominent theme of contemporary conservatism. Liberals, for their part, are understandably concerned that the last para-

graph of Justice O'Connor's opinion suggests the possibility that race-based districting, even in the absence of irregular shapes, might be unconstitutional. If so, presumably the regime that the Court itself established in *Gingles* would be obliterated.

Nevertheless, *Shaw* is by no means a pure gain, measured by conservative values. One such value is the preservation of the role of the states in the federal structure. The Voting Rights Act in general, and amended Section 2 as interpreted in *Gingles* in particular, intrudes into the crucial realm of the state's freedom to structure its own political system.[c] Most Americans would now agree that the intrusion was justified by the overriding need to assure the extension of voting rights, though of course they disagree over the appropriate degree of that intrusion. The intrusion is limited, however, in the sense that so long as the state complies, it is otherwise free to structure its political system as it chooses.

Shaw changes the situation. Assuming that the Court is not inclined to declare the Voting Rights Act and its own handiwork in *Gingles* unconstitutional, the new situation is that race-based districting is *required* up to the point mandated by federal law, but sharply *restricted* beyond the federal mandate. Thus, the zone of state discretion with respect to one important factor in districting is narrowed. Indeed, one lower court may have eliminated that zone entirely, by interpreting *Shaw* to hold that "any plan that entails more racial gerrymandering than is absolutely necessary to pass Voting Rights Act muster is potentially unconstitutional." *Hays v. Louisiana*, 839 F.Supp. 1188, 1197 n.21 (W.D.La. 1993), prob. juris. noted, 115 S.Ct. 687 (1994). Furthermore, given Justice O'Connor's willingness to assume that the odd shape of North Carolina's 12th Congressional District must "rationally" be explained as motivated solely by race in the face of a record suggesting that the odd shape resulted from the state's desire to accommodate its own political goals with federally-imposed racial requirements, *Shaw* threatens to restrict state autonomy over districting beyond questions of race.

Related to these questions of federalism is a possible conflict between *Shaw* and conservative ideas regarding the role of race and ethnicity in politics. Peter Skerry, MEXICAN AMERICANS: THE AMBIVALENT MINORITY 11–15 (1993), draws a distinction between what he labels "minority" and "ethnic" groups. The terms do not necessarily refer to different groups but to different conceptions of how the groups do or should operate within the political system and how the system does or should protect the groups' rights and interests. The term "minority," Skerry writes, "has come to denote...a victimized racial claimant group." Id. at 11. In contrast, an ethnic group is not defined by societal oppression or discrimination, but by the group itself, whose members hold "a positive identification with [the group's] ethnic and cultural heritage." Id. at 15. Conservatives—though not only conservatives—may find it desirable, to the maximum extent possible, for groups to achieve social justice and promote their interests by acting, in Skerry's terms, as "ethnic" rather than "minority" groups. Indeed, a major difference between con-

c. Admittedly, the congressional districts under challenge in *Shaw* are part of the national system of government, not that of the state, and the federalism concerns expressed in this Note are perhaps minimal. However, nothing in *Shaw* suggests that its doctrine is limited to congressional districting.

servatives and liberals on racial issues might be described as a difference over the degree to which the "minority" group conception is necessary for the accomplishment of social justice.

In the context of voting rights issues, the "minority" approach is to provide the groups in question with legal rights, supreme over the state's political determinations, to prescribed forms of representation. The "ethnic" approach is for the groups to compete within the state's political process to achieve as best they can the forms of representation that they prefer. If, in the post-*Shaw* regime, Congress has free rein to guarantee representational preference to racial and language groups, but the groups are constitutionally barred from competing for additional favorable representation within the state political systems, then the Constitution will be enshrining the "minority" approach and banning the "ethnic" approach. This appears to be a perverse result, especially from a conservative perspective.

5. Whatever values *Shaw* promotes and whatever the soundness of its analysis, the novelty of the decision poses a number of problems for its implementation. What must the plaintiff demonstrate to show a prima facie violation of the Equal Protection Clause under *Shaw*? If a prima facie violation is established, what would constitute a compelling state interest in defense of the districting plan's constitutionality? The first of these questions will be considered in this Note, and the second in the following Note.

With respect to the showing required for a prima facie violation, the courts have considered two related questions: 1) is the irregular shape of the district in question a part of the violation and therefore essential to a prima facie showing or is it simply an indicator of race-based districting? 2) must the district's configuration be attributable solely to racial considerations, or is it sufficient if race was considered? If the latter, how major a consideration must race have been?

On the first question, lower courts have tended to assume that an irregular shape is not necessary for a prima facie showing that a race-based district is unconstitutional.

> The purpose of scrutinizing a district's shape is to glean the intent of the legislature by working backwards: if the district appears uninfluenced by accepted districting principles, as evidenced by its shape, then it must have been influenced by unaccepted ones. The Supreme Court explicitly approved this inferential approach because legislative intent is notoriously difficult—if not logically impossible—to ascertain, and in redistricting cases, the district itself may provide the only firm evidence, albeit circumstantial, of that intent. What the Supreme Court did not do is imbue geography with constitutional significance; the requirement for a successful Equal Protection claim is still intent, however proved. Foreclosing production of direct evidence of intent until Plaintiffs convince the Court that a district looks so weird that race must have dominated its creation is not what *Shaw* intended. That approach would make district shape a (previously unheard of) threshold to constitutional claims.

Johnson v. Miller, 864 F.Supp. 1354, 1374 (S.D.Ga. 1994), prob. juris. noted, 115 S.Ct. 713 (1995). See also *Shaw v. Hunt*, 861 F.Supp. 408, 431 (E.D.N.Car. 1994); *Hays v. Louisiana*, 839 F.Supp. 1188, 1195 (W.D.La. 1993), prob. juris. noted, 115 S.Ct. 687 (1994).

Although this position may be supported by logic, it is hard to square with the majority opinion in *Shaw*, as Pildes & Niemi, 92 MICHIGAN LAW REVIEW at 495–96, demonstrate:

> First, if race-conscious districting per se were the constitutional problem, it is difficult to rationalize the architecture of the decision. The keystone in *Shaw* is the "highly irregular" shape of District 12. The negative pregnant, then, is that "regular" districts designed for race-conscious reasons do not raise similar constitutional concerns. Second, the Court's analysis builds on major precedents [especially *UJO*] establishing that intentional race-conscious districting is not inherently unconstitutional. The Court finds constraints that apply in *Shaw* within these precedents or concludes that these cases address a distinct kind of claim and hence do not apply; it does not, however, call these decisions into question. Third, at several points, the Court suggests that race-conscious districting is neither problematic nor a trigger for strict judicial scrutiny. In addition, compliance with the VRA and *Gingles* necessarily requires race-conscious districting; *Shaw* does not suggest, at least directly, that the Court was questioning the restructuring of the political process that has resulted from reliance on the VRA and *Gingles*. At least to the extent race consciousness arises in connection with VRA compliance, *Shaw* appears to accept it.

Judicial views have differed over the extent to which racial considerations must have dictated the configuration of a district. In *Johnson v. Miller*, 864 F.Supp. at 1371–72, the Georgia court described opposing views and purported to find a middle ground:

> There has been some debate over the necessary prominence of race in legislative deliberations before it can be found that the redistricting plan is "unexplainable on grounds other than race," and thus subject to strict scrutiny. There are three possible solutions. Defendants in the instant case, along with some district courts, argue that race must have been the sole motivation behind a particular district shape before strict scrutiny is appropriate.... See *Bridgeport Coalition v. City of Bridgeport*, 26 F.3d 271 (2d Cir. 1994) (finding that a lower court order did not transgress *Shaw* because it did not instruct the City Council to redistrict *solely* on racial grounds) (emphasis added); *DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D.Cal. 1994)(stating, for example, "*Shaw* held when districts are drawn in such an extremely irregular fashion as to be unexplainable, other than being based *solely* on race, a claim under the Equal Protection Clause for racial gerrymandering can be stated.") (emphasis added).
>
> A second school teaches that race need only have been a recognizable factor—not the sole or dominant one—before a redistricting plan is constitutionally suspect. See *Hays v. Louisiana*, 839 F.Supp. at 1202; *Shaw v. Hunt*, 861 F.Supp. at 431....
>
> We feel that a better approach...is that, in order to invoke strict scrutiny, it must be shown that race was the substantial or motivating consideration in creation of the district in question. That term requires

> that the legislature (a) was consciously influenced by race, and (b) while other considerations may also have consciously influenced the district shape, race was the overriding, predominant force determining the lines of the district. If race, however deliberately used, was one factor among many of equal or greater significance to the drafters, the plan is not a racial gerrymander/racial classification subject to strict scrutiny.

6. If a prima facie violation of the Equal Protection Clause is found, what is necessary for the state's plan to survive "strict scrutiny"? Litigation of this question to date has centered on the state's desire to comply with Section 2 of the Voting Rights Act or to obtain preclearance under Section 5. In the *Shaw* remand, the court concluded that a state has a compelling interest in engaging in race-based districting when it has a "strong basis in evidence" for believing that such districting is necessary to avoid a violation of the Voting Rights Act, and that the state

> has a "strong basis in evidence" for concluding that it must engage in race-based districting to comply with § 5 whenever the Justice Department has refused to preclear a plan it has proposed for the same round of redistricting on the ground that it fails to satisfy the § 5 standard, and the state reasonably concludes, after conducting its own independent reassessment of the rejected plan in light of the concerns identified by the Justice Department, that the Justice Department's conclusion is legally and factually supportable.

Shaw v. Hunt, 861 F.Supp. at 443. In the Georgia case, the court seems to have applied a stricter standard. A race-based plan cannot be upheld on the ground that it is "narrowly tailored" to further the state's compelling interest in obtaining preclearance unless the Justice Department required the majority-minority districts and unless the court actually determines the districts were required by the Voting Rights Act. *Johnson v. Miller*, 864 F.Supp. at 1381–83.

If the court finds that the state had a compelling interest in creating a given number of majority-minority districts, does the state's plan promote this interest in a "narrowly tailored" manner if the shapes of the districts are more irregular than was necessary to meet the Voting Rights Act's quota? This question was answered in the negative in *Vera v. Richards*, 861 F.Supp. 1304, 1343–44 (S.D.Tex. 1994):

> Because a *Shaw* claim embraces the district's appearance as well as its racial construction, narrow tailoring must take both these elements into account. That is, to be narrowly tailored, a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.... Where obvious alternatives to a racially offensive districting scheme exist, the bizarre districts are not narrowly tailored.

The opposite conclusion was reached in *Shaw v. Hunt*, 861 F.Supp. at 449:

> [W]e cannot agree that a race-based redistricting plan imposes an unacceptable burden upon third parties simply because it deviates from traditional notions of geographical compactness, contiguity, and respect for the integrity of political subdivisions, which are not themselves consti-

tutionally-mandated districting principles, to a greater degree than a federal court may think was necessary to accomplish the state's compelling purpose.

Under the view taken in *Vera*, *supra*, a state that is required to create one or more majority-minority districts because of racially polarized voting and residential concentration of minority population will be subject to an apparently strict, constitutionally-imposed compactness requirement that will be inapplicable to a state that has no obligation to create a majority-minority district. Is there any justification for this disparity in constitutional requirements?

7. The lower court on remand in *Shaw* upheld the North Carolina congressional plan on the ground that it was narrowly tailored to further the state's compelling interest in complying with the Voting Rights Act and obtaining preclearance. Other courts have struck down congressional districts on the basis of *Shaw* in Louisiana, Texas, and Georgia. The Supreme Court has granted review and stayed the lower court orders in Louisiana and Georgia. Supreme Court review has been sought in the other cases.

8. On June 29, 1995, the Supreme Court issued decisions in the Georgia and Louisiana cases.[a] In the Louisiana case, *United States v. Hays*, — S.Ct. —, 63 U.S.L.W. 4679 (1995), the Court unanimously ruled that the plaintiffs had no standing, because they did not reside in the congressional district that they contended was racially gerrymandered. In the Georgia case, which follows, the Court reached the merits and affirmed the lower court's ruling that the Georgia congressional districts violated the Equal Protection Clause under the doctrine announced in *Shaw*.

Miller v. Johnson

— S.Ct. — , 63 U.S.L.W. 4726 (1995)

JUSTICE KENNEDY delivered the opinion of the Court.

The constitutionality of Georgia's congressional redistricting plan is at issue here. In *Shaw v. Reno*, we held that a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race. The question we now decide is whether Georgia's new Eleventh District gives rise to a valid equal protection claim under the principles announced in *Shaw*, and, if so, whether it can be sustained nonetheless as narrowly tailored to serve a compelling governmental interest.

I

A

[The Equal Protection Clause's] central mandate is racial neutrality in governmental decisionmaking.... Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest.

a. This volume was already in page proofs when the Supreme Court issued its decisions. No revisions of this chapter have been attempted, other than the insertion at this point of an edited version of *Miller v. Johnson*, without the usual notes and questions following the decision—perhaps to the reader's relief.

In *Shaw* we recognized that these equal protection principles govern a State's drawing of congressional districts, though, as our cautious approach there discloses, application of these principles to electoral districting is a most delicate task....

This case requires us to apply the principles articulated in *Shaw* to the most recent congressional redistricting plan enacted by the State of Georgia.

B

In 1965, the Attorney General designated Georgia a covered jurisdiction under § 4(b) of the Voting Rights Act....

Between 1980 and 1990, one of Georgia's 10 congressional districts was a majority-black district, that is, a majority of the district's voters were black. The 1990 Decennial Census indicated that Georgia's population of 6,478,216 persons, 27% of whom are black, entitled it to an additional eleventh congressional seat, prompting Georgia's General Assembly to redraw the State's congressional districts. Both the House and the Senate adopted redistricting guidelines which, among other things, required single-member districts of equal population, contiguous geography, nondilution of minority voting strength, fidelity to precinct lines where possible, and compliance with §§ 2 and 5 of the Act. Only after these requirements were met did the guidelines permit drafters to consider other ends, such as maintaining the integrity of political subdivisions, preserving the core of existing districts, and avoiding contests between incumbents.

A special session opened in August 1991, and the General Assembly submitted a congressional redistricting plan to the Attorney General for preclearance on October 1, 1991. The legislature's plan contained two majority-minority districts, the Fifth and Eleventh, and an additional district, the Second, in which blacks comprised just over 35% of the voting age population. Despite the plan's increase in the number of majority-black districts from one to two and the absence of any evidence of an intent to discriminate against minority voters, the Department of Justice refused preclearance on January 21, 1992. The Department's objection letter noted a concern that Georgia had created only two majority-minority districts, and that the proposed plan did not "recognize" certain minority populations by placing them in a majority-black district.

The General Assembly returned to the drawing board. A new plan was enacted and submitted for preclearance. This second attempt assigned the black population in Central Georgia's Baldwin County to the Eleventh District and increased the black populations in the Eleventh, Fifth and Second Districts. The Justice Department refused preclearance again, relying on alternative plans proposing three majority-minority districts. One of the alternative schemes relied on by the Department was the so-called "max-black" plan, drafted by the American Civil Liberties Union (ACLU) for the General Assembly's black caucus. The key to the ACLU's plan was the "Macon/Savannah trade." The dense black population in the Macon region would be transferred from the Eleventh District to the Second, converting the Second into a majority-black district, and the Eleventh District's loss in black population would be offset by extending the Eleventh to include the black populations in Savannah. Pointing to the General Assembly's refusal to enact the Macon/Savannah swap into law, the Justice Department concluded that Georgia had "failed to explain adequately" its failure to create a third majority-minority district. The State did not seek a declaratory judgment from the District Court for the District of Columbia.

Twice spurned, the General Assembly set out to create three majority-minority districts to gain preclearance. Using the ACLU's "max-black" plan as its benchmark, the General Assembly enacted a plan that

> bore all the signs of [the Justice Department's] involvement: The black population of Meriwether County was gouged out of the Third District and attached to the Second District by the narrowest of land bridges; Effingham and Chatham Counties were split to make way for the Savannah extension, which itself split the City of Savannah; and the plan as a whole split 26 counties, 23 more than the existing congressional districts.

The new plan also enacted the Macon/Savannah swap necessary to create a third majority-black district. The Eleventh District lost the black population of Macon, but picked up Savannah, thereby connecting the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture. In short, the social, political and economic makeup of the Eleventh District tells a tale of disparity, not community. As the attached appendices attest,

> [t]he populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors....
>
> The dense population centers of the approved Eleventh District were all majority-black, all at the periphery of the district, and in the case of Atlanta, Augusta and Savannah, all tied to a sparsely populated rural core by even less populated land bridges. Extending from Atlanta to the Atlantic, the Eleventh covered 6,784.2 square miles, splitting eight counties and five municipalities along the way.

The *Almanac of American Politics* has this to say about the Eleventh District: "Geographically, it is a monstrosity, stretching from Atlanta to Savannah. Its core is the plantation country in the center of the state, lightly populated, but heavily black. It links by narrow corridors the black neighborhoods in Augusta, Savannah and southern DeKalb County." Georgia's plan included three majority-black districts, though, and received Justice Department preclearance on April 2, 1992.

Elections were held under the new congressional redistricting plan on November 4, 1992, and black candidates were elected to Congress from all three majority-black districts. On January 13, 1994, appellees, five white voters from the Eleventh District, filed this action against various state officials (Miller Appellants) in the United States District Court for the Southern District of Georgia. As residents of the challenged Eleventh District, all appellees had standing. See *United States v. Hays*. Their suit alleged that Georgia's Eleventh District was a racial gerrymander and so a violation of the Equal Protection Clause as interpreted in *Shaw*....

II

A

Finding that the "evidence of the General Assembly's intent to racially gerrymander the Eleventh District is overwhelming, and practically stipulated by the

parties involved," the District Court held that race was the predominant, overriding factor in drawing the Eleventh District. Appellants do not take issue with the court's factual finding of this racial motivation. Rather, they contend that evidence of a legislature's deliberate classification of voters on the basis of race cannot alone suffice to state a claim under *Shaw*. They argue that, regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race, and that appellees failed to make that showing here. Appellants' conception of the constitutional violation misapprehends our holding in *Shaw* and the Equal Protection precedent upon which *Shaw* relied.

Shaw recognized a claim "analytically distinct" from a vote dilution claim. Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device "to minimize or cancel out the voting potential of racial or ethnic minorities," *Bolden*, an action disadvantaging voters of a particular race, the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches and schools, so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race. The idea is a simple one: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'CONNOR, J., dissenting). When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw*....

Our observation in *Shaw* of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation. Nor was our conclusion in *Shaw* that in certain instances a district's appearance (or, to be more precise, its appearance in combination with certain demographic evidence) can give rise to an equal protection claim a holding that bizarreness was a threshold showing, as appellants believe it to be. Our circumspect approach and narrow holding in *Shaw* did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. The logical implication, as courts applying *Shaw* have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting.

Our reasoning in *Shaw* compels this conclusion. We recognized in *Shaw* that, outside the districting context, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object. In the rare case, where the effect of government action is a pattern "unexplainable on grounds other than race," "[t]he evidentiary inquiry is.... relatively easy." As early as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court

recognized that a laundry permit ordinance was administered in a deliberate way to exclude all Chinese from the laundry business; and in *Gomillion v. Lightfoot*, the Court concluded that the redrawing of Tuskegee, Alabama's municipal boundaries left no doubt that the plan was designed to exclude blacks. Even in those cases, however, it was the presumed racial purpose of state action, not its stark manifestation, that was the constitutional violation. Patterns of discrimination as conspicuous as these are rare, and are not a necessary predicate to a violation of the Equal Protection Clause. In the absence of a pattern as stark as those in *Yick Wo* or *Gomillion*, "impact alone is not determinative, and the Court must look to other evidence" of race-based decisionmaking.

Shaw applied these same principles to redistricting. "In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e].... voters' on the basis of race." *Shaw*. In other cases, where the district is not so bizarre on its face that it discloses a racial design, the proof will be more "difficul[t]." Ibid. Although it was not necessary in *Shaw* to consider further the proof required in these more difficult cases, the logical import of our reasoning is that evidence other than a district's bizarre shape can be used to support the claim.

Appellants and some of their *amici* argue that the Equal Protection Clause's general proscription on race-based decisionmaking does not obtain in the districting context because redistricting by definition involves racial considerations. Underlying their argument are the very stereotypical assumptions the Equal Protection Clause forbids. It is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition, but it does not follow from this that individuals of the same race share a single political interest. The view that they do is "based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens," *Metro Broadcasting* (KENNEDY, J., dissenting), the precise use of race as a proxy the Constitution prohibits. Nor can the argument that districting cases are excepted from standard equal protection precepts be resuscitated by *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, where the Court addressed a claim that New York violated the Constitution by splitting a Hasidic Jewish community in order to include additional majority-minority districts. As we explained in *Shaw*, a majority of the Justices in *UJO* construed the complaint as stating a vote dilution claim, so their analysis does not apply to a claim that the State has separated voters on the basis of race. To the extent any of the opinions in that "highly fractured decision," id., can be interpreted as suggesting that a State's assignment of voters on the basis of race would be subject to anything but our strictest scrutiny, those views ought not be deemed controlling.

In sum, we make clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness. Today's case requires us further to consider the requirements of the proof necessary to sustain this equal protection challenge.

B

Federal court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that "reapportionment is pri-

marily the duty and responsibility of the State." *Chapman v. Meier*, 420 U.S. 1, 27 (1975). Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests. Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed. The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. *Shaw*. The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines." *Shaw*. These principles inform the plaintiff's burden of proof at trial. Of course, courts must also recognize these principles, and the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed.

In our view, the District Court applied the correct analysis, and its finding that race was the predominant factor motivating the drawing of the Eleventh District was not clearly erroneous. The court found it was "exceedingly obvious" from the shape of the Eleventh District, together with the relevant racial demographics, that the drawing of narrow land bridges to incorporate within the District outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district. Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer. Although this evidence is quite compelling, we need not determine whether it was, standing alone, sufficient to establish a *Shaw* claim that the Eleventh District is unexplainable other than by race. The District Court had before it considerable additional evidence showing that the General Assembly was motivated by a predominant, overriding desire to assign black populations to the Eleventh District and thereby permit the creation of a third majority-black district in the Second.

The court found that "it became obvious," both from the Justice Department's objection letters and the three preclearance rounds in general, "that [the

Justice Department] would accept nothing less than abject surrender to its maximization agenda." It further found that the General Assembly acquiesced and as a consequence was driven by its overriding desire to comply with the Department's maximization demands. The court supported its conclusion not just with the testimony of Linda Meggers, the operator of "Herschel," Georgia's reapportionment computer, and "probably the most knowledgeable person available on the subject of Georgian redistricting," but also with the State's own concessions. The State admitted that it "would not have added those portions of Effingham and Chatham Counties that are now in the [far southeastern extension of the] present Eleventh Congressional District but for the need to include additional black population in that district to offset the loss of black population caused by the shift of predominantly black portions of Bibb County in the Second Congressional District which occurred in response to the Department of Justice's March 20th, 1992, objection letter." It conceded further that "[t]o the extent that precincts in the Eleventh Congressional District are split, a substantial reason for their being split was the objective of increasing the black population of that district." And in its brief to this Court, the State concedes that "[i]t is undisputed that Georgia's eleventh is the product of a desire by the General Assembly to create a majority black district." Hence the trial court had little difficulty concluding that the Justice Department "spent months demanding purely race-based revisions to Georgia's redistricting plans, and that Georgia spent months attempting to comply." On this record, we fail to see how the District Court could have reached any conclusion other than that race was the predominant factor in drawing Georgia's Eleventh District; and in any event we conclude the court's finding is not clearly erroneous.

In light of its well-supported finding, the District Court was justified in rejecting the various alternative explanations offered for the District. Although a legislature's compliance with "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" may well suffice to refute a claim of racial gerrymandering, *Shaw*, appellants cannot make such a refutation where, as here, those factors were subordinated to racial objectives. Georgia's Attorney General objected to the Justice Department's demand for three majority-black districts on the ground that to do so the State would have to "violate all reasonable standards of compactness and contiguity." This statement from a state official is powerful evidence that the legislature subordinated traditional districting principles to race when it ultimately enacted a plan creating three majority-black districts, and justified the District Court's finding that "every [objective districting] factor that could realistically be subordinated to racial tinkering in fact suffered that fate."

Nor can the State's districting legislation be rescued by mere recitation of purported communities of interest. The evidence was compelling "that there are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District." A comprehensive report demonstrated the fractured political, social, and economic interests within the Eleventh District's black population. It is apparent that it was not alleged shared interests but rather the object of maximizing the District's black population and obtaining Justice Department approval that in fact explained the General Assembly's actions. A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. "[W]hen members of a racial group

live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." *Shaw*. But where the State assumes from a group of voters' race that they "think alike, share the same political interests, and will prefer the same candidates at the polls," it engages in racial stereotyping at odds with equal protection mandates. Id.

Race was, as the District Court found, the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations. As a result, Georgia's congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review.

III

To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest. There is a "significant state interest in eradicating the effects of past racial discrimination." *Shaw*. The State does not argue, however, that it created the Eleventh District to remedy past discrimination, and with good reason: there is little doubt that the State's true interest in designing the Eleventh District was creating a third majority-black district to satisfy the Justice Department's preclearance demands. Whether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here. As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.

The Justice Department refused to preclear both of Georgia's first two submitted redistricting plans. The District Court found that the Justice Department had adopted a "black-maximization" policy under § 5, and that it was clear from its objection letters that the Department would not grant preclearance until the State made the "Macon/Savannah trade" and created a third majority-black district. It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the Voting Rights Act.

We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues. When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied. See, e.g., *Shaw*.... Our presumptive skepticism of all racial classifications prohibits us as well from accepting on its face the Justice Department's conclusion that racial districting is necessary under the Voting Rights Act. Where a State relies on the Department's determination that race-based districting is necessary to comply with the Voting Rights Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest. Were we to accept the Justice Department's objection itself as a compelling interest adequate to insulate racial districting from constitutional

review, we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action. We may not do so. See, e.g., *United States v. Nixon*, 418 U.S. 683, 704 (1974) (judicial power cannot be shared with Executive Branch); *Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

For the same reasons, we think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Act. Although we have deferred to the Department's interpretation in certain statutory cases, we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions. When the Justice Department's interpretation of the Act compels race-based districting, it by definition raises a serious constitutional question.

Georgia's drawing of the Eleventh District was not required under the Act because there was no reasonable basis to believe that Georgia's earlier enacted plans violated § 5. Wherever a plan is "ameliorative," a term we have used to describe plans increasing the number of majority-minority districts, it "cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." *Beer.* Georgia's first and second proposed plans increased the number of majority-black districts from 1 out of 10 (10%) to 2 out of 11 (18.18%). These plans were "ameliorative" and could not have violated § 5's non-retrogression principle. *Ibid.* Acknowledging as much, the United States now relies on the fact that the Justice Department may object to a state proposal either on the ground that it has a prohibited purpose or a prohibited effect, see, e.g., *Pleasant Grove v. United States,* 479 U.S. 462, 469 (1987). The Government justifies its preclearance objections on the ground that the submitted plans violated § 5's purpose element. The key to the Government's position, which is plain from its objection letters if not from its briefs to this Court, is and always has been that Georgia failed to proffer a nondiscriminatory purpose for its refusal in the first two submissions to take the steps necessary to create a third majority-minority district.

The Government's position is insupportable. "[A]meliorative changes, even if they fall short of what might be accomplished in terms of increasing minority representation, cannot be found to violate section 5 unless they so discriminate on the basis of race or color as to violate the Constitution." Days, *Section 5 and the Role of the Justice Department,* in CONTROVERSIES. Although it is true we have held that the State has the burden to prove a nondiscriminatory purpose under § 5, Georgia's Attorney General provided a detailed explanation for the State's initial decision not to enact the max-black plan. The District Court accepted this explanation and found an absence of any discriminatory intent. The State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan "so discriminates on the basis of race or color as to violate the Constitution," *Beer*, and thus cannot provide any basis under § 5 for the Justice Department's objection.

Instead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts. Although the Government now disavows having had that policy and seems to concede its impropriety, the District Court's well-documented factual finding was that the Department did adopt a maximization policy and followed

it in objecting to Georgia's first two plans. One of the two Department of Justice line attorneys overseeing the Georgia preclearance process himself disclosed that "what we did and what I did specifically was to take a...map of the State of Georgia shaded for race, shaded by minority concentration, and overlay the districts that were drawn by the State of Georgia and see how well those lines adequately reflected black voting strength." In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld.

Section 5 was directed at preventing a particular set of invidious practices which had the effect of "undo[ing] or defeat[ing] the rights recently won by nonwhite voters." As we explained in *Beer*, "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down."...

Based on this historical understanding, we recognized in *Beer* that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." The Justice Department's maximization policy seems quite far removed from this purpose. We are especially reluctant to conclude that § 5 justifies that policy given the serious constitutional concerns it raises. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), we upheld § 5 as a necessary and constitutional response to some states' "extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." But our belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case. And the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment, into tension with the Fourteenth Amendment. As we recalled in *Katzenbach* itself, Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must "consist with the letter and spirit of the constitution" (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819)). We need not, however, resolve these troubling and difficult constitutional questions today. There is no indication Congress intended such a far-reaching application of § 5, so we reject the Justice Department's interpretation of the statute and avoid the constitutional problems that interpretation raises.

IV

The Voting Rights Act, and its grant of authority to the federal courts to uncover official efforts to abridge minorities' right to vote, has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is neither assured nor well served, however, by carving electorates

into racial blocs. "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 630-631 (1991). It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.

* * *

The judgment of the District Court is affirmed, and the case is remanded for further proceedings consistent with this decision....

JUSTICE O'CONNOR, concurring.

I understand the threshold standard the Court adopts—"that the legislature subordinated traditional race-neutral districting principles...to racial considerations,"—to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. The standard would be no different if a legislature had drawn the boundaries to favor some other ethnic group; certainly the standard does not treat efforts to create majority-minority districts *less* favorably than similar efforts on behalf of other groups. Indeed, the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks.

Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process. But application of the Court's standard helps achieve *Shaw*'s basic objective of making extreme instances of gerrymandering subject to meaningful judicial review. I therefore join the Court's opinion.

JUSTICE GINSBURG, with whom JUSTICES STEVENS and BREYER join, and with whom JUSTICE SOUTER joins except as to Part III-B, dissenting.

Legislative districting is highly political business. This Court has generally respected the competence of state legislatures to attend to the task. When race is the issue, however, we have recognized the need for judicial intervention to prevent dilution of minority voting strength. Generations of rank discrimination against African-Americans, as citizens and voters, account for that surveillance.

Two Terms ago, in *Shaw v. Reno*, this Court took up a claim "analytically distinct" from a vote dilution claim. *Shaw* authorized judicial intervention in "extremely irregular" apportionments, in which the legislature cast aside traditional districting practices to consider race alone—in the *Shaw* case, to create a district in North Carolina in which African-Americans would compose a majority of the voters.

Today the Court expands the judicial role, announcing that federal courts are to undertake searching review of any district with contours "predominantly motivated" by race: "strict scrutiny" will be triggered not only when traditional districting practices are abandoned, but also when those practices are "subordinated

to"—given less weight than—race. Applying this new "race-as-predominant-factor" standard, the Court invalidates Georgia's districting plan even though Georgia's Eleventh District, the focus of today's dispute, bears the imprint of familiar districting practices. Because I do not endorse the Court's new standard and would not upset Georgia's plan, I dissent.

I

At the outset, it may be useful to note points on which the Court does not divide. First, we agree that federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions; as a rule, the task should remain within the domain of state legislatures. Second, for most of our Nation's history, the franchise has not been enjoyed equally by black citizens and white voters. To redress past wrongs and to avert any recurrence of exclusion of blacks from political processes, federal courts now respond to Equal Protection Clause and Voting Rights Act complaints of state action that dilutes minority voting strength. See, e.g., *Gingles; Regester*. Third, to meet statutory requirements, state legislatures must sometimes consider race as a factor highly relevant to the drawing of district lines. Finally, state legislatures may recognize communities that have a particular racial or ethnic makeup, even in the absence of any compulsion to do so, in order to account for interests common to or shared by the persons grouped together. See *Shaw* ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

Therefore, the fact that the Georgia General Assembly took account of race in drawing district lines—a fact not in dispute—does not render the State's plan invalid. To offend the Equal Protection Clause, all agree, the legislature had to do more than consider race. How much more, is the issue that divides the Court today.

A...

District lines are drawn to accommodate a myriad of factors—geographic, economic, historical, and political—and state legislatures, as arenas of compromise and electoral accountability, are best positioned to mediate competing claims; courts, with a mandate to adjudicate, are ill equipped for the task.

B

Federal courts have ventured into the political thicket of apportionment when necessary to secure to members of racial minorities equal voting rights—rights denied in many States, including Georgia, until not long ago....

It was against this backdrop that the Court, construing the Equal Protection Clause, undertook to ensure that apportionment plans do not dilute minority voting strength. By enacting the Voting Rights Act of 1965, Congress heightened federal judicial involvement in apportionment, and also fashioned a role for the Attorney General....

These Court decisions and congressional directions significantly reduced voting discrimination against minorities. In the 1972 election, Georgia gained its first black Member of Congress since Reconstruction, and the 1981 apportionment created the State's first majority-minority district. This voting district, however,

was not gained easily. Georgia created it only after the United States District Court for the District of Columbia refused to preclear a predecessor apportionment plan that included no such district—an omission due in part to the influence of Joe Mack Wilson, then Chairman of the Georgia House Reapportionment Committee. As Wilson put it only 14 years ago, "I don't want to draw nigger districts." *Busbee v. Smith*, 549 F. Supp. 494, 501 (D.D.C. 1982).

II

A

Before *Shaw v. Reno*, this Court invoked the Equal Protection Clause to justify intervention in the quintessentially political task of legislative districting in two circumstances: to enforce the one-person-one-vote requirement, and to prevent dilution of a minority group's voting strength.

In *Shaw*, the Court recognized a third basis for an equal protection challenge to a State's apportionment plan. The Court wrote cautiously, emphasizing that judicial intervention is exceptional: "[S]trict [judicial] scrutiny" is in order, the Court declared, if a district is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting."

"[E]xtrem[e] irregular[ity]" was evident in *Shaw*, the Court explained.... The problem in *Shaw* was not the plan architects' consideration of race as relevant in redistricting. Rather, in the Court's estimation, it was the virtual exclusion of other factors from the calculus. Traditional districting practices were cast aside, the Court concluded, with race alone steering placement of district lines.

B

The record before us does not show that race similarly overwhelmed traditional districting practices in Georgia. Although the Georgia General Assembly prominently considered race in shaping the Eleventh District, race did not crowd out all other factors, as the Court found it did in North Carolina's delineation of the *Shaw* district.

In contrast to the snake-like North Carolina district inspected in *Shaw*, Georgia's Eleventh District is hardly "bizarre," "extremely irregular," or "irrational on its face." Instead, the Eleventh District's design reflects significant consideration of "traditional districting factors (such as keeping political subdivisions intact) and the usual political process of compromise and trades for a variety of nonracial reasons" (Edmondson, J., dissenting below). The District covers a core area in central and eastern Georgia, and its total land area of 6,780 square miles is about average for the State. The border of the Eleventh District runs 1,184 miles, in line with Georgia's Second District, which has a 1,243-mile border, and the State's Eighth District, with a border running 1,155 miles.

Nor does the Eleventh District disrespect the boundaries of political subdivisions. Of the 22 counties in the District, 14 are intact and 8 are divided. That puts the Eleventh District at about the state average in divided counties.... Seventy-one percent of the Eleventh District's boundaries track the borders of political subdivisions. Of the State's 11 districts, 5 score worse than the Eleventh District on this criterion, and 5 score better. Eighty-three percent of the Eleventh District's geo-

graphic area is composed of intact counties, above average for the State's congressional districts. And notably, the Eleventh District's boundaries largely follow precinct lines.

Evidence at trial similarly shows that considerations other than race went into determining the Eleventh District's boundaries. For a "political reason"—to accommodate the request of an incumbent State Senator regarding the placement of the precinct in which his son lived—the DeKalb County portion of the Eleventh District was drawn to include a particular (largely white) precinct. The corridor through Effingham County was substantially narrowed at the request of a (white) State Representative. In Chatham County, the District was trimmed to exclude a heavily black community in Garden City because a State Representative wanted to keep the city intact inside the neighboring First District. The Savannah extension was configured by "the narrowest means possible" to avoid splitting the city of Port Wentworth.

Georgia's Eleventh District, in sum, is not an outlier district shaped without reference to familiar districting techniques. Tellingly, the District that the Court's decision today unsettles is not among those on a statistically calculated list of the 28 most bizarre districts in the United States, a study prepared in the wake of our decision in *Shaw*. See Pildes & Niemi, 92 MICH. L.REV., at 565.

C

The Court suggests that it was not Georgia's legislature, but the U.S. Department of Justice, that effectively drew the lines, and that Department officers did so with nothing but race in mind. Yet the "Max-Black" plan advanced by the Attorney General was not the plan passed by the Georgia General Assembly....

And although the Attorney General refused preclearance to the first two plans approved by Georgia's legislature, the State was not thereby disarmed; Georgia could have demanded relief from the Department's objections by instituting a civil action in the United States District Court for the District of Columbia, with ultimate review in this Court. Instead of pursuing that avenue, the State chose to adopt the plan here in controversy—a plan the State forcefully defends before us. We should respect Georgia's choice by taking its position on brief as genuine.

D

Along with attention to size, shape, and political subdivisions, the Court recognizes as an appropriate districting principle, "respect for... communities defined by actual shared interests." The Court finds no community here, however, because a report in the record showed "fractured political, social, and economic interests within the Eleventh District's black population."

But ethnicity itself can tie people together, as volumes of social science literature have documented—even people with divergent economic interests. For this reason, ethnicity is a significant force in political life....

To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our Nation's cities are full of districts identified by their ethnic character—Chinese, Irish, Italian, Jewish, Polish, Russian, for example. The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation.

III

To separate permissible and impermissible use of race in legislative apportionment, the Court orders strict scrutiny for districting plans "predominantly motivated" by race. No longer can a State avoid judicial oversight by giving—as in this case—genuine and measurable consideration to traditional districting practices. Instead, a federal case can be mounted whenever plaintiffs plausibly allege that other factors carried less weight than race. This invitation to litigate against the State seems to me neither necessary nor proper.

A

The Court derives its test from diverse opinions on the relevance of race in contexts distinctly unlike apportionment. The controlling idea, the Court says, is "the simple command [at the heart of the Constitution's guarantee of equal protection] that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." (quoting *Metro Broadcasting*) (O'CONNOR, J. dissenting)).

In adopting districting plans, however, States do not treat people as individuals. Apportionment schemes, by their very nature, assemble people in groups. States do not assign voters to districts based on merit or achievement, standards States might use in hiring employees or engaging contractors. Rather, legislators classify voters in groups—by economic, geographical, political, or social characteristics—and then "reconcile the competing claims of [these] groups." *Bandemer* (O'CONNOR, J., concurring in judgment).

That ethnicity defines some of these groups is a political reality. Until now, no constitutional infirmity has been seen in districting Irish or Italian voters together, for example, so long as the delineation does not abandon familiar apportionment practices. If Chinese-Americans and Russian-Americans may seek and secure group recognition in the delineation of voting districts, then African-Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we would shut out "the very minority group whose history in the United States gave birth to the Equal Protection Clause." See *Shaw* (STEVENS, J., dissenting).

B

Under the Court's approach, judicial review of the same intensity, i.e., strict scrutiny, is in order once it is determined that an apportionment is predominantly motivated by race. It matters not at all, in this new regime, whether the apportionment dilutes or enhances minority voting strength. As very recently observed, however, "[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." *Adarand Constructors, Inc. v. Pena*, ___ U.S. ___ (1995) (STEVENS, J., dissenting).

Special circumstances justify vigilant judicial inspection to protect minority voters—circumstances that do not apply to majority voters. A history of exclusion from state politics left racial minorities without clout to extract provisions for fair representation in the lawmaking forum. The equal protection rights of minority voters thus could have remained unrealized absent the Judiciary's close surveillance. The majority, by definition, encounters no such blockage. White voters in Georgia do not lack means to exert strong pressure on their state legislators. The

force of their numbers is itself a powerful determiner of what the legislature will do that does not coincide with perceived majority interests.

State legislatures like Georgia's today operate under federal constraints imposed by the Voting Rights Act—constraints justified by history and designed by Congress to make once-subordinated people free and equal citizens. But these federal constraints do not leave majority voters in need of extraordinary judicial solicitude. The Attorney General, who administers the Voting Rights Act's preclearance requirements, is herself a political actor. She has a duty to enforce the law Congress passed, and she is no doubt aware of the political cost of venturing too far to the detriment of majority voters. Majority voters, furthermore, can press the State to seek judicial review if the Attorney General refuses to preclear a plan that the voters favor. Finally, the Act is itself a political measure, subject to modification in the political process.

C

The Court's disposition renders redistricting perilous work for state legislatures. Statutory mandates and political realities may require States to consider race when drawing district lines. But today's decision is a counterforce; it opens the way for federal litigation if "traditional... districting principles" arguably were accorded less weight than race. Genuine attention to traditional districting practices and avoidance of bizarre configurations seemed, under *Shaw*, to provide a safe harbor. In view of today's decision, that is no longer the case.

Only after litigation—under either the Voting Rights Act, the Court's new *Miller* standard, or both—will States now be assured that plans conscious of race are safe. Federal judges in large numbers may be drawn into the fray. This enlargement of the judicial role is unwarranted. The reapportionment plan that resulted from Georgia's political process merited this Court's approbation, not its condemnation. Accordingly, I dissent.

[Justice Stevens wrote an additional dissenting opinion in which he argued that the plaintiffs were without standing.]

Chapter 6

Ballot Propositions

Most of this book, like American political thought generally, centers around institutions of representative democracy, in which the people elect representatives who are empowered either directly or through their appointees to make governmental decisions. In most states, representative democracy has long been supplemented by direct votes on propositions. For example, every state but Delaware requires a vote of the people to amend the state constitution. However, at the beginning of this century, the Progressives urged the extension of direct democracy to further supplement the ordinary legislative process. The three mechanisms most often advanced by the Progressives were the initiative, the referendum, and the recall.[1]

The *initiative* is a mechanism that permits a specified number of voters to propose a statute (and, in many states, a constitutional amendment) by signing petitions. Once the petitions qualify by receiving enough signatures the proposal is placed on the ballot, and it is enacted if the voters approve it. The *referendum* permits voters to challenge a statute passed by the legislature.[2] If a referendum petition qualifies, the challenged statute does not go into effect unless it is approved by the voters at the next election.[3] The *recall* is a device whereby voters may attempt to unseat an elected official whose term has not expired. Logically, the recall might best be categorized as a part of the system of representative democracy, but it is customarily listed with the devices of direct democracy.

Although ballot measure elections do not occur at the national level in the United States,[4] about half the states have adopted one or more of the above

1. For a colorful account of the adoption of the initiative and referendum in Oregon, see David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System,"* 67 TEMPLE LAW REVIEW 947 (1994).

2. Some confusion is engendered by the fact that the word "referendum" sometimes is used as a generic term, referring to any type of ballot proposition.

3. Suppose a petition referring a redistricting statute to the voters qualifies for the ballot. According to the procedures governing the referendum process, the law is ineffective until and unless the voters approve it. If the first available election at which the referendum can be put to the voters occurs at the statewide primary, at which districts are needed for the nomination of candidates for Congress and the state legislature, what districts should be used? See *Assembly v. Deukmejian*, 30 Cal.3d 638, 639 P.2d 939, 180 Cal.Rptr. 297 (1982), cert. denied 456 U.S. 941 (1982).

4. The United States is one of five major democracies that have never had a nationwide referendum. The others are India, Israel, Japan, and the Netherlands. See David Butler & Austin Ranney, *Conclusion*, in REFERENDUMS AROUND THE WORLD 258 (1994).

devices. All but five of these states did so during the first two decades of the twentieth century, and since 1978 only Mississippi, whose supreme court in 1922 had struck down an initiative law on procedural grounds,[5] has adopted (or, as in Mississippi's case, readopted) the initiative.

Despite the relative stability in availability of the initiative and referendum, a continuing controversy swirls around these devices. Even after nearly a century of experience with direct democracy in a number of states, observers offer sharply differing assessments of the initiative, the most frequently used device. This chapter begins with a relatively balanced evaluation by Thomas E. Cronin. The chapter then considers some limits on the content of initiative proposals and closes with a brief consideration of judicial oversight of the initiative process. Some of the most controversial issues surrounding the initiative relate to money, especially in connection with the qualification of initiative proposals for the ballot and the election campaigns that occur once those proposals have qualified. Consideration of these issues must be deferred to Chapter 12, after introduction to the Supreme Court's treatment of campaign finance regulation under the First Amendment.

I. Pros And Cons

Thomas E. Cronin, DIRECT DEMOCRACY 224–32 (1989)

Has direct democracy enhanced government responsiveness and accountability? The answer is at best a maybe. States that have adopted direct democracy are more accountable than they once were. Yet other factors, not limited to states that have the initiative and referendum, also help to account for this change, including better education, vastly increased revenues, professional staffs, and more experience with rule by law. California, Oregon, and Colorado—three notable users of direct democracy—are frequently mentioned by state government experts as pacesetting, trend-starting states. And interviews with people in user states yield the impression that state officials are somewhat more responsive than elsewhere; however, many citizens in those states also think their officials are not responsive enough. Few initiative, referendum, and recall states are known for corruption and discrimination. Still, it is difficult to single them out and argue persuasively that they are decidedly more responsive than those without the initiative, referendum, and recall.

Do direct democracy devices provide an effective safety valve when legislators prove timid, corrupt, or dominated by narrow special interests? Generally, yes. Indeed, the mere circulation of petitions for an initiative, referendum, or recall sometimes "encourages" officials to reconsider what they are doing and how they are doing it.

Do direct democracy devices eventually weaken autocratic bosses and strengthen the policy and political voice of the people? Party bosses have lost power, but this change probably had much more to do with the curtailment of patronage, the institutionalization of the civil service, the advent of the Social Secu-

5. *Power v. Robinson*, 93 So. 769 (Miss. 1922). This ruling was reaffirmed in *Moore v. Molpus*, 578 So.2d 624 (Miss. 1991), a decision that prompted the readoption of the initiative in 1992.

rity system, and similar developments, than with the inception of the initiative, referendum, and recall. Partisanship has declined as well. Still, bossism persists in legislatures that retain hierarchical procedures, such as the California Assembly and the Massachusetts House. Moreover, the decline of the traditional turn-of-the-century bosses has not necessarily shifted their power to the common people. Today power appears to be dispersed widely among organized interests, public employee unions or associations, teachers' associations, farmers, real estate developers, and business, manufacturing, and trade associations of all kinds, which regularly wield influence at the state and local levels....Popular democracy devices have probably lessened the likelihood of boss rule, but so have other developments.

Direct democracy processes have *not* brought about rule by the common people. Government by the people has been a dream for many, but most Americans want their legislators and other elected officials to represent them as best they can and to make the vast bulk of public policy decisions. Direct democracy devices occasionally permit those who are motivated and interested in public policy issues to have a direct personal input by recording their vote, but this is a long way from claiming that direct democracy gives a significant voice to ordinary citizens on a regular basis. That early claim was considerably overstated.

A related claim was that direct democracy devices would lessen the undesirable influences of special interests. These devices may have done this in some respects, but special interests are still present and can still afford highly paid, high-caliber lobbyists at every state legislature. And there are many more lobbyists now than there were in 1900.

On the other hand, direct democracy devices have sometimes allowed less well-represented interests to bring their messages before the public. Environmentalists, for example, have used the initiative process to force legislatures to give greater consideration to conservation and environmental protection issues. Other groups, such as those favoring the death penalty and mandatory sentences, have been able to get their ideas heard and often enacted into law. Ultimately, however, single individuals unwilling to join groups and form coalitions are unable to use direct democracy processes. In the larger states the initiative process has come to be dominated by large organizations displacing the citizen groups it was once intended to serve. Only in groups and in concert with several groups can a few individuals make the devices work for them. The much-talked-about "common man" is required to become an uncommon joiner and organizer in order to realize the aspirations of the proponents of direct democracy. And it helps to be wealthy and to have access to professional campaign management technologies, especially in California.

Direct democracy was also supposed to stimulate educational debate about important policy issues. It does, yet the debates usually last only five or six weeks. Direct democracy processes do allow debate in public forums well beyond the legislative hearing chambers, and as a result, public officials, newspapers, radio and television stations, and various interest groups often take a stand and trigger at least limited public discussion and debate. In a few states voter handbooks, although they are difficult to read on many issues, help individuals to digest complicated information about ballot measures.

The most unfortunate deficiency of this claim, one not adequately anticipated by the early advocates of initiative, referendum, and recall, is that the side with more money too often gets to define the issue and structure the debate in an

unbalanced way. Whereas a town meeting gives all sides an equal chance to speak, money and court rulings permitting unlimited spending promote a system in which the better-financed side can, and often does, outspend the other by a dramatic margin.

Direct democracy was also intended to stimulate voter interest in issues and encourage higher election-day turnouts. It often does stir interest and sometimes even polarizes factions. Certainly it heightens interest at election time, although interest in candidate races, especially for top offices such as president, governor, and the U.S. Congress, ordinarily is greater. Interest in any kind of election is in large part a function of the money spent in publicizing and promoting (or fighting against) either the candidate or the issue. A blitz of thirty- or sixty-second spot advertisements in the last weeks of a campaign will almost always stir voter interest—particularly if the issue is one that affects voters personally.

[P]ublic opinion surveys regularly report that nonvoters and unregistered voters say that they would be more likely to vote if they could vote on issues as well as candidates. Certain controversial issues—such as the death penalty, abortion, gun control, nuclear power plants, nuclear waste, mandatory bottle deposits, tax increases or cuts, gay rights, AIDS, right-to-work laws, and English-only proposals—undoubtedly bring additional voters to the polls. Civic-minded and informed citizens are already likely to vote; having issues on the ballot probably merely reinforces their customary behavior. Only a few voters probably come solely because of ballot issues.... At best, having issues on the ballot only slightly increases election-day turnout. Analysts occasionally say too that long lists of issues such as those on California ballots intimidate voters. The implication is that some potential voters may even stay away, scared off by the demands and bewilderment—not to mention the time and energy costs—of having to study complex ballot issues. Others may vote for candidates but not for ballot measures. Both speculations are plausible, yet little evidence exists to confirm either. The 1987 nationwide survey conducted for [Cronin's] book by the Gallup Organization found that virtually no one would be less inclined to vote because issues were on the ballot, and an impressive number of unregistered voters implied that voting on ballot issues was appealing to them. Moreover, common sense suggests that turnout is generally a function of increment—increments among different elements of candidate coalitions, increments from the various levels of races (local, state, federal) and increments from whatever ballot measures (bond issues, initiatives, constitutional amendments, and so on) are listed.

The challenge, of course, is to improve the process (through better education, improved debates, increased readability of statements and initiatives) so that larger numbers of citizens will be more competent to vote on ballot issues.

Finally, proponents of direct democracy claimed that their innovations would increase civic pride and trust in government and thereby diminish apathy and alienation. This was a proud boast and a noble aspiration. Trust in or alienation from government is difficult to measure. Americans tend to love their country and dislike their government. Government reminds them of taxes, regulations, and restrictions. Pride in government is cyclical and is related in part to war or its absence, prosperity or its absence, Olympic successes, bicentennials, and similar events. It would be difficult to prove that Minnesotans or Virginians are less proud or trusting of their state governments than Coloradans or Californians. Many states without direct democracy devices appear to enjoy as much citizen

respect and acceptance as states that have them. In one area civic pride did increase. In states in the West that once were dominated by a few large special interests and often by party bosses—including the Dakotas, Oregon, and California—direct democracy devices doubtless did play a role in encouraging state governments to become more responsive to ordinary citizens. But better education, better and more media, increased competition between the political parties, and other factors also contributed to this same end. Clearly, direct democracy's advocates overstated their claim.

Have the initiative, referendum, and recall undermined representative democracy? Have the devices weakened our legislatures? Although experts still argue about the consequences, most would say that direct democracy has not weakened our regular legislative processes. Even in areas where these devices are used, 98 or 99 percent of the laws remain the responsibility of legislators. Legislatures are more important today than ever, as growing population and growing demands on government force them to assume greater responsibilities. Americans overwhelmingly endorse leaving the job of making laws to their elected representatives and view direct democracy devices almost entirely as a last alternative to the legislative process.

Seats in state legislative bodies today are much valued, sought after, and actively competed for by able citizens. Little evidence exists to suggest that even in the states most frequently using the initiative, referendum, and recall, candidates for the legislatures are harder to find or less motivated to perform effectively. Some legislatures may occasionally refer a few too many controversial topics to the ballot, yet this practice can hardly be said to have undermined representative government. On balance, then, direct democracy has developed as a supplement and not an undermining force in American government.

A second major objection to direct democracy held that it would produce unsound legislation and unwise or bad policy. Unwise legislation does get onto ballots, but the record indicates that voters reject most really unsound ideas. When defective legislation has been approved by direct democracy procedures, it has often been contested later in the courts, resulting in modification or outright invalidation.

Critics say, with some justification, that direct legislation is less well prepared than institutional legislation. Legislators have access to veteran legislative draftsmen, researchers, and counsel—resources that can seldom be matched by interest groups or concerned activists trying to get a measure on the ballot. This problem could be remedied, and safeguards have been adopted in some states, but the number of judicial reversals of initiatives attests to the reality that direct democracy efforts sometimes produce poorly drafted legislation.

A related fear was that minority rights might be sacrificed on the altar of majority rule. However, remarkably few ballot issues of this type have prevailed. When compared with the work of the nation's legislatures, the outcomes of initiative and referendum campaigns can be characterized as equally tolerant of minority rights. In some regions of the country state legislatures, even in the twentieth century, have been notably intolerant of women, minorities, and members of a minority party or even the major opposition political party. Most of these same states do not permit their voters the initiative, referendum, and recall.

Opponents also have long objected to direct democracy on the grounds that the typical voter would not be informed enough to cast an intelligent vote.

According to this view, few voters consider all the possible alternatives to and consequences of a single vote; they are asked to render a verdict on a specific point but not on its context. American voters themselves would agree that their votes are often not as informed as they should be. Even people who feel strongly that citizens ought to be able to vote directly on issues admit that many citizens, including themselves, are often not able to cast a well-informed vote. Survey data confirm that as many as one-third to a majority of those voting acknowledge that they felt uncomfortable about voting because they needed more information or more time to discuss the issue or to read the voter pamphlet more carefully, or found that the statement was too hard to read and comprehend. However, most of the perceived flaws of the direct democracy processes are also the flaws of democracy in general. Voters often wish they had more information about the candidates—especially for state and county offices—when they have to choose among them. Delegates at constitutional conventions or national party conventions almost always have similar misgivings when they are forced to render yes-or-no votes on complicated issues. So, too, members of state and national legislatures—especially in those frantic days near the end of a session—yearn for more information about consequences, and more discussion and compromise than time will permit. Despite the misgivings of critics, voters judge reasonably well when faced with initiative, referendum, or recall choices. It is partly a matter of the gap between the ideal and real worlds. In the ideal context, voters would prepare their votes in a judicious, scholarly, and textbook-citizen fashion. But seldom is the time available. This is also true, but obviously to a lesser extent, for local, state, and national legislators. There too, a gap exists between the textbook legislator and the legislator with a family to raise, campaign funds to collect, a second job to maintain, and party loyalties to sustain.

Few potential voters stay home because they fear initiatives or referenda. Of course some voters are confused. Some are also not sure they have enough information to vote on many or even most of the issues. Still, these would-be voters have the option of voting only for candidates and skipping the ballot issues.

For all potential voters who stay away from the polls because they are intimidated by the issues on the ballot, at least an equal number are motivated to come out and vote precisely because controversial issues are on their ballot. Of course there is an educational bias at work. Better-educated, well-to-do voters are more comfortable and informed when it comes to voting on ballot propositions than are lower-income, less educated citizens. This is a reality—and one that needs to be addressed and remedied, although it will never be entirely remedied.

Critics of direct democracy predicted that special interests would turn these devices to their own advantage. Has this in fact been the case? To get things accomplished, individuals have to join a group with which they share common interest. America has become a nation of interest groups—and this is likely to be even more the case in the future than in the past. These realities confirm some of the fears expressed by Herbert Croly and Richard Hofstadter years ago: that the impulse toward popular democratic rule always ran the risk of losing its meaning when it was divorced from an explicit social movement. Initial achievements or victories were won by the populists and progressives, but the very bosses or interests against whom these devices were aimed soon learned to adapt to the new rules, deflect them, or use them to advance their strategic interests. These critics may have overstated their point, but their argument is compelling....

In reality, special interests and single-issue groups contend with one another regularly both in the legislative processes and in any form of direct democracy. And this is as it should be. [According to Patrick B. McGuigan,] "[s]ingle issue groups of both the right and the left will not go away, now or ever, and it is much better for them to get involved in direct or representative democracy than to let their frustrations fester and grow." Legislatures, to be sure, are usually the best place to reconcile the divergent interests of a state or nation, but they need not be the only place. Parties, the media, and the processes provided for in direct democracy can sometimes perform the reconciliation and compromising functions we usually assign, and should assign, to our institutionalized legislatures.

The final objection to direct democracy was that it would weaken the political accountability of elected officials. Voters in ballot issue elections seldom have to live with the consequences of their decision; they seldom understand the longer-term needs and interests of the region; they are likely to think only of the short term and usually of their own self-interest.

These are serious objections. The sharing and checking of powers among elected officials in the three branches of government do provide for greater continuity and consideration of long-range consequences than do the initiative, referendum, and recall. Indeed, one criterion voters use in deciding whom to elect to office is the candidate's ability to comprehend the overall needs of a state or nation. Yet the record suggests that the public can also act responsibly. Indeed, on environmental matters the public appears to be more responsible than most state legislatures. Tax issues in Colorado, Ohio, and Michigan in recent years also suggest that voters can and often will decide on crucial issues on the basis of higher goals, not on that of short-term selfishness. The fear that populist democracy via initiative, referendum, and recall would lead to irresponsible, mercurial, or even bizarre decision making has not been borne out. The outcomes of direct democracy are similar to the outcomes of indirect democratic processes. One reason is that several safeguards regulate the existing forms of direct democracy. Another is that most Americans take their civic responsibilities seriously and have worked hard to make the initiative, referendum, and recall reasonably safe supplements to the traditional Madisonian checks and balances system.

Both proponents and opponents have too often overstated their positions. The existing direct democracy processes have both virtues and liabilities.

Notes and Questions

1. In Chapter 1, two contrasting tendencies in American political thought were labeled "pluralism" and "progressivism." The initiative, referendum and recall are products of the Progressive Era. Does it follow that those who incline to progressivism should or are likely to support these devices, while those inclined to pluralism should or are likely to oppose them? The author of one study summarized the values at stake in the controversy over direct democracy as follows:

> Not only do direct and indirect forms of democracy differ in the institutional arrangements they advocate but they pursue quite different ends and values as well. Direct democracy values participation, open access, and political equality. It tends to deemphasize compromise, continuity, and consensus. In short, direct democracy encourages conflict and compe-

> tition and attempts to expand the base of participants. Indirect democracy values stability, consensus, and compromise and seeks institutional arrangements that insulate fundamental principles from momentary passions or fluctuations in opinion.

David Magleby, DIRECT LEGISLATION 181 (1984). Although Magleby recognizes the legitimacy of both sets of values, he reaches conclusions much more critical of direct democracy than Cronin's, because he believes the benefits of the initiative and referendum are largely illusory, while some of their impairment of the values of representative democracy is real. For example, he writes:

> Essential to the claim that more democratic government results from direct legislation is the assumption that the issues placed on ballots are representative of the issues people have on their minds and would like submitted to a public vote. Very few voters, however, can spontaneously name any particular issues on which they would like to see the public vote. Those issues that do appear on the ballot are typically not the same issues that voters list as the most important problems facing the state or the nation....
>
> Because of voter disinterest and the signature threshold requirement, the agenda of issues to be decided is determined by proponents' capacity to hire professional signature-gathering firms or by the dedication of issue activists or single-issue groups who desire to place measures on the ballot.

Id. at 182. Magleby asserts that the initiative process impairs the ability of a state to solve problems in a way that accommodates conflicting interests.

> Another important distinction between the two forms of legislation is that the direct means does not permit an assessment of the participants' intensity of opinion. In direct legislation all votes are counted equally, but not all voters feel equally positive or negative about the proposition. Some voters may be only slightly opposed or slightly in favor of the proposition, but their votes have the same weight as the votes cast by those who are sure of their opinions and feel strongly about them. In the legislative process, elected representatives can calculate the varying degrees of intensity and include them in their legislative decisions. This advantage of the legislative process works to facilitate accommodation. The strength of feeling among all partisans to an issue is weighted as legislators arrive at compromises acceptable to a majority of legislators. This is not the case in direct legislation, which helps to explain why direct legislation measures are often more extreme than measures produced by legislatures.

Id. at 184–85.

Magleby's conclusions are criticized by Richard Briffault, *Distrust of Democracy*, 63 TEXAS LAW REVIEW 1347 (1985), who believes Magleby interprets the data in an unduly negative manner. For example, on the agenda-setting question, Briffault writes:

> Although Magleby's analysis of the high hurdles tending to limit access to the initiative agenda to special interest organizations is difficult to refute, a significant number of ballot measures have been the product of forces outside the power elite who are not usually successful at the

> ordinary politics of working the lobbies of the State House. In the last decade, such outside groups have qualified proposals to control handguns, restrict indoor smoking, ban nonreturnable beverage containers, limit nuclear power plants, and legalize the possession and use of marijuana.

Id. at 1357. More generally, Briffault contends that

> although [Magleby's] discussion of direct democracy is well informed by an understanding of its defects in practice, his analysis of legislatures is at the abstract level of the textbook model. When direct legislation "in the field" is set against an idealized construct of the legislative process, it is bound to fall short.

Id. at 1350. Briffault points out that a high percentage of initiative proposals deal with areas such as governmental processes or taxation, in which legislatures may sometimes be prone to subordinate the public interest to their own interests or those of special interest supporters. Briffault gives a number of examples and concludes:

> In these cases, the initiative served as a remedy for legislative failure—much as the Progressives had envisioned. Direct legislation did not serve as a substitute for the legislative process but as a complement when the legislature had displayed prolonged indifference to the wishes of a significant portion of the public. The initiative was an effective device for getting the legislature's attention and reminding representatives of the public outside the community of political insiders.

Id. at 1371.

2. One of the most prominent themes in recent criticism has been the concern that direct democracy will facilitate tyranny of the majority over minorities. Such criticism draws on Madison's *Federalist No. 10*:

> James Madison, who preferred representative government because it fostered consideration and compromise of competing interests, believed that popular democracy was prone to majority dictatorship because there were few checks on the temptation to sacrifice minority interests or disadvantage unpopular individuals.

Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASHINGTON LAW REVIEW 1, 16 (1978). Bell contends that "the growing reliance on the referendum and initiative poses a threat to individual rights in general and in particular creates a crisis for the rights of racial and other discrete minorities." Id. at 2. He contends that the danger of majority tyranny in direct democracy exceeds the danger in representative democracy:

> Public officials, even those elected on more or less overtly racist campaigns, may prove responsive to minority pressures for civil rights measures once in office or, at least, be open to the negotiation and give-and-take that constitutes much of the political process. Thus, legislators may vote for, or executive officials may sign, a civil rights or social reform bill with full knowledge that a majority of their constituents oppose the measure. They are in the spotlight and do not wish publicly to advocate

racism; they cannot openly attribute their opposition to "racist constituents." The more neutral reasons for opposition are often inadequate in the face of serious racial injustices, particularly those posing threats not confined to the minority community.

When the legislative process is turned back to the citizenry either to enact laws by initiative or to review existing laws through the referendum, few of the concerns that can transform the "conservative" politician into a "moderate" public official are likely to affect the individual voter's decision. No political factors counsel restraint on racial passions emanating from long held and little considered beliefs and fears. Far from being the pure path to democracy..., direct democracy, carried out in the privacy of the voting booth, has diminished the ability of minority groups to participate in the democratic process. Ironically, because it enables the voters' racial beliefs and fears to be recorded and tabulated in their pure form, the referendum has been a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day.

Id. at 13–15.

Bell's criticism is probably on its strongest ground when directed against procedures that single out for referendum certain decisions, such as civil rights ordinances or land use regulations, that have particular effect on racial or other minorities. The Supreme Court has struck down procedures that require referendums before adoption of measures designed to benefit racial minorities, such as the adoption of fair housing ordinances or the imposition of school integration devices. See *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). However, it has permitted referendum requirements that apply only to measures benefiting poor people, such as approval of low-cost housing projects. See *James v. Valtierra*, 402 U.S. 137 (1971).

Defenders have contested the validity of Bell's charges as applied to initiatives, especially at the state level. Thus, Briffault, *supra*, 63 TEXAS LAW REVIEW at 1364–66, writes:

[I]t is difficult to argue that historically minorities—in particular, blacks and other racial minorities did all that well in state legislatures. Racial discrimination was largely a product of state legislative action, not initiative votes. Nor are the great advances of minorities in recent decades attributable to state legislative action. The initial successes of the civil rights movement were won in the courts or on the streets. The legislatures resisted and delayed and became more responsive only under extraordinary political and legal pressures. Even today, in times of fiscal stringency, states may be more prone to cut programs that help minorities and the poor than those that serve more politically powerful groups.

At another level, the challenge to the initiative for lack of sensitivity to minority interests is misguided; the initiative, like other devices of direct democracy, was designed as a *majoritarian* tool, to be used when the legislature failed to act on a program the majority desires. The appropriate question here is whether the initiative is more likely than the legislature to be a source of measures that discriminate against minorities or

> infringe upon the rights of the politically powerless. Without offering a firm answer, I suggest that there are two institutions that tend to mitigate the antiminority potential of direct legislation: the judiciary and the initiative process itself.
>
> The electorate-as-legislature can no more infringe upon constitutionally protected rights than can the representative legislature. Although the courts frequently bestow rhetorical plaudits on direct democracy, they have not hesitated to invalidate initiative measures as unconstitutional....
>
> The second constraint on majoritarian abuse lies in the nature of the initiative process. [I]t is difficult to get measures on the ballot and it is difficult to get them passed. Minority groups benefit from the "negative bias" in the system. A minority group that intensely opposes a measure can seek to block ballot qualification and it can mount a campaign that generates doubts and uncertainties about the proposition, exploiting the electorate's innate caution and reinforcing the tendency to reject initiatives even if the proposition appeals to antiminority prejudices. The "negative bias," although a barrier to "good" legislation, functions equally as a shield against "bad" legislation: a defect of direct democracy may also prevent its abuse.

In recent years, opponents of certain initiatives have revived the claim that the process may be abused by majorities against unpopular minorities. These initiatives include California's Proposition 187 in the November, 1994, election, which excludes illegal immigrants from various public benefits including education and non-emergency medical care, and initiatives in several states that have prevented municipalities from prohibiting discrimination based on sexual orientation. For criticism of the "anti-gay" initiatives, see Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OREGON LAW REVIEW 19 (1993); *Symposium: The Bill of Rights vs. the Ballot Box: Constitutional Implications of Anti-Gay Ballot Initiatives*, 55 OHIO STATE LAW JOURNAL 491 (1994).

3. Should the initiative be adopted as part of the federal government's legislative process? In 1978, Senator James Abourezk, a liberal Democrat from South Dakota, proposed a constitutional amendment to do so. Senate Joint Resolution 67, 95th Cong., 1st Sess. (1977). For the text of Senator Abourezk's proposal see Bell, *supra*, at 21–22 n.79. The most extensive argument in favor of this proposal is Ronald J. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEBRASKA LAW REVIEW 695 (1979). For additional views, see *Voter Initiative Constitutional Amendment: Hearings on S.J. Res. 67 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 1st Sess. (1977).

4. In the states that have adopted the initiative process, its use has gone in cycles. Since about 1970, use has been increasing. In the 1960s, 85 initiatives were on state ballots; in the 1970s, 120; and in the 1980s, 193. See David B. Magleby, *Direct Legislation in the States*, in REFERENDUMS AROUND THE WORLD 218, 232 (David Butler & Austin Ranney, eds., 1994). Since 1898, 37 percent of the initiatives placed on the ballot in twelve states have been approved, compared with 61 percent of measures placed on the ballot by the state legislatures of those states. Id. at 251.

The procedural requirements for qualifying initiatives vary considerably from state to state. Failure to conform carefully with the requirements can cause the invalidation of an initiative effort. For a recent example, see *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994). Some of the more common requirements are described by Magleby, id. at 225–29:

> One of the most important legal requirements in all direct legislation processes is the signature threshold and related requirements. All forms of the initiative and popular referendum require that petitioners gather sufficient signatures from registered voters to meet a signature threshold, typically set as a proportion of the vote for governor in the previous gubernatorial election. Signature requirements range from a low of 2 percent in North Dakota for statutory initiatives to a high of 15 percent in Wyoming for statutory initiatives and [referendums.]
>
> The stringency of a state's signature threshold is inversely related to the frequency of measures qualifying for the ballot. Thirteen states have a geographic distribution requirement for signatures on direct legislation petitions. The intent of this requirement is to force petitioners to demonstrate support for their measure outside a few highly populated counties. The presence of a geographic distribution requirement appears to hamper proponents in getting their measures on the ballot....
>
> Other important procedural rules include the time period a measure can remain in circulation, the process whereby the measure is given its official title and summary, limitations on the subject matter that may be part of the measure, and whether the vote necessary for success is a simple majority of those voting on the measure, a majority of those voting in the election, or a supermajority of 60 percent or more of those voting in the election. Initiative petitions typically may circulate for up to 120 days, but the time limitation can be as short as 50 days or as long as 360 days. [R]eferendum petitions typically have a shorter time period for circulation, averaging about 90 to 120 days.
>
> Because initiatives are proposed laws or constitutional amendments, they can be very lengthy and technical in their wording. All states provide a short summary of the proposal, and most states give a short title as well. In some states, the proponents are permitted to title and summarize their own measures, but in most states this task is left to election officials. The process of summarizing and titling initiatives is often challenged in court....
>
> The vote needed for enactment of direct legislation also varies among the states. Some states require a majority of those voting on the measure, others a majority of those voting in the election, and still others an extraordinary majority of those voting in the election. At least one state requires a majority vote in two consecutive elections for a constitutional initiative to take effect. In 1988 and 1990, for instance, Nevada voters approved a constitutional initiative banning income taxes. When Minnesota voted on whether to adopt the initiative process in 1980, 53.2 percent of those voting on the question voted for the proposal, but a quarter of a million persons who voted in the election failed to vote on the question. Hence the affirmative vote was only 46.7 percent of all voters in the

election. Since Minnesota law requires that a majority of those voting in the election vote affirmatively for changes in the state constitution, the proposal for a statewide initiative failed.

Only registered voters may sign petitions, except in North Dakota, which does not have voter registration. There is a wide variation in how states verify petition signatures, ranging from verifying each signature to verifying random samples of signatures. States routinely check for duplicate signatures and evidence of petition fraud.

In recent years, two studies have commented on a variety of issues connected to the working of direct democracy in California. See Philip L. Dubois & Floyd F. Feeney, IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE (1992); California Commission on Campaign Financing, DEMOCRACY BY INITIATIVE (1992).

II. Content Restrictions

Paisner v. Attorney General

458 N.E.2d 734 (Mass. 1983)

HENNESSEY, Chief Justice.

This is an action for declaratory and injunctive relief challenging a decision of the Attorney General, who declined to certify an initiative petition on the ground that it was not in proper form for submission to the people. Art. 48, The Initiative, II, § 3, of the Massachusetts Constitution.[2] The Attorney General ruled in

2. Pertinent parts of art. 48, as amended by art. 74 of the Amendments to the Massachusetts Constitution, are as follows:

I. *Definition.*

"Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection;...

THE INITIATIVE.

II. *Initiative Petitions.*

"SECTION 1. *Contents.*—An initiative petition shall set forth the full text of the constitutional amendment or law, hereinafter designated as the measure which is proposed by the petition.

"SECTION 2. *Excluded Matters.*—No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect....

"No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

"No part of the constitution specifically excluding any matter from the operation of the

substance that the initiative petition did not propose enactment of a "law" as required by art. 48. We conclude that the Attorney General was correct both in his determination that he had the authority to decline to certify the petition, and in his ruling that the petition does not propose a proper subject for the popular initiative....

It is clear beyond dispute that the initiative petition here concerns the internal proceedings of the two Houses of the Legislature.... Many of the measure's proposals relate to the organization and operation of the House and Senate.... Procedures are prescribed for the nomination of presiding officers, the appointment to majority and minority floor leadership positions, the nomination, approval, and election of "chairs of legislative committees," and the selection of committee members. Procedures are prescribed for final reporting of matters by committees, for the discharge of legislative matters by petition, for the approval and signing of favorable reports of a committee, for the recording of committee votes in certain circumstances, for notice of committee sessions, and for a public hearing on every bill. There are provisions concerning legislative procedures, such as daily calendars, the printing of bills, and roll calls, and for a committee on legislative administration and budget. The proposal contains other matters such as limitations of the salary differentials of legislative leaders....

There are two issues before us: (1) Whether the Attorney General has authority under art. 48 to refuse to certify a proposed initiative as not in proper "form" because it does not propose a "law," and (2) if the Attorney General has such authority, whether his ruling was correct that the petition here does not propose a law....

1. *The Attorney General's Review of the Form of Petition.*

The plaintiffs assert that the Attorney General has no authority under art. 48 to refuse to certify an initiative petition on the ground that he is of opinion that it does not propose a law as required by art. 48. The Attorney General counters that he has such authority because his function includes a certification that the petition is "in the proper form for submission to the people," and this requires him to determine whether the petition is within the scope permitted by art. 48. We agree with the Attorney General.

The Constitution imposes, as to the initiative process, several responsibilities upon the Attorney General which require the exercise of his discretion and

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popular initiative and referendum shall be the subject of an initiative petition; nor shall this section be the subject of such a petition.

"The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder.

"SECTION 3. *Mode of Originating.*—Such petition shall first be signed by ten qualified voters of the commonwealth and shall be submitted to the attorney-general not later than the first Wednesday of the August before the assembling of the general court into which it is to be introduced, and if he shall certify that the measure and the title thereof are in proper form for submission to the people, and that the measure is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial state elections, and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent, it may then be filed with the secretary of the commonwealth...."

legal judgment. For example, he prepares summaries and attests that amendments to the petitions are "perfecting." Despite this grant of significant responsibilities, despite the fact that the Attorney General is the chief law officer of the Commonwealth, and despite the fact that no other State officer or official has been given explicit authority to rule upon the basic question related to the scope of art. 48, the plaintiffs would have us construe the word "form" in a narrow and technical sense.

This court has quashed certification by the Attorney General of initiative petitions which did not propose a law and thus were beyond the scope of art. 48. *Cohen v. Attorney Gen.*, 357 Mass. 564, 578–579, 259 N.E.2d 539 (1970). It follows that the Attorney General has the prerogative, indeed the duty, pursuant to his review of the "form" of the initiative petition, to apply his legal judgment to the issue whether a law is proposed.

Finally, in response to an argument of the plaintiffs that the Attorney General must not be permitted, in the certification process, to thwart the will of the people, we observe that, as in the instant case, the decision of the Attorney General as to certification is subject to judicial review. This is a safeguard against errors of law or arbitrary action by the Attorney General.

2. *Does This Petition Propose a Law?*

It is clear to us that the popular initiative is confined to laws and constitutional amendments. This conclusion derives from the plain meaning of the words of art. 48: "Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection." Art. 48, The Initiative, I. "An initiative petition shall set forth the full text of the constitutional amendment or law, hereinafter designated as the measure, which is proposed by the petition." Art. 48, The Initiative, II, § 1. Since this case does not concern constitutional amendments, we must examine whether the proposed initiative relates to a law. We conclude that it does not.

The first chapter of Part 2 of the Constitution of the Commonwealth establishes "The Legislative Power" as including prerogatives other than law-making. The first section of that chapter provides that laws may be enacted by bicameral action of the two Houses and presentment to the Governor. However, in addition to these law-making powers, the respective branches of the General Court possess many unicameral powers, most of which are bestowed on them by Part II, c. 1, §§ 2 and 3. The Attorney General fairly summarizes some examples of these powers: "The House alone, for instance, may originate a money bill or make an impeachment, while the Senate alone may hear and determine those impeachments. The power to 'choose its own President, appoint its own officers, and determine its own rules of proceedings' is conferred exclusively on the Senate, while the members of the House of Representatives possess the corollary power to 'choose their own Speaker, appoint their own officers, and settle the rules and orders of proceeding in their own House...'"...

Thus not all legislative products are laws and we examine the proposed initiative to decide in which category of legislative power it resides, laws or rules. Since the proposal concededly relates to internal legislative procedures, which are with-

in the constitutional unicameral powers of the respective Houses, it can logically be argued that the unicameral/bicameral distinction favors a conclusion that the proposed initiative does not concern a law. The Attorney General, however, submits what he believes are other critical distinctions between laws and rules. We consider them below, and we find them supportive of the conclusion that the proposed initiative does not relate to a law.

First, laws govern conduct external to the legislative body, while rules govern internal procedures. As we have seen, it is clear in this case that the initiative petition is aimed at the internal procedures of the branches of the Legislature, and this indicates that this petition establishes rules rather than laws because its principal purpose is to order the internal operations of the Senate and the House rather than to alter the legal duties of persons outside the Legislature.

Second, a law is binding; a rule is not. Legislative rule-making authority is a continuous power absolute and beyond the challenge of any other tribunal. *United States v. Ballin*, 144 U.S. 1 (1892). Even if the proposed initiative were to be enacted, the continuing power of the individual branches to ignore its provisions and to determine their own procedures would render the proposal a nullity. This is in sharp contrast to the methods permitted by the Constitution for rescinding or amending laws. It cannot be emphasized too strongly that this power over procedures rests, not in the "General Court," but in the separate Houses of the Legislature. See *Dinan v. Swig*, 112 N.E. 91 (Mass. 1916). Thus each branch of each successive Legislature may proceed to make rules without seeking concurrence or approval of the other branch, or of the executive, and without being bound by action taken by an earlier Legislature. *Id.* The plaintiffs argued before us that if their initiative were enacted, the Houses of the Legislature would not have unicameral power to nullify its content. In this they are mistaken, because such a result would effectively vacate the constitutional authority of the Senate and House to order their own internal procedures. This cannot be brought about by an initiative petition unless that petition, unlike the one before us, seeks and accomplishes a constitutional amendment to that end. Thus the initiative proposed here should not be characterized as a law because it is not binding. If enacted, it would be no more than a nonbinding expression of opinion, and we have held that such a plebiscite or declaration is not a law and is not an appropriate subject for the popular initiative. *Cohen, supra.*

One of the plaintiffs' arguments derives from the undisputed fact that the Commonwealth has statutes which directly relate to the internal proceedings of the two Houses. As we view their argument, the plaintiffs construct a syllogism: the Legislature has enacted such statutes; the popular initiative is as broad as the Legislature's law-making power; the initiative therefore can encompass the internal proceedings of the Houses of the Legislature.

The flaw in the plaintiffs' argument is in their minor premise. We agree that the popular initiative is coextensive with the Legislature's law-making power but, as we have seen above, the power to determine their own rules of proceedings is exclusively granted to the Senate and the House respectively.... The enactment of statutes relating to internal proceedings was obviously accomplished by the voluntary participation of each of the two Houses. Thus each House was essentially engaged in its rule-making function. It does not follow, from this voluntary exercise by the Houses, that others, through the popular initiative, may introduce rules under the guise of laws. The analogy urged by the plaintiffs is nonexistent.

Such procedural statutes are not binding upon the Houses; consequently they are not laws in the sense contemplated in art. 48. Either branch, under its exclusive rule-making constitutional prerogatives, is free to disregard or supersede such statutes by unicameral action. See *Dinan*, *supra*....

Judgment shall enter...declaring that the Attorney General was within his authority under art. 48 in declining to certify the proposed initiative, and further declaring that the petition here does not propose a law and consequently is not a proper subject for the popular initiative....

Notes and Questions

1. In *Paisner*, the court held that the initiative proposal was not a "law," and therefore not within the scope of the initiative power. In *People's Advocate v. Superior Court*, 226 Cal.Rptr. 640 (Cal.App. 1986), an initiative that made "sweeping changes in the organization and operation of the Assembly and Senate" had gone before the voters and been approved. The court struck down the initiative on reasoning comparable to that of *Paisner*, observing that "[s]ince the inception of our state the power of a legislative body to govern its own internal workings has been viewed as essential to its functioning except as it may have been expressly constrained by the California Constitution."

The initiative in *People's Advocate* contained an additional provision reducing the appropriations for the state legislature and setting a formula to restrict such appropriations in future years. This provision was likewise struck down, on the following reasoning:

> [The provision] seeks to govern the *content* of future legislation by limiting the amount of monies appropriated for the support of the Legislature....
>
> Neither house of the Legislature may bind its own hands or those of future Legislatures by adopting rules not capable of change....
>
> This principle has special application here. What is at issue is not the authority to amend a statute, however adopted, but the power to say what content a future statute may have. The authority to enact statutes which appropriate money for the support of the state government, including the Legislature, is set forth in article 4, section 12 of the California Constitution....
>
> Section 9934 limits the amount of monies that may be "appropriated" by statute for the support of the Legislature in *each* fiscal year beginning with the fiscal year 1984–1985. The limitation is based upon a formula tied to the budget bill enacted for the fiscal year 1982-1983. Section 9934 thus seeks to operate upon and condition the content of future statutes, appropriations statutes. In so doing it invades not only the *content* of the Governor's budget bill but displaces the process (budget and budget bill) by which article IV, section 12, commands the adoption and enforcement of the budget....By these means, section 9934 "divest[s] [the Legislature] of the power to enact legislation within its competence" and violates the specific injunctions of article IV, section 12 of the Constitution....Since the Legislature is denied such a statutory power, so are the people. For these reasons section 9934 is invalid.

People's Advocate does not imply a general prohibition on initiatives that rule out certain types of future legislation. Thus, in *California Common Cause v. Fair Political Practices Commission*, 269 Cal.Rptr. 873 (Cal.App. 1990), a provision in an initiative approved by the voters prohibited the use of public funds for political campaigns. Petitioners, relying on *People's Advocate* and other cases, contended that the provision restricted the ability of future state and local legislatures to enact public financing of campaigns. The court rejected this contention:

> The cases upon which petitioners rely are not on point. In each of them the challenged statutory provision directly conflicted with authority vested in the legislative body by the paramount organic law. While these provisions did purport to "bind the hands" of future legislative bodies, they were invalid precisely because they were in conflict with the constitution or local charter.
>
> ...In *People's Advocate*, a statutory initiative measure was approved which limited the amount of money the Legislature could appropriate for its own operations. This court invalidated the statute because it conflicted with article IV, section 12 of the California Constitution, which reserves to the Legislature the power to govern its own operations.

2. In Illinois, the initiative is permitted *only* for the purpose of altering the legislative process.

> Amendments to Article IV [the legislative article] of this Constitution may be proposed by a petition signed by a [specified number of electors]. Amendments shall be limited to structural and procedural subjects contained in Article IV....

Illinois Constitution, art. 14, § 3. The rationale for this very limited scope of the initiative process has been explained as follows:

> Section 3 recognizes that the General Assembly is unlikely to propose any changes in its basic structure, but that some changes may appear to be necessary. Thus, a method of constitutional revision other than through the General Assembly is necessary.

Robert A. Helman & Wayne W. Whalen, *Constitutional Commentary*, in SMITH-HURD COMPILED STATUTES ANNOTATED, Const., art. 14, § 3 (1993).

Paisner and *People's Advocate* could be crudely paraphrased as saying that the initiative can address most subjects but not the legislative process itself. Does the Illinois constitution take exactly the opposite approach? If so, which is better?

The Illinois provision for the initiative, narrow to begin with, has been interpreted strictly by the Illinois courts. In *Coalition for Political Honesty v. State Board of Elections*, 359 N.E.2d 138 (Ill. 1976), the Illinois Supreme Court ruled that an Illinois initiative must make both structural *and* procedural changes to the legislative process. On this basis it struck down three initiative proposals, including one that prohibited legislators from voting on bills in which they had conflicts of interest. Presumably, the court regarded that as a procedural but not as a structural change. In *Chicago Bar Association v. State Board of Elections*, 561 N.E.2d 50 (Ill. 1990), the court struck down a proposal that would have required a three-fifths vote in each house for any bill that would increase revenues and would have required a special revenue committee to be created in each house, with detailed

specifications regarding number of members, method of appointment, and so on. The court explained:

> The [proponent] argues that the proposed Amendment does affect structural and procedural subjects of article IV, and thus complies with section 3 of article XIV. Even assuming that the [proponent] is correct in this regard, we find that the proposed Amendment is not *limited to* the structural and procedural subjects of article IV. Wrapped up in this structural and procedural package is a substantive issue not found in article IV—the subject of increasing State revenue or increasing taxes.

If an initiative like the ones in *Paisner* and *People's Advocate* were proposed in Illinois, would the Illinois courts permit it to go on the ballot?

3. The cases described above show that courts will often protect the legislature's autonomy from interference through the initiative process. Will they extend similar protection to the other two branches of government?

In *Citizens Coalition for Tort Reform v. McAlpine*, 810 P.2d 162 (Alaska 1991), the Supreme Court of Alaska struck from the ballot an initiative proposal to limit contingent attorney's fees in personal injury cases. The Alaska Constitution, art. XI, § 7, barred initiative proposals to "create courts, define the jurisdiction of courts or prescribe their rules." The proposal in question limited fees "regardless of whether the recovery is by settlement, arbitration, or judgment." The Alaska Supreme Court reasoned that since the regulation of the practice of law, including regulation of fees, was within its own power, the proposed initiative was an effort to prescribe a court rule.

In *Yute Air Alaska v. McAlpine*, 698 P.2d 1173 (1985), the Alaska court approved an initiative proposal that provided in part:

> The governor shall use best efforts and all appropriate means to persuade the United States Congress to repeal... the Jones Act[, which required the use of United States vessels for shipping goods between United States ports]. Until that Act is repealed, the governor shall publish an annual report documenting the harmful effects of the Act on Alaska commerce, and progress made towards its repeal.

The court rejected a contention that this provision was not a "law" that could be enacted by the initiative process. What if this proposal were enacted and the governor did not favor repeal of the Jones Act? What if the Jones Act were still in effect and the governor or staff or consultants employed by the governor to prepare the required annual report concluded from the evidence that harm to Alaska commerce from the Jones Act either did not exist or could not be documented?

4. In some states the initiative may be used to "amend" the state constitution but not to "revise" it. See e.g., *McFadden v. Jordan*, 196 P.2d 787, (Cal. 1948), cert. denied 336 U.S. 918 (1949); *Holmes v. Appling*, 392 P.2d 636 (Or. 1964). This distinction is said to be "based on the principle that 'comprehensive changes' to the Constitution require more formality, discussion and deliberation than is available through the initiative process." See *Raven v. Deukmejian*, 276 Cal.Rptr. 326, 801 P.2d 1077 (1990).

Not surprisingly, California's famous Proposition 13 was challenged on the ground that it revised rather than amended the California Constitution. Proposition 13 has been described

> as a revolutionary measure for reducing the level and growth of state and local government expenditure as well as sharply restricting the use of the property tax as a source of government revenue. [Proposition 13] 1) restricts the property tax rate to no more than 1 percent of assessed value; 2) sets assessed value for a property that has not been transferred since 1975–76 equal to its fair market value in that year plus 2 percent per year (compounded); in the event that the property has been transferred since 1975–76, the market value at the time of sale is used (plus the 2 percent growth factor); and 3) requires that new taxes or increases in existing taxes (except property taxes) receive a two-thirds approval of the legislature in the case of state taxes, or of the electorate, in the case of local taxes.
>
> The potential fiscal impact of these provisions is enormous....
>
> There are, among others, implications for financial markets; taxpayer equity; efficiency of the housing market; the structure of state and local government; and perhaps, most dramatically, for other governments, including the federal government.

William H. Oakland, *Proposition 13: Genesis and Consequences*, in THE PROPERTY TAX REVOLT: THE CASE OF PROPOSITION 13, 31, 31–32 (1981).[6] In *Amador Valley Joint Union High School District v. State Board of Equalization*, 149 Cal.Rptr. 239, 583 P.2d 1281 (1978), the California Supreme Court ruled that Proposition 13 was valid as a constitutional "amendment." The court stated that

> our analysis in determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature. For example, an enactment which is so extensive in its provisions as to change directly the "substantial entirety" of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also.

Proposition 13 was not a revision under this analysis, because its "changes operate functionally within a relatively narrow range to accomplish a new system of taxation which may provide substantial tax relief for our citizens."

However, in *Raven*, *supra*, the court ruled that a provision in an initiative known as Proposition 115 was void because it purported to revise the constitution. The provision in question required that various procedural rights of defendants in criminal cases

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6. The effects of Proposition 13 have been described less neutrally by Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 UNIVERSITY OF COLORADO LAW REVIEW 733 (1994):

> Proposition 13 has left education, welfare, public safety, the economy, and the infrastructure in shambles. California, which once ranked as the nation's leader in primary and secondary education, now relishes a year in which it finishes forty-eighth rather than fiftieth. The University of California may still be a gem among public institutions of higher learning, but too often it is less a diamond than a zirconium.

> shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States....

This provision admittedly was not a revision on quantitative grounds. Despite the fact that the California Supreme Court had a "general principle or policy" of being guided in its construction of state constitutional rights by the United States Supreme Court's interpretation of corresponding federal rights, the California court had departed from this policy on a number of occasions. Accordingly, from a qualitative standpoint, "the effect of Proposition 115 is devastating," because as to the rights in question, "California courts in criminal cases would no longer have authority to interpret the state Constitution in a manner more protective of defendants' rights than extended by the federal Constitution...."

Less than a year later the California court upheld Proposition 140 against a claim that it revised the state constitution. Proposition 140 imposed term limits on state legislators and other elected state officials; reduced the state legislature's budget by about 38 percent; and eliminated pensions for future state legislators. The court distinguished *Raven* as follows:

> As indicated in *Raven*, a qualitative revision includes one that involves a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational powers of its branches. *Raven* invalidated a portion of Proposition 115 because it deprived the state judiciary of its foundational power to decide cases by independently interpreting provisions of the state Constitution, and delegated that power to the United States Supreme Court.
>
> By contrast, Proposition 140 on its face does not affect either the structure or the foundational powers of the Legislature, which remains free to enact whatever laws it deems appropriate. The challenged measure alters neither the content of those laws nor the process by which they are adopted. No legislative power is diminished or delegated to other persons or agencies. The relationships between the three governmental branches, and their respective powers, remain untouched.

Legislature v. Eu, 286 Cal.Rptr. 283, 816 P.2d 1309 (1991), cert. denied 503 U.S. 919 (1992).

Amador Valley, *Raven*, and *Legislature* involved, respectively: Proposition 13, which dramatically lowered property taxes, greatly increased the difficulty of increasing taxes in the future, and predictably effected a major shift of power from local to state governments; Proposition 115, which converted a general principle of interpretation of certain rights into a mandatory principle; and Proposition 140, which adopted term limits and slashed the legislative budget. Which of these propositions brought about the most "comprehensive changes" in the California system of governance? Which brought about the least "comprehensive changes"?

Do the decisions summarized in this Note and in Note 3 suggest the possibility that courts are more sensitive to intrusions on their own powers than on those of the coordinate branches of government?

5. Numerous additional subject-matter restrictions on the content of initiatives exist in one or more states. Following is a sampling:

In some jurisdictions, an initiative may not appropriate funds. See *Dorsey v. District of Columbia Board of Elections & Ethics*, 648 A.2d 675 (Dist. Col. 1994).

In many jurisdictions, initiatives may not resolve "administrative" as opposed to "legislative" questions. This issue most commonly arises in connection with initiative proposals at the local level. For example, in *Foster v. Clark*, 790 P.2d 1 (Or. 1990), the Portland City Council had changed the name of a street from "Union Avenue" to "Martin Luther King, Jr. Boulevard." An initiative proposal to change the name of the street back to "Union Avenue" was struck off the ballot on the ground that it dealt with an administrative issue.

A few jurisdictions prohibit the reversal by initiative of a decision that already has been made by the legislative body. See, e.g., *Schaefer v. Village Board*, 501 N.W.2d 901 (Wis. 1993).

In at least some states, courts will remove from the ballot initiatives that declare an opinion on some question of public policy without legislating on the subject. The California Supreme Court adopted this view in *AFL-CIO v. Eu*, 206 Cal.Rptr. 89, 686 P.2d 609 (1984), while acknowledging

> that there may be a value to permitting the people by direct vote not only to adopt statutes, but also to adopt resolutions, declare policy, and make known their views upon matters of statewide, national, or even international concern. Such initiatives, while not having the force of law, could nevertheless guide the lawmakers in future decisions. Indeed it may well be that the declaration of broad statements of policy is a more suitable use for the initiative than the enactment of detailed and technical statutes. Under the terms of the California Constitution, however, the initiative does not serve these hortatory objectives; it functions instead as a reserved legislative power, a method of enacting statutory law.

6. One restriction on the content of initiatives that exists in many states and has been the subject of considerable litigation is the "single subject rule." For example, California Constitution, art. II, § 8(d) provides: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."

Challenges to initiatives on single-subject grounds have had the greatest success in Florida, as the following case illustrates.

In re Advisory Opinion to the Attorney General

632 So.2d 1018 (Fla. 1994)

McDONALD, Justice.

[T]he Attorney General has petitioned this Court for an advisory opinion on the validity of an initiative petition....

The petition seeks to amend article I, section 10 of the Florida Constitution, which provides:

> No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

The petition would amend the above provision in the following manner:

> 1) Article I, section 10 of the Constitution of the State of Florida is hereby amended by...adding a new subsection "(b)" at the end thereof to read:
>
> (b) The state, political subdivisions of the state, municipalities or any other governmental entity shall not enact or adopt any law regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status, or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status. As used herein the term 'sex' shall mean the biological state of either being a male person or a female person; 'marital status' shall mean the state of being lawfully married to a person of the opposite sex, separated, divorced, widowed or single; and 'familial status' shall mean the state of being a person domiciled with a minor, as defined by law, who is the parent or person with legal custody of such minor or who is a person with written permission from such parent or person with legal custody of such minor.
>
> (2) All laws previously enacted which are inconsistent with this provision are hereby repealed to the extent of such inconsistency....

Our advisory opinion is limited to determining whether the proposed amendment complies with article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes (1993). Article XI, section 3 of the Florida Constitution requires that a proposed amendment "shall embrace but one subject and matter directly connected therewith." The Attorney General concluded that "on its face," the amendment appeared to satisfy the single-subject requirement. Looking beyond the surface, however, we find that the proposed amendment touches upon more than one subject and therefore violates the single-subject provision of the constitution.

Florida's state constitution reflects a consensus on the issues and values that the electorate has declared to be of fundamental importance. When voters are asked to consider a modification to the constitution, they should not be forced to "accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support." *Fine v. Firestone*, 448 So.2d 984, 988 (Fla.1984). The single-subject rule is a constitutional restraint placed on proposed amendments to prevent voters from being trapped in such a predicament. Thus, to comply with the single-subject requirement, the proposed amendment must manifest a "logical and natural oneness of purpose." *Id.*

To ascertain whether the necessary "oneness of purpose" exists, we must consider whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution. *Id.* In support of the validity of the proposed amendment, the American Family Political Committee argues that discrimination is the sole subject of the proposed amendment. This Court has emphasized, however, that "enfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement." *Evans v. Firestone*, 457 So.2d 1351, 1353 (Fla.1984). In *Fine*, we disapproved a proposed amendment that characterized the provisions as affecting the single sub-

ject of revenues because it actually affected the government's ability to tax, government user-fee operations, and funding of capital improvements through revenue bonds. Similarly, we find that the subject of discrimination in the proposed amendment is an expansive generality that encompasses both civil rights and the power of all state and local governmental bodies. By including the language "any other governmental entity," the proposed amendment encroaches on municipal home rule powers and on the rulemaking authority of executive agencies and the judiciary. In addition, the amendment modifies article I, section 2 of the Florida Constitution, dealing with the basic rights of all natural persons, and also affects article I, section 6 of the Florida Constitution, dealing with the right of employees to bargain collectively.

The proposed amendment also violates the single-subject requirement because it enumerates ten classifications of people that would be entitled to protection from discrimination if the amendment were passed. The voter is essentially being asked to give one "yes" or "no" answer to a proposal that actually asks ten questions. For example, a voter may want to support protection from discrimination for people based on race and religion, but oppose protection based on marital status and familial status. Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single-subject limitation. Therefore, the proposed amendment fails the single-subject requirement of article IV, section 3 of the Florida Constitution.

[The court also ruled that an additional reason for striking the measure from the ballot was that the proposed ballot title and summary were misleading. A concurring opinion by Justice Kogan is omitted.]

Notes and Questions

1. Florida, like most states, has a provision in its constitution requiring that statutes passed by the legislature address only a single subject. In *Fine v. Firestone*, 448 So.2d 984 (Fla. 1984), cited in *In re Advisory Opinion*, the Florida Supreme Court "receded" from earlier decisions interpreting the two single-subject rules to establish the same standard. The court concluded that

> we should take a broader view of the legislative provision because any proposed law must proceed through legislative debate and public hearing. Such a process allows change in the content of any law before its adoption. This process is, in itself, a restriction on the drafting of a proposal which is not applicable to the scheme for constitutional revision or amendment by initiative.

Additional reasons, which were more specific to Florida, depended on the specific language used in the constitutional provisions and on the fact that the single-subject rule for the legislature applied only to statutes while the rule for initiatives applied only to constitutional amendments and revisions. Florida allows only constitutional, not statutory, initiatives.

Most states that have considered the issue at least purport to apply the single-subject rule identically to the legislature and to the initiative process. Indeed, the Oregon Supreme Court canvassed decisions in a number of states on this point

and concluded that "[i]t does appear...that the Florida court stands alone." *Oregon Education Association v. Phillips*, 727 P.2d 602 (Or. 1986).

2. What is the purpose of the single subject rule, as applied to initiatives? Two purposes are commonly articulated: to prevent voter confusion and, as the Florida court stated, to prevent logrolling. Is the single subject rule well suited to accomplish these purposes? See Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VIRGINIA LAW REVIEW 625, 664–70 (1994) (arguing that the single subject rule serves an anti-logrolling function); Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA LAW REVIEW 936, 954–65 (1983) (arguing that the rule serves neither purpose, but proposing an alternative rationale for the rule).

3. Although Florida may be the only state that expressly applies the single-subject rule more rigorously to initiatives than to acts of the state legislature, there are other states that articulate relatively strict interpretations of the rule. For example, in Arizona, the rule is described as follows:

> If the different changes contained in the proposed amendment all cover matters necessary to be dealt with in some manner, in order that the Constitution, as amended, shall constitute a consistent and workable whole on the general topic embraced in that part which is amended, and if, logically speaking, they should stand or fall as a whole, then there is but one amendment submitted. But, if any one of the propositions, although not directly contradicting the others, does not refer to such matters, or if it is not such that the voter supporting it would reasonably be expected to support the principle of the others, then there are in reality two or more amendments to be submitted, and the proposed amendment falls within the constitutional prohibition.

Tilson v. Mofford, 737 P.2d 1367 (Ariz. 1987), quoting *Kerby v. Luhrs*, 36 P.2d 549 (Ariz. 1934).

Most states do not follow Arizona in requiring that all the provisions in an initiative be "necessary." For example, in Alaska, the "standard is that the 'act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject.'" *Yute Air Alaska v. McAlpine*, 698 P.2d 1173 (Alaska 1985) (quoting from earlier decisions applying the single subject rule to legislatures). In California, likewise, the courts have applied the single subject rule liberally in order to sustain "statutes and initiatives which fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose." *Brosnahan v. Brown*, 186 Cal.Rptr. 30, 651 P.2d 274, 284 (1982).

One writer criticizes the liberal application of the rule in California on these grounds:

> The supreme court uses several artifices to avoid invalidating initiatives under the single-subject rule. Indeed, with these methods it can avoid altogether a meaningful application of the rule. These artifices include the broad manner of defining "subject," the loose relationship allowed between the measure's provisions and its "subject," the failure to

> distinguish between a measure's subject and objective, and the preference for delaying review until after an election. These artifices allow the court to sidestep serious review of complex initiative measures.

Marilyn E. Minger, Comment, *Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California*, 24 U.C. DAVIS LAW REVIEW 879, 899–900 (1991). For a defense of the liberal interpretation, see Lowenstein, *supra*.

Even in a state that interprets the rule liberally, anyone drafting an initiative—and anyone looking for a way to invalidate an initiative—should bear the single subject rule in mind. See, e.g., *Chemical Specialties Manufacturers Association v. Deukmejian*, 278 Cal.Rptr. 128 (Cal.App. 1991), in which an initiative entitled the "Public's Right to Know Act" was declared void for violating the rule. The initiative required labeling of household toxic products; disclosure of the affiliations of certain marketers of insurance to seniors; disclosures in contracts of nursing homes; disclosure of the major funding source in advertisements for or against statewide ballot propositions; and disclosure to investors if the issuer of securities was doing business in South Africa. The court wrote that "the object of providing the public with accurate information in advertising is so broad that a virtually unlimited array of provisions could be considered germane thereto and joined in this proposition, essentially obliterating the constitutional requirement."

III. Judicial Review

Laws passed by the initiative process are subject to judicial review under the state and federal constitutions, and state constitutional amendments passed by initiative are reviewed under the United States Constitution. One contention has been that the initiative process itself violates Article IV, § 4 of the Constitution, which provides in part: "The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion...." Those who believe the initiative process violates this "Guaranty Clause" maintain, relying in part on Madison's *Federalist No. 10*, that the "republican form of government" that is guaranteed must consist of a representative government, in contrast with a "democratic" form relying on direct action by the voters. The constitutionality of a tax adopted by initiative in Oregon was challenged on this theory in *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). The Supreme Court declined to reach the merits of this challenge, holding instead that questions raised under the Guaranty Clause are nonjusticiable.

State courts generally have followed *Pacific States* and declined to pass on whether the initiative process violates the Guaranty Clause. A former member of the Oregon Supreme Court and distinguished scholar has argued that state courts should not be bound by the federal nonjusticiability doctrine. He contends that if state courts are unwilling to strike down the initiative process as a whole, they should declare that the submission to the voters of certain types of measures, particularly those that stigmatize particular groups, may violate the requirement of a republican form of government. See Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OREGON LAW REVIEW 19 (1993); Hans A. Linde, *Who Is Responsible for Repub-*

lican Government?, 65 UNIVERSITY OF COLORADO LAW REVIEW 709 (1994). However, Linde's theory was rejected by an Oregon appellate court, which refused to remove from the ballot an "anti-gay" initiative:

> [P]laintiffs claim that Article IV, section 4 of the United States Constitution, which guarantees to the states a republican form of government, prohibits the use of the initiative for various purposes, including, among others, to enact a state constitutional amendment that "imposes unique disabilities on an identifiable group of citizens," and to propose a measure that asks voters to act on the basis of passion and interest. Plaintiffs assert that the Guaranty Clause forbids states from holding an election by popular vote on any "proposed laws aimed at restricting the substantive rights of unpopular minority groups."...
>
> Plaintiffs...do not cite *Pacific States* or make any argument about why we are not bound by the United States Supreme Court's interpretation of the federal constitution....[W]e conclude that the United States Supreme Court's interpretation of the Guaranty Clause as presenting a purely political question that is exclusively for Congress and not the courts to decide, precludes the courts of this state from entering any declaration about compliance with the Guaranty Clause.

Lowe v. Keisling, 882 P.2d 91 (Or.App. 1994). For criticism of the Linde approach, see Jesse H. Choper, *Observations on the Guarantee Clause—As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 UNIVERSITY OF COLORADO LAW REVIEW 741, 744–46 (1994).

Although court challenges to the initiative process itself have been stymied to date, it is not surprising that the specific measures enacted through a process designed to produce innovative and controversial laws should stimulate numerous constitutional challenges. As the next case illustrates, questions have arisen about the appropriate procedures for resolving such challenges, including whether the constitutionality of a proposal should be considered before it has been approved by the voters.

Wyoming National Abortion Rights League v. Karpan

881 P.2d 281 (Wyo. 1994)

THOMAS, Justice.

The major concern in these consolidated cases is whether this court should order that an initiative measure [entitled the Wyoming Human Life Protection Act] not be placed on the general election ballot because of its potential unconstitutionality, if enacted. Embraced within this question are issues relating to the existence of a justiciable controversy; the unconstitutionality *vel non* of the proposed initiative measure; the constitutional invalidity of the measure because the title and summary do not clearly express its subject, and the body of the initiative contains more than a single subject; and whether the correct election year was selected for the purpose of tabulating the required number of signatures. Recognizing a split of authority with respect to the existence of a justiciable controversy, we hold that, if enacted, the measure would not be unconstitutional in its entirety under current federal standards. It follows that it should be included in the gener-

al election ballot unless one or more of the alternative grounds urged by the appellants is valid....

We hold there is nothing in our law relating to justiciability that would inhibit the consideration of this case....

We acknowledge that the power of the electorate to enact laws through the initiative process is of "equal dignity" to the power of the legislature to adopt statutes. An apt statement of this concept is found in 82 C.J.S. *Statutes* § 118 (1953):

> Through the initiative the people are a coordinate legislative body with co-extensive legislative power, exercising the same power of sovereignty in passing on measures as that exercised by the legislature in passing laws. Statutes enacted by the people directly under the initiative are of equal dignity with those passed by the legislature, for the result is the same in either case.

In Wyoming, a measure adopted through the initiative process enjoys a superior status because it is not subject to veto and, while it may be amended at any time, it cannot be repealed by the legislature within two years of its effective date. Wyo. Const. art. 3, § 52(f). The only proscriptions with respect to the adoption of measures by initiative and referendum are found in Article 3, Section 52(g) of the Constitution of the State of Wyoming, which states:

> The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, enact local or special legislation, or enact that prohibited by the constitution for enactment by the legislature.

In our sister jurisdictions that have constitutional provisions for the initiative process, the majority of courts have ruled that a controversy over the constitutionality of an initiative is justiciable only after it has been enacted. These courts clearly have held that any pre-election challenge to the constitutionality of an initiative does not present a justiciable controversy under any circumstances. *Tilson v. Mofford*, 737 P.2d 1367 (Ariz. 1987); *McKee v. City of Louisville*, 616 P.2d 969 (Colo. 1980); *Associated Taxpayers of Idaho v. Cenarrusa*, 725 P.2d 526 (Idaho 1986); *Bowe v. Secretary of the Commonwealth*, 69 N.E.2d 115 (Mass. 1946); *Anderson v. Byrne*, 242 N.W. 687 (N.Dak. 1932); *Barnes v. Paulus*, 588 P.2d 1120 (Or.App. 1978); *State ex rel. Althouse v. City of Madison*, 255 N.W.2d 449 (Wis. 1977). The majority rule usually is explained by the prohibition against "advisory opinions."

In some of those jurisdictions, pre-enactment challenges are justiciable and can be the subject of judicial review if the initiative addresses subject matter that is excluded from or proscribed by the initiative process as delineated in the constitutional measure. *See, e.g., Whitson v. Anchorage*, 608 P.2d 759 (Alaska 1980) (where municipal charter amendment in initiative was in conflict with state statute); *Boucher v. Engstrom*, 528 P.2d 456 (Alaska 1974) (where initiative would have permitted the passage of a local or special law); *Convention Center Referendum Committee v. Dist. of Columbia Bd. of Elections and Ethics*, 441 A.2d 889 (App.D.C.1981) (where initiative would have permitted the appropriation of funds); *Bowe*, 69 N.E.2d 115 (where court held it had the authority to enforce the constitutional exclusions to the initiative process).

The Supreme Court of Arizona stated its rationale in this way:

> Just as under the separation of powers doctrine the courts are powerless to predetermine the constitutionality of the substance of legislation, so also they are powerless to predetermine the validity of the substance of an initiated measure....
>
> *In the absence of any constitutional or statutory directive to the contrary*, the proper place to argue about the potential impact of an initiative is in the political arena, in speeches, newspaper articles, advertisements and other forums. The constitutionality of the interpretation or application of the proposed amendment will be considered by this court only after the amendment is adopted and the issue is presented by litigants whose rights are affected.

Tilson, 737 P.2d at 1369, 1372 (emphasis added). This emphasized language suggests that Arizona might make room for a pre-enactment adjudication of the constitutionality of an initiative, but only if judicial action was directed by state constitutional or statutory law. *Whitson*; *Boucher*; *Bowe*.

In some jurisdictions, the constitutionality *vel non* of a proposed initiative measure is perceived as justiciable on the premise that the electorate has no right to enact an unconstitutional law. In *State ex rel. Harper v. Waltermire*, 691 P.2d 826, 828–29 (Mont. 1984), the Supreme Court of Montana, while recognizing that "the initiative power should be broadly construed to maintain the maximum power in the people," invalidated the measure before it as an attempt by the electorate to "circumvent their Constitution by indirectly doing that which cannot be done directly." The Supreme Court of California, declaring improper a proposed initiative that would have allowed redistricting more than once during the ten-year period following the federal census, stated the proposition in this way:

> A statutory initiative is subject to the same state and federal constitutional limitations as are the Legislature and the statutes which it enacts.

Legislature v. Deukmejian, 194 Cal.Rptr. 781, 669 P.2d 17, 26–27 (1983). To the same effect are *Hessey v. Burden*, 615 A.2d 562 (D.C.App.1992); *Stumpf v. Lau*, 839 P.2d 120 (Nev. 1992) (where initiative placing term limits on United States Congressman or Senator from Nevada was held violative of the federal constitution); *In Re Petition No. 349*, 838 P.2d 1 (Okla.1992) (where a similar petition to initiative at issue in this case was kept off the ballot because it violated the federal constitution); *City of Newark v. Benjamin*, 364 A.2d 563 (N.J.Super. 1976) (where general rule against pre-election review is abrogated if initiative is facially invalid or initiative fails to meet statutory requirements). As early as 1934, the Supreme Court of Florida, addressing a constitutional amendment, succinctly articulated this rationale:

> If a proposed amendment to the state Constitution by its terms specifically and necessarily violates a command or limitation of the Federal Constitution,...the prescribed legal procedure for submitting such a proposed amendment to the electorate...may be enjoined at the suit of proper parties in order to avoid the expense of submission, when the amendment, if adopted, would palpably violate the paramount law and

> would inevitably be futile and nugatory and incapable of being made operative under any conditions or circumstances.

Gray v. Winthrop, 156 So. 270, 272 (Fla. 1934).

We acknowledge the political pragmatism of the majority view. In part, that hinges upon a recognition that the issue may be mooted by the failure to adopt the proposed initiative. Still, we perceive no difference between the situation in which an initiative may violate a command or limitation of the state or federal constitution and one in which the constitutional provision, as interpreted and applied, is violated.

It is clear, and the pro-life faction does not substantially disagree, that the proposed initiative entitled "Wyoming Human Life Protection Act" is partially unconstitutional under federal standards. In Section 35-6-102 of the proposed initiative, abortion is prohibited and, in conjunction with provisions of existing law, it would be criminalized. This without regard to the doctrine of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992). The provisions directly contravene the rule of those cases.

In *Roe*, the Supreme Court of the United States ruled that state criminal statutes prohibiting abortions at any stage of pregnancy except to save the mother's life are unconstitutional under the federal constitution.... *Roe* represents the legal *status quo* with respect to federal constitutionality, and we cannot predict any change in that rule based upon the history to this time.

There was substantial speculation about the possibility of a new case overruling or undercutting the principles articulated in *Roe*. *Casey* ended this speculation and upheld the rule of *Roe* to the effect that a state may not prohibit a woman from making the ultimate decision to terminate her pregnancy prior to viability of the fetus....

Because the initiative at issue is contrary to the ruling of the Supreme Court of the United States in *Roe*, recently reaffirmed in *Casey*, logic dictates that a justiciable controversy is present in the same way that one would be present if the language of the constitution were challenged directly. A ruling by this court on such a constitutional issue should not be perceived as simply an advisory opinion. The dynamics of the situation are different from that in which the constitutionality of an initiative proposition has not been previously adjudicated.

We hold that an initiative measure that contravenes direct constitutional language, or constitutional language as previously interpreted by the highest court of a state or of the United States, is subject to review under the declaratory judgment statutes....[I]f such a measure were clearly unconstitutional, there would be no purpose in submitting it to the electorate under the initiative process. The initiative process was designed and intended for a different purpose than simply providing a formal straw vote.

It is this proposition that the pro-choice faction relies upon in seeking to inhibit the initiative from the general election ballot. Their argument encompasses the claim that there is a burden on the electoral process if voters address time, thought, and deliberation to legislation, the adoption of which is a hollow act. They also argue that the effort is a waste of state time and money in preparing the ballot and submitting it to the electorate.

Both the federal and the state constitutions require our compliance with federal constitutional law on issues preserved within the federal domain. This con-

cept, we hold, brings the issue within the language of Article 3, Section 52(g) of the Constitution of the State of Wyoming providing that:

> The initiative shall not be used to...enact that prohibited by the constitution for enactment by the legislature.

The proposed initiative makes no allowance for a woman's pre-viability decision with respect to a non-therapeutic abortion. If it were adopted, it could not withstand challenges under the rule of *Roe* and *Casey*, and it clearly would be unconstitutional under those standards. This does not end the case, however.

...Other provisions exist in the proposed initiative, particularly Section 35-6-117, that prohibit the appropriation of state funds for abortions except for cases of sexual assault, incest, and pregnancies detrimental to the health of the mother. This proposed section in the initiative is the same in substance as the current section and would be constitutional within the parameters of *Maher v. Roe*, 432 U.S. 464 (1977). In addition, other provisions exist addressing a prohibition of civil liability for refusal to perform abortion and the necessity for reporting abortion.

The Supreme Court of Florida has held that it is necessary to find a measure unconstitutional in its entirety in order to proscribe its submission to the electorate, saying

> when a proposal of the nature here involved is assaulted on the ground that it violates the Constitution, the courts will not interfere if upon ultimate approval by the electorate such proposal can have a valid field of operation even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law. In other words, if an examination of the proposed amendment reveals that if adopted it would be legally operative in part, even though it might ultimately become necessary to determine that particular aspects violate the Constitution, then the submission of such a proposal to the electorate for approval or disapproval will not be restrained.

Dade County v. Dade County League of Municipalities, 104 So.2d 512, 515 (Fla.1958).

The logic and rationale from the Supreme Court of Florida...are pertinent and compelling. We hold that an initiative, attacked as facially unconstitutional, must be unconstitutional in toto before we could foreclose its inclusion in the ballot for a vote of the people.

Under our constitution, and the federal constitution as interpreted, there are aspects of the Wyoming Human Life Protection Act that are constitutional. Given that fact, and the prospect of severability, this court cannot, by a pre-enactment ruling, declare the proposed bill unconstitutional. It follows that it should be included on the 1994 general election ballot and voted upon by the people....

We are not persuaded by the pro-life argument that, like a legislative bill, an initiative cannot be reviewed until it is enacted. Justice Oliver Wendell Holmes stated for the Supreme Court of the United States, "litigation cannot arise until the moment of legislation is passed." *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 228 (1908). There is a difference, however, between the initiative process and the normal legislative process. Once the initiative has been submitted to the voters in the petition drive, its language cannot be changed. For the purpose of knowing

what the final form of the measure will be, the proposed initiative settles that question. Consequently, ripeness of the initiative issue is not the same problem for purposes of judicial review as ripeness of a legislative measure might be. The latter can be amended at any point in the legislative process up until its final enactment. This is not true regarding an initiative.

[The court rejected the additional grounds asserted by the pro-choice plaintiffs for removing the measure from the ballot. Concurring and dissenting opinions are omitted.]

Notes and Questions

1. Proposition 187 was a controversial California initiative in 1994. One of its provisions was to prohibit children who are aliens illegally in the United States from attending public schools. Virtually everyone, including most knowledgeable supporters of Proposition 187, agreed that the public school provision violated the Equal Protection Clause as interpreted in *Plyler v. Doe*, 457 U.S. 202 (1982). Some supporters of Proposition 187 hoped that if the prohibition were enacted, a majority on the Supreme Court might be persuaded to reverse *Plyler*. Other provisions of Proposition 187, denying various public services to unlawful aliens, did not obviously violate existing constitutional doctrine. Would the Wyoming court have ruled Proposition 187 off the ballot? Suppose Proposition 187 had contained only the public school provision and had been proposed solely for the purpose of challenging *Plyler*. Does this hypothetical suggest that state courts should or should not provide pre-election constitutional review of initiatives?

2. Suppose you are consulted by a group in Wyoming that has drafted a law to bar unlawful aliens from public schools, in the belief that a majority on the Supreme Court would be willing to reverse *Plyler v. Doe*. The group proposes to circulate the proposed law as an initiative. How would you advise them to draft their law to assure that the Wyoming courts will permit it to go on the ballot?

3. In *Stumpf v. Lau*, 839 P.2d 120 (Nev. 1992), cited in the Wyoming decision, the Nevada Supreme Court said it would strike from the ballot a measure that "would constitute a 'plain and palpable' violation of the United States Constitution and would 'inevitably be futile and nugatory and incapable of being made operative under any conditions or circumstances.'" However, it would permit the voters to decide on "a ballot question that arguably might [be] applied in a constitutional manner." Applying these principles, it removed from the ballot a congressional term limits initiative. Is the Nevada approach a good compromise, given the pros and cons of pre-election review? Does it differ from the Wyoming approach? In *U.S. Term Limits v. Thornton*, 115 S.Ct. 1842 (1995), the Supreme Court ruled that congressional term limits are unconstitutional by a 5–4 vote. Given the Nevada court's professed standard, was *Stumpf v. Lau* correctly decided?

4. The Wyoming decision also cited *Legislature v. Deukmejian*, 194 Cal.Rptr. 781, 669 P.2d 17 (Cal. 1983). The governor of California had called a special election for December 13, 1983, to vote on an initiative that would have repealed districting lines for the state legislature and the House of Representatives that had been enacted by the state legislature, and replaced them with new lines set forth in the initiative. In *Legislature*, the California Supreme Court called off the spe-

cial election on the ground that under the California constitution, once a districting plan had been adopted during a decade, no new plans could be adopted until the following decade. The court acknowledged a "general rule favoring postelection review," but wrote that the general rule

> contemplates that no serious consequences will result if consideration of the validity of a measure is delayed until after an election. Under those circumstances, the normal arguments in favor of the "passive virtues" suggest that a court not adjudicate an issue until it is clearly required to do so. If the measure passes, there will be ample time to rule on its validity. If it fails, judicial action will not be required.

The court pointed to several special circumstances that made pre-election review desirable in *Legislature*. Because the initiative was to be voted upon at a special election, there would be considerable avoidable expense of public funds if review were deferred. More significantly, if the initiative passed on December 13 and were then challenged, the uncertainty over which district lines should be used while the challenge was pending would create serious difficulties for candidates and election officials. In addition, the challenge was to the power of the electorate to adopt the districting plan rather than to the substantive constitutionality of the plan, so that the issue was, "in a sense, jurisdictional." Finally, one of the purposes of the "once-a-decade" rule was to "avoid subjecting the body politic unnecessarily to a repetition of the turmoil and disruption which inevitably surround reapportionment and redistricting." This purpose would be frustrated if pre-election review were denied.

5. Like the state courts, commentators are divided on the desirability of pre-election review of substantive constitutional questions. Opponents of pre-election review contend that it "involves issuing an advisory opinion, violates ripeness requirements, undermines the policy of avoiding unnecessary constitutional questions, and constitutes unwarranted judicial interference with a legislative process." James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME LAW REVIEW 298 (1989). Gordon and Magleby elaborate on their ripeness point:

> Suits attacking the substantive validity of ballot measures involve a double contingency which renders any injury speculative and uncertain. First, the measure may not pass; only a minority do.... Second, even if the measure passes, there may be no threat of enforcement. Prosecutors and other government officials often exercise their discretion not to enforce a law because of their doubts about its constitutionality, their perception of its social disutility, or their allocation of resources to other tasks. Also, there is often the possibility that if enacted, the law may be applied in a constitutional manner. Therefore, the uncertainty about the measure's passage and the government's implementation of it creates a double contingency which makes suits attacking the substantive constitutionality of ballot measures unripe for review.

Id. at 310.

William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO STATE LAW JOURNAL 583, 626 (1994), calls for pre-election substantive

review, at least where necessary to protect groups such as the targets of the "anti-gay" initiatives from oppression:

> In response to the argument that the judicial system would be subjected to criticism for removing a measure before an election, one should consider the alternatives. If a court strikes a measure passed by the electorate, the criticism of the judicial system certainly will not be less. Going through the charade of an election to pass a measure that cannot withstand legal scrutiny not only wastes time, energy, and other resources, it also mocks the electoral system it supposedly honors. Voters are given the option of either choosing what is constitutionally permissible or having their choice rejected for its illegality. Further, holding these elections has a harmful impact upon those whom the courts should be protecting. The controversy and animosity surrounding these measures has generated violent acts against the groups they target. This should not be surprising because the attempt to give discrimination an official sanction simply reinforces the bigoted notion that the persons being denied protection are worthy of the scorn and abuse they receive.

6. Courts typically will engage in pre-election review of procedural questions relating to the qualification of an initiative. See Douglas Michael, Comment, *Judicial Review of Initiative Constitutional Amendments*, 14 UC DAVIS LAW REVIEW 461, 468–74 (1980).

"Indeed," one court has said, "the procedures leading up to an election cannot be questioned after the people have voted, but instead the procedures must be challenged before the election is held." *Tilson v. Mofford*, 737 P.2d 1367 (Ariz. 1987). It is questionable how many states follow the Arizona rule that approval of an initiative by the electorate obviates post-election challenges to procedural inadequacies. For example, a Nebraska term-limits initiative recently was voided because under an unexpected interpretation of the state constitution, the proponents had collected too few signatures to qualify the measure. See *Duggan v. Beermann*, 515 N.W.2d 788 (Neb. 1994).

7. Some critics of the initiative process, including Derrick Bell, whose writings were quoted in Section I of this chapter, have proposed that when initiatives are challenged for substantive unconstitutionality, they should be subjected to particularly rigorous review. In the words of another proponent of this view, challenged initiatives should receive a "hard look." Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE LAW JOURNAL 1503 (1990). Eule bases his argument on the constitutional system of checks and balances, which he contends is largely circumvented by the initiative process:

> Where courts are but *one* of many checks on majority preferences, they serve predominantly as a safety net to catch those grains of tyrannical majoritarianism that slip through when the constitutional filtering system malfunctions. Most arguments for judicial restraint, I shall suggest, ought not to be perceived as pro-majoritarian. They are more on the order of "everything in its place." The claim is not that majorities do not need checking, but that courts are just one of several "solutions" to majority factions. The delicate balance put in place by the Framers is disturbed as much by judicial hyperactivity as by judicial dormancy. Where,

> however, the filtering system has been removed, courts must play a larger role—not because direct democracy is unconstitutional, nor because it frequently produces legislation that we may find substantively displeasing or short sighted, but because the judiciary stands *alone* in guarding against the evils incident to transient, impassioned majorities that the Constitution seeks to dissipate.

Id. at 1525. Eule does not propose that the "hard look" should be applied to all initiatives:

> Because the harder look is prompted by a concern for individual rights and equal application of laws, it is principally in these areas that the courts should treat [initiatives] with particular suspicion. Where, on the other hand, the electorate acts to improve the processes of legislative representation, the justification for judicial vigilance is absent. Measures to enforce ethics in government, regulate lobbyists, or reform campaign finance practices pose no distinctive threat of majoritarian tyranny. These measures install new filters rather than seeking to bypass the existing ones....
>
> I am unwilling, however, to group alterations of government structure and reapportionment efforts in the category of governmental reform. Too often these "reforms" are a facade for disenfranchising minorities; courts should be watchful of such chicanery. Neither do I ignore the threat of majority tyranny in fiscal measures like taxation and spending limitations. The beneficiaries of these so-called taxpayer revolts are principally upper and upper-middle class white citizens. The brunt of the burdens, in contrast, is borne by the underrepresented poor and by racial minorities.

Id. at 1559–60. Even where the "hard look" is applicable, Eule would apply it in a flexible manner:

> I do not perceive the concept of a hard judicial look to be a rigid one. Unlike "strict scrutiny"—a standard which on paper at least can be reduced to precise formulation—it is not intended to take on a unitary form. What I have in mind is more a general notion that courts should be willing to examine the realities of [initiatives]—that the unspoken assumptions about the legislative process that so often induce judicial restraint deserve less play in a setting where they are more fanciful. Sometimes a hard judicial look will take the form...of a candid "We know what's going on here and we won't allow any of it." In other situations[,] recognition that the burden of plebiscitary action falls on political actors able to defend their interests in the popular arena, combined with a need to conserve limited judicial capital, will appropriately lead to a more modest form of review.

Id. at 1572–73.

Eule concedes that, to date at least, courts addressing the question almost invariably have said that for purposes of substantive constitutional review, it makes no difference whether a law was passed by the legislature or by initiative. Id. at 1505–06. Furthermore, his call for a "hard judicial look" has been criticized by some scholars. Lynn Baker, *Direct Democracy and Discrimination: A*

Public Choice Perspective, 67 CHICAGO-KENT LAW REVIEW 707, 756 (1991), argues that the "hard look" is unnecessary:

> [From Eule's discussion,] one might expect the United States Reports to be littered with instances in which the Court has upheld arguably racially discriminatory legislation enacted by plebiscites. In fact, the Court has heard only four cases in which plebiscitary legislation was challenged as racially discriminatory in violation of the Fourteenth Amendment. Applying the same equal protection standards that it applies to the enactments of representative bodies, the Court found that three of the four plebiscitary enactments violated the Equal Protection Clause.

Eule responds that although the Court *purported* to use the same equal protection standards it applies to laws produced by legislatures, in fact it may silently have been giving the initiatives in question a hard look. See Julian N. Eule, *Representative Government: The People's Choice*, 67 CHICAGO-KENT LAW REVIEW 777, 780–82 (1991).

The "hard look" approach is also criticized by Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL LAW REVIEW 527 (1994), who contends that heightened judicial review is a misplaced remedy for the defects that critics find in the initiative process:

> [T]he real problem that proponents of special judicial review have with plebiscites lies with the plebiscitary process, not with plebiscitary results. But, having concluded that the process, although undesirable, is constitutional, they are left with no constitutional recourse but to attack the results.
>
> Either state and local plebiscitary processes are constitutional forms of lawmaking or they are not. If they are constitutional, dissatisfaction with the perceived efficacy of these processes for particular groups should not, in and of itself, warrant different constitutional treatment of the products of such processes. In other words, if plebiscitary lawmaking does not violate the Guarantee Clause, it should not matter whether state and local plebiscitary schemes fulfill the structural goals of the system prescribed for federal decisionmaking. That federal structure, and its tripartite, minority-protective safeguards, could have been, but was not, imposed on the states. In terms of the structure of state governments, the federal constitution imposes no limits beyond those contained in the Guarantee Clause. If that clause condemns only the extremes of state government excess (pure democracy and monarchy), then that is all the structural protection against state and local majoritarianism that minorities were intended to receive under the Constitution.

Id. at 556–57. Furthermore, Charlow contends that heightened judicial review of initiatives may hinder rather than further the constitutional system of checks and balances:

> It could be said that the implementation of plebiscites was motivated by a desire to have the populace perform in a new power-checking capacity. Plebiscites grew out of the populist Progressive reform movement of the late 19th and early 20th centuries. According to conventional histori-

> cal analyses, public lawmaking was approved in an effort to break the perceived stranglehold that certain minority, monied interests—in particular, wealthy corporations—had managed to secure over elected state and local legislatures. The plebiscitary institution, therefore, like conventional branches of government, has a tradition of serving a distinct part in assuring against the overconcentration of power in one governmental body.
>
> ...One purpose of separating power among the three branches of government was to diminish the influence of majoritarian faction expressed in the politically responsive legislative branch. The special review thesis seems to conclude that the populace must be checked by the judiciary precisely because it presents a similar and even more exceptional threat of majoritarian tyranny. Thus, with regard to the peril of majoritarian tyranny, plebiscites are supposedly worse than legislatures, and therefore more in need of judicial oversight or, conversely, less deserving of judicial deference.
>
> However, it could also be said that separation of powers was adopted to prevent minoritarian tyranny, for example, in the unelected judicial branch. This would support the separation of powers explanation for the judiciary's deference to the will of the majoritarian legislative branch. Plebiscites were likewise instituted to allay minority faction, albeit in the usually majoritarian legislative body rather than in the judiciary. Therefore, if courts are supposed to defer to legislatures in order to guard against an excessive concentration of their own minoritarian power, perhaps they ought likewise defer to the electorate in the case of plebiscites in order to ensure against the overconcentration of minoritarian power within the usually majoritarian legislature. Indeed, in theory plebiscites embody the will of the ultimate politically responsive body—the electorate itself—so courts should defer to them even more readily than they do to legislative action in order to avoid minority tyranny.

Id. at 580–82. In her conclusion, Charlow says that she agrees with Bell, Eule, and other critics, that the initiative process creates dangers for some groups, but she contends that heightened substantive constitutional review of initiatives is neither called for nor an adequate solution. She proposes instead that the initiative process be improved or, if it is perceived to be sufficiently dangerous, that it be scrapped. Alternatively, she suggests that remedies may be found within the political process, by defeating oppressive initiative proposals, or repealing those that are enacted. Finally, she suggests that if discriminatory laws still survive, the solution is in improvement of equal protection doctrine generally, rather than heightened application of the Equal Protection Clause only to laws that were enacted by initiative. Id. at 625–30.

Chapter 7

Major Political Parties

Political parties play a central role in the organization of electoral systems in every Western democracy. Some countries, such as Italy and Israel, rely on a multi-party, coalition-building system. Japan was an example from 1955 until the ruling Liberal Democratic Party finally fell from power in 1993, of a system characterized by a single party that dominated the government, more or less indefinitely, with a fractured opposition. In the United States, at least since the 1830s, politics has centered around two major political parties.

For most of our history, the national parties in the United States were essentially federations of state organizations. In the past three decades, the national parties have grown in importance as independent organizations, though this development has come about by different means in the two major parties. Growth of the Republican National Committee began after the Republican disaster in the 1964 presidential election, as the national party organization became increasingly important as a provider of administrative and fundraising support for Republican candidates and state organizations. In the Democratic Party, beginning in 1968, the national organization successfully began to assert power over state organizations on various matters, especially the procedures for selecting delegates to national nominating conventions. Later, the national Democratic organizations increased their fundraising and administrative support activities, though the Democrats have continued to lag behind the Republicans in these respects. See generally John F. Bibby, *Party Renewal in the National Republican Party*, in PARTY RENEWAL IN AMERICA: THEORY AND PRACTICE (Gerald M. Pomper ed. 1980); James A. Reichley, *The Rise of National Parties*, in THE NEW DIRECTION IN AMERICAN POLITICS (J. Chubb & P. Peterson eds. 1985).

At the national level, law has played comparatively little role in creating or shaping the parties, which have been thought of as autonomous, private organizations to be kept free from legal regulation. Yet the activities of political parties—nominating candidates for office, building and reflecting support for legislation—are central to the actual working of government. A tension reflected in a variety of legal issues thus arises between the private nature of party organizations and the essential political functions they perform. To what extent should the parties be subject to the same constitutional constraints as the government? To what extent should party activities be regulated in the public interest? To the extent regulation is necessary or desirable, should it be a matter of federal law or should it be left to the states? More generally, how does the party system, particularly in presiden-

tial elections, relate to the federal system? How active or restrained should the courts be in party affairs?

At the state level, parties went similarly unregulated through most of the nineteenth century. During the present century there has been a strong tendency toward regulation of the parties by state law. The centerpiece in this movement has been the state-mandated direct primary election for choosing party candidates, but party activities have been regulated in many other significant respects as well. Like federal non-regulation, state law regulation gives rise to many questions: Do the particular regulations serve the interests of the parties? Of the public? Would a different system of regulation be preferable? Aside from the substance of the regulations, would it be better to deregulate the parties and let them decide on their own structure? Do parties have a constitutional right to deregulation? If parties are to be deregulated, who should be able to set the rules for the parties? Party members (i.e., voters)? Party activists? Party officials? Partisan elected officials? Should the allocation of power within the party be determined by law?

This chapter considers these and other questions relating to the major political parties.

I. The Party and the Political System

The role parties do and should play in American politics has long been a subject of controversy among political scientists, party activists, government officials, lawyers and, at times, the general public. In reading the following materials, consider whether "law" has much to do with the controversy or should have much to do with it.

The Constitution does not mention political parties. The framers of the Constitution, of course, recognized the power of organized groups and public opinion and took steps to curb them through the indirect election of the Senate, the electoral college, and the system of checks and balances described by Madison in *Federalist* Nos. 10 and 51. None of these measures, however, seems directed expressly against political parties as opposed to other types of associations formed for political purposes. The majority of the framers, if asked, probably would have included political parties in the "factions" the constitutional system should guard against. See RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 40–73 (1969).

Despite their relegation to a constitutional no-man's land, political parties arose quickly in America for reasons described by Justice Reed in *Ray v. Blair*, 343 U.S. 214, 220–21 (1952):

> As is well known, political parties in the modern sense were not born with the Republic. They were created by necessity, by the need to organize the rapidly increasing population, scattered over our Land, so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable.

Political parties are, to some extent, an anomaly engrafted onto a constitutional system that did not plan for them.[a]

a. For a lively historical summary of the rise of the American parties and their fortunes

One controversy over the role political parties should play in our political system generally has crystallized around the issue of how ideologically-oriented or "disciplined" the parties should be. One's position on the proper scope of legal regulation of political parties may well turn on one's view of the propriety or impropriety of "party discipline" and of means to achieve party ideological unity and coherence.

The most disciplined political party is one whose leaders pick the candidates for office on the basis of ideological fealty to the party's position and have the capacity to discipline non-adherents. It is probably also the party whose members—the voters—have the least to say about who the candidates should be. A disciplined party is thus arguably less democratic in organization and structure and more "boss" dominated than a looser ideological coalition. It is also the party whose structure arguably can produce the clearest ideological choice for voters at the general election.[b]

The history of American political parties has been to give voters more, not less direct control over party candidates and positions. To quote Justice Reed again:

> The party conventions of locally chosen delegates, from the county to the national level, succeeded the caucuses of self-appointed legislators or other interested individuals. Dissatisfaction with the manipulation of conventions caused that system to be largely superseded by the direct primary.

Ray v. Blair, 343 U.S. at 221. Direct primaries, which have become by far the most common method of selecting party nominees, allow candidates to appeal over the heads of party leaders directly to the voters. They have become a prime device for weakening party discipline.

Our major parties usually have been ideologically loose confederations of people of varying political persuasions, seeking to moderate their position on issues so as to attract the maximum number of voters. They are anything but ideologically disciplined.

In 1950, the Committee on Political Parties of the American Political Science Association submitted a still cited, seminal report called TOWARD A MORE RESPONSIBLE TWO PARTY SYSTEM (reprinted as a supplement to 44 AMERICAN POLITICAL SCIENCE REVIEW No. 3, Part 2 (1950)), criticizing this type of party organization. The thesis of the report was:

> Historical and other factors have caused the American two-party system to operate as two loose associations of state and local organizations, with very little national machinery and very little national cohesion. As a result, either major party, when in power, is ill-equipped to organize its members in the legislative and the executive branches into a government held together and guided by the party program. Party responsibility at

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down through the 1950s, see JAMES MACGREGOR BURNS, THE DEADLOCK OF DEMOCRACY 8–203 (1963).

b. For a careful analysis of leading American theories of party government, see AUSTIN RANNEY, THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT (1954). For a useful account that is more concise and more up-to-date, see LEON EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 9–39 (1986).

> the polls thus tends to vanish. This is a very serious matter, for it affects the very heartbeat of American democracy. It also poses grave problems of domestic and foreign policy in an era when it is no longer safe for the nation to deal piecemeal with issues that can be disposed of only on the basis of coherent programs.

The Committee argued that "an effective party system requires, first, that the parties are able to bring forth programs to which they commit themselves and, second, that the parties possess sufficient internal cohesion to carry out these programs." *Id.* at 17–18. The Committee made a number of recommendations to bring about centralized, ideologically coherent parties. One typical recommendation would have given the national party the right to exclude ideologically disloyal state organizations from party deliberations (such as refusing to seat them at the national convention).

The Association's report and recommendations caused substantial controversy when published. See, e.g., J. Roland Pennock, *Responsiveness, Responsibility and Majority Rule*, 46 AMERICAN POLITICAL SCIENCE REVIEW 790 (1952) (arguing disciplined parties could be created only by polarizing the country along class lines and are inadequate for the task of "political brokerage" in America); Murray S. Stedman & Herbert Sonthoff, *Party Responsibility—A Critical Inquiry*, 4 WESTERN POLITICAL QUARTERLY 454 (1951) (arguing disciplined parties are incompatible with principles of federalism and with a non-partisan approach to local government, and that they would lead to the evils of bossism on a national scale). One of the few legal scholars who has shown sustained concern for the role of parties in American democracy recently considered the APSA report retrospectively and concluded that although some of its specific recommendations proved to be flawed, its general goals and orientation have continuing relevance and value. See Stephen E. Gottlieb, *Election Reform and Democratic Objectives—Match or Mismatch?*, 9 YALE LAW & SOCIAL POLICY REVIEW 205 (1991).

For better or for worse, the kind of political party envisioned in the Committee's report did not exist in 1950, and as the following article shows, some observers believe that the problems that existed then have grown worse.

Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*
109 DAEDALUS 25 (1980)

Though the founding fathers believed in the necessity of establishing a genuinely national government, they took great pains to design one that could not lightly do things *to* its citizens; what government might do *for* its citizens was to be limited to the functions of what we know now as the "watchman state." Thus the Founders composed the constitutional litany familiar to every schoolchild: they created a federal system, they distributed and blended powers within and across the federal levels, and they encouraged the occupants of the various positions to check and balance each other by structuring incentives so that one officeholder's ambitions would be likely to conflict with others'. The resulting system of institutional arrangements predictably hampers efforts to undertake major initiatives and favors maintenance of the status quo.

Given the historical record faced by the Founders, their emphasis on constraining government is understandable. But we face a later historical record, one that shows two hundred years of increasing demands for government to act positively. Moreover, developments unforeseen by the Founders increasingly raise the likelihood that the uncoordinated actions of individuals and groups will inflict serious damage on the nation as a whole. The by-products of the industrial and technological revolutions impose physical risks not only on us, but on future generations as well. Resource shortages and international cartels raise the spectre of economic ruin. And the simple proliferation of special interests with their intense, particularistic demands threatens to render us politically incapable of taking actions that might either advance the state of society or prevent foreseeable deteriorations in that state. None of this is to suggest that we should forget about what government can do *to* us—the contemporary concern with the proper scope and methods of government intervention in the social and economic orders is long overdue. But the modern age demands as well that we worry about our ability to make government work *for* us. The problem is that we are gradually losing that ability, and a principal reason for this loss is the steady erosion of *responsibility* in American politics.

What do I mean by this important quality, responsibility? To say that some person or group is responsible for a state of affairs is to assert that he or they have the ability to take legitimate actions that have a major impact on that state of affairs. More colloquially, when someone is responsible, we know whom to blame. Human beings have asymmetric attitudes toward responsibility, as captured by the saying "Success has a thousand fathers, but failure is an orphan." This general observation applies very much to politicians, not surprisingly, and this creates a problem for democratic theory, because clear location of responsibility is vitally important to the operation of democratic governments. Without responsibility, citizens can only guess at who deserves their support; the act of voting loses much of its meaning. Moreover, the expectation of being held responsible provides representatives with a personal incentive to govern in their constituents' interest. As ordinary citizens we do not know the proper rate of growth of the money supply, the appropriate level of the federal deficit, the advantages of the MX over alternative missile systems, and so forth. We elect people to make those decisions. But only if those elected know they will be held accountable for the results of their decisions (or nondecisions, as the case may be), do they have a personal incentive to govern in our interest.[1]

Unfortunately, the importance of responsibility in a democracy is matched by the difficulty of attaining it. In an autocracy, individual responsibility suffices; the location of power in a single individual locates responsibility in that individual as well. But individual responsibility is insufficient whenever more than one person shares governmental authority. We can hold a particular congressman individually responsible for a personal transgression such as bribe-taking. We can even hold a president individually responsible for military moves where he presents Congress and the citizenry with a *fait accompli*. But on most national issues individual

1. This may sound cynical, but it is a standard assumption in American democratic theory. Certainly the Founders believed that the government should not depend on the nobility of heart of officialdom in order to operate properly.

responsibility is difficult to assess. If one were to go to Washington, randomly accost a Democratic congressman, and berate him about a 20-percent rate of inflation, imagine the response. More than likely it would run, "Don't blame me. If 'they' had done what I've advocated for x years, things would be fine today." And if one were to walk over to the White House and similarly confront President Carter, he would respond as he already has, by blaming Arabs, free-spending congressmen, special interests, and, of course, us.

American institutional structure makes this kind of game-playing all too easy. In order to overcome it we must lay the credit or blame for national conditions on all those who had any hand in bringing them about: some form of collective responsibility is essential.

The only way collective responsibility has ever existed, and can exist given our institutions, is through the agency of the political party; in American politics, responsibility requires cohesive parties. This is an old claim to be sure, but its age does not detract from its present relevance. In fact, the continuing decline in public esteem for the parties and continuing efforts to "reform" them out of the political process suggest that old arguments for party responsibility have not been made often enough or, at least, convincingly enough, so I will make these arguments once again in this essay.

A strong political party can generate collective responsibility by creating incentive for leaders, followers, and popular supporters to think and act in collective terms. First, by providing party leaders with the capability (e.g., control of institutional patronage, nominations, and so on) to discipline party members, genuine leadership becomes possible. Legislative output is less likely to be a least common denominator—a residue of myriad conflicting proposals—and more likely to consist of a program actually intended to solve a problem or move the nation in a particular direction. Second, the subordination of individual officeholders to the party lessens their ability to separate themselves from party actions. Like it or not, their performance becomes identified with the performance of the collectivity to which they belong. Third, with individual candidate variation greatly reduced, voters have less incentive to support individuals and more incentive to support or oppose the party as a whole. And fourth, the circle closes as party-line voting in the electorate provides party leaders with the incentive to propose policies that will earn the support of a national majority, and party back-benchers with the personal incentive to cooperate with leaders in the attempt to compile a good record for the party as a whole.

In the American context, strong parties have traditionally clarified politics in two ways. First, they allow citizens to assess responsibility easily, at least when the government is unified, which it more often was in earlier eras when party meant more than it does today.[3] Citizens need only evaluate the social, economic, and international conditions they observe and make a simple decision for or against change. They do not need to decide whether the energy, inflation, urban,

3. During the postwar period the national government has experienced divided party control about half the time. In the preceding half century there were only six years of divided control. [Since the publication of Forina's article, divided control has prevailed continuously except for the period 1993–94.—Ed.]

and defense policies advocated by their congressman would be superior to those advocated by Carter—were any of them to be enacted![c]

The second way in which strong parties clarify American politics follows from the first. When citizens assess responsibility on the party as a whole, party members have personal incentives to see the party evaluated favorably. They have little to gain from gutting their president's program one day and attacking him for lack of leadership the next, since they share in the president's fate when voters do not differentiate within the party. Put simply, party responsibility provides party members with a personal stake in their collective performance.

Admittedly, party responsibility is a blunt instrument. The objection immediately arises that party responsibility condemns junior Democratic representatives to suffer electorally for an inflation they could do little to affect. An unhappy situation, true, but unless we accept it, Congress as a whole escapes electoral retribution for an inflation they *could* have done something to affect. Responsibility requires acceptance of both conditions. The choice is between a blunt instrument or none at all.

Of course, the United States is not Great Britain. We have neither the institutions nor the traditions to support a British brand of responsible party government, and I do not see either the possibility or the necessity for such a system in America. In the past the United States has enjoyed eras in which party was a much stronger force than today. And until recently—a generation, roughly—parties have provided an "adequate" degree of collective responsibility. They have done so by connecting the electoral fates of party members, via presidential coattails, for example, and by transforming elections into referenda on party performance, as with congressional off-year elections.

In earlier times, when citizens voted for the party, not the person, parties had incentives to nominate good candidates, because poor ones could have harmful fallout on the ticket as a whole.[4] In particular, the existence of presidential coattails (positive and negative) provided an inducement to avoid the nomination of narrowly based candidates, no matter how committed their supporters. And, once in office, the existence of party voting in the electorate provided party members with the incentive to compile a good *party* record. In particular, the tendency of national midterm elections to serve as referenda on the performance of the president provided a clear inducement for congressmen to do what they could to see that their president was perceived as a solid performer. By stimulating electoral

c. Most theories of party accountability—and probably most popular thought on the subject—have emphasized the party platforms, which consist of promises to adopt or follow specified policies. Fiorina espouses an alternate view: that rather than choosing among the parties on the basis of beliefs about policies, it is easier and more feasible for voters to evaluate the results of recent governmental policies. In effect, they decide how to vote by answering the famous question Ronald Reagan posed in one of his 1980 debates against President Carter, when Reagan asked voters whether they felt better off than four years previously. For an elaboration of this approach, see MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981).

4. At this point skeptics invariably ask, "What about Warren G. Harding?" The statement in the text is meant to express a tendency. Certainly, in the first sixty years of this century we did not see a string of candidates comparable to the products of the amateur politics of the past fourteen years (Goldwater, McGovern, Carter, Reagan).

phenomena such as coattail effects and midterm referenda, party transformed some degree of personal ambition into concern with collective performance.

In the contemporary period, however, even the preceding tendencies toward collective responsibility have largely dissipated. As background for a discussion of this contemporary weakening of collective responsibility and its deleterious consequences, let us briefly review the evidence for the decline of party in America.

The Continuing Decline of Party in the United States

Party is a simple term that covers a multitude of complicated organizations and processes. It manifests itself most concretely as the set of party organizations that exist principally at the state and local levels. It manifests itself most elusively as a psychological presence in the mind of the citizen. Somewhere in between, and partly a function of the first two, is the manifestation of party as a force in government. The discussion in this section will hold to this traditional schema, though it is clear that the three aspects of party have important interconnections.

Party Organizations

In the United States, party organization has traditionally meant state and local party organization. The national party generally has been a loose confederacy of subnational units that swings into action for a brief period every four years. This characterization remains true today, despite the somewhat greater influence and augmented functions of the national organizations. Though such things are difficult to measure precisely, there is general agreement that the formal party organizations have undergone a secular decline since their peak at the end of the nineteenth century. The prototype of the old-style organization was the urban machine, a form approximated today only in Chicago.

Several long-term trends have served to undercut old-style party organizations. The patronage system has been steadily chopped back since passage of the Civil Service Act of 1883. The social welfare functions of the parties have passed to the government as the modern welfare state developed. And, less concretely, the entire ethos of the old-style party organization is increasingly at odds with modern ideas of government based on rational expertise. These longterm trends spawned specific attacks on the old party organizations. In the late nineteenth and early twentieth centuries the Populists, Progressives, and assorted other reformers fought electoral corruption with the Australian Ballot and personal registration systems. They attempted to break the hold of the party bosses over nominations by mandating the direct primary. They attacked the urban machines with drives for nonpartisan at-large elections and nonpartisan city managers. None of these reforms destroyed the parties; they managed to live with the reforms better than most reformers had hoped. But the reforms reflected changing popular attitudes toward the parties and accelerated the secular decline in the influence of the party organizations.

The New Deal period temporarily arrested the deterioration of the party organizations, at least on the Democratic side. Unified party control under a "political" president provided favorable conditions for the state and local organizations. But following the heyday of the New Deal (and ironically, in part, because of government assumption of subnational parties' functions) the decline continued.

In the 1970s two series of reforms further weakened the influence of organized parties in American national politics. The first was a series of legal changes deliberately intended to lessen organized party influence in the presidential nominating process. In the Democratic party, "New Politics" activists captured the national party apparatus and imposed a series of rules changes designed to "open up" the politics of presidential nominations. The Republican party—long more amateur and open than the Democratic party—adopted weaker versions of the Democratic rules changes. In addition, modifications of state electoral laws to conform to the Democratic rules changes (enforced by the federal courts) stimulated Republican rules changes as well. [T]he presidential nominating process has indeed been opened up. In little more than a decade after the disastrous 1968 Democratic conclave, the number of primary states has more than doubled, and the number of delegates chosen in primaries has increased from little more than a third to three-quarters. Moreover, the remaining delegates emerge from caucuses far more open to mass citizen participation, and the delegates themselves are more likely to be amateurs, than previously....

A second series of 1970s reforms lessened the role of formal party organizations in the conduct of political campaigns. These are financing regulations growing out of the Federal Election Campaign Act of 1971 as amended in 1974 and 1976. In this case the reforms were aimed at cleaning up corruption in the financing of campaigns; their effects on the parties were a by-product, though many individuals accurately predicted its nature. Serious presidential candidates are now publicly financed. Though the law permits the national party to spend two cents per eligible voter on behalf of the nominee, it also obliges the candidate to set up a finance committee separate from the national party. Between this legally mandated separation and fear of violating spending limits or accounting regulations, for example, the law has the effect of encouraging the candidate to keep his party at arm's length.

At present only presidential candidates enjoy public financing, but a series of new limits on contributions and expenditures affects other national races. Prior to the implementation of the new law, data on congressional campaign financing were highly unreliable, but consider some of the trends that have emerged in the short time the law has been in effect....In House races, the decline in the party proportion of funding has been made up by the generosity of political action committees (also stimulated by the new law). In the Senate, wealthy candidates appear to have picked up the slack left by the diminished party role. The party funding contribution in congressional races has declined not only as a proportion of the total, but also in absolute dollars, and considerably in inflation-adjusted dollars. [Fiorina describes in some detail the limits on party contributions to House and Senate candidates under the federal campaign law. The maximum contributions permitted would constitute only a small percentage of what serious congressional candidates typically spend in their campaigns. On the other hand, Fiorina acknowledges, parties usually were unable to contribute even as much as the limits permitted.]

Probably more constraining than limits on what the parties can contribute to the candidates are limits on what citizens and groups can contribute to the parties. Under current law, individual contributors may give $ 1,000 per election to a candidate (primary, runoff, general election), $5,000 per year to a political action committee, and $20,000 per year to a party. From the standpoint of the law, each

of the two great national parties is the equivalent of four PACs. The PACs themselves are limited to a $15,000 per year contribution to the national party. Thus financial angels are severely restricted. They must spread contributions around to individual candidates, each of whom is likely to regard the contribution as an expression of personal worthiness and, if anything, as less reason than ever to think in terms of the party.

The ultimate results of such reforms are easy to predict. A lesser party role in the nominating and financing of candidates encourages candidates to organize and conduct independent campaigns, which further weakens the role of parties.[d] Of course, party is not the entire story in this regard. Other modern day changes contribute to the diminished party role in campaign politics. For one thing, party foot soldiers are no longer so important, given the existence of a large leisured middle class that participates out of duty or enjoyment, but that participates on behalf of particular candidates and issues rather than parties. Similarly, contemporary campaigns rely heavily on survey research, the mass media, and modern advertising methods—all provided by independent consultants outside the formal party apparatus. Although these developments are not directly related to the contemporary reforms, their effect is the same: the diminution of the role of parties in conducting political campaigns. And if parties do not grant nominations, fund their choices, and work for them, why should those choices feel any commitment to their party?

Party in the Electorate

In the citizenry at large, party takes the form of a psychological attachment. The typical American traditionally has been likely to identify with one or the other of the two major parties. Such identifications are transmitted across generations to some degree, and within the individual they tend to be fairly stable. But there is mounting evidence that the basis of identification lies in the individual's experiences (direct and vicarious, through family and social groups) with the parties in the past. Our current party system, of course, is based on the dislocations of the Depression period and the New Deal attempts to alleviate them. Though only a small proportion of those who experienced the Depression directly are active voters today, the general outlines of citizen party identifications much resemble those established at that time.

Again, there is reason to believe that the extent of citizen attachments to parties has undergone a long-term decline from a late nineteenth century high.[12] And again, the New Deal appears to have been a period during which the decline was arrested, even temporarily reversed. But again, the decline of party has reasserted itself in the 1970s....

Indisputably, party in the electorate has declined in recent years. Why? To some extent the electoral decline results from the organizational decline. Few

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d. Many political scientists have agreed with this conclusion. A prominent example is NELSON W. POLSBY, CONSEQUENCES OF PARTY REFORM (1983). However, others have contested the assertion that campaign finance reforms have harmed parties. See David Adamany, *Political Finance and the American Political Parties*, 10 HASTINGS CONSTITUTIONAL LAW QUARTERLY 497 (1983). For an excellent discussion, see FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 120–53 (1988).

12. For a discussion, see WALTER DEAN BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS (1970).

party organizations any longer have the tangible incentives to turn out the faithful and assure their loyalty. Candidates run independent campaigns and deemphasize their partisan ties whenever they see any short-term electoral gain in doing so. If party is increasingly less important in the nomination and election of candidates, it is not surprising that such diminished importance is reflected in the attitudes and behavior of the voter.

Certain long-term sociological and technological trends also appear to work against party in the electorate. The population is younger, and younger citizens traditionally are less attached to the parties than their elders. The population is more highly educated; fewer voters need some means of simplifying the choices they face in the political arena, and party, of course, has been the principal means of simplification. And the media revolution has vastly expanded the amount of information easily available to the citizenry. Candidates would have little incentive to operate campaigns independent of the parties if there were no means to apprise the citizenry of their independence. The media provide the means.

Finally, our present party system is an old one. For increasing numbers of citizens, party attachments based on the Great Depression seem lacking in relevance to the problems of the late twentieth century. Beginning with the racial issue in the 1960s, proceeding to the social issue of the 1970s, and to the energy, environment, and inflation issues of today, the parties have been rent by internal dissension. Sometimes they failed to take stands, at other times they took the wrong ones from the standpoint of the rank and file, and at most times they have failed to solve the new problems in any genuine sense. Since 1965 the parties have done little or nothing to earn the loyalties of modern Americans.

Party in Government

If the organizational capabilities of the parties have weakened, and their psychological ties to the voters have loosened, one would expect predictable consequences for the party in government. In particular, one would expect to see an increasing degree of split party control within and across the levels of American government. The evidence on this point is overwhelming.

At the state level, twenty-seven of the fifty governments were under divided party control after the 1978 election. In seventeen states a governor of one party opposed a legislature controlled by the other, and in ten others a bicameral legislature was split between the parties.[e] By way of contrast, twenty years ago the number of states with divided party control was sixteen.

At the federal level the trend is similar. In 1953 only twelve states sent a senator of each party to Washington. The number increased to sixteen by 1961, to twenty-one by 1972, and stands at twenty-seven today.[f] Of course, the senators in each state are elected at different times. But the same patterns emerge when we

e. After the 1992 elections there were 21 states with unified government and three others in which the governor and one house of the legislature were of one party and the other house was divided evenly between the parties. Eleven states had a governor of one party and a legislature controlled by the other. Thirteen states had split party control of the two-house legislatures. Two states, including one of the ones with a split legislature, had governors who had run as independents. One state, Nebraska, has a nonpartisan one-house legislature.—ED.

f. This number stood at 21 after the 1992 election. Although this is a decline from the post-1978 figure that Fiorina reports, both figures are consistent with what one would expect if party choices for the Senate were random.—ED.

examine simultaneous elections. There is an increasing tendency for congressional districts to support a congressman of one party and the presidential candidate of the other.... At the turn of the century it was extremely rare for a congressional district to report a split result. But since that time the trend has been steadily upward....[g]

Seemingly unsatisfied with the increasing tendencies of the voters to engage in ticket-splitting, we have added to the split of party in government by changing electoral rules in a manner that lessens the impact of national forces. For example, in 1920 thirty-five states elected their legislators, governors, and other state officials in presidential election years. In 1944 thirty-two states still did so. But in the past generation the trend has been toward isolation of state elections from national currents: as of 1970 only twenty states still held their elections concurrently with the national ones. This legal separation of the state and national electoral arenas helps to separate the electoral fates of party officeholders at different levels of government, and thereby lessens their common interest in a good party record.

The increased fragmentation of the party in government makes it more difficult for government officeholders to work together than in times past (not that it has ever been terribly easy). Voters meanwhile have a more difficult time attributing responsibility for government performance, and this only further fragments party control. The result is lessened collective responsibility in the system.

In recent years it has become a commonplace to bemoan the decline of party in government. National commentators nostalgically contrast the Senate under Lyndon Johnson with that under Robert Byrd. They deplore the cowardice and paralysis of a House of Representatives, supposedly controlled by a two-thirds Democratic majority under the most activist, partisan speaker since Sam Rayburn.[h] And, of course, there are the unfavorable comparisons of Jimmy Carter to previous presidents—not only FDR and LBJ, but even Kennedy. Such observations may be descriptively accurate, but they are not very illuminating. It is not enough to call for more inspiring presidential leadership and to demand that the majority party in Congress show more readiness to bite the bullet. Our present national problems should be recognized as the outgrowths of the increasing separation of the presidential and congressional electoral arenas.

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g. The trend probably has leveled off since Fiorina wrote. In the two elections preceding his article, the figures were 192 (1972) and 124 (1976). In the next three elections the figures were 143 (1980), 196 (1984), and 148 (1988). It is not surprising that the two largest figures were in 1972 and 1984, when Democratic presidential candidates suffered disastrous losses, but many Democratic House members were able to hold onto districts lost by McGovern and Mondale. In 1992, when the results may have been influenced by the Perot independent candidacy, the figure was 100. This was the lowest figure since 1952. All earlier figures in the twentieth century were below 100. See VITAL STATISTICS ON AMERICAN POLITICS 147 (4th ed. 1994).—ED.

h. The reference is to Tip O'Neill. Recently, some scholars have observed that during the 1980s O'Neill and his successors as Speaker, Jim Wright and Tom Foley, were able to exercise more effective leadership than had been the case in the 1970s, and that the cohesiveness of the parties in Congress has increased. See DAVID W. ROHDE, PARTIES AND LEADERSHIP IN THE POSTREFORM HOUSE (1991); Barbara Sinclair, *The Congressional Party: Evolving Organizational, Agenda-Setting, and Policy Roles*, in THE PARTIES RESPOND: CHANGES IN THE AMERICAN PARTY SYSTEM 227 (L. Sandy Maisel, ed., 1990). Similar developments have been found in many state legislatures. See ANTHONY GIERZYNSKI, LEGISLATIVE PARTY CAMPAIGN COMMITTEES IN THE AMERICAN STATES 122 (1992).

Table 7. Recent Trends in Congressional Support of the Executive
(in Percentages)

Congress	Year	Presidential Success	Presidential Support within His Party	
			House	Senate
83rd	'53–54	83	72	72
87th	'61–62	83	73	64
89th	'65–66	87	69	61
91st	'69–70	76	62	63
95th	'77–78	77	61	67

Source: *Congressional Quarterly Almanacs*

By now it is widely understood that senatorial races are in a class by themselves. The visibility of the office attracts the attention of the media as well as that of organized interest groups. Celebrities and plutocrats find the office attractive. Thus massive media campaigns and the politics of personality increasingly affect these races. Senate elections now are most notable for their idiosyncrasy, and consequentially for their growing volatility; correspondingly, such general forces as the president and the party are less influential in senatorial voting today than previously.

What is less often recognized is that House elections have grown increasingly idiosyncratic as well. I have already discussed the declining importance of party identification in House voting and the increasing number of split results at the district level. These trends are both cause and consequence of incumbent efforts to insulate themselves from the electoral effects of national conditions.

[Fiorina presents data showing that between the late 1940s and the early 1970s, House incumbents as a group were able to increase the margins by which they were typically reelected. Fiorina argues that not only partisan but also programmatic and ideological influences have diminished as factors in House elections. These have been replaced, to a significant extent, by "personal and local influences." In particular, the growth of the federal government has greatly increased the opportunity for House incumbents to provide ombudsman and other individualized services to individuals and organizations in their districts. This activity enables the incumbents to build personal followings that may insulate them from national tides detrimental to their party. For elaboration of this argument, see MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989).

In the present context, Fiorina argues that the greater insulation of incumbents from national partisan tides means a severe diminution in electoral phenomena such as presidential coattails and the midterm election as a referendum on presidential performance.[i]]

The effects of the insulation of congressional incumbents have begun to show up in a systematic way in the governmental arena. Table 7 presents data on presidential success and presidential support in Congress for the first two years of the

i. More detailed and up-to-date information on the "incumbency advantage" is contained in Chapter 15 of this book.

administrations of our last five elected presidents. As is evident, Carter ('77–78) was less successful than earlier presidents who enjoyed a Congress controlled by their own party; he was only as successful as Nixon, who faced an opposition Congress. Moreover, in the House, Carter has done relatively poorly in gaining the support of his own party. It is noteworthy that John F. Kennedy ('61–62) earned a significantly higher level of support from a congressional party that was nearly half Southern, whereas Carter enjoyed a majority in which the regional split was much less severe.

Of course, it is possible to discount the preceding argument as an unjustified generalization of a unique situation—a particularly inept president, a Congress full of prima donnas still flexing their post-Watergate muscles, and so on. But I think not. The withering away of the party organizations and the weakening of party in the electorate have begun to show up as disarray in the party in government. As the electoral fates of congressmen and the president have diverged, their incentives to cooperate have diverged as well. Congressmen have little personal incentive to bear any risk in their president's behalf, since they no longer expect to gain much from his successes or suffer much from his failures. Only those who personally agree with the president's program and/or those who find that program well suited for their particular district support the president. And there are not enough of these to construct the coalitions necessary for action on the major issues now facing the country. By holding only the president responsible for national conditions, the electorate enables officialdom as a whole to escape responsibility. This situation lies at the root of many of the problems that now plague American public life.

Some Consequences of the Decline of Collective Responsibility

The weakening of party has contributed directly to the severity of several of the important problems the nation faces. For some of these, such as the government's inability to deal with inflation and energy, the connections are obvious. But for other problems, such as the growing importance of single-issue politics and the growing alienation of the American citizenry, the connections are more subtle.

Immobilism

As the electoral interdependence of the party in government declines, its ability to act also declines. If responsibility can be shifted to another level or to another officeholder, there is less incentive to stick one's own neck out in an attempt to solve a given problem. Leadership becomes more difficult, the ever-present bias toward the short-term solution becomes more pronounced, and the possibility of solving any given problem lessens.

Consider the two critical problems facing the country today, energy and inflation. Major energy problems were forecast years ago, the 1973 embargo underlined the dangers, and yet what passes for our national energy policy is still only a weak set of jerry-built compromises achieved at the expense of years of political infighting. The related inflation problem has festered for more than a decade, and our current president is on his fourth anti-inflation plan, a set of proposals widely regarded as yet another instance of too little, too late. The failures of policy-making in these areas are easy to identify and explain. A potential problem is identified, and actions that might head it off are proposed "for discussion." But the problem lies in the future, while the solutions impose costs in the present. So

politicians dismiss the solutions as unfeasible and act as though the problem will go away. When it doesn't, popular concern increases. The president, in particular, feels compelled to act—he will be held responsible, both at election time and in the judgment of history. But congressmen expect to bear much less responsibility; moreover, the representatives face an election in less than two years, whereas the president can wait at least four (longer for the lame duck) for the results of his policy to become evident. Congressmen, logically enough, rebel. They denounce every proposed initiative as unfair, which simply means that it imposes costs on their constituents, whereas they prefer the costs to fall on everyone else's constituents. At first, no policy will be adopted; later, as pressure builds, Congress adopts a weak and ineffectual policy for symbolic purposes. Then, as the problem continues to worsen, congressmen join with the press and the public and attack the president for failures of leadership.

The preceding scenario is simplified, to be sure, but largely accurate, and in my opinion, rather disgusting. What makes it possible is the electoral fragmentation produced by the decline of party. Members of Congress are aware that national problems arising from inaction will have little political impact on them, and that the president's failures in dealing with those problems will have similarly little impact. Responsibility for inflation and energy problems? Don't look at congressmen.

In 1958 the Fourth Republic of France collapsed after years of immobilism. The features of congressional policy-making just discussed were carried to their logical extremes in that Parliamentary regime. According to contemporary observers, the basic principle of the French Deputy was to avoid responsibility. To achieve that goal the deputies followed subsidiary rules, the most important of which was delay. Action would take place only when crisis removed any possible alternative to action (and most of the alternative actions as well). A slogan of the time was "Those who crawl do not fall."

No one seriously believes that the American constitutional order is in danger of collapse (and certainly we have no de Gaulle waiting in the wings). But political inability to take actions that entail short-run costs ordinarily will result in much higher costs in the long run—we cannot continually depend on the technological fix. So the present American immobilism cannot be dismissed lightly. The sad thing is that the American people appear to understand the depth of our present problems and, at least in principle, appear prepared to sacrifice in furtherance of the long-run good. But they will not have an opportunity to choose between two or more such long-term plans. Although both parties promise tough, equitable policies, in the present state of our politics, neither can deliver.

Single-Issue Politics

In recent years both political analysts and politicians have decried the increased importance of single-issue groups in American politics. Some in fact would claim that the present immobilism in our politics owes more to the rise of single-issue groups than to the decline of party. A little thought, however, should reveal that the two trends are connected. Is single-issue politics a recent phenomenon? The contention is doubtful; such groups have always been active participants in American politics. The gun lobby already was a classic example at the time of President Kennedy's assassination. And however impressive the antiabortionists appear today, remember the temperance movement, which succeeded in

getting its constitutional amendment. American history contains numerous forerunners of today's groups, from anti-Masons to abolitionists to the Klan—singularity of purpose is by no means a modern phenomenon. Why, then, do we hear all the contemporary hoopla about single-issue groups? Probably because politicians fear them now more than before and thus allow them to play a larger role in our politics. Why should this be so? Simply because the parties are too weak to protect their members and thus to contain single-issue politics.

In earlier times single-issue groups were under greater pressures to reach accommodations with the parties. After all, the parties nominated candidates, financed candidates, worked for candidates, and, perhaps most important, party voting protected candidates. When a contemporary single-issue group threatens to "get" an officeholder, the threat must be taken seriously. The group can go into his district, recruit a primary or general election challenger, or both, and bankroll that candidate. Even if the sentiment espoused by the group is not the majority sentiment of the district, few officeholders relish the thought of a strong, well-financed opponent. Things were different when strong parties existed. Party leaders controlled the nomination process and would fight to maintain that control. An outside challenge would merely serve to galvanize the party into action to protect its prerogatives. Only if a single-issue group represented the dominant sentiment in a given area could it count on controlling the party organization itself, and thereby electoral politics in that area.

Not only did the party organization have greater ability to resist single-issue pressures at the electoral level, but the party in government had greater ability to control the agenda, and thereby contain single-issue pressures at the policymaking level. Today we seem condemned to go through an annual agony over federal abortion funding. There is little doubt that politicians on both sides would prefer to reach some reasonable compromise at the committee level and settle the issue. But in today's decentralized Congress there is no way to put the lid on. In contrast, historians tell us that in the late nineteenth century a large portion of the Republican constituency was far less interested in the tariff and other questions of national economic development than in whether German immigrants should be permitted to teach their native language in their local schools, and whether Catholics and "liturgical Protestants" should be permitted to consume alcohol. Interestingly, however, the national agenda of the period is devoid of such issues. And when they do show up on the state level, the exceptions prove the rule; they produce party splits and striking defeats for the party that allowed them to surface.

One can cite more recent examples as well. Prior to 1970 popular commentators frequently criticized the autocratic antimajoritarian behavior of congressional committee chairmen in general, and of the entire Rules Committee in particular. It is certainly true that the seniority leadership killed many bills the rank and file might have passed if left to their own devices. But congressional scholars were always aware as well that the seniority leadership buried many bills that the rank and file wanted buried but lacked the political courage to bury themselves. In 1961, for example, the House Rules Committee was roundly condemned for killing a major federal aid to education bill over the question of extension of that aid to parochial schools. Contemporary accounts, however, suggest that congressmen regarded the action of the Rules Committee as a public service. Of course, control of the agenda is a double-edged sword (a point we return to below), but

today commentators on single-issue groups clearly are concerned with too little control rather than too much.

In sum, a strong party that is held accountable for the government of a nation-state has both the ability and the incentive to contain particularistic pressures. It controls nominations, elections, and the agenda, and it collectively realizes that small minorities are small minorities no matter how intense they are. But as the parties decline they lose control over nominations and campaigns, they lose the loyalty of the voters, and they lose control of the agenda. Party officeholders cease to be held collectively accountable for party performance, but they become individually exposed to the political pressure of myriad interest groups. The decline of party permits interest groups to weld greater influence, their success encourages the formation of still more interest groups, politics becomes increasingly fragmented, and collective responsibility becomes still more elusive.

Popular Alienation from Government

For at least a decade political analysts have pondered the significance of survey data indicative of a steady increase in the alienation of the American public from the political process. [According to the 1978 National Election Studies survey,] two-thirds of the American public feel the government is run for the benefit of big interests rather than for the people as a whole, three-quarters believe that government officials waste a lot of tax money, and half flatly agree with the statement that government officials are basically incompetent. The American public is in a nasty mood, a cynical, distrusting, and resentful mood. The question is, Why?

Specific events and personalities clearly have some effect: we see pronounced "Watergate effects" between 1972 and 1976. But the trends clearly began much earlier. Indeed, the first political science studies analyzing the trends were based on data no later than 1972. At the other extreme it also appears that the American data are only the strongest manifestation of a pattern evident in many democracies, perhaps for reasons common to all countries in the present era, perhaps not. I do think it probable, however, that the trends thus far discussed bear some relation to the popular mood in the United States.

If the same national problems not only persist but worsen while ever-greater amounts of revenue are directed at them, why shouldn't the typical citizen conclude that most of the money must be wasted by incompetent officials? If narrowly based interest groups increasingly affect our politics, why shouldn't citizens increasingly conclude that the interests run the government? For fifteen years the citizenry has listened to a steady stream of promises but has seen very little in the way of follow-through. An increasing proportion of the electorate does not believe that elections make a difference, a fact that largely explains the much-discussed post-1960 decline in voting turnout.

Continued public disillusionment with the political process poses several real dangers. For one thing, disillusionment begets further disillusionment. Leadership becomes more difficult if citizens do not trust their leaders and will not give them the benefit of a doubt. Policy failure becomes more likely if citizens expect the policy to fail. Waste increases and government competence decreases as citizen disrespect for politics encourages a lesser breed of person to make careers in government. And "government by a few big interests" becomes more than a cliché if

citizens increasingly decide the cliché is true and cease participating for that reason.

Finally, there is the real danger that continued disappointment with particular government officials ultimately metamorphoses into disillusionment with government per se. Increasing numbers of citizens believe that government is not simply overextended but perhaps incapable of any further bettering of the world. Yes, government is overextended, inefficiency is pervasive, and ineffectiveness is all too common. But government is one of the few instruments of collective action we have, and even those committed to selective pruning of government programs cannot blithely allow the concept of an activist government to fall into disrepute.

* * *

The concept of democracy does not submit to precise definition, a claim supported by the existence of numerous nonidentical definitions. To most people democracy embodies a number of valued qualities. Unfortunately, there is no reason to believe that all such valued qualities are mutually compatible. At the least, maximizing the attainment of one quality may require accepting middling levels of another.

Recent American political thought has emphasized government *of* the people and *by* the people. Attempts have been made to insure that all preferences receive a hearing, especially through direct expression of those preferences, but if not, at least through faithful representation. Citizen *participation* is the reigning value, and arrangements that foster widespread participation are much in favor.

Of late, however, some political commentators have begun to wonder whether contemporary thought places sufficient emphasis on government *for* the people. In stressing participation have we lost sight of *accountability*? Surely, we should be as concerned with what government produces as with how many participate. What good is participation if the citizenry is unable to determine who merits their support?[27]

Participation and responsibility are not logically incompatible, but there is a degree of tension between the two, and the quest for either may be carried to extremes. Participation maximizers find themselves involved with quotas and virtual representation schemes, while responsibility maximizers can find themselves with a closed shop under boss rule. Moreover, both qualities can weaken the democracy they supposedly underpin. Unfettered participation produces Hyde Amendments and immobilism. Responsible parties can use agenda power to thwart democratic decision—for more than a century the Democratic party used what control it had to suppress the racial issue. Neither participation nor responsibility should be pursued at the expense of all other values, but that is what has happened with participation over the course of the past two decades, and we now reap the consequences in our politics. In 1970 journalist David Broder wrote:

> what we have is a society in which discontent, disbelief, cynicism and political inertia characterize the public mood; a country whose economy suffers from severe dislocations, whose currency is endangered, where

27. There is, of course, a school of thought, dating back at least to John Stuart Mill, that holds that participation is a good in itself. While I am prepared to concede that self-expression is nice, I strongly object to making it the *raison d'être* of democratic politics.

> unemployment and inflation coexist, where increasing numbers of people and even giant enterprises live on the public dole; a country whose two races continue to withdraw from each other in growing physical and social isolation; a country whose major public institutions command steadily less allegiance from its citizens; whose education, transportation, law enforcement, health and sanitation systems fall far short of filling their functions; a country, whose largest city is close to being ungovernable and uninhabitable; and a country, still far from reconciling its international responsibilities with its unmet domestic needs.
>
> We are in trouble.[29]

Broder is not a Cassandra, and he was writing before FECA, before the OPEC embargo, before Watergate, and before Jimmy Carter. If he was correct that we were in trouble then, what about now?

The depressing thing is that no rays of light shine through the dark clouds. The trends that underlie the decline of parties continue unabated, and the kinds of structural reforms that might override those trends are too sweeping and/or outlandish to stand any chance of adoption.[30] Through a complex mixture of accident and intention we have constructed for ourselves a system that articulates interests superbly but aggregates them poorly. We hold our politicians individually accountable for the proposals they advocate, but less so for the adoption of those proposals, and not at all for overseeing the implementation of those proposals and the evaluation of their results. In contemporary America officials do not govern, they merely posture.

Notes and Questions

1. For an expression of similar views, see Gerald Pomper, *The Decline of the Party in American Elections*, 92 POLITICAL SCIENCE QUARTERLY 21 (1977). Notice that Fiorina and Pomper wrote after the 1976 election but before the 1980 election. Would the subsequent elections have compelled Fiorina and Pomper to change their views? Recall that in 1980, Ronald Reagan's presidential victory was accompanied by a Republican takeover of the Senate (though not of the House), and the Republicans maintained their control until the 1986 election. From 1986 through 1992 we reverted to the situation in which the Republicans control the White House while the Democrats control both houses of Congress. After two years of united government under President Clinton and the Democrats, the Republicans won control of Congress for the first time in 40 years. Was the 1994 election good news for one holding Fiorina's view of the need for greater political accountability?

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29. DAVID BRODER, THE PARTY'S OVER xxv (1972).

30. For example, party cohesion would no doubt be strengthened by revising existing statutes to prevent split-ticket voting and to permit campaign contributions only to parties. At the constitutional level, giving the president the power of dissolution and replacing the single-member district system with proportional representation would probably unify the party in government much more than at present. Obviously, changes such as these are not only highly improbable but also exceedingly risky, since we cannot accurately predict the unintended consequences that surely would accompany them.

A number of observers have agreed with Fiorina that "divided government"—the situation in which neither party controls both the presidency and both houses of Congress—creates severe structural problems for the working of government. See, e.g., James Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 POLITICAL SCIENCE QUARTERLY 613 (1988). Some have regarded the problem as so serious that they have recommended major constitutional changes, comparable to those dismissed by Fiorina in footnote 30 of his article, as remedies. E.g., Lloyd N. Cutler, *Party Government Under the American Constitution*, 25 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 134 (1985). During the Reagan and Bush administrations, political scientists devoted considerable resources to trying to identify causes for the frequent occurrence of divided government since World War II. See Morris P. Fiorina, *An Era of Divided Government*, in DEVELOPMENTS IN AMERICAN POLITICS 324 (Gillian Peele et al., eds., 1992); GARY C. JACOBSON, THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT: COMPETITION IN U.S. HOUSE ELECTIONS, 1946–1988 (1990); John R. Petrocik, *Divided Government: Is It All in the Campaigns?*, in THE POLITICS OF DIVIDED GOVERNMENT 13 (Gary W. Cox & Samuel Kernell, eds., 1991).

Probably the most common concern about divided government is that with the president and at least one house of Congress controlled by different parties, the two branches will be unable to work together to formulate legislation or coordinated government policy in order to solve important problems facing the country. This concern seems logical, but a recent study poses a serious challenge to it on empirical grounds. See DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING AND INVESTIGATIONS, 1946–1990 (1990). Mayhew made a list of laws that were regarded as major by contemporaries and that were passed by Congress during the 45 years covered by his study. He found that the enactment of major legislation was no more frequent during periods of unified government than during periods of divided government.

It is difficult to imagine that divided partisan control of the government has *no* systematic consequences, but as Fiorina himself has acknowledged in a book that provides a useful overview of the subject, Mayhew's study makes it difficult to blame divided government for "gridlock." See MORRIS P. FIORINA, DIVIDED GOVERNMENT 86–92 (1992). But if Mayhew's findings are accepted, does it follow that Fiorina's concerns about divided government expressed in his 1980 article are misplaced? See id. at 109–111.

2. The restoration of unified government by the election of Bill Clinton as president in 1992 put concerns about divided government temporarily into the background, and the Republican takeover of Congress presents the phenomenon of divided government in a manner not seen since the Republican victory of 1946, during the presidency of Democrat Harry Truman. In any event, divided government is only one of the causes and one of the symptoms of the distress of the American party system perceived by Fiorina, Pomper, and many other observers.

Although these writers suggest that American parties have declined since World War II, concern about the weakness of American parties long predates that period. For example, a prominent political scientist writing in 1901 found very little incidence of strong party-line voting in Congress or in state legislatures, and he gave this explanation, which sounds as if it could have been excerpted from Fiorina's article:

> If in England a member of the majority in the House of Commons refuses to support an important measure upon which the cabinet insists, and if enough of his colleagues share his opinion to turn the scale, the consequence must be a change of ministry or a dissolution; but under similar circumstances in America no such dire results will follow. The measure will simply be lost, but the member can retain his seat undisturbed till the end of his term, and the administration will go on as before. Hence the difficulty in carrying out party platforms, and the discredit into which they have fallen in consequence.

A. Lawrence Lowell, *The Influence of Party upon Legislation in England and America*, 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1901 321, 346.

3. Is there really any evidence that old-fashioned "strong" party organizations have better satisfied the functions required for a working democratic government than the currently predominant system in which a candidate forms his or her own organization to appeal directly to the voters through the mass media to compete for a party nomination in a primary election? Which system of nomination is likely to foster greater public trust in candidates? More coherent and far-seeing public policy? Greater responsiveness to voter concerns?

Many states in the west and upper midwest have used the direct primary since around the turn of the century, whereas many eastern and southern states have had stronger party organizations until more recently. Which regions have been characterized by more efficient, honest, and progressive state and local governments? Does the party structure significantly affect the quality of the government? If so, does the historical record support Fiorina's position? Might Fiorina argue that so far as the issues he is dealing with are concerned, the state and federal governments are not comparable?

4. Suppose you wanted to strengthen the Republican and Democratic parties. What steps would you take to do it? Consider the pros and cons of the following proposals and, to the extent you believe they are desirable, consider whether they should be adopted by state or national party organizations or by state or national law:

> A. Allocating a fixed number of seats for elected officials and other party leaders as delegates to the national convention.
>
> B. Requiring all candidates in a party's primary for national, state, and local office to sign a pledge under oath that if elected they will faithfully adhere to and attempt to enact the party's platform as adopted at its convention. (If you agree with this proposal, would there be some system of discipline and punishment if the promise were broken?)
>
> C. Reqiring all candidates in a party's primary for national, state, and local office to sign a pledge that they will support the candidate of the party chosen in the primary even if they are defeated.
>
> D. Providing public funding for any and all of a party's internal operations.
>
> E. Requiring candidates for statewide office who are not the designee of a party convention to obtain the signatures of 5 or 10 percent of registered party members in order to qualify for the ballot in the upcoming primary.

F. Reqiring voters who want to switch parties to wait out one primary election before they could reregister. See *Kusper v. Pontikes*, 414 U.S. 51 (1973). Cf. *Rosario v. Rockefeller*, 410 U.S. 752 (1973).

Some of the foregoing proposals might raise substantial constitutional and legal questions, especially if they were implemented by state or federal statute. The materials that follow should help you identify some of these questions.

II. Obligations of Parties Under the Constitution

For a long time, courts treated political parties as private associations, subject only to the comparatively minimal legal restraints imposed on purely private groups. See *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARVARD LAW REVIEW 983, 1020–37 (1963). The courts' reluctance to intervene in the internal operations of political parties was influenced by the view that their functions of compromise, negotiation and conciliation between competing political factions would be hampered by deciding disputes through litigation. See Comment, *Judicial Intervention in Political Party Disputes: The Political Thicket Reconsidered*, 22 UCLA LAW REVIEW 622, 625 (1975).

The scope of state regulation of political party operations increased dramatically, however, beginning in 1903 when Wisconsin mandated that parties choose candidates through the direct primary and established procedures for conducting the primary. The primary quickly became a critical locus of party activity and a battlefront in the courts. Once state government began to direct the way political parties were to operate, legal questions inevitably arose as to the extent parties thus became subject to a higher standard of constitutional constraint than a purely private association. More recently, courts have considered the extent to which the Constitution may immunize political parties from state regulation.[j]

In the remainder of this section, we shall consider the extent to which the courts have imposed or should impose constraints on the parties in the name of protecting constitutional rights. In the following two sections, we shall consider the extent to which parties are immune under the First Amendment from regulation by state legislatures. In the final section of this chapter we shall consider the constitutional limits on patronage, a practice that for much of this country's history was an important means for the parties to maintain power and influence.

A. *The Federal Interest in Regulating Party Primaries*

Before the constitutional constraints on parties could be explored, the initial question whether the federal constitution had any impact on the party primary had to be answered. As previously mentioned, the Constitution makes no mention of parties or primaries. Article I, § 4 of the Constitution gives state legislatures the power to prescribe the "times, places and manner of holding *elections* for Senators and Representatives," subject to Congress' power to "make or alter such regulations" (emphasis added). The Fifteenth and Nineteenth Amendments prohibit discrimination on grounds of race or sex in extension of the right to vote. Was a

j. For an overview of the history of legal regulation of political parties, see JOHN W. EPPERSON, THE CHANGING LEGAL STATUS OF POLITICAL PARTIES IN THE UNITED STATES (1986).

state party primary an "election" under article I, § 4 subject to federal regulation? Were the antidiscrimination guarantees of the Fifteenth and Nineteenth Amendments applicable to the right to vote in primaries of political parties, which many viewed as purely private associations?

By a 5–4 decision in *Newberry v. United States*, 256 U.S. 232 (1921), the Supreme Court temporarily delayed the application of federal statutory and constitutional constraints to state party primaries. The defendants in *Newberry*—a candidate for Michigan's Republican nomination for Senate and his supporters—were charged with violating federal statutes that limited campaign expenditures. Newberry's lawyer, former Justice and future Chief Justice Charles Evans Hughes, argued that Congress' power under article I, § 4 extended only to general elections, not primaries, and thus the statute did not apply to his clients. The Court held that the statute was inapplicable, but only four justices agreed with Hughes' position. They concluded that primaries "are in no sense elections for office, but merely methods by which party adherents agree upon candidates." 256 U.S. at 740. The virtual necessity of party nomination for election did not impress these four justices. "Birth must precede, but it is no part of either funeral or apotheosis," reasoned the plurality. 256 U.S. at 757. The fifth vote was supplied by Justice McKenna, who reasoned that Congress might have the power to regulate senatorial primaries in the future because of the passage of the Seventeenth Amendment, which provided for the direct election of senators. Four justices dissented.

B. *The White Primary Cases and the State Action Doctrine*

The *Newberry* plurality's philosophy could not forever withstand the increasing use of the primary as the main method of selecting candidates, or the necessity of a federal role in protecting the voting rights of African-Americans, particularly in the then one-party southern states where victory in the Democratic primary was tantamount to election. The Texas Democratic primary became the main constitutional battleground over a quarter of a century as the state party tried a variety of increasingly sophisticated devices to exclude African-American participation and as African-Americans responded with court challenges.

In *Nixon v. Herndon*, 273 U.S. 536 (1927), the Court unanimously held that Texas' state law expressly disqualifying African-Americans from voting in the Democratic primary denied African-American voters equal protection under the *Fourteenth* Amendment. The Court did not discuss whether the *Fifteenth* Amendment right to vote extended to a primary election. Texas then repealed the statute, but gave the party's executive committee the right to determine who was qualified to vote in the primary. The executive committee promptly obliged by passing a resolution prohibiting African-Americans from participating.

In *Nixon v. Condon*, 286 U.S. 73 (1932), the Court invalidated the executive committee's resolution on the ground that the state had, by statute, given the executive committee a power it never had previously held. The executive committee thereby acted as an agent of the state and the result was the same as in *Nixon v. Herndon*. Again, the Fourteenth Amendment's equal protection clause was the ground for decision.

Undaunted, the Texas Democratic Party in convention then adopted a resolution restricting party membership to whites. No legislation authorized this resolution. The issue of the constitutional power of the party to do something the state could not do itself was squarely presented. In *Grovey v. Townsend*, 295 U.S. 45 (1935), the Court temporarily stepped back from the principle that racial discrimination in party affairs central to the electoral process was constitutionally unacceptable. It held unanimously that the Texas party's resolution did not violate federally guaranteed constitutional rights. The philosophy of *Newberry*, that the party was a private association and its primary not a subject of federal constitutional interest, was temporarily reaffirmed.

The landmark decision in *United States v. Classic*, 313 U.S. 299 (1941), though not involving issues of racial discrimination, resumed the course of placing party primaries under the restraint of federal constitutional law. The indictment in *Classic* charged several Louisiana election officials with dishonest practices in a primary election for Congress. The district court dismissed the indictment on the ground that no federal statutory right was violated by a dishonest count in a state-administered congressional primary. The Supreme Court reversed, and overruled *Newberry* explicitly. The Court held Congress had the power to regulate primary elections under article I, § 4. The new thinking of the Court on Congress' expansive powers in the elections area was analogous to its new thinking regarding the power of the federal government in economic regulation, inspired by Franklin Roosevelt's abortive Court packing plan and his recent appointees.

Grovey v. Townsend also succumbed to this new trend, in *Smith v. Allwright*, 321 U.S. 649 (1944), decided three years after *Classic*. In *Allwright* the Court emphasized the *Fifteenth* Amendment as the source of the voter's right to be free from racial discrimination in casting a ballot in a party primary. The Court stated that *Classic* "fused the primary and general elections into a single instrumentality." Texas' detailed regulation and involvement in the primary process turned that process into a state function, even though it was conducted by the ostensibly private Democratic Party.

The Court's new activism in protecting African-American voting rights in party primaries took its final step in *Terry v. Adams*, 345 U.S. 461 (1953). The Jaybird Democratic Association of Fort Bend County, Texas, a group founded in 1889, held a straw vote every year several months before the official Democratic primary. The Jaybird vote was open to any white voter. The Jaybird election victor had no special official status under state law and had to compete on an equal basis with every other candidate in the primary. In practice, however, the Jaybird victor always won the primary and general elections. In a result reached by a majority that was split between three separate opinions, the Court held that the Jaybird action excluding African-Americans from the straw vote violated the Fifteenth Amendment.

Terry has been described by one commentator as holding that Texas "violated the Fifteenth Amendment by permitting within its borders a private device that would have been forbidden in a public election." Ronald D. Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda*, 53 TEXAS LAW REVIEW 935, 954 (1975). Rotunda concludes that the "logic of the *White Primary Cases* supports the conclusion that an election for public office is a public function and that any integral part of that function must be constitutional." Id. at 955.

Another commentator has suggested that *Terry* "went too far." John G. Kester, *Constitutional Restrictions on Political Parties*, 60 VIRGINIA LAW REVIEW 735, 738 (1974). In Kester's view: "For the judiciary now to place constitutional limitations on endorsements by a private group simply because the electorate respects and normally follows the group's endorsements is nothing less than a judicial subversion of the American political process." Id. Further, as Kester interprets the *White Primary Cases*, the "right of a political party to determine its own membership by any standard it pleases is unimpaired so long as it does not abridge the *right to vote* free from racial, and probably sexual discrimination. The arguments in favor of granting a party such freedom are even more forceful today... in light of the intervening recognition of constitutionally protected rights of association which parties and its members may claim." Id. at 759–60.

Do you agree with Kester that *Terry* goes too far? Suppose a hypothetical Jaybird Association never conducts straw votes, but consists of a handful of local leaders who publicize their recommendations to the voters before each primary election. If this small group's recommended candidates always or nearly always win in the primaries, and if the group's members are all whites, would their activities violate the Fifteenth Amendment? If the group includes members of all races and all ethnic groups but are all males, would their activities violate the Nineteenth Amendment? What if the members are all white males, but the candidates they endorse come from all racial and ethnic groups and both sexes? What if their recommendations appear to be influential but fall way short of being decisive? What if they do not publicize their recommendations at all, but contribute substantial campaign funds to the candidates they support?

Do you share Kester's concern that the *White Primary Cases*, by treating parties and even non-party groups such as the Jaybird Association as subject to constitutional constraints, may impair legitimate associational freedoms of parties? Consider the following.

Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*
71 TEXAS LAW REVIEW 1741, 1747–54 (1993)

Nearly everyone who has written about the constitutional rights or obligations of parties seems to have assumed that whether parties or their activities are to be classified as "private" or "public" is a crucial issue....

To the uninitiated, this must seem odd. Parties are not government agencies. In ordinary conversation, to suggest that they are would be bizarre. However, the Supreme Court's continued adherence to the state action doctrine has forced the Justices to depart from ordinary conceptions of what entities are "public." Under the doctrine, unless an entity's actions affecting others are regarded as "public," the entity need not conform to the requirements of due process of law, equal protection, freedom of speech, or other provisions of the Bill of Rights. Accordingly, when the Supreme Court was confronted in the *White Primary Cases* with the question of whether the Texas Democratic Party could exclude African-Americans from voting in its primaries, the only way it could find to prohibit such an exclusion was to declare that parties, at least when they nominate candidates in primary elections, are acting as public agencies.

The difficulty created by the *White Primary Cases* for proponents of freedom of association for political parties is that the public/private distinction is generally perceived as governing not only whether an entity must conform to constitutional requirements in its treatment of others, but also whether the entity itself enjoys constitutional rights against the government. Thus, by declaring parties to be "public," the *White Primary Cases* not only prohibited them from depriving racial minorities of their right to vote but also seemed to deprive the parties of the protections of the Bill of Rights. If instead parties were declared to be "private," they would enjoy constitutional rights, but the foundation for the *White Primary Cases* would be undercut.

One response to this dilemma would be to disavow the *White Primary Cases* and treat parties as purely private in nature. The proposal is not monstrous, because the *White Primary Cases* had only modest success in extending the franchise to African-Americans in the southern states and, more importantly, because federal voting rights legislation and greatly changed mores make it extremely unlikely that the parties would seek to exclude primary voters on grounds of race in the foreseeable future. Renunciation now of the *White Primary Cases* would have no tangible cost in racial discrimination, would bring constitutional doctrine into accord with the common sense notion that parties are not government agencies, and would clear the way for a full extension of constitutional freedoms to parties. However, the *White Primary Cases*, despite their limited effectiveness, are rightly remembered as one of the bright spots in the history of the Supreme Court and the struggle for racial equality. For the Supreme Court now to declare that the cases were wrong would be unpleasant, even disillusioning. Most of us would never believe the Court anyway. Furthermore, it is always possible that at some time in the future the parties will act in a manner perceived to deny fundamental rights to some group of Americans. The possibility of constitutional relief, won so painstakingly from the 1920s to the 1950s, should not be tossed away lightly. In any event, few commentators and no courts have suggested the disavowal of the *White Primary Cases*.

At the opposite extreme is the position that the parties are public, pure and simple. [But this position is not viable after the cases considered in Sections III and IV of the present chapter. Therefore,] as the Justices like to say, it is "too late in the day" for the argument to succeed. Nor should it. The idea of parties as "public" is in tension not only with the everyday recognition that parties are not government agencies, but also with the need to assure that the party system maintains a basic autonomy from the state so that the parties may serve as vehicles for expressing the public's needs and sentiments. Such autonomy distinguishes democracies from authoritarian systems, and our constitutional law may as well recognize this fact. It is one thing to argue about the nature of the protection accorded to parties by the First Amendment, but to argue that the parties are entitled to *no* such protection has an incongruous ring to it.

A third approach is the middle ground that parties are a mixture of public and private elements or that some of their activities are public and others private. Leon Epstein captures this idea by analogizing parties to public utilities.[45] Of course, the key question for any middle-ground approach is: When is the party private, and when is it public? The most common answer has been that it is the

45. LEON D. EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 155–59 (1986).

election process that is a governmental activity; therefore, when parties nominate candidates or engage in other activities directly connected with the conduct of elections, their activities are public. Other activities, such as internal governance and the adoption of platforms, are private.

This distinction between electoral and internal activities is another casualty of *Tashjian*[, *infra*]. The activity in question in *Tashjian*, determination of who could vote in a primary election, was the same as in the *White Primary Cases*, but in *Tashjian* the party was treated as a bearer of First Amendment rights, and therefore presumably private rather than public.

Aside from its fate at the hands of the *Tashjian* Court, the middle-ground approach might mitigate but cannot solve the public/private dilemma that exists for anyone who believes that there are at least some situations in which parties should be required to honor constitutional rights and other situations in which parties should bear constitutional rights. A middle ground allows for both possibilities by dividing party activities into two categories. But within the "public" category it must still be the case that the parties bear no constitutional rights, and within the "private" category the party will be free to deny equal protection, freedom of speech, and other constitutional protections to others.

The final approach is to ignore the problem. Thus, the *White Primary Cases* are limited to their "unusual context: a state-mandated racially discriminatory primary scheme in a one-party state where nomination is tantamount to election."[48] If we take the public/private distinction seriously, this will not do. To suggest that political parties act as agents of the government when and only when they violate the fundamental rights of citizens is to do violence to the English language, if the terms "public" and "private" are taken to have any descriptive meaning whatever.

But should we take the public/private distinction seriously? If we set the distinction aside momentarily, we are free simply to conclude, as the Ninth Circuit did in *Eu*, [*infra*], that parties bear constitutional rights *and* that they act unconstitutionally when they deprive any group of citizens of the opportunity for political participation. Surely this is the result most of us want. We can obtain this result by recognizing that the question of whether a party action is public or private is not a tool of analysis used in deciding a constitutional controversy, but is instead the attachment, after the fact, of a more or less superfluous label to a result reached for other reasons. For example, the reason parties are prohibited from excluding African-Americans from primaries is not that they act in a public capacity when they exclude. Rather, the action of excluding African-Americans is labeled a state action because we have chosen to interpret the Constitution as prohibiting it. Similarly, the party has a First Amendment right to permit independents to vote in its primaries, but not because analysis has shown the party to be a private association. Rather, it is because the Court decided *Tashjian* as it did that we label the decision whether independents should be able to vote in the party's primary as a private associational decision.

Thus the terms "public" and "private" (like many similar terms in the law) actually function as *post hoc* labels, rather than as the *a priori* analytical devices that conventional doctrine supposes them to be. They do so because the world is

48. San Francisco County Democratic Cent. Comm. v. Eu, 826 F.2d 814, 826 n.21 (9th Cir. 1987), *aff'd*, [*infra*].

too diverse for all its phenomena to fit comfortably within a small set of categories that can suffice for an acceptable normative ordering. A dichotomy such as the public/private distinction is devised because it is found to be a useful way of ordering some range of activities, but it is an artificial categorization.... As such, it is susceptible to manipulation, and it is virtually certain to be manipulated for at least two reasons. First, different people (such as different Justices) who apply the categories will be guided by different values and life experiences. Second, although the categories may be straightforward and acceptable within a range of problems, outside of that range their application will be obscure or even perverse.

So it is with the public/private distinction as applied to political parties. We have seen that the distinction leads to perverse results, for it permits parties either to be subject to constitutional rights or to bear them, but not both (at least with respect to any given party activity). However, the greatest harm caused by fixation on the public/private distinction is not that it requires an embarrassing and illogical confinement of the *White Primary Cases* "to their facts," but that it tends to preclude consideration of the actual relationship between the government and major political parties. That relationship does not justify denying First Amendment Rights to parties, but it significantly affects the way in which those rights should be applied.

Note

As this excerpt reflects, considerable attention has been given to the tension that may exist between the constitutional *rights* of parties and the constitutional *obligations* of parties. Similar tension may exist between parties' *constitutional* rights and their *statutory* obligations. Consider, for example, the requirement of Section 5 of the Voting Rights Act that a covered "State or political subdivision" must seek preclearance before implementing changed voting procedures. If eligibility for voting in primaries in a covered jurisdiction is set by parties and a party wishes to change the requirements, must it seek preclearance? By the logic of *Smith v. Allwright*, if the primary and general elections are "fused," then preclearance must be required to prevent the state from evading Section 5 by handing control of the primaries to the parties. See, e.g., *MacGuire v. Amos*, 343 F.Supp. 119 (M.D.Ala. 1972). However, suppose candidates are nominated at party conventions rather than at primaries. Must a change in the method of selecting delegates to the convention be precleared? This question was answered in the negative in *Morse v. North*, 853 F.Supp. 212 (W.D.Va. 1994), a decision currently pending review in the Supreme Court.

C. *The Constitution and the Party in the Legislature*

Ammond v. McGahn

390 F.Supp. 655 (D.N.J. 1975).

COHEN, Senior District Judge:

Perhaps, for the first time in the history of the New Jersey State Legislature, a federal court is asked to decide whether a political caucus may exclude one of its

members for her critical public statements without violating the First and Fourteenth Amendments to the Federal Constitution....

Plaintiff, Alene S. Ammond, in November, 1973, was elected [as a Democrat] to the New Jersey State Senate by the voters of the Sixth Senatorial District. [Additional plaintiffs were residents of Senator Ammond's district.]

The defendants are 28 Democratic Senators who comprise the New Jersey State Democratic Caucus; the Sergeant-at-Arms of the State Senate; the Executive Director of the Senate Majority; and both counsel for the Senate Majority Caucus.

It is contended by the plaintiff, Senator Ammond, that the decision by her fellow-Democratic Senators to exclude her from the Caucus was in retaliation for public statements she made regarding the Caucus and its members; that the Senate Democratic Caucus is a vital and integral part of the New Jersey State Legislative process; and that her right to free speech guaranteed under the First Amendment has been violated.

Plaintiffs, Karp, Paull and Powers contend that the exclusion of their duly elected representative from the Caucus denies them the Equal Protection of the Law guaranteed by the Fourteenth Amendment....

Defendants while not conceding that the conduct of the Caucus is "state action,"...seem to rest primarily on the defense of immunity. Plaintiffs, on the other hand, maintain that the Caucus is inextricably bound up with the affairs of the Senate, and, therefore, a symbiotic relationship exists between the Caucus and the Senate....[I]f, as plaintiff alleges, the Caucus is a vital and integral part of the legislative process, then there can be no question as to state action. For, as the Supreme Court indicated in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974), "We have of course found state action present in the exercise by private entity of powers traditionally exclusively reserved to the State. If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one." Thus, the question presented here resolves itself to whether the Caucus is, in fact, an integral part of the legislative process in New Jersey.

In deciding this issue, the testimony of Senator Ammond, supported by that of Bolton Schwartz, who has been characterized as the "Dean of the Press Corps," must be considered. At the hearing, it was revealed that on or about January 20, 1975, in her absence, the Democratic Caucus voted unanimously to exclude Senator Ammond from the Caucus. She received no official communication informing her that she had been so barred, nor was she accorded any hearing whatsoever in connection with her exclusion. On January 27, 1975, she attempted to attend the regularly scheduled meeting of the Caucus. The sergeant-at-arms barred her entry, and informed her that the President of the Senate, Frank J. Dodd, had authorized him to convey to her that she could not enter the Caucus as a result of the exclusion vote adopted the previous week. Senator Ammond maintains that the decision to exclude her was in retaliation for public statements she made regarding the caucus and its members.

The Caucus is a body composed of all Democratic members of the State Senate who receive compensation from the State of New Jersey. Its sessions are conducted in the State House on State property and attended by elected and appointed State officials; it is serviced by State paid employees, who include, among others, the sergeant-at-arms for the Senate, the Executive Director of the Senate

Majority and its counsel; and notice of the Caucus meetings, by telegrams listing proposed legislative bills and other matters on the agenda, are paid by the State.

Bills pending before the Senate are discussed by their sponsors followed by general discussion and debate among the members of the Caucus. The views of members of the Executive Branch of the State Government are presented. Often, "Straw" votes are taken to determine the likelihood of passage of a bill. Since the Democratic members of the Senate are a large majority, the result of a "Straw" vote will often determine the outcome of a bill on the floor of the Senate. Bills which do not command a majority are often withdrawn. Majority counsel participate in the Caucus and render advisory opinions on the legislative proposals.

Additionally, a "consent list" is prepared in Caucus, consisting of those bills which will pass on the floor without debate. The purpose of this list is to free legislative time by obviating the necessity for debate on routine matters.

It is the determination of the Court that the Caucus functions as an arm of the State Legislature and is an essential part of the legislative process in New Jersey. We hold that the Caucus exercises legislative power which is normally associated with sovereignty and, therefore, action by the Caucus is "state action"... *Jackson*; *Terry v. Adams*.

The Caucus is not, as the defendants attempted to elicit on cross-examination, an informal social gathering—a luncheon club consisting of members of the same political party. It conducts the business of the State. [Telegrams were introduced into evidence,] paid for by the State, signed by Frank J. Dodd, Senate President, addressed to Senator Ammond at her residence, notifying her that the Senate will convene on a specified date; requesting her to be prepared to vote on certain enumerated Senate Bills; advising her that certain Senate Committees will meet at specified times; and that party conferences will be held at specified times. Obviously, all of the aforementioned State business was to be discussed at the Conference or party Caucus.

The exclusion of Senator Ammond from the Caucus in retaliation for her critical public statements is violative of her right of free speech under the First Amendment. Given the fact that the Caucus often decides the course of legislation before it ever reaches the floor of the Senate, exclusion from the Caucus is tantamount to exclusion from the Senate....

It is further determined that the exclusion of Senator Ammond from the Caucus without a prior hearing violates the Due Process Clause of the Fourteenth Amendment. No elected representative of the people may be barred from participation in the forum to which he or she was elected for misconduct, no matter how egregious, without some type of hearing. *Bond v. Floyd*, 385 U.S. 116 (1966); see *Goss v. Lopez*, 419 U.S. 565 (1975). The action by the Caucus in denying Senator Ammond the opportunity to attend its deliberations deprived her constituents of the Equal Protection of the law. In effect, the action by the Caucus created two classes of voters. One class consists of those citizens whose Senators could effectively participate fully in the legislative process and another class whose Senator could participate only to a limited degree. As the Supreme Court has indicated:

> ...The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote as effectively as by wholly prohibiting the free exercise of the franchise. *Reynolds*.

While it is true that Senator Ammond was not barred from voting on the floor of the New Jersey Senate, her exclusion from the Caucus could vastly diminish her efficacy as an elected representative.

This court need not consider the merits of the controversy between Senator Ammond and her colleagues and while we are not confronted with the question of whether her public statements are defamatory, we note that the alleged "injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

We also note, in passing, that if these defendants were to seek redress in the courts for the alleged injury to their reputations caused by Senator Ammond's remarks, they would be met by "the constitutional guarantees... that prohibit[] a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279–80; see *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974). While we intimate no view as to the defamatory nature of Senator Ammond's statements, it is significant that defendants concede that Senator Ammond's exclusion was a result of her public statements.

It was rather well established from the testimony that Senator Ammond is an outspoken critic of the Legislature and its members. She has been characterized as "The Terror of Trenton." As was legendarily and so forcefully proclaimed by Voltaire:[3]

> I disapprove of what you say, but I will defend to the death your right to say it.

[Earlier in the proceedings, the court had issued a temporary restraining order against the defendants, ordering them not to deny Senator Ammond access to the Caucus meetings during the pendency of the law suit. The Caucus then voted to readmit Senator Ammond. The court nevertheless concluded that the case was not moot.]

This court believes a preliminary injunction is appropriate. We are convinced that plaintiffs have a reasonable chance of ultimate success in this suit, and that unless injunctive relief is provided, freedom of speech may suffer a chilling effect....

Notes and Questions

1. On appeal, the District Court's granting of a preliminary injunction in favor of Senator Ammond was reversed on the ground that the Democratic Caucus had voted to readmit her, so that there was "no clear showing of immediate irreparable injury. Under such circumstances, a court should not exercise the delicate power of injunctive relief." *Ammond v. McGahn*, 532 F.2d 325, 329 (3d Cir. 1976). The appellate court thus found it unnecessary to discuss "the possible conflict between the associational and political rights of the members of the Caucus, ...and the constitutional rights of the plaintiffs...."

3. Although this quote is commonly attributed to Voltaire, it is actually a paraphrase of his attitude by S. G. Tallentyre in *Friends of Voltaire* 199 (London, 1907).

2. Republicans win 55% of the seats in a state legislative chamber and Democrats win the remaining 45%. The Republican speaker appoints disproportionately large numbers of Republicans to committees, with Democrats receiving as few as 10% of the seats in several of the key committees. The Democratic representatives, joined by Democratic voters in their districts, seek injunctive relief ordering the speaker to reappoint the committees so that the membership of each will be approximately proportionate to the partisan breakdown in the chamber as a whole. How should the court rule? See *Davids v. Akers*, 549 F.2d 120 (9th Cir. 1977).

III. Parties and Federalism

For most of our history party organization was centered at the state and local levels. National parties were confederations of these state organizations, and for the most part were inactive except during the quadrennial periods of presidential nomination and campaigning. Since the 1830s, presidential candidates have been nominated at national party conventions, which, until the 1970s, were dominated by the state organizations.

Each state could decide for itself by what means its delegation to the convention would be selected. When disputes arose over who could properly represent a state party at the National Convention, these disputes were referred to the Credentials Committee, whose decisions were subject to appeal to the Convention as a whole. Often these disputes were treated more as ploys in the competition for the nomination than as matters to be resolved on the basis of principle or legal propriety.

Since there were few restrictions on the manner in which states could select delegates, state legislatures could regulate the process without much danger of coming into conflict with national party rules or requirements. Dating from the Progressive period in the early twentieth century, a number of states used presidential primaries, but these states did not constitute close to a majority at the conventions. Although the presidential primaries provided a test of the popularity of competing candidates, they were by no means the predominant factor in the awarding of a presidential nomination. The great majority of delegates at the conventions were more or less selected by and controlled by the state party leaders and organizations, and it was the state leaders who ultimately had the greatest say in who would be the presidential candidates.

Because of the controversies attending their troubled 1968 convention, the Democrats created a commission to propose reformed delegate selection procedures. The commission was originally chaired by Senator George McGovern, who later became a candidate for President and was succeeded by Representative Donald Fraser. The reforms proposed by the McGovern-Fraser commission and later adopted almost intact by the Democratic National Committee had three major thrusts.

First, whether the state used a primary or a caucus system,[k] the procedure had to be open to all registered Democrats and held at a time and in a manner

k. "Caucuses," in this context, are meetings held simultaneously across the state in each neighborhood. Participants in each caucus select representatives, usually chosen according to

that would permit each participant to vote for a specific presidential candidate. Previously, in many states, delegates or those empowered to name the delegates were selected long before the presidential campaign began, or otherwise in a manner calculated to discourage participation by anyone but supporters of the dominant party organization.

Second, the tallying of voter preferences had to be roughly though not necessarily precisely proportional. In other words, "winner-take-all" primaries or caucus procedures would be prohibited. However, in a compromise, states were permitted to retain winner-take-all primaries through the 1972 election. As we shall see shortly, this compromise helped trigger the first round of litigation under the new rules.

Third, the demographic makeup of the delegation, especially with respect to race and sex, but also with respect to characteristics such as age and income, must not depart excessively from the population of the states. By 1980 the Democratic Convention required that each delegation include equal numbers of men and women.

As Byron E. Shafer points out in his detailed history of the McGovern-Fraser proposals,[1] there was a tension between the first two of these requirements, which demanded that a state delegation be representative of voter preferences, and the third, which demanded that the delegation be representative of voter demographic characteristics. Nevertheless, the reformers regarded both types of demands as necessary to make the national party and its nomination process more democratic. Each state had to develop "slating" rules to assure that once the allocation of delegates to the different presidential candidates was established, the selection of individual delegates would conform to the demographic requirements.

One important consequence of the adoption of the reforms, commented upon by Fiorina, *supra*, was that there was a dramatic increase in the number of states that selected their delegates by holding a presidential primary. This was not required by the new rules, and it probably was not even desired by many of the reformers, who consisted primarily of liberal activists who might have expected to be overrepresented among voters turning out at caucuses held in accordance with the new requirements. However, the caucus requirements were complex, and many states found it easier to assure compliance with the new rules by opting for a primary election. Furthermore, those state parties that were still dominated by old-line organizations may have preferred a presidential primary to a caucus proceeding that could spread the new "democratization" to state party governance. See SHAFER, *supra*; NELSON W. POLSBY, CONSEQUENCES OF PARTY REFORM (1983).

Although the Republican Party did not adopt all the reforms that the Democrats adopted, the Republicans were influenced significantly by them. They did adopt some of the reforms, though usually in a more moderate version. In addition, when the reforms were adopted via state legislation, the new laws often

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the presidential candidates they support, to a higher level caucus or convention. A pyramidal process eventuates in a statewide convention of representatives whose selection is ultimately traceable to the preferences expressed at the original caucuses. The statewide convention selects the actual presidential nominating delegation.

1. BYRON E. SHAFER, QUIET REVOLUTION: THE STRUGGLE FOR THE DEMOCRATIC PARTY AND THE SHAPING OF POST-REFORM POLITICS (1983).

applied to the Republicans as well. This was especially true in the case of the adoption of presidential primaries, which with very few exceptions was done either for both parties or for neither.

By inducing greatly increased use of presidential primaries, the new rules helped bring about a basic change in the method of selecting the president. As we have seen, success in primaries was only a part of a campaign for the nomination prior to 1972. Its major significance was to demonstrate to party leaders that an aspirant would make a strong candidate. For example, John Kennedy's victory over Hubert Humphrey in the West Virginia primary in 1960 went a long way toward overcoming doubts of some party leaders as to whether a Roman Catholic could win votes in heavily Protestant parts of the country. But the final decision was determined not by primaries, but by negotiations between state delegation leaders at the convention. In contrast, since 1972, the nominee of each party has been the candidate who could win a majority of delegate votes in the primaries and state caucuses.

The parties, especially the Democrats, continued to tinker with the delegate selection rules in advance of each convention after 1972 at least through 1984. Of greater consequence to us in this section is that the rules changes have stimulated litigation presenting complex new constitutional problems.

State parties on occasion have resisted one or another aspect of the delegate selection rules. Since the state party is likely to have influence over the state legislature on such matters, the state party's resistance sometimes is buttressed by state law. When such conflicts arise, they raise the question whether the national party rules, state party rules, or state legislation should be supreme with respect to the selection of the state party delegation to a national convention.[m] When such conflicts are brought to court, they present an additional question: Should the conflicts be resolved by the judiciary at all, or should they be left to the political process for resolution.

Brown v. O'Brien, 409 U.S. 1 (1972), went to the Supreme Court on the eve of the 1972 Democratic National Convention. The Credentials Committee, whose rulings would be subject to review by the convention delegates, had upheld challenges to the California and Illinois delegations. The California challenge was based on the fact that California had conducted a winner-take-all primary. George McGovern, who had won the primary, virtually was assured the nomination if he received all the California delegates, whereas the nomination might be up for grabs if the California delegation were divided among the candidates in proportion to their vote percentages. The Illinois delegation, which was controlled by Chicago Mayor Richard Daley, was challenged for underrepresenting women, minorities, and young people.

Prior to the convention, the two rejected delegations brought actions in the United States District Court for the District of Columbia, seeking orders that they be seated at the Convention. The District Court dismissed both suits, but on appeal the D.C. Circuit, while affirming the decision rejecting the Illinois claim, reversed the California decision. The court held the credentials committee ruling

m. One constitutional question that has not been tested is the degree to which Congress has the power to regulate the national conventions or other national or state party processes. To date, Congress has withheld its legislative hand.

unseating the McGovern delegates violated due process, since those delegates were selected in accordance with then existing state law.

The losing sides in the D.C. Circuit both applied to the Supreme Court for stays of the D.C. Circuit's orders. Three days before the Convention opened, the Court granted those requests, in part because of the "grave doubts" it had about the action of the D.C. Circuit. In the *per curiam* opinion in *O'Brien*, 409 U.S. at 4, the Court said:

> It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action, and if so, the reach of the Due Process Clause in this unique context. Vital rights of association guaranteed by the Constitution are also involved.

The Court did not, however, definitively resolve the issues it identified, because of the lack of time for adequate briefing of them and "the availability of the Convention as a forum to review the recommendations of the Credentials Committee." The Convention did ultimately uphold the Credentials Committee on the Illinois challenge but reversed its decision on the California challenge, thus assuring the nomination for Senator McGovern.

The constitutional issues raised by the credentials fight at the 1972 Democratic Convention did not, however, become entirely moot with the Convention's adjournment. The Daley delegation (also called the Wigoda delegation) had obtained an injunction from an Illinois state judge prohibiting the challengers (the Cousins delegation) from acting as delegates. The Cousins delegation ignored the injunction and participated in the Convention as the delegates from Illinois. The Illinois state judge who had issued the injunction then held the Cousins delegation in contempt of court for violating it. The issue was thus clearly joined over the power of state election law to govern the conduct of a national party's Convention. The Supreme Court ultimately held that the Illinois judge had no power to control the actions of the Convention. *Cousins v. Wigoda*, 419 U.S. 477 (1975). The reasoning of *Cousins* is described in detail and arguably applied in the following case that arose out of a conflict related to the 1980 Democratic Convention.

Democratic Party of the United States v. La Follette

450 U.S. 107 (1981)

Justice STEWART delivered the opinion of the Court.

The charter of the appellant Democratic Party of the United States (National Party) provides that delegates to its National Convention shall be chosen through procedures in which only Democrats can participate. Consistently with the charter, the National Party's Delegate Selection Rules provide that only those who are willing to affiliate publicly with the Democratic Party may participate in the

process of selecting delegates to the Party's National Convention. The question on this appeal is whether Wisconsin may successfully insist that its delegates to the Convention be seated, even though those delegates are chosen through a process that includes a binding state preference primary election in which voters do not declare their party affiliation. The Wisconsin Supreme Court held that the National Convention is bound by the Wisconsin primary election results, and cannot refuse to seat the delegates chosen in accord with Wisconsin law.

I

Rule 2A of the Democratic Selection Rules for the 1980 National Convention states: "Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded." Under National Party rules, the "delegate selection process" includes any procedure by which delegates to the Convention are bound to vote for the nomination of particular candidates.

The election laws of Wisconsin allow non-Democrats—including members of other parties and independents—to vote in the Democratic primary without regard to party affiliation and without requiring a public declaration of party preference. The voters in Wisconsin's "open" primary express their choice among Presidential candidates for the Democratic Party's nomination; they do not vote for delegates to the National Convention. Delegates to the National Convention are chosen separately, after the primary, at caucuses of persons who have stated their affiliation with the Party. But these delegates, under Wisconsin law, are bound to vote at the National Convention in accord with the results of the open primary election. Accordingly, while Wisconsin's open Presidential preference primary does not itself violate National Party rules, the State's mandate that the results of the primary shall determine the allocation of votes cast by the State's delegates at the National Convention does.

In May 1979, the Democratic Party of Wisconsin (State Party) submitted to the Compliance Review Commission of the National Party its plan for selecting delegates to the 1980 National Convention. The plan incorporated the provisions of the State's open primary laws, and, as a result the Commission disapproved it as violating Rule 2A. Since compliance with Rule 2A was a condition of participation at the Convention, for which no exception could be made, the National Party indicated that Wisconsin delegates who were bound to vote according to the results of the open primary would not be seated.

The State Attorney General then brought an original action in the Wisconsin Supreme Court on behalf of the State. Named as respondents in the suit were the National Party and the Democratic National Committee, who are the appellants in this Court, and the State Party, an appellee here. The State sought a declaration that the Wisconsin delegate selection system was constitutional as applied to the appellants and that the appellants could not lawfully refuse to seat the Wisconsin delegation at the Convention. The State Party responded by agreeing that state law may validly be applied against it and the National Party, and cross-claimed against the National Party, asking the court to order the National Party to recognize the delegates selected in accord with Wisconsin law. The National Party argued that under the First and Fourteenth Amendments it could not be compelled to seat the Wisconsin delegation in violation of Party rules.

The Wisconsin Supreme Court entered a judgment declaring that the State's system of selecting delegates to the Democratic National Convention is constitutional and binding on the appellants....

II

Rule 2A can be traced to efforts of the National Party to study and reform its nominating procedures and internal structure after the 1968 Democratic National Convention.[14] [The Court reviews the work of the McGovern-Fraser Commission prior to the 1972 Convention and the Mikulski Commission, which recommended rules changes for the 1976 Convention. In 1976, Rule 2A restricted participation in the delegate selection process to Democratic voters "who publicly declare their party preference," but there was a general escape clause in 1976, contained in Rule 20, from any rule, including Rule 2A, that was inconsistent with state law that the state party was unable to have changed.]

In 1975, the Party established yet another commission to review its nominating procedures, the Commission on Presidential Nomination and Party Structure (Winograd Commission). This Commission was particularly concerned with what it believed to be the dilution of the voting strength of Party members in States sponsoring open or "crossover" primaries.[18] Indeed, the Commission based its concern in part on a study of voting behavior in Wisconsin's open primary. See Adamany, Cross-Over Voting and the Democratic Party's Reform Rules, 70 Am.Pol.Sci.Rev. 536, 538–539 (1976).

The Adamany study, assessing the Wisconsin Democratic primaries from 1964 to 1972, found that crossover voters comprised 26% to 34% of the primary voters; that the voting patterns of crossover voters differed significantly from those of participants who identified themselves as Democrats; and that crossover voters altered the composition of the delegate slate chosen from Wisconsin. The Winograd Commission thus recommended that the Party strengthen its rules against crossover voting, predicting that continued crossover voting "could result in a convention delegation which did not fairly reflect the division of preferences among Democratic identifiers in the electorate."...Accordingly, the text of Rule

14. Wisconsin's open primary system has a history far longer than that of Rule 2A of the National Party. The open primary was adopted in 1903, and in the words of the Wisconsin Supreme Court, it has "functioned well" ever since. The open primary is employed in Wisconsin not only to express preference for Presidential candidates, but to choose "partisan...state and local candidates...and an extensive array of nonpartisan officers" as well....

Wisconsin's open primary apparently is still very popular. On September 5, 1979, by a unanimous vote of its Senate and a 92–1 vote of its Assembly, the Wisconsin Legislature reaffirmed by joint resolution the "firm and enduring commitment of the people of Wisconsin to the open presidential preference primary law as an integral element of Wisconsin's proud tradition of direct and effective participatory democracy." And on September 14, 1979, a bill to create a modified closed primary was defeated in committee.

[For a political history and analysis of the events giving rise to this litigation, see GARY D. WEKKIN, DEMOCRAT VERSUS DEMOCRAT: THE NATIONAL PARTY'S CAMPAIGN TO CLOSE THE WISCONSIN PRIMARY (1984).—ED.]

18. A crossover primary is one that permits nonadherents of a party to "cross over" and vote in that party's primary.

2A was retained, but a new Rule, 2B, was added, prohibiting any exemptions from Rule 2A.[20]

III

The question in this case is not whether Wisconsin may conduct an open primary election if it chooses to do so, or whether the National Party may require Wisconsin to limit its primary election to publicly declared Democrats.[21] Rather, the question is whether, once Wisconsin has opened its Democratic Presidential preference primary to voters who do not publicly declare their party affiliation, it may then bind the National Party to honor the binding primary results, even though those results were reached in a manner contrary to National Party rules.

The Wisconsin Supreme Court considered the question before it to be the constitutionality of the "open" feature of the state primary election law, as such. Concluding that the open primary serves compelling state interest by encouraging voter participation, the court held the state open primary constitutionally valid. Upon this issue, the Wisconsin Supreme Court may well be correct. In any event there is no need to question its conclusion here. For the rules of the National Party do not challenge the authority of a State to conduct an open primary, so long as it is not binding on the National Party Convention. The issue is whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party. And this issue was resolved, we believe, in *Cousins v. Wigoda*.

In *Cousins* the Court reviewed the decision of an Illinois court holding that state law exclusively governed the seating of a state delegation at the 1972 Democratic National Convention, and enjoining the National Party from refusing to seat delegates selected in a manner in accord with state law although contrary to National Party rules.... The Court reversed the state judgment, holding that "Illinois' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention." That disposition controls here.

The *Cousins* Court relied upon the principle that "[t]he National Democratic Party and its adherents enjoy a constitutionally protected right of political association."... And the freedom to associate for the "common advancement of political

20. Rule 2A was the only rule applicable to the 1980 Convention that permitted no exemption....

21. In its answer to the complaint filed by the Wisconsin Attorney General, the National Party stated that it would "recognize only those delegate votes at the 1980 Convention which are the product of delegate selection processes, whether in binding primaries, conventions, or caucuses, which are restricted to Democratic voters who publicly declare their party preference and have that preference publicly recorded." The National Party nowhere indicated that the Wisconsin primary cannot be open; it averred only that any process adopted by the State that *binds* the National Party must comply with Party rules. And in the joint stipulation of facts before the Wisconsin Supreme Court, the National Party did not declare that Wisconsin must abandon its open primary. The National Party said only that if Wisconsin does not change its primary laws by requiring public party declaration consistent with Party rules, it would be satisfied with some other, Party-run, delegate selection system that did comply with Party rules. This statement is consistent with Rule 2C of the 1980 Delegate Selection Rules, which provides that "[a] State Party which is precluded by state statute from complying with this rule [2A], shall adopt and implement an alternative Party-run delegate selection system which complies with this rule."

beliefs," necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only....

Here, the members of the National Party, speaking through their rules, chose to define their associational rights by limiting those who could participate in the processes leading to the selection of delegates to their National Convention. On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions—and that political parties may accordingly protect themselves "from intrusion by those with adverse political principles." *Ray v. Blair.* In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), for example, the Court sustained the constitutionality of a requirement—there imposed by a state statute—that a voter enroll in the party of his choice at least 30 days before the general election in order to vote in the next party primary. The purpose of that statute was "to inhibit party 'raiding,' whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." See also *Kusper v. Pontikes*, 414 U.S. 51, 59–60 (1973).

The State argues that its law places only a minor burden on the National Party. The National Party argues that the burden is substantial, because it prevents the Party from "screen[ing] out those whose affiliation is...slight, tenuous, or fleeting," and that such screening is essential to build a more effective and responsible Party. But it is not for the courts to mediate the merits of this dispute. For even if the State were correct,[25] a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution. And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.[27]

IV

We must consider, finally, whether the State has compelling interests that justify the imposition of its will upon the appellants. "Neither the right to associate nor the right to participate in political activities is absolute." *CSC v. Letter Carriers*, 413 U.S. 548, 567 (1973). The State asserts a compelling interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters.

25. It may be the case, of course, that the public avowal of party affiliation required by Rule 2A provides no more assurance of party loyalty than does Wisconsin's requirement that a person vote in no more than one party's primary. But the stringency, and wisdom, of membership requirements is for the association and its members to decide—not the courts—so long as those requirements are otherwise constitutionally permissible.

27. The State Party argues at length that empirical data do not support the National Party's need for Rule 2A. That argument should be addressed to the National Party—which has studied the need for something like Rule 2A for 12 years—and not to the judiciary. The State also contends that the National Party should not be able to prevent "principled crossovers" from influencing the selection of its candidate, and that the appellants have not presented any evidence that "raiding" has been a problem. These contentions are irrelevant. It is for the National Party—and not the Wisconsin Legislature or any court—to determine the appropriate standards for participation in the Party's candidate selection process.

But all those interests go to the conduct of the Presidential preference primary—not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates. Therefore, the interests advanced by the State do not justify its substantial intrusion into the associational freedom of members of the National Party.

V

The State has a substantial interest in the manner in which its elections are conducted, and the National Party has a substantial interest in the manner in which the delegates to its National Convention are selected. But these interests are not incompatible, and to the limited extent they clash in this case, both interests can be preserved. The National Party rules do not forbid Wisconsin to conduct an open primary. But if Wisconsin does open its primary, it cannot require that Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules. Since the Wisconsin Supreme Court has declared that the National Party cannot disqualify delegates who are bound to vote in accordance with the results of the Wisconsin open primary, its judgment is reversed.

Justice POWELL, with whom Justice BLACKMUN and Justice REHNQUIST join, dissenting.

[Rule 2A] has the ironic effect of calling into question a state law that was intended itself to open up participation in the nominating process and minimize the influence of "party bosses."

...All that Wisconsin has done is to require the major parties to allow voters to affiliate with them—for the limited purpose of participation in a primary—*secretly*, in the privacy of the voting booth. The Democrats remain free to require public affiliation from anyone wishing any greater degree of participation in party affairs. In Wisconsin, participation in the caucuses where delegates are selected is limited to publicly affiliated Democrats.

In evaluating the constitutional significance of this relatively minimal state regulation of party membership requirements, I am unwilling—at least in the context of a claim by one of the two major political parties—to conclude that every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights. Instead, I would look closely at the nature of the intrusion, in light of the nature of the association involved, to see whether we are presented with a real limitation on First Amendment freedoms.

It goes without saying that nomination of a candidate for President is a principal function performed by a national political party, and Wisconsin has, to an extent, regulated the terms on which a citizen may become a "member" of the group of people permitted to influence that decision. If appellant National Party were an organization with a particular ideological orientation or political mission, perhaps this regulation would present a different question. In such a case, the state law might well open the organization to participation by persons with incompatible beliefs and interfere with the associational rights of its founders.

The Democratic Party, however, is not organized around the achievement of defined ideological goals. Instead, the major parties in this country "have been characterized by a fluidity and overlap of philosophy and membership." *Rosario*

(POWELL, J., dissenting). It can hardly be denied that this party generally has been composed of various elements reflecting most of the American political spectrum.[4] The Party does take positions on public issues, but these positions vary from time to time, and there never has been a serious effort to establish for the Party a monolithic ideological identity by excluding all those with differing views. As a result, it is hard to see what the Democratic Party has to fear from an open primary plan. Wisconsin's law may influence to some extent the outcome of a primary contest by allowing participation by voters who are unwilling to affiliate with the Party publicly. It is unlikely, however, that this influence will produce a delegation with preferences that differ from those represented by a substantial number of delegates from other parts of the country. Moreover, it seems reasonable to conclude that, insofar as the major parties do have ideological identities, an open primary merely allows relatively independent voters to cast their lot with the party that speaks to their present concerns. By attracting participation by relatively independent-minded voters, the Wisconsin plan arguably may enlarge the support for a party at the general election.

It is significant that the Democratic Party of Wisconsin, which represents those citizens of Wisconsin willing to take part publicly in Party affairs, is here *defending* the state law. Moreover, the National Party's apparent concern that the outcome of the Wisconsin Presidential primary will be skewed cannot be taken seriously when one considers the alternative delegate-selection methods that are acceptable to the Party under its rules. Delegates pledged to various candidates may be selected by a caucus procedure involving a small minority of Party members, as long as all participants in the process are publicly affiliated. While such a process would eliminate "crossovers," it would be at least as likely as an open primary to reflect inaccurately the views of a State's Democrats. In addition, the National Party apparently is quite willing to accept public affiliation immediately before primary voting, which some States permit. As Party affiliation becomes this easy for a voter to change in order to participate in a particular primary election, the difference between open and closed primaries loses its practical significance.[8]

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4. ... As Professor Ranney has written: "[E]ach party has sought winning coalitions by attempting accommodations among competing interests it hopes will appeal to more contributors and voters than will the rival accommodations offered by the opposition party. This strategy, it is conceded, has resulted in vague, ambiguous, and overlapping party programs and in elections that offer the voters choices between personalities and, at most, general programmatic tendencies, certainly not unequivocal choices between sharply different programs. But this... is not a vice but a virtue, for it has enabled Americans through all but one era of their history to manage their differences with relatively little violence and to preserve the world's oldest constitutional democratic regime." AUSTIN RANNEY, CURING THE MISCHIEFS OF FACTION 201 (1975).

8. As one scholar has stated: "The distinctions between open and closed primaries are easy to exaggerate. Too simple a distinction ignores the range of nuances and varieties within the closed primary states, which after all do account for 82 percent of the states. Take the case of Illinois. Voters do not register as members of a party; at the polling place they simply state their party preference and are given the ballot of that party, no questions asked. Because Illinois voters must disclose a party preference before entering the voting booth, their primary is generally considered 'closed.' One would be hard put, however, to argue that it is in operation much different from an open primary." FRANK SORAUF, PARTY POLITICS IN AMERICA 206 (4th ed. 1980).

In sum, I would hold that the National Party has failed to make a sufficient showing of a burden on its associational rights.[9]

The Court does not dispute that the State serves important interests by its open primary plan. Instead the Court argues that these interests are irrelevant because they do not support a requirement that the outcome of the primary be binding on delegates chosen for the convention. This argument, however, is premised on the unstated assumption that a nonbinding primary would be an adequate mechanism for pursuing the state interests involved. This assumption is unsupportable because the very purpose of a Presidential primary, as enunciated as early as 1903 when Wisconsin passed its first primary law, was to give control over the nomination process to individual voters. Wisconsin cannot do this, and still pursue the interests underlying an open primary, without making the open primary binding....

Notes and Questions

1. Justice Stewart emphasizes the National Democratic Party's constitutional right to freedom of association as an important reason for the result he reaches for the Court in *La Follette*. Yet, the Wisconsin Democratic Party strongly supported the open primary and attempted to defend it in the litigation. Is the majority's ruling an infringement on the state party's freedom of association? Why is the state party's right to select delegates to the National Convention by the process it chooses of less constitutional weight than the National Party's right to decide which delegates to seat? Indeed, why is there not even any discussion of the state party's associational rights?

2. Would the result in *La Follette* have been different if Congress had passed a statute allowing state legislatures to choose between an open and closed primary and Wisconsin had opted for an open primary? See Note, *Freedom of Association and Selection of Delegates to National Political Conventions*, 56 CORNELL LAW REVIEW 148, 152–60 (1970). Would it be relevant that the great majority of Democrats in the House and Senate voted for the bill and that it was signed by a Democratic president?

Could Congress require the political parties to hold their primaries in every state on a single day? Should it? In the absence of any such action by Congress, New Hampshire has a statute that sets its primary date one week earlier than the next earliest state. Suppose Vermont passed the same statute?

If one of the national parties stated it would not seat delegates selected in primaries unless the primary were held on a date specified, would its refusal to seat the delegates be constitutionally protected under *La Follette*? What if the state proved (1) that it had traditionally held its primary on a different date; (2) that change in the date was strongly resisted by the opposing party; and (3) that hold-

9. Of course, the National Party could decide that it no longer wishes to be a relatively nonideological party, but it has not done so. Such a change might call into question the institutionalized status achieved by the two major parties in state and federal law. It cannot be denied that these parties play a central role in the electoral process in this country, to a degree that has led this Court on occasion to impose constitutional limitations on party activities. See *Smith v. Allwright*; *Terry v. Adams*. Arguably, the special status of the major parties is an additional factor favoring state regulation of the electoral process even in the face of a claim by such a party that this regulation has interfered with its First Amendment rights.

ing the two parties' primaries on separate dates would entail considerable public expense and would be likely to reduce turnout, not only in the presidential primaries but in other elections held concurrently, such as state and local primaries and ballot measure elections?

3. To what extent is the result in *La Follette* dependent upon the fact that the state law conflicted with a rule of the national *Democratic* Party? Suppose it were the Libertarian Party instead? Would or should the result be different?

4. *La Follette* does not really answer the question of the extent to which the decision of a national political party in allocation and selection of delegates is "state action" subject to constitutional restraint. See generally the numerous cases and secondary sources cited in *Cousins v. Wigoda*, 419 U.S. at 483, n.4. Consider the following:

A. Can the party require all candidates for president to swear in advance of the nomination to support and abide by its platform with the sanction of withdrawal of the nomination if the candidate deviates? If so, is the victorious candidate who allegedly deviates entitled to a trial where he or she can challenge the allegations and evidence? Before whom? Under what procedures?

B. Is allocation of delegates to states at national party conventions subject to the principles of the redistricting decisions? Suppose, for example, the Republicans decide to award substantial numbers of extra delegates at their next convention to states carried by Republican candidates for President or Senator or that elected a majority of Republicans to the seats in the House allocated to their state. The Republicans' theory is that the bonus allocation will encourage state organizations to work harder to get out the Republican vote. See Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda*, 53 TEXAS LAW REVIEW 935, 938–43 (1975), and cases and sources discussed therein. What are the practical consequences of such a system, compared to apportionment of delegates strictly by population?

C. Is it constitutional for a party to require that a state's delegation to a nominating convention must contain women, identified racial minorities, and young people in the exact percentage that those groups are present in the population of the state? See *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987), holding that Maryland rules to implement policies of the national Democratic Party, requiring individuals to vote for equal numbers of men and women for delegate to the convention, did not infringe on the right to vote. See generally John G. Kester, *Constitutional Restrictions on Political Parties*, 60 VIRGINIA LAW REVIEW 735, 770–72 (1974).

D. Is your answer to any of the above questions affected by the fact that the major parties receive public funds to finance their conventions? Would your answer be influenced if Congress appropriated funds to pay for the parties' internal operations? Their public relations activities?

E. Is your view of when a political party's action is state action different for the national, state, and local parties? Suppose, for example, that in a given state, trial court judges are not nominated in primaries but by the party county committees. A party committee in a given county is taken over by a reform faction. Assume further that the party's nomination for trial court judge in

that county is tantamount to election. Wholly on its own volition, the party committee establishes a screening committee of distinguished lawyers and non-lawyers to recommend nominees for judge to it, and the party committee agrees to be bound by the screening committee's choice. A candidate for judge rejected by the screening committee sues the county party, alleging that the screening committee considered hearsay statements of unidentified lawyers and former clients in rejecting the candidate and did not give the rejected candidate the opportunity to confront accusers and be heard on the charges. The candidate alleges the screening committee is in effect an arm of the county party, whose nomination of the candidate endorsed by the screening committee is state action subject to the due process clause of the fourteenth amendment. What result, and why?

5. To what extent is the result in *La Follette* influenced by the varying views of the justices about the desirability of ideological cohesiveness within the parties? Should that factor have influenced the result?

6. Is Justice Powell's dissenting opinion in *La Follette* consistent with the admonition against court intervention in party affairs in *Brown v. O'Brien*?

7. In 1980, the Democratic National Convention seated the Wisconsin delegation despite the fact that the open primary violated the national rules and despite the fact that the Supreme Court had stayed the state court order requiring that the delegates be seated. In 1984, the Wisconsin Democrats yielded by selecting delegates at caucuses, but by 1988 the national Democrats had given in, revising the national rules to permit Wisconsin to use its open primary. Who won the *La Follette* case?

IV. Associational Rights of Parties

In the *White Primary Cases*, constitutional rights of voters were asserted successfully against political parties. In *Cousins* and *La Follette*, parties were able to assert their own associational rights to defend national party control of the national conventions against state judicial interference. In this section, we consider cases in which state parties, or individuals claiming to act on a party's behalf, assert associational rights under the First Amendment as a means of striking down state regulation.

Tashjian v. Republican Party of Connecticut

479 U.S. 208 (1986)

Justice MARSHALL delivered the opinion of the Court.

Appellee Republican Party of the State of Connecticut (Party) in 1984 adopted a Party rule which permits independent voters—registered voters not affiliated with any political party—to vote in Republican primaries for federal and statewide offices. Appellant Julia Tashjian, the Secretary of the State of Connecticut, is charged with the administration of the State's election statutes, which include a provision requiring voters in any party primary to be registered members of that party. Conn. Gen. Stat. § 9-431 (1985). Appellees, who in addition to the Party include the Party's federal officeholders and the Party's state chairman, challenged

this eligibility provision on the ground that it deprives the Party of its First Amendment right to enter into political association with individuals of its own choosing. The District Court granted summary judgment in favor of appellees. The Court of Appeals affirmed. We...now affirm.

I

In 1955, Connecticut adopted its present primary election system. For major parties, the process of candidate selection for federal and statewide offices requires a statewide convention of party delegates; district conventions are held to select candidates for seats in the state legislature. The party convention may certify as the party-endorsed candidate any person receiving more than 20% of the votes cast in a roll-call vote at the convention. Any candidate not endorsed by the party who received 20% of the vote may challenge the party-endorsed candidate in a primary election, in which the candidate receiving the plurality of votes becomes the party's nominee. Candidates selected by the major parties, whether through convention or primary, are automatically accorded a place on the ballot at the general election....

Motivated in part by the demographic importance of independent voters in Connecticut politics,[3] in September 1983 the Party's Central Committee recommended calling a state convention to consider altering the Party's rules to allow independents to vote in Party primaries. In January 1984 the state convention adopted the Party rule now at issue, which provides:

> Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

During the 1984 session, the Republican leadership in the state legislature, in response to the conflict between the newly enacted Party rule and § 9-431, proposed to amend the statute to allow independents to vote in primaries when permitted by Party rules. The proposed legislation was defeated, substantially along party lines, in both houses of the legislature, which at that time were controlled by the Democratic Party....[4]

II

...The nature of appellees' First Amendment interest is evident. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The freedom of association protected by the First and Fourteenth Amendments includes partisan political organi-

3. The record shows that in October 1983 there were 659,268 registered Democrats, 425,695 registered Republicans, and 532,723 registered and unaffiliated voters in Connecticut.

4. In the November 1984 elections, the Republicans acquired a majority of seats in both houses of the state legislature, and an amendment to § 9-431 was passed, but was vetoed by the Democratic Governor.

zation. "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper.*

The Party here contends that § 9-431 impermissibly burdens the right of its members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success. The Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association. As we have said, the freedom to join together in furtherance of common political beliefs "necessarily presupposes the freedom to identify the people who constitute the association." *LaFollette.*

A major state political party necessarily includes individuals playing a broad spectrum of roles in the organization's activities. Some of the Party's members devote substantial portions of their lives to furthering its political and organizational goals, others provide substantial financial support, while still others limit their participation to casting their votes for some or all of the Party's candidates. Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important.

Were the State to restrict by statute financial support of the Party's candidates to Party members, or to provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals. As we have said, "'[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.'" *LaFollette* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).[6] The statute here places limits upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. *Kusper.* The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.[7]

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6. It is this element of potential interference with the rights of the Party's members which distinguishes the present case from others in which we have considered claims by nonmembers of a party seeking to vote in that party's primary despite the party's opposition. In this latter class of cases, the nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications. See *Rosario.* Similarly, the Court has upheld the right of national political parties to refuse to seat at their conventions delegates chosen in state selection processes which did not conform to party rules. See LaFollette; Cousins. These situations are analytically distinct from the present case, in which the Party and its members seek to provide enhanced opportunities for participation by willing nonmembers. Under these circumstances, there is no conflict between the associational interests of members and nonmembers.

7. Appellant contends that any infringement of the associational right of the Party or its members is de minimis, because Connecticut law, as amended during the pendency of this litigation, provides that any previously unaffiliated voter may become eligible to vote in the Party's primary by enrolling as a Party member as late as noon on the last business day preceding the primary. Thus, appellant contends, any independent voter wishing to participate in any Party primary may do so.

This is not a satisfactory response to the Party's contentions for two reasons. First, as the Court of Appeals noted, the formal affiliation process is one which individual voters may employ in order to associate with the Party, but it provides no means by which the members of

It is, of course, fundamental to appellant's defense of the State's statute that this impingement upon the associational rights of the Party and its members occurs at the ballot box, for the Constitution grants to the States a broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices. But this authority does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens. The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, see *Wesberry*, or, as here, the freedom of political association. We turn then to an examination of the interests which appellant asserts to justify the burden cast by the statute upon the associational rights of the Party and its members.

III

Appellant contends that § 9-431 is a narrowly tailored regulation which advances the State's compelling interests by ensuring the administrability of the primary system, preventing raiding, avoiding voter confusion, and protecting the responsibility of party government.

A

[Appellant argues] that the administrative burden imposed by the Party rule is a sufficient ground on which to uphold the constitutionality of § 9-431. Appellant contends that the Party's rule would require the purchase of additional voting machines, the training of additional poll workers, and potentially the printing of additional ballot materials specifically intended for independents voting in the Republican primary. In essence, appellant claims that the administration of the system contemplated by the Party rule would simply cost the State too much.

Even assuming the factual accuracy of these contentions..., the possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing appellees' First Amendment rights. Costs of administration would likewise increase if a third major party should come into existence in Connecticut, thus requiring the State to fund a third major-party primary. Additional voting machines, poll workers, and ballot materials would all be necessary under these circumstances as well. But the State could not forever protect the two existing major parties from competition solely on the ground that two major parties are all the public can afford. While the State is of course entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all, it can no more restrain the Republican Party's

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the Party may choose to broaden opportunities for joining the association by their own act, without any intervening action by potential voters. Second, and more importantly, the requirement of public affiliation with the Party in order to vote in the primary conditions the exercise of the associational right upon the making of a public statement of adherence to the Party which the State requires regardless of the actual beliefs of the individual voter. As counsel for appellees conceded at oral argument, a requirement that independent voters merely notify state authorities of their intention to vote in the Party primary would be acceptable as an administrative measure, but "[t]he problem is that the State is insisting on a public act of affiliation... joining the Republican Party as a condition of this association."

freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party.

B

Appellant argues that § 9-431 is justified as a measure to prevent raiding, a practice "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario*. While we have recognized that "a State may have a legitimate interest in seeking to curtail 'raiding,' since that practice may affect the integrity of the electoral process," *Kusper*; *Rosario*, that interest is not implicated here. The statute as applied to the Party's rule prevents independents, who otherwise cannot vote in any primary, from participating in the Republican primary. Yet a raid on the Republican Party primary by independent voters, a curious concept only distantly related to the type of raiding discussed in *Kusper* and *Rosario*, is not impeded by § 9-431; the independent raiders need only register as Republicans and vote in the primary. Indeed, under Conn.Gen.Stat. § 9-56 (1985), which permits an independent to affiliate with the Party as late as noon on the business day preceding the primary, the State's election statutes actually *assist* a "raid" by independents, which could be organized and implemented at the 11th hour. The State's asserted interest in the prevention of raiding provides no justification for the statute challenged here.

C

Appellant's next argument in support of § 9-431 is that the closed primary system avoids voter confusion. Appellant contends that "[t]he legislature could properly find that it would be difficult for the general public to understand what a candidate stood for who was nominated in part by an unknown amorphous body outside the party, while nevertheless using the party name." Appellees respond that the State is attempting to act as the ideological guarantor of the Republican Party's candidates, ensuring that voters are not misled by a "Republican" candidate who professes something other than what the State regards as true Republican principles.

As we have said, "[t]here can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Anderson v. Celebrezze*, 460 U.S. 780 (1983). To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise. Appellant's argument depends upon the belief that voters can be "misled" by party labels. But "[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Id.* Moreover, appellant's concern that candidates selected under the Party rule will be the nominees of an "amorphous" group using the Party's name is inconsistent with the facts. The Party is not proposing that independents be allowed to choose the Party's nominee without Party participation; on the contrary, to be listed on the Party's primary ballot continues to require, under a statute not challenged here, that the primary candidate have obtained at least 20% of the vote at a Party convention, which only Party members may attend. Conn. Gen. Stat. § 9-400 (1985). If no such candidate seeks to challenge the convention's nominee in a pri-

mary, then no primary is held, and the convention nominee becomes the Party's nominee in the general election without any intervention by independent voters. Even assuming, however, that putative candidates defeated at the Party convention will have an increased incentive under the Party's rule to make primary challenges, hoping to attract more substantial support from independents than from Party delegates, the requirement that such challengers garner substantial minority support at the convention greatly attenuates the State's concern that the ultimate nominee will be wedded to the Party in nothing more than a marriage of convenience.

In arguing that the Party rule interferes with educated decisions by voters, appellant also disregards the substantial benefit which the Party rule provides to the Party and its members in seeking to choose successful candidates. Given the numerical strength of independent voters in the State, one of the questions most likely to occur to Connecticut Republicans in selecting candidates for public office is how can the Party most effectively appeal to the independent voter? By inviting independents to assist in the choice at the polls between primary candidates selected at the Party convention, the Party rule is intended to produce the candidate and platform most likely to achieve that goal. The state statute is said to decrease voter confusion, yet it deprives the Party and its members of the opportunity to inform themselves as to the level of support for the Party's candidates among a critical group of electors. "A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson*. The State's legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions in no respect "make it necessary to burden the [Party's] rights." *Id.*[n]

D

Finally, appellant contends that § 9-431 furthers the State's compelling interest in protecting the integrity of the two-party system and the responsibility of party government. Appellant argues vigorously and at length that the closed primary system chosen by the state legislature promotes responsiveness by elected officials and strengthens the effectiveness of the political parties.

The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century, and no consensus has as yet emerged.[11] Appellant invokes a long and distinguished line of political scientists and public officials who have been supporters of the closed primary. But our role

n. Connecticut is unusual both in its requirement that candidates surpass a percentage threshold at a party convention as a prerequisite to appearing on the ballot in a primary and in its high percentage of independent voters. If a controversy like *Tashjian* arose in a state that was unlike Connecticut in both these respects, what should the result be?

11. At the present time, 21 States provide for "closed" primaries of the classic sort, in which the primary voter must be registered as a member of the party for some period of time prior to the holding of the primary election. Sixteen States allow a voter previously unaffiliated with any party to vote in a party primary if he affiliates with the party at the time of, or for the purpose of, voting in the primary. Four States provide for nonpartisan primaries in which all registered voters may participate, while nine States have adopted classical "open" primaries, in which all registered voters may choose in which party primary to vote.

is not to decide whether the state legislature was acting wisely in enacting the closed primary system in 1955, or whether the Republican Party makes a mistake in seeking to depart from the practice of the past 30 years.[12]

We have previously recognized the danger that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government." *Storer v. Brown*, 415 U.S. 724 (1974). We upheld a California statute which denied access to the ballot to any independent candidate who had voted in a party primary or been registered as a member of a political party within one year prior to the immediately preceding primary election. We said:

> [T]he one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.

The statute in *Storer* was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees. This protection, like that accorded to parties threatened by raiding in *Rosario*, is undertaken to prevent the disruption of the political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates. The forms of regulation upheld in *Storer* and *Rosario* imposed certain burdens upon the protected First and Fourteenth Amendment interests of some individuals, both voters and potential candidates, in order to protect the interests of others. In the present case, the state statute is defended on the ground that it protects the integrity of the Party against the Party itself.

Under these circumstances, the views of the State, which to some extent represent the views of the one political party transiently enjoying majority power, as to the optimum methods for preserving party integrity lose much of their force. The State argues that its statute is well designed to save the Republican Party from undertaking a course of conduct destructive of its own interests. But on this point "even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *LaFollette*. The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution. "And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational." *Id.*[13]

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12. We note that appellant's direst predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 States which have chosen to permit more substantial openness in their primary systems than Connecticut has permitted heretofore.

13. Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes in *Storer* and *Rosario* were designed to prevent. We have observed on several occasions that a State may adopt a "policy of confining each voter to a single nominating act," a

We conclude that the State's enforcement, under these circumstances, of its closed primary system burdens the First Amendment rights of the Party. The interests which the appellant adduces in support of the statute are insubstantial, and accordingly the statute, as applied to the Party in this case, is unconstitutional.

IV

[In Part IV, the Court considers and rejects a different defense of the statute, based on provisions in the Constitution requiring that the qualifications for voters be the same in elections for Congress as they are for voters in elections for the more numerous branch of the state legislature. Art. 1, § 2; Seventeenth Amendment. The state argued that since the Republican Party rule allowed independents to vote in congressional but not state legislative primaries, different qualifications for voting in the two types of election were being imposed, contrary to the dictate of the Constitution. The Court agreed with the state that the constitutional provisions apply to voter qualifications in primaries as well as in general elections, but concluded that the Constitution was intended to prevent congressional voter qualifications from being *more* restrictive than the qualifications for state legislative voting but not to prevent *less* restrictive qualifications. Justice Stevens, in an opinion joined by Justice Scalia, dissented from this latter conclusion.]

V

We conclude that § 9-431 impermissibly burdens the rights of the Party and its members protected by the First and Fourteenth Amendments. The interests asserted by appellant in defense of the statute are insubstantial. The judgment of the Court of Appeals is

Affirmed.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice O'CONNOR join, dissenting....

In my view, the Court's opinion exaggerates the importance of the associational interest at issue, if indeed it does not see one where none exists. There is no question here of restricting the Republican Party's ability to recruit and enroll Party members by offering them the ability to select Party candidates; Conn. Gen. Stat. § 9-56 (1985) permits an independent voter to join the Party as late as the day before the primary. Nor is there any question of restricting the ability of the Party's members to select whatever candidate they desire. Appellees' only complaint is that the Party cannot leave the selection of its candidate to persons who are not members of the Party, and are unwilling to become members. It seems to me fanciful to refer to this as an interest in freedom of association between the members of the Republican Party and the putative independent voters. The Connecticut voter who, while steadfastly refusing to register as a Repub-

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policy decision which is not involved in the present case. See *Anderson*; *Storer*. The analysis of these situations derives much from the particular facts involved. "The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'" *Anderson* (quoting *Storer*).

lican, casts a vote in the Republican primary, forms no more meaningful an "association" with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster. If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use....

The ability of the members of the Republican Party to select their own candidate, on the other hand, unquestionably implicates an associational freedom—but it can hardly be thought that that freedom is unconstitutionally impaired here. The Party is entirely free to put forward, if it wishes, that candidate who has the highest degree of support among Party members and independents combined. The State is under no obligation, however, to let its party primary be used, instead of a party-funded opinion poll, as the means by which the party identifies the relative popularity of its potential candidates among independents. Nor is there any reason apparent to me why the State cannot insist that this decision to support what might be called the independents' choice be taken *by the party membership in a democratic fashion*, rather than through a process that permits the members' votes to be diluted—and perhaps even absolutely outnumbered—by the votes of outsiders.

The Court's opinion characterizes this, disparagingly, as an attempt to "protec[t] the integrity of the Party against the Party itself." There are two problems with this characterization. The first, and less important, is that it is not true. We have no way of knowing that a majority of the Party's members is in favor of allowing ultimate selection of its candidates for federal and statewide office to be determined by persons outside the Party. That decision was not made by democratic ballot, but by the Party's state convention—which, for all we know, may have been dominated by officeholders and office seekers whose evaluation of the merits of assuring election of the Party's candidates, vis-a-vis the merits of proposing candidates faithful to the Party's political philosophy, diverged significantly from the views of the Party's rank and file. I had always thought it was a major purpose of state-imposed party primary requirements to protect the general party membership against this sort of minority control. Second and more important, however, *even if* it were the fact that the majority of the Party's members wanted its candidates to be determined by outsiders, there is no reason why the State is bound to honor that desire—any more than it would be bound to honor a party's democratically expressed desire that its candidates henceforth be selected by convention rather than by primary, or by the party's executive committee in a smoke-filled room. In other words, the validity of the state-imposed primary requirement itself, which we have hitherto considered "too plain for argument," *American Party of Texas v. White*, 415 U.S. 767 (1974), presupposes that the State *has* the right "to protect the Party against the Party itself." Connecticut may lawfully require that significant elements of the democratic election process be democratic—whether the Party wants that or not. It is beyond my understanding why the Republican Party's delegation of its democratic choice to a Republican Convention can be proscribed, but its delegation of that choice to nonmembers of the Party cannot.

In the case before us, Connecticut has said no more than this: Just as the Republican Party may, if it wishes, nominate the candidate recommended by the Party's executive committee, so long as its members select that candidate by name in a democratic vote; so also it may nominate the independents' choice, so long as

its members select him by name in a democratic vote. That seems to me plainly and entirely constitutional.

I respectfully dissent.

Notes and Questions

1. Suppose state law requires the selection of nominees for state office by party primary, but the leaders of one of the major parties decide they would prefer to select the party's nominees by means of a state convention. The party therefore brings an action challenging the statutory requirement that the party choose its nominees in primary elections. What result? See generally Stephen E. Gottlieb, *Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case*, 11 HOFSTRA LAW REVIEW 191 (1982).

2. Article I, § 4, ¶ 1 of the United States Constitution, referred to in *Tashjian*, provides in part as follows:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations....

If Congress passed a law requiring that party nominations in congressional elections be determined by nominating conventions, could the law be enforced over the objection of a state party that preferred to select its nominees in primaries? Would it matter in this dispute whether the state statutes provided for primaries, provided for conventions, or were silent? Would the result be different in the opposite case: Congress requires primaries, and a state party prefers nominating conventions? If a federal statute required that only persons registered in the party be permitted to vote in congressional primaries, would this requirement be enforceable against the Republican Party of Connecticut?

3. Suppose the Democratic Party of Connecticut decided to adopt the same rule as the Republicans. In that event, registered Democrats would vote only in the Democratic primary, registered Republicans would vote only in the Republican primary, and independent voters would be permitted to vote in whichever party's primary they chose at any given election. What incentive would a voter have to register as a party member under this system? Does the state have a legitimate interest in encouraging voters to affiliate with parties? Is the political system better off if voters are so encouraged?

One who took the perspective of Morris Fiorina, Section I, *supra*, would be likely to answer the last question in the affirmative. If the open primary validated in *Tashjian* had the effect of weakening the party system by reducing incentives for voters to affiliate with parties, should a supporter of strong parties accept this setback as the price of the increased associational freedom *Tashjian* recognizes in parties? On the whole, how are parties likely to use such associational freedom? Will the choices they make be more or less likely than choices made by state legislatures to promote a stronger party system?

4. One of the most controversial election law issues in California this century has been over the system known as "cross-filing." The system and its origin are described by Bernard L. Hyink, Seyom Brown & Ernest W. Hacker, POLITICS AND GOVERNMENT IN CALIFORNIA 43–44 (9th ed. 1975):

> The Hiram Johnson Progressives... created California's highly controversial cross-filing system in 1913 with the aim of giving the voter a completely free choice in the nominating primaries. The 1909 law establishing the direct primary had allowed only supporters of a party to receive that party's nomination. The 1913 cross-filing law eliminated any such partisan requirement, permitting an individual candidate to file for the nomination of more than one party for any partisan office.... A voter could still cast his ballot only in the primary of the party with which he was registered; but a candidate, no matter in which party he was registered, could attempt to gain the nomination of any or all parties, and his name would appear on the ballots of all parties for which he had filed a proper affidavit.
>
> A candidate who cross-filed could win the nomination of parties in addition to his own. For example, if a registered Republican seeking nomination to Congress were to gain a plurality in both the Republican and Democratic primaries, he would become the nominee of both parties, and be listed on the November general election ballot with both "Republican" and "Democratic" after his name. His election would be almost a certainty since his name might be the only one on the ballot for Congress or since he might have to face only nominal opposition from a third-party candidate.

The prospect of candidates receiving both major party nominations and thereby running essentially unopposed in general elections was not a mere theoretical possibility. In primaries, candidates' party affiliations were not identified on the ballot. Candidates whose names were recognizable because of incumbency or campaign publicity could and did win the primary votes of loyalists of the opposing party. According to Hyink et al., from 1940–52, 84 percent of state senate races and 72 percent of assembly races were decided in the primaries. Republicans Earl Warren (governor, 1946) and William Knowland (U.S. Senator, 1952) won both parties' primaries for major offices.

As immigration from southern states to California moved the state's electorate from Republican to Democratic, cross-filing became a contentious partisan issue. Democrats contended that incumbency, better financing, and press support, combined with cross-filing, permitted Republicans to get elected and reelected in Democratic areas. Pressure from the Democrats and nonpartisan groups induced the Republican-controlled legislature to require candidates' party affiliation to appear on primary ballots, starting with the 1954 election. The number of successful cross-filings declined drastically, as even well-known candidates found it difficult to win primaries when their own affiliation with the opposing party was specified on the ballot. After the Democrats swept the 1958 California elections, one of their first actions was to repeal cross-filing.

The majority opinion in *Tashjian* says, "Were the State... to provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals." Is the California prohibition of cross-filing (found currently in Section 8001 of the Elections Code) unconstitutional?

Eu v. San Francisco County Democratic Central Committee
489 U.S. 214 (1989).

Justice MARSHALL delivered the opinion of the Court.

The California Elections Code prohibits the official governing bodies of political parties from endorsing candidates in party primaries. It also dictates the organization and composition of those bodies, limits the term of office of a party chair, and requires that the chair rotate between residents of northern and southern California. The Court of Appeals for the Ninth Circuit held that these provisions violate the free speech and associational rights of political parties and their members guaranteed by the First and Fourteenth Amendments. We... now affirm.

I

A

The State of California heavily regulates its political parties. Although the laws vary in extent and detail from party to party, certain requirements apply to all "ballot-qualified" parties. The California Elections Code provides that the "official governing bodies" for such a party are its "state convention," "state central committee," and "county central committees," Cal. Elec. Code § 11702, and that these bodies are responsible for conducting the party's campaigns.[2] At the same time, the Code provides that the official governing bodies "shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election." Ibid. It is a misdemeanor for any primary candidate, or a person on her behalf, to claim that she is the officially endorsed candidate of the party. § 29430.

Although the official governing bodies of political parties are barred from issuing endorsements, other groups are not. Political clubs affiliated with a party, labor organizations, political action committees, other politically active associations, and newspapers frequently endorse primary candidates. With the official party organizations silenced by the ban, it has been possible for a candidate with views antithetical to those of her party nevertheless to win its primary.[4]

In addition to restricting the primary activities of the official governing bodies of political parties, California also regulates their internal affairs. Separate statutory provisions dictate the size and composition of the state central committees; set forth rules governing the selection and removal of committee members; fix the

2. The Code requires the state central committee of each party to conduct campaigns for the party, employ campaign directors, and develop whatever campaign organizations serve the best interests of the party. § 8776 (Democratic Party); § 9276 (Republican Party); § 9688 (American Independent Party); § 9819 (Peace and Freedom Party). The county central committees, in turn, "have charge of the party campaign under general direction of the state central committee." § 8940 (Democratic Party); § 9440 (Republican Party); § 9740 (American Independent Party); § 9850 (Peace and Freedom Party). In addition, they "perform such other duties and services for th[e] political party as seem to be for the benefit of the party." § 8942 (Democratic Party); § 9443 (Republican Party); § 9742 (American Independent Party); § 9852 (Peace and Freedom Party).

4. In 1980, for example, Tom Metzger won the Democratic Party's nomination for United States House of Representative from the San Diego area, although he was a Grand Dragon of the Ku Klux Klan and held views antithetical to those of the Democratic Party.

maximum term of office for the chair of the state central committee; require that the chair rotate between residents of northern and southern California; specify the time and place of committee meetings; and limit the dues parties may impose on members. Violations of these provisions are criminal offenses punishable by fine and imprisonment.

B

Various county central committees of the Democratic and Republican Parties, the state central committee of the Libertarian Party, members of various state and county central committees, and other groups and individuals active in partisan politics in California brought this action in federal court against state officials responsible for enforcing the Code. They contended that the ban on primary endorsements and the restrictions on internal party governance deprive political parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments of the United States Constitution....

II

A State's broad power to regulate the time, place, and manner of elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian*.... If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest.

A

We first consider California's prohibition on primary endorsements by the official governing bodies of political parties. California concedes that its ban implicates the First Amendment, but contends that the burden is "miniscule." We disagree....

California's ban on primary endorsements... prevents party governing bodies from stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought. This prohibition directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues. A "highly paternalistic approach" limiting what people may hear is generally suspect, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), but it is particularly egregious where the State censors the political speech a political party shares with its members.

Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association. It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. *Tashjian*. Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to "'identify the people who constitute the association,' " *Tashjian* (quoting *La Follette*), and to select a "standard bearer who best represents the party's ideologies and preferences." *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567

(D.C. Cir. 1975) (Tamm, J., concurring in result), cert. denied, 424 U.S. 933 (1976).

Depriving a political party of the power to endorse suffocates this right.... Even though individual members of the state central committees and county central committees are free to issue endorsements, imposing limitations "on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981).

Because the ban burdens appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest.[15] The State offers two: stable government and protecting voters from confusion and undue influence. Maintaining a stable political system is, unquestionably, a compelling state interest. California, however, never adequately explains how banning parties from endorsing or opposing primary candidates advances that interest. There is no showing, for example, that California's political system is any more stable now than it was in 1963, when the legislature enacted the ban. Nor does the State explain what makes the California system so peculiar that it is virtually the only State that has determined that such a ban is necessary.[17]

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15. California contends that it need not show that its endorsement ban serves a compelling state interest because the political parties have "consented" to it. In support of this claim, California observes that the legislators who could repeal the ban belong to political parties, that the bylaws of some parties prohibit primary endorsements, and that parties continue to participate in state-run primaries.

This argument is fatally flawed in several respects. We have never held that a political party's consent will cure a statute that otherwise violates the First Amendment. Even aside from this fundamental defect, California's consent argument is contradicted by the simple fact that the official governing bodies of various political parties have joined this lawsuit. In addition, the Democratic and Libertarian Parties moved to issue endorsements following the Court of Appeals' invalidation of the endorsement ban.

There are other flaws in the State's argument. Simply because a legislator belongs to a political party does not make her at all times a representative of party interests. In supporting the endorsement ban, an individual legislator may be acting on her understanding of the public good or her interest in reelection. The independence of legislators from their parties is illustrated by the California Legislature's frequent refusal to amend the election laws in accordance with the wishes of political parties. See, *e.g.*, declaration of Bert Coffey, chair of the Democratic state central committee. Moreover, the State's argument ignores those parties with negligible, if any, representation in the legislature.

That the bylaws of some parties prohibit party primary endorsements also does not prove consent. These parties may have chosen to reflect state election law in their bylaws, rather than permit or require conduct prohibited by law. Nor does the fact that parties continue to participate in the state-run primary process indicate that they favor each regulation imposed upon that process. A decision to participate in state-run primaries more likely reflects a party's determination that ballot participation is more advantageous than the alternatives, that is, supporting independent candidates or conducting write-in campaigns.

Finally, the State's focus on the parties' alleged consent ignores the independent First Amendment rights of the parties' members. It is wholly undemonstrated that the members authorized the parties to consent to infringements of members' rights.

17. New Jersey also bans primary endorsements by political parties. Florida's statutory ban on primary endorsements by political parties was held to violate the First Amendment. See *Abrams v. Reno*, 452 F.Supp. 1166 (S.D.Fla. 1978), aff'd, 649 F.2d 342 (5th Cir. 1981), cert. denied, 455 U.S. 1016 (1982)....

The only explanation the State offers is that its compelling interest in stable government embraces a similar interest in party stability. The State relies heavily on *Storer v. Brown*, 415 U.S. 724 (1974), where we stated that because "splintered parties and unrestrained factionalism may do significant damage to the fabric of government," States may regulate elections to ensure that "some sort of order, rather than chaos... accompan[ies] the democratic processes." Our decision in *Storer*, however, does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism during a primary campaign. To the contrary, Storer recognized that "contending forces within the party employ the primary campaign and the primary election to finally settle their differences." A primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them....

It is no answer to argue, as does the State, that a party that issues primary endorsements risks intraparty friction which may endanger the party's general election prospects. Presumably a party will be motivated by self-interest and not engage in acts or speech that run counter to its political success. However, even if a ban on endorsements saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party. Because preserving party unity during a primary is not a compelling state interest, we must look elsewhere to justify the challenged law.

The State's second justification for the ban on party endorsements and statements of opposition is that it is necessary to protect primary voters from confusion and undue influence. Certainly the State has a legitimate interest in fostering an informed electorate. However, "'[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.'" *Tashjian* (quoting *Anderson*). While a State may regulate the flow of information between political associations and their members when necessary to prevent fraud and corruption, see *Buckley v. Valeo*, 424 U.S. 1 (1976), there is no evidence that California's ban on party primary endorsements serves that purpose.[19]

Because the ban on primary endorsements by political parties burdens political speech while serving no compelling governmental interest, we hold that §§ 11702 and 29430 violate the First and Fourteenth Amendments.

B

We turn next to California's restrictions on the organization and composition of official governing bodies, the limits on the term of office for state central committee chair, and the requirement that the chair rotate between residents of northern and southern California. These laws directly implicate the associational rights of political parties and their members. As we noted in *Tashjian*, a political party's "determination... of the structure which best allows it to pursue its political goals, is protected by the Constitution." Freedom of association also encompasses

19. The State suggested at oral argument that the endorsement ban prevents fraud by barring party officials from misrepresenting that they speak for the party. To the extent that the State suggests that only the primary election results can constitute a party endorsement, it confuses an endorsement from the official governing bodies that may influence election results with the results themselves....

a political party's decisions about the identity of, and the process for electing, its leaders.

The laws at issue burden these rights. By requiring parties to establish official governing bodies at the county level, California prevents the political parties from governing themselves with the structure they think best. And by specifying who shall be the members of the parties' official governing bodies, California interferes with the parties' choice of leaders. A party might decide, for example, that it will be more effective if a greater number of its official leaders are local activists rather than Washington-based elected officials. The Code prevents such a change. A party might also decide that the state central committee chair needs more than two years to successfully formulate and implement policy. The Code prevents such an extension of the chair's term of office. A party might find that a resident of northern California would be particularly effective in promoting the party's message and in unifying the party. The Code prevents her from chairing the state central committee unless the preceding chair was from the southern part of the State.

Each restriction thus limits a political party's discretion in how to organize itself, conduct its affairs, and select its leaders. Indeed, the associational rights at stake are much stronger than those we credited in *Tashjian*. There, we found that a party's right to free association embraces a right to allow registered voters who are not party members to vote in the party's primary. Here, party members do not seek to associate with nonparty members, but only with one another in freely choosing their party leaders.

Because the challenged laws burden the associational rights of political parties and their members, the question is whether they serve a compelling state interest. A State indisputably has a compelling interest in preserving the integrity of its election process. *Rosario*. Toward that end, a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. *Storer*. For example, a State may impose certain eligibility requirements for voters in the general election even though they limit parties' ability to garner support and members. See, *e.g.*, *Dunn v. Blumstein*, 405 U.S., 330 (1972) (residence requirement); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (age minimum); *Kramer* (citizenship requirement). We have also recognized that a State may impose restrictions that promote the integrity of primary elections. None of these restrictions, however, involved direct regulation of a party's leaders. Rather, the infringement on the associational rights of the parties and their members was the indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections.

In the instant case, the State has not shown that its regulation of internal party governance is necessary to the integrity of the electoral process. Instead, it contends that the challenged laws serve a compelling "interest in the 'democratic management of the political party's internal affairs.'" This, however, is not a case where intervention is necessary to prevent the derogation of the civil rights of party adherents. Cf. *Smith v. Allwright*. Moreover, as we have observed, the State has no interest in "protect[ing] the integrity of the Party against the Party itself." *Tashjian*. The State further claims that limiting the term of the state central committee chair and requiring that the chair rotate between residents of northern and southern California helps "prevent regional friction from reaching a 'critical mass.'" However, a State cannot substitute its judgment for that of the party as to

the desirability of a particular internal party structure, any more than it can tell a party that its proposed communication to party members is unwise.

In sum, a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair. Because California has made no such showing here, the challenged laws cannot be upheld.

III

For the reasons stated above, we hold that the challenged California election laws burden the First Amendment rights of political parties and their members without serving a compelling state interest. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Chief Justice REHNQUIST took no part in the consideration or decision of this case. [The concurring opinion of Justice STEVENS is omitted.]

Notes and Questions

1. Does a ban on party endorsements in *non*partisan primaries violate the First Amendment. In *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990), an 8–3 majority struck down a 1986 amendment to the California Constitution that prohibited such endorsements. In *Renne v. Geary*, 501 U.S. 312 (1991), the Supreme Court reversed on procedural grounds without reaching the merits. If the chairman of the San Francisco County Republican Central Committee asked you whether the committee could legally endorse a candidate in the next nonpartisan mayoral election, what advice would you give?

2. Recall the view of political scientists, summarized in Fiorina's article, that parties consist of at least three parts: the party in the electorate, the party in elective office, and the party organization. Why should the latter of these be able to speak for the party in endorsing candidates in the primary? If the party organization really does speak for the party, what is the point in holding the primary at all? Would a statute be constitutional that permitted state and county central committees to endorse candidates and to publicize those endorsements, but required that such publicity refer to the endorsement as that of the committee and not of the party? See footnote 19 of the Justice Marshall's opinion for the Court.

3. Suppose a state statute provides that all members of the state Senate who are affiliated with a political party are members of the Senate Caucus of that party. Under factual circumstances similar to those of *Ammond v. McGahn*, *supra*, the Senate Democratic Caucus votes to expel Senator Ammond. She goes to court seeking reinstatement as a member of the Caucus, relying on the statute. The Caucus asserts that the statute is unconstitutional as an infringement of the party's freedom of association. What result?

4. In *Tashjian*, a united Republican Party was prevented by Democratic elective officials from structuring the Republican primary in the manner the Republicans wanted. In California, there was a tradition of letting the members of each major party in the Legislature fashion the rules governing that party, without interference from the opposing party. (This was not true in the case of the Liber-

tarians, who had been unable to obtain legislation structuring their party in the way they wanted.) Should this difference be relevant to the associational claims put forth in the name of one of the major parties? See Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry,* 71 TEXAS LAW REVIEW 1741, 1770–90 (1993).

5. *Rosario v. Rockefeller*, 410 U.S. 752 (1973), and *Kusper v. Pontikes*, 414 U.S. 51 (1973), both involved waiting periods before voters who switched parties could vote in the primary of their new party. In *Rosario*, voters challenged a New York requirement that in order to vote in a party's primary, they must affiliate with the party 30 days before the previous general election. For example, a Republican voter who wanted to switch to the Democratic Party would have to have enrolled as a Democrat by early October, 1994, in order to vote in the next Democratic primary held in the state. The Court upheld this long waiting period, in part because it protected parties against "raiding" by supporters of an opposing party. Raiding would occur if there were an uncontested primary in Party *A* and supporters of Party *A* therefore decided to vote in the primary of Party *B*, where their votes might prove decisive. Because few voters could anticipate this situation prior to the preceding general election, the waiting period was expected to make raiding impossible. However, this anti-raiding purpose was insufficient to justify Illinois' longer waiting period of 23 months in *Kusper*. Illinois conducted primaries each year, so that the 23-month waiting period meant that voters who wished to switch parties would have to go through at least one primary election without being able to vote within either party. The Court regarded this denial of the right to vote as unnecessary and as outweighing the state's anti-raiding purpose.

No political party participated as a litigant in either *Rosario* or *Kusper*. Yet the Court was willing to assume that the statutes being challenged were intended to protect the associational integrity of the political parties. Why shouldn't the same assumption be made in *Eu*? The obvious answer would seem to be that in disputes, like *Rosario* and *Kusper*, between individual voters and the state, it can be assumed that the state is in accord with the wishes of the parties, but that this assumption would obviously be inappropriate in a dispute between one or more parties and the state, such as *Eu*. But on what basis can we characterize *Eu* as a dispute between the major parties and the state? Neither the Democratic nor the Republican State Central Committee was a plaintiff. Even if they had been plaintiffs, why should the "party organization" be regarded as speaking for "the Democratic Party" or "the Republican Party" more than the Democratic and Republican elected officials who enacted the statutes under attack? See generally Lowenstein, *supra*.

6. The importance of the initial assumption of who should be regarded as speaking for the party is also illustrated by FAHEY v. DARIGAN, 405 F.Supp. 1386 (D.R.I. 1975), a lower court decision that correctly anticipated the freedom of association doctrine later developed in *Tashjian* and *Eu*.

Until 1975, Rhode Island statutes provided for cities, including Providence, to be divided into wards. Voters in each party elected ward committees, the members of which also made up the party's city committee. By party rule, in the Democratic Party each of the thirteen wards in Providence elected eleven members to the ward committee. In 1974, plaintiff Fahey was elected to the Ninth Ward Democratic committee and was elected chairman of that committee. As a

member of the ward committee, he also sat on the city committee, which elected defendant Darigan as its chair.

In 1975, the Rhode Island legislature amended the statute that established the ward and city committees. The amended statute set the number of members of each Providence ward committee at 19. This meant that the overall size of the city committee would be raised from 143 to 247. The amendments also provided that the chairman of the city committee (i.e., Darigan in the case of the Democrats) would be able to appoint the 104 new members until the next election, in 1978.

Fahey, a political opponent of Darigan, and others challenged both the establishment of a statutory size for the ward and city committees and the transitional power of appointment given to Darigan, in part because these provisions interfered with the party's freedom of association. The court struck down the amendment on this ground. Following are excerpts from the opinion:

> H 6371 requires that the committees be enlarged by appointment to almost twice their present size. It is quite likely that the appointment process will result in a substantial redistribution of strength among existing factions on the committees, and will no longer accurately reflect the choice made by the party's electorate in the September 1974 primary.
>
> Setting aside for the moment the broader question as to whether the State has *any* right to affix the committees' size by statute, we address the question of the State's right to require that the present committees be increased in size by the appointment process in derogation of the party electorate's choice made in the last primary election. By essentially revising the outcome of the 1974 Democratic primary election, section 2 of H 6371 without question works a substantial burden on the party members' right to associate for political purposes. *Cf. Cousins.*
>
> No compelling state interest, such as the need to remedy an existing malapportionment, has been raised to support this statutory mandate; indeed, it must be noted that implementation of section 2 of the Act is also in conflict with the State's more basic requirement, that these committee members be elected by popular vote of the party electorate. The only interest asserted by the defendant is that H 6371 was enacted to "enable the Democratic City Committee to comply with the spirit and intent of the policy of the [National] Democratic Party" as expressed in the National Democratic Party's ("NDP") Charter of December 7, 1974. It is not contended that failure to comply with the NDP Charter and affirmative action program will in any way result in a violation of state or federal constitutional or statutory law or otherwise undermine the integrity and stability of the state political process. The Court fails to see how this purpose, however salutary its implementation may be, would constitute a *state* interest, let alone a compelling one. Furthermore, H 6371 can hardly be said to accomplish the above cited purpose by the least restrictive means, as defendant virtually concedes. H 6371 may enable the defendant to comply with the NDP Charter, but it neither requires nor recommends that he do so, nor does it exclude the Republican City Committee from its terms, as would be consonant with its alleged purpose. Although these less drastic alternatives may themselves be of questionable constitutionality, they nonetheless illustrate... how

poorly H 6371 serves the purpose asserted by the defendant. In consequence, I conclude that section 2 of H 6371 cannot withstand plaintiffs' First Amendment Challenge.

We turn now to the plaintiffs' attack on section 1 of H 6371 insofar as it affixes a statutory size for ward committees of the City of Providence. The plaintiffs do not dispute the State's right to require that ward committee members be elected by popular vote, or that such elections take place once in every four years for Providence while biennially in the State.

The first issue to be addressed is whether the establishment of a ward committee size by statute under the circumstances constitutes a substantial burden upon the party members' associational rights. An examination of Supreme Court cases in which a substantial burden has been found discloses government intrusions which often go to the heart of a political association's *raison d'être.* This is not a case where a political party is effectively denied a place on the ballot and access to the electorate, or where a political association is foreclosed by statute from engaging in activities designed to further its members' political aims. In contrast, all that H 6371 requires is that the respective committees increase their membership and maintain it at the statutory size. It has not been alleged that organizing or convening the expanded committees will be so unmanageable as to make effective operation impossible. On the other hand, it cannot be doubted that the required increase in the committees to almost double their present size constitutes a significant deviation from the parties' choice of optimum size which in all probability will affect the manner in which the committees fulfill their statutory and party functions.

We should not lightly dismiss, as *de minimis*, a party's choice of organizational structure even though the state interference at issue involves a mechanically applied, numerical or formal requirement.... [T]he Providence ward and City committees perform a "public" function in only the rarest of circumstances. Accordingly, the Court concludes that the state intrusion at issue, which governs internal political party structure and not access to the state ballot, imposes a substantial burden upon plaintiffs' associational rights and is therefore subject to strict judicial scrutiny.

The Court has already considered and rejected the interest cited by the defendant to support the challenged statute. Furthermore, affixing the size of these party committees by statute has no discernible relation to the asserted interest. As a result, section 1 of H 6371, insofar as it statutorily affixes the size of ward committees for the City of Providence, is unconstitutional.[12]

Footnote 12, at the end of the *Fahey* opinion, reads as follows:

The Court feels constrained to comment on what it perceives to be the unfortunate fact that this case ever arose in federal court at all. The defendant's inability to proffer a compelling, or indeed any, *state* interest furthered by the challenged portions of the statute is not surprising in view of the defendant's own statement that the statute was passed at his urging to further Party goals (Affidavit of Francis J. Darigan). The fact

that this law suit was instituted is itself evidence that the Chairman's objectives were opposed within his own party. Instead of subverting the public political process to private party purposes and thereby fully exposing party activities to judicial review, the party factions should have resolved their differences by intraparty politicking, as is ordinarily and properly the case.

a. Prior to the events that gave rise to the *Fahey* case, state statutes governed much of the structure of the Providence Democratic committees but did not specify the size of the committees. This gap was filled by a party rule. Then, in 1975, the chairman of the city party requested and obtained from a state legislature dominated by Democrats an amendment of the state statutes, at least ostensibly for the purpose of facilitating compliance with policies of the National Democratic Party. This statutory amendment was challenged by a leader of a minority faction within the Providence Democratic Party. Under these circumstances, why does the court act on the apparent premise that Fahey, and not Darigan, speaks for the associational interests of the Democratic Party?

b. The *Fahey* court holds that amending the statute to provide for appointment rather than election of the new committee members constituted a substantial burden on the party members' right of association. Do you agree? Is the statutory requirement that committee members be elected (except those members chosen to fill the new posts on an interim basis) also a substantial burden? If the party wanted to institute a permanent process of selection by appointment, would it succeed in getting the court to overturn the statute?

c. The statutory amendment was defended as a means of facilitating compliance with affirmative action policies of the National Democratic Party. Presumably, resistance would be minimized if the affirmative action program were accomplished by expanding the size of the committee, rather than by replacing incumbent members. Initial appointment rather than election may also have helped assure that the goal of affirmative action would be met. Why does the court reject this rationale? Is the court's reasoning persuasive?

d. Consider note 12 of the court's opinion. What caused H 6371 to be adopted by the legislature? Does this case reflect a conflict between the "state" and the party, or between two factions within the party? Why does the court believe "intraparty politicking" is a better means of resolving this conflict than legislative action?

7. The firm establishment in *Tashjian* and *Eu* of parties' associational freedom cannot eliminate the likelihood of conflicts between the exercise of that freedom and alleged rights of those aggrieved by the parties' actions. One such conflict was presented in the following case.

Duke v. Cleland

954 F.2d 1526 (11th Cir. 1992).

ANDERSON, Circuit Judge: [David Duke, a former Ku Klux Klan officer who received nationwide notoriety when he was elected to the Louisiana state legislature and then made it to a run-off election as a gubernatorial candidate,

announced that he was a candidate for the 1992 Republican presidential nomination. Under Georgia law, it was the Secretary of State's responsibility to create a preliminary list of candidates "who are generally advocated or recognized in news media throughout the United States" as candidates for president. However, the statutes provided that a candidate could be removed from the ballot if a Committee consisting of the Republican leaders of both houses of the state legislature and the Republican state chairperson unanimously agreed. Duke appeared on the preliminary list of Republican candidates, but the three-member Committee unanimously removed his name from the ballot. Duke and some of his Georgia supporters brought this action, in which the trial court declined to issue a preliminary injunction requiring that Duke's name be placed on the ballot. In this opinion, the Eleventh Circuit affirmed the lower court's denial of a preliminary injunction on the ground that the plaintiff-appellants had failed to demonstrate that they were likely to prevail on the merits.][4]...

In the present case, we need not definitively decide upon the proper standard [of review]. While we are hesitant in concluding that the burdens imposed on appellants infringe rights protected by the Constitution, we are more confident in concluding that the interests appellees advance are legitimate and compelling interests, justifying the resulting burden. Therefore, even under a strict scrutiny analysis, it appears that appellants are unlikely to prevail on the merits.

Despite the uncertainty in the specific standard to be employed, we need to articulate precisely the claims appellants make, examining the constitutional rights allegedly burdened by the Committee's decision to exclude Duke from the presidential primary ballot. Appellants argue that the Committee's action violates their First and Fourteenth Amendment rights. First, Duke claims that his deletion from the presidential primary ballot infringes his right to associate with the political party of his choosing. Second, the other appellants, individual voters, claim there has been an infringement on their right to vote.[5]

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4. Before addressing appellants' constitutional claims, we address the issue of whether the action of the Committee in excluding Duke from the ballot constitutes state action. Appellees argue that there is no state action in this case because the decision to exclude Duke from the ballot was a private, political choice made by Republican party officials. Appellees urge that the Georgia statute does not create the right permitting political parties to choose their candidates. Appellants counter that the Committee acted pursuant to a specific statutory scheme and that, therefore, the action of the Republican party members was attributable to the state. We need not resolve the state action question at this juncture, however, because we assume, *arguendo*, the presence of state action and proceed to address the appellants' likelihood of success on the merits of their constitutional claims.

5. We emphasize, however, the claims that have not been made by appellants. Duke and the other appellants have not claimed that the Committee used improper procedures to reject him, that the Committee excluded him for any reason other than his political beliefs, or that the Committee's decision was, in any other way, arbitrary. In addition, appellants do not assert that the Republican members of the Committee lack the authority to speak for the Republican Party or that some other person or governing body has superior authority to speak for the Republican Party. Moreover, appellants failed to adduce any evidence to support a finding of a lack of authority by the Republican Committee members or to demonstrate a failure to follow the procedures set out by the Republican Party or the Georgia statutes. Finally, appellants have asserted no challenge to the statute itself. Rather, appellants' sole challenge is that the Republican members of the Committee excluded Duke from the Republican primary ballot because of his political beliefs.

1. Duke's Claim of Infringement of His Right of Association

Duke first claims that the Committee's decision excluding him from the ballot infringed his right of association. In effect, Duke argues that he has a right to associate with an "unwilling partner," the Republican Party.

As the discussion below demonstrates, the Republican Party enjoys a constitutionally protected freedom which includes the right to identify the people who constitute this association that was formed for the purpose of advancing shared beliefs and to limit the association to those people only. *See La Follette.* The necessary corollary to this is that Duke has no right to associate with the Republican Party if the Republican Party has identified Duke as ideologically outside the party. In cases where a voter has urged a right to vote in a party primary, the Supreme Court has stated that a "nonmember's desire to vote in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." *Tashjian*, n.6. The same rationale is also applicable in the instant case. Despite Duke's desire to be slated on the ballot as a Republican, we find that appellees did not infringe his right of association because the Republican Party legitimately exercised its right "to identify the people who constitute the association, and to limit the association to those people only." *La Follette.*

2. The Appellants' Claim of Infringement of Their Right to Vote

Appellants also argue that the decision of the Committee has burdened their right to vote. While the Supreme Court has acknowledged that the right to vote is a fundamental right, *see Harper*, the absolute right to vote is not implicated in this case. The specific right alleged to be infringed in this case is not the right to vote in general but the right to vote for a particular candidate as a Republican in the presidential primary. It is important to note that appellees' actions have not deprived appellants of their right to vote for Duke as either an independent candidate or the candidate of a third party in the general election. Nor is there any claim in this case that appellants have been deprived of their right to vote for Duke as a third-party candidate in the primary or as a write-in candidate in the primary or general election.... Although the alleged infringement on the right to vote in this case is thus considerably attenuated,[6] we will assume *arguendo* that there has been some burden on the right to vote, and thus we proceed to evaluate the countervailing state interests.

3. State Interests

Appellees assert that Georgia has an interest in maintaining the autonomy of political parties. The Supreme Court has long recognized that the First Amendment guarantees a political party's right of association and that this right "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *La Follette.* In *Eu*, in holding that a California statute that prohibited a political party from endorsing a primary candidate violated the party's constitutionally protected freedom of association, the Court stated that the party's freedom of association extends to the

6. Indeed a strong argument could be made that there is no right to vote for any particular candidate in a party primary, because the party has the right to select its candidates.

right to identify the people who constitute the association, and the right to select a standard bearer who best represents the party's ideologies and preferences.

[In *La Follette*], the Court recognized that the party's rule played a legitimate role in safeguarding the party's constitutionally protected right of political association. The Court indicated that the legitimacy of the Democratic Party rule was supported by precedent which "recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions—and that political parties may accordingly protect themselves from 'intrusions by those with adverse political principles.'"

In *Ray v. Blair*, 343 U.S. 214 (1952), the Alabama Democratic Party refused to certify Blair as a candidate for Presidential Elector to the Electoral College in the Democratic Primary, because Blair refused to sign the loyalty pledge required of party candidates, pledging to aid and support the nominees of the national convention of the Democratic Party. The Supreme Court of Alabama granted a writ of mandamus requiring the certification. The United States Supreme Court reversed, in effect recognizing the legitimacy of the loyalty oath required by the Party. The Court recognized that "[s]uch a provision protects a party from intrusion by those with adverse political principles."

On the basis of the foregoing precedent, we conclude that the Republican Party in this case enjoys a constitutionally protected right of freedom of association. We conclude that the Party's constitutionally protected right encompasses its decision to exclude Duke as a candidate on the Republican Primary ballot because Duke's political beliefs are inconsistent with those of the Republican Party. None of the previous Supreme Court cases is directly in point. For example, in *La Follette*, the Court recognized the legitimacy of the party rule, the effect of which was to limit participation at the voter level in the party primary or delegate selection procedure. Thus, that case did not involve party limitations at the candidate level. Nonetheless, the case provides strong support for the proposition that party procedures to guard against intrusion by those with inconsistent ideologies are legitimate. We conclude that the burden on the right to vote in the *La Follette* case—the exclusion of all voters in the Party primary election who were not members of the Democratic Party—is comparable to the burden on the right to vote in this case—the exclusion from the Republican primary of a candidate whose beliefs the Republican Party has determined are inconsistent with those of the Party. *Ray v. Blair* is more directly analogous to this case in that it recognizes the legitimacy of a political party's exclusion of a candidate in the party primary in order to protect itself from those with adverse political principles. *Ray v. Blair* involves the same burden on the right to vote as that involved in this case—exclusion of a candidate from a party primary. We acknowledge that *Ray v. Blair* is not directly on point because that Court was not presented with the precise argument articulated by appellants in this case. Appellants argue that the action of the Republican Party was illegitimate because his exclusion was based upon his political beliefs. The fallacy in appellants' argument is that the Supreme Court precedent expressly permits a political party to limit its membership on the basis of political beliefs. As the Supreme Court stated in *La Follette*, the party's freedom of association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." We conclude that the Republican Party's exclusion of Duke because of his political beliefs was an action taken pursuant to a legitimate and compelling interest; it

was an appropriate exercise of the Party's freedom to associate with persons of common political beliefs.

CONCLUSION

We conclude that appellants are unlikely to prevail on the merits because the only claims asserted on appeal are ultimately without merit. Therefore, the district court's denial of appellants' motion for a preliminary injunction is AFFIRMED.

KRAVITCH, Circuit Judge, dissenting:

This case implicates two competing First Amendment values: first, the interests of voters and would-be candidates in participating in electoral processes; second, the interests of a political party in advancing the shared political beliefs of its members. Because, in my view, the exclusion of appellant David Duke from the Georgia Republican Presidential Preference Primary ballot substantially burdens the former interests without significantly protecting the latter, I believe that Duke and the appellant voters have demonstrated a likelihood of success on the merits of their claim....

The right to vote embraces not only a voter's access to the ballot, but also his access to alternative viewpoints and positions presented on the ballot....

Further a candidate's *individual* right to seek party nomination or political office is implicated by the action of the state in this case....

Where, as here, the state determines availability of political opportunity on the basis of ideology,... heightened scrutiny is appropriate. [T]he exclusion of Duke from access to the primary ballot on the explicit basis of his political philosophy and that of his adherents implicates the most cherished constitutional freedoms....

The majority maintains that the state has a compelling interest in protecting the institutional autonomy and First Amendment associational rights of members of the Republican Party, citing in support of this proposition a line of Supreme Court cases emphasizing the associational rights of political parties.

The majority's opinion begs the question of whether the preservation of the First Amendment rights of the Republican Party in particular is a compelling *state* interest. I am not convinced that it is. Nevertheless, I will assume *arguendo* that the state does indeed advance a compelling state interest in support of its challenged action....

The majority holds that Duke's inclusion on the Georgia Republican presidential primary ballot infringes on the Republican Party's First Amendment right to determine its membership and the right to choose its standard bearer. I do not believe that Duke's inclusion on the ballot constitutes any such infringement on the Party's rights, given that the Republican Party is free to disavow Duke, to campaign aggressively against him and to urge the Party membership to reject his candidacy at the polls.

La Follette... does not support the majority's position.... The participation of non-Democratic voters in the Wisconsin primary bound the Democratic Party to honor those voters' ideological preferences: "[t]he results of the party's decision-making processes might... have been distorted" by this forced association. *Bellotti v. Connolly*, 460 U.S. 1057 (1983) (Stevens, J., dissenting). The inclusion of Duke on the Republican primary ballot, conversely, does not distort the Party's

decisionmaking processes because no one is required to vote for him. Because the Party is in no way bound to honor Duke's ideological preferences by virtue of his appearance on the ballot, no association between Duke and the Party occurs in the absence of support for Duke from Party members.

...I do not believe that the appellees have shown that the state action in this case is narrowly tailored to serve the Republican Party's associational interests because those interests can be fully preserved by allowing the Republican Party to campaign against Duke's candidacy prior to the election. The Republican Party of Georgia and the state seek to exclude Duke from the primary ballot because they believe that the Party will suffer embarrassment and adverse publicity by virtue of his candidacy for the Republican nomination. No political body, however, has a constitutional right to freedom from embarrassment or adverse publicity.

Notes and Questions

1. In footnote 5, the court mentions that the appellants did not question the ability of the three Republicans on the Committee to speak for the party. Was this a tactical error? If the appellants had made an issue of this point, would it have affected the result? If one or two county Republican committees and at least one member of the state committee had joined in the law suit with Duke, could the case be distinguished from *Eu*?

In connection with these questions, consider the subsequent proceedings in *Duke*. Plaintiffs continued to press forward despite having been denied a preliminary injunction. The trial court dismissed the case on the ground that the action of the Committee in removing Duke from the ballot did not constitute state action. This dismissal was reversed in *Duke v. Cleland*, 5 F.3d 1399 (11th Cir. 1993) (*Duke II*), in which a different panel from the one that decided *Duke I* ruled that the exclusion of Duke was state action. The case was remanded for proceedings to consider whether the state's interests were sufficient to offset the infringement of plaintiffs' rights. In its discussion of the state action issue, the *Duke II* court made the following comments:

> The Committee is a creature of state law and its actions are attributable to the state. First, the state vests the initial power to include or exclude candidates in the Secretary of State. This seminal power of selection, conferred upon a high state official, is tempered only by the state's requirement that the candidates selected be generally recognized by the national media as aspirants for the presidency. Second, the statute then confers upon the Committee the absolute power to decide who may run and who may not. The statute represents a scheme whereby the state confers largely upon itself the raw power to choose who may or may not be party primary candidates. Two-thirds of the Committee's voting members are elected officials representing their respective parties. No guidelines limit their power. The Committee may exclude nationally recognized candidates for any reason or no reason at all.
>
> [The Committee's] power to restrict ballot access flows directly from the state *ab initio*. The parties themselves do not select their primary candidates or retain ultimate responsibility for choosing those it seeks for representation. Indeed, the Committee's determinations are essentially

unreviewable by the party membership. The Committee's power is such that it alone may declare who is fit to run, and who, by extension, is fit to govern. As the product of legislative choice, the Committee's power constitutes "state action" within the meaning of the Fourteenth Amendment.

Because the Committee is an arm of the state, the *private* associational rights of the Republican party do not end the inquiry in this case. Also at stake are Duke's asserted right to associate with a political party free from governmental interference based on ideology, and the Voters' right to vote for a candidate best reflecting their views, free from governmental entanglement.

Note that in *Duke I*, the court treated the Committee's decision to exclude Duke from the ballot as a decision of the Republican Party. In *Duke I* the court was considering whether, as a substantive matter, the panel had violated the Constitution, whereas in *Duke II* the court was addressing only the state action issue. Does this distinction make it possible to reconcile the two decisions?

2. The dissenting judge in *Duke I* notes that the Republican leadership wanted to exclude Duke from the ballot in order to avoid "embarrassment and adverse publicity." The degree of embarrassment and adverse publicity would have been directly proportional to the share of the Republican vote that Duke received. Suppose the Republicans on the Committee thus voted to exclude Duke because of fear that he would receive a significant share of the vote rather than because of a belief that he would receive very few votes. Which way does this supposition cut?

3. Given Duke's background, the judges in *Duke I* undoubtedly sympathized with the desire of the Republicans to exclude him from their primary ballot, whatever the judges' beliefs about the exclusion's legality. In 1980, President Jimmy Carter, a former Georgia governor, was seriously challenged in many Democratic primaries by Senator Edward Kennedy. Suppose Kennedy had wanted to run in the Georgia primary but was excluded from the ballot by a Carter-dominated panel of Democratic leaders using the same statutory scheme that excluded Duke. If Kennedy and his supporters brought suit to place his name on the ballot in the Democratic primary, would the result have been the same as in *Duke I*?

4. David Duke was also excluded from the Republican primary ballot in Florida in 1992. The process under which he was excluded was roughly similar to the one in Georgia, but there were some significant differences. The initial lists of candidates were compiled by the parties, and the final decision was made by a selection committee whose voting members were the Democratic and Republican leaders of both houses of the state legislature and the Democratic and Republican state chairs. Duke and several other minor candidates for President in both parties brought an action challenging their exclusion from the ballot by the selection committee. The district court ruled against the plaintiffs on the ground that there was no state action. This ruling was reversed in *Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994). The appellate court found state action on the authority of *Duke II*. On the merits, the court found the Florida scheme unconstitutional because no standards were provided according to which the selection committee should make its decisions. In a footnote, the court added that the exclusion of Duke was unconstitutional for the additional reason that he was excluded because of his exercise of

the rights of free speech and of association with white supremacist hate groups. Is *Duke v. Smith* inconsistent with the result in *Duke I*?

V. Parties and Patronage

"Patronage" refers to the practice of awarding governmental benefits to allies of the party or the individuals in power. Broadly speaking the term can refer to a variety of governmental benefits, such as the awarding of profitable contracts or of government franchises, loans or grants. Commonly, the term is used more narrowly to refer to the providing of government jobs to allies and party loyalists. These jobs can run the spectrum from very high level positions, such as ambassadorships and judgeships, to the lowest level manual or clerical positions. They can be full-time jobs or particular assignments, such as, in many states, inheritance tax appraisers.

Patronage, and the controversy it arouses, has played a conspicuous part in American history and even in American culture. Mention of a few highlights will illustrate the point. After Republican Thomas Jefferson defeated Federalist incumbent John Adams in the 1800 presidential election, Adams appointed as many Federalists as possible to a variety of offices, including the notorious "midnight judges," one of whom was the great Chief Justice John Marshall. Jefferson later wrote:

> I can say with truth that one act of Mr. Adams's life, and one only, ever gave me a moment's personal displeasure. I did consider his last appointments to office as personally unkind. They were from among my most ardent political enemies, from whom no faithful cooperation could ever be expected, and laid me under the embarrassment of acting thro' men whose views were to defeat mine; or to encounter the odium of putting others in their places. It seemed but common justice to leave a successor free to act by instruments of his own choice.[o]

Upon taking office, Jefferson seemed to promise a new policy, when he declared,

> every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all Republicans, we are all Federalists.[p]

Nevertheless, within a few months, Jefferson was forced to explain his replacement of Federalist officeholders with Republicans:

> Declarations of myself in favor of *political tolerance*, exhortations to *harmony* and affection in social intercourse, and to respect for the *equal rights* of the minority, have, on certain occasions, been quoted & misconstrued into assurances that the tenure of offices was to be undisturbed. But could candor apply such a construction?... When it is considered, that during the late administration, those who were not of a particular sect of politics were excluded from all office; when, by a steady pursuit of

o. Letter from Thomas Jefferson to Abigail Adams, June 13, 1804, in Thomas Jefferson, *Writings* 1144, 1145–46 (Library of America, 1984).

p. Thomas Jefferson, First Inaugural Address, March 4, 1801, in ibid., 492, 493.

> this measure, nearly the whole offices of the U S were monopolized by that sect; when the public sentiment at length declared itself, and burst open the doors of honor and confidence to those whose opinions they more approved, was it to be imagined that this monopoly of office was still to be continued in the hands of the minority? Does it violate their *equal rights*, to assert some rights in the majority also? Is it *political intolerance* to claim a proportionate share in the direction of the public affairs? Can they not *harmonize* in society unless they have everything in their own hands?[q]

During the so-called "era of good feelings" that followed, partisan patronage was not an issue at the national level, since national politics was dominated by a single party. During the 1820s, the Democratic-Republican Party split between the supporters, respectively, of John Quincy Adams and Andrew Jackson. The Jacksonians, finally victorious in the 1828 election, openly declared their policy of filling offices by partisan criteria. In the ensuing decades, there was alternation in the presidency between the Democrats and the Whigs and, after 1860, between the Democrats and the Republicans. Each time the presidency was transferred from one party to the other, federal officeholders were swept out of office to be replaced by adherents of the newly victorious party.

Even during its heyday, the practice of federal patronage did not go without criticism. The otherwise routine firing of the manager of the federal custom-house in Salem, Massachusetts, by the Whigs after the victory of their candidate, Zachary Taylor, in 1848, became immortalized because its victim, Nathaniel Hawthorne, recorded the incident in his introductory essay to one of America's greatest novels.

"[I]t is a strange experience," Hawthorne wrote,

> to a man of pride and sensibility, to know that his interests are within the control of individuals who neither love nor understand him, and by whom, since one or the other must needs happen, he would rather be injured than obliged. Strange, too, for one who has kept his calmness throughout the contest, to observe the bloodthirstiness that is developed in the hour of triumph, and to be conscious that he is himself among its objects! There are few uglier traits of human nature than this tendency—which I now witnessed in men no worse than their neighbours—to grow cruel, merely because they possessed the power of inflicting harm. If the guillotine, as applied to office-holders, were a literal fact, instead of one of the most apt of metaphors, it is my sincere belief, that the active members of the victorious party were sufficiently excited to have chopped off all our heads, and have thanked Heaven for the opportunity![r]

Opposition to patronage at the federal level grew, especially after the Civil War, and came to a head when a disappointed office seeker assassinated President James Garfield in 1881. The Pendleton Act, introducing the federal civil service

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q. Thomas Jefferson, Letter to Elias Shipman and Others, a Committee of the Merchants of New Haven, July 12, 1801, in ibid., 497, 498 (emphasis in original).

r. Nathaniel Hawthorne, *The Custom-House*, in THE SCARLET LETTER 4, 31 (3d Norton Critical Edition, 1988).

system and sharply reducing the number of federal positions subject to patronage appointments, was enacted in 1883.

Patronage played a more important role and lasted longer in state and local politics. Patronage, in both the narrow and the broad senses, was the mainstay of party "machines" in state and, most notoriously, in big city politics around the country. Patronage and the corruption many people associated with it were a prime target of the "muckraking" journalists of the turn of the century and of the early twentieth century Progressive movement. The result was a gradual displacement of a great deal of patronage in state and local governments with civil service systems over the course of most of the twentieth century.

The best known strong patronage systems to survive into the 1970s were those of the state of Illinois and the city of Chicago, the latter controlled by then Mayor Richard Daley.[s] By 1976, when the Supreme Court decided *Elrod v. Burns*, patronage in the narrow sense had declined considerably in most of the country, so that the significance of the Court's patronage cases may not be as great as the justices in both the majority and the minority in *Elrod* and subsequent cases seem to have believed. However, patronage in the narrow sense has by no means entirely disappeared, and patronage in the broader sense is likely to endure in one form or another so long as democracy as we know it exists.[t] One question you might bear in mind, as you read the patronage cases that follow, is to what extent their conclusions ought to be applicable to other types of government benefits, such as the awarding of franchises or contracts, or even broader policy matters such as the adoption of legislation. Does it violate the First Amendment for government officials to base such decisions in whole or in part on the party affiliation of interested persons? On whether or not interested persons have made campaign contributions to the right party or the right candidates?

Elrod v. Burns
427 U.S. 347 (1976)

Mr. Justice BRENNAN announced the judgment of the Court and delivered an opinion in which Mr. Justice WHITE and Mr. Justice MARSHALL joined.

This case presents the question whether public employees who allege that they were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments....

In December 1970, the Sheriff of Cook County, a Republican, was replaced by Richard Elrod, a Democrat. At that time, respondents, all Republicans, were employees of the Cook County Sheriff's Office. They were non-civil-service employees and, therefore, not covered by any statute, ordinance, or regulation protecting them from arbitrary discharge....

It has been the practice of the Sheriff of Cook County, when he assumes office from a Sheriff of a different political party, to replace non-civil-service

s. See generally Cynthia Grant Bowman, "*We Don't Want Anybody Anybody Sent*": *The Death of Patronage Hiring in Chicago*, 86 NORTHWESTERN UNIVERSITY LAW REVIEW 57 (1991).

t. See generally Raymond E. Wolfinger, *Why Political Machines Have Not Withered Away and Other Revisionist Thoughts*, 34 JOURNAL OF POLITICS 365 (1972).

employees of the Sheriff's Office with members of his own party when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party. Consequently, subsequent to Sheriff Elrod's assumption of office, respondents, with the exception of Buckley, were discharged from their employment solely because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders. Buckley is in imminent danger of being discharged solely for the same reasons....

The Cook County Sheriff's practice of dismissing employees on a partisan basis is but one form of the general practice of political patronage. The practice also includes placing loyal supporters in government jobs that may or may not have been made available by political discharges. Nonofficeholders may be the beneficiaries of lucrative government contracts for highway construction, buildings, and supplies. Favored wards may receive improved public services. Members of the judiciary may even engage in the practice through the appointment of receiverships, trusteeships, and refereeships. Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons.

Patronage practice is not new to American politics. It has existed at the federal level at least since the Presidency of Thomas Jefferson, although its popularization and legitimation primarily occurred later, in the Presidency of Andrew Jackson. The practice is not unique to American politics. It has been used in many European countries, and in darker times, it played a significant role in the Nazi rise to power in Germany and other totalitarian states. More recent times have witnessed a strong decline in its use, particularly with respect to public employment. Indeed, only a few decades after Andrew Jackson's administration, strong discontent with the corruption and inefficiency of the patronage system of public employment eventuated in the Pendleton Act, the foundation of modern civil service. And on the state and local levels, merit systems have increasingly displaced the practice.[8]...

The decline of patronage employment is not, of course relevant to the question of its constitutionality. It is the practice itself, not the magnitude of its occurrence, the constitutionality of which must be determined. Nor for that matter does any unacceptability of the practice signified by its decline indicate its unconstitutionality. Our inquiry does not begin with the judgment of history, though the actual operation of a practice viewed in retrospect may help to assess its workings with respect to constitutional limitations....

The cost of the practice of patronage is the restraint it places on freedoms of belief and association. In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives. Regardless of the incumbent party's identity, Democratic or otherwise, the consequences for association and belief are

8. See *Broadrick v. Oklahoma*, 413 U.S. 601, 604–605 n.2 (1973). Factors contributing to the declining use of patronage have not been limited to the proliferation of merit systems. New methods of political financing, the greater necessity of job expertise in public employment, growing issue orientation in the elective process, and new incentives for political campaigners have also contributed.

the same. An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief....

It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers. Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, as well as the multitude seeking jobs. As government employment, state or federal, becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise. Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant.

[The practice of patronage firings] unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief and association through the conditioning of public employment on political faith....

Particularly pertinent to the constitutionality of the practice of patronage dismissals are *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and *Perry v. Sindermann*, 408 U.S. 593 (1972). In *Keyishian*, the Court invalidated New York statutes barring employment merely on the basis of membership in "subversive" organizations. *Keyishian* squarely held that political association alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment. In *Perry*, the Court broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a governmental benefit....

Patronage practice falls squarely within the prohibitions of *Keyishian* and *Perry*. Under that practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party. The threat of dismissal for failure to provide that support unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise. The belief and association which government may not ordain directly are achieved by indirection....

Although the practice of patronage dismissals clearly infringes First Amendment interests, our inquiry is not at an end, for the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons....

It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny....

One interest which has been offered in justification of patronage is the need to insure effective government and the efficiency of public employees. It is argued that employees of political persuasions not the same as that of the party in control of public office will not have the incentive to work effectively and may even be motivated to subvert the incumbent administration's efforts to govern effectively. We are not persuaded. The inefficiency resulting from the wholesale replacement

of large numbers of public employees every time political office changes hands belies this justification. And the prospect of dismissal after an election in which the incumbent party has lost is only a disincentive to good work. Further, it is not clear that dismissal in order to make room for a patronage appointment will result in replacement by a person more qualified to do the job since appointment often occurs in exchange for the delivery of votes, or other party service, not job capability. More fundamentally, however, the argument does not succeed because it is doubtful that the mere difference of political persuasion motivates poor performance; nor do we think it legitimately may be used as a basis for imputing such behavior. The Court has consistently recognized that mere political association is an inadequate basis for imputing disposition to ill-willed conduct.... At all events, less drastic means for insuring government effectiveness and employee efficiency are available to the State. Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist.

Even if the first argument that patronage serves effectiveness and efficiency be rejected, it still may be argued that patronage serves those interests by giving the employees of an incumbent party the incentive to perform well in order to insure their party's incumbency and thereby their jobs. Patronage, according to the argument, thus makes employees highly accountable to the public. But the ability of officials more directly accountable to the electorate to discharge employees for cause and the availability of merit systems, growth in the use of which has been quite significant, convince us that means less intrusive than patronage still exist for achieving accountability in the public work force and, thereby, effective and efficient government. The greater effectiveness of patronage over these less drastic means, if any, is at best marginal, a gain outweighed by the absence of intrusion on protected interests under the alternatives.

The lack of any justification for patronage dismissals as a means of furthering government effectiveness and efficiency distinguishes this case from *CSC v. Letter Carriers*, 413 U.S. 548 (1973), and *United Public Workers v. Mitchell*, 330 U.S. 75 (1949). In both of those cases, legislative restraints on political management and campaigning by public employees were upheld despite their encroachment on First Amendment rights because, *inter alia*, they did serve in a necessary manner to foster and protect efficient and effective government. Interestingly, the activities that were restrained by the legislation involved in those cases are characteristic of patronage practices. As the Court observed in *Mitchell*, "The conviction that an actively partisan governmental personnel threatens good administration has deepened since [1882]. Congress recognizes danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections."

A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. Nonpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party.

No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals. Thus, the political loyalty "justification is a matter of proof, or at least argument, directed at particular kinds of jobs." *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972). Since, as we have noted, it is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification as to any particular respondent will rest on the petitioners on remand, cases of doubt being resolved in favor of the particular respondent.

It is argued that a third interest supporting patronage dismissals is the preservation of the democratic process. According to petitioners, "we have contrived no system for the support of party that does not place considerable reliance on patronage. The party organization makes a democratic government work and charges a price for its services."[21] The argument is thus premised on the centrality of partisan politics to the democratic process.

Preservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms. But however important preservation of the two-party system or any system involving a fixed number of parties may or may not be, we are not persuaded that the elimination of patronage practice or, as is specifically involved here, the interdiction of patronage dismissals, will bring about the demise of party politics. Political parties existed in the absence of active patronage practice prior to the administration of Andrew Jackson, and they have survived substantial reduction in their patronage power through the establishment of merit systems.

Patronage dismissals thus are not the least restrictive alternative to achieving the contribution they may make to the democratic process. The process functions as well without the practice, perhaps even better, for patronage dismissals clearly also retard that process. Patronage can result in the entrenchment of one or a few parties to the exclusion of others. And most indisputably, as we recognized at the outset, patronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government. Thus, if patronage contributes at all to the elective process, that contribution is diminished by the practice's impairment of the same. Indeed, unlike the gain to representative government provided by the Hatch Act in *CSC v. Letter Carriers*, *supra*, and *United Public Workers v. Mitchell*, *supra*, the gain to representative government provided by the practice of patronage, if any, would be insufficient to justify its sacrifice of First Amendment rights.

21. Brief for Petitioners, quoting V.O. Key, POLITICS, PARTIES AND PRESSURE GROUPS 369 (5th ed. 1964).

To be sure, *Letter Carriers* and *Mitchell* upheld Hatch Act restraints sacrificing political campaigning and management, activities themselves protected by the First Amendment. But in those cases it was the Court's judgment that congressional subordination of those activities was permissible to safeguard the core interests of individual belief and association. Subordination of some First Amendment activity was permissible to protect other such activity. Today, we hold that subordination of other First Amendment activity, that is, patronage dismissals, not only is permissible, but also is mandated by the First Amendment. And since patronage dismissals fall within the category of political campaigning and management, this conclusion irresistibly flows from *Mitchell* and *Letter Carriers*. For if the First Amendment did not place individual belief and association above political campaigning and management, at least in the setting of public employment, the restraints on those latter activities could not have been judged permissible in *Mitchell* and *Letter Carriers*.

It is apparent that at bottom we are required to engage in the resolution of conflicting interests under the First Amendment. The constitutional adjudication called for by this task is well within our province. The illuminating source to which we turn in performing the task is the system of government the First Amendment was intended to protect, a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern. Our decision in obedience to the guidance of that source does not outlaw political parties or political campaigning and management. Parties are free to exist and their concomitant activities are free to continue. We require only that the rights of every citizen to believe as he will and to act and associate according to his beliefs be free to continue as well.

In summary, patronage dismissals severely restrict political belief and association. Though there is a vital need for government efficiency and effectiveness, such dismissals are on balance not the least restrictive means for fostering that end. There is also a need to insure that policies which the electorate has sanctioned are effectively implemented. That interest can be fully satisfied by limiting patronage dismissals to policymaking positions. Finally, patronage dismissals cannot be justified by their contribution to the proper functioning of our democratic process through their assistance to partisan politics since political parties are nurtured by other, less intrusive and equally effective methods. More fundamentally, however, any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms. We hold, therefore, that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments, and that respondents thus stated a valid claim for relief....

The judgment of the Court of Appeals is

Affirmed.

Mr. Justice STEVENS did not participate in the consideration or decision of this case.

Mr. Justice STEWART, with whom Mr. Justice BLACKMUN joins, concurring in the judgment.

Although I cannot join the plurality's wide-ranging opinion, I can and do concur in its judgment.

This case does not require us to consider the broad contours of the so-called patronage system, with all its variations and permutations. In particular, it does not require us to consider the constitutional validity of a system that confines the hiring of some governmental employees to those of a particular political party, and I would intimate no views whatever on that question.

The single substantive question involved in this case is whether a nonpolicy-making, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot. See *Perry v. Sindermann*.

[A short dissenting opinion by Chief Justice BURGER is omitted.]

Mr. Justice POWELL, with whom THE CHIEF JUSTICE and Mr. Justice REHNQUIST join, dissenting.

The Court holds unconstitutional a practice as old as the Republic, a practice which has contributed significantly to the democratization of American politics. This decision is urged on us in the name of First Amendment rights, but in my view the judgment neither is constitutionally required nor serves the interest of a representative democracy. It also may well disserve rather than promote core values of the First Amendment. I therefore dissent.

The Cook County Sheriff's Office employs approximately 3,000 people. Roughly half of these employees are "merit" employees given various protections from discharge. The other half of the employees have no such protection. Customary Illinois political practice has allowed such "non-merit" positions to be awarded on "patronage" grounds. This tradition has entitled newly elected officeholders to replace incumbent nonmerit employees with patronage appointments.

[Patronage] in employment played a significant role in democratizing American politics. Before patronage practices developed fully, an "aristocratic" class dominated political affairs, a tendency that persisted in areas where patronage did not become prevalent. Patronage practices broadened the base of political participation by providing incentives to take part in the process, thereby increasing the volume of political discourse in society. Patronage also strengthened parties, and hence encouraged the development of institutional responsibility to the electorate on a permanent basis. Parties became "instrument(s) through which discipline and responsibility may be achieved within the Leviathan." Sorauf, "Patronage and Party," 3 *Midwest J. Pol. Sci.* 115 (1959).

In many situations patronage employment practices also entailed costs to government efficiency. These costs led eventually to reforms placing most federal and state civil service employment on a nonpatronage basis. But the course of such reform is of limited relevance to the task of constitutional adjudication in this case. It is pertinent to note, however, that a perceived impingement on employees' political beliefs by the patronage system was not a significant impetus to such reform. Most advocates of reform were concerned primarily with the corruption and inefficiency that patronage was thought to induce in civil service and the power that patronage practices were thought to give the "professional" politicians who relied on them. Moreover, it generally was thought that elimination of these evils required the imposition both of a merit system and of restrictions on First Amendment activities by government employees.

[In this case we] have complaining employees who apparently accepted patronage jobs knowingly and willingly, while fully familiar with the "tenure" practices long prevailing in the Sheriff's Office. Such employees have *benefited* from their political beliefs and activities; they have not been penalized for them. In these circumstances, I [believe] that beneficiaries of a patronage system may not be heard to challenge it when it comes their turn to be replaced....

It is difficult to disagree with the view, as an abstract proposition, that government employment ordinarily should not be conditioned upon one's political beliefs or activities. But we deal here with a highly practical and rather fundamental element of our political system, not the theoretical abstractions of a political science seminar. In concluding that patronage hiring practices are unconstitutional, the plurality seriously underestimates the strength of the government interest—especially at the local level—in allowing some patronage hiring practices, and it exaggerates the perceived burden on First Amendment rights.

As indicated above, patronage hiring practices have contributed to American democracy by stimulating political activity and by strengthening parties, thereby helping to make government accountable. It cannot be questioned seriously that these contributions promote important state interests....

The complaining parties are or were employees of the Sheriff. In many communities, the sheriff's duties are as routine as process serving, and his election attracts little or no general public interest. In the States, and especially in the thousands of local communities, there are large numbers of elective offices, and many are as relatively obscure as that of the local sheriff or constable. Despite the importance of elective offices to the ongoing work of local governments, election campaigns for lesser offices in particular usually attract little attention from the media, with consequent disinterest and absence of intelligent participation on the part of the public. Unless the candidates for these offices are able to dispense the traditional patronage that has accrued to the offices, they also are unlikely to attract donations of time or money from voluntary groups. In short, the resource pools that fuel the intensity of political interest and debate in "important" elections frequently "could care less" about who fills the offices deemed to be relatively unimportant. Long experience teaches that at this local level traditional patronage practices contribute significantly to the democratic process. The candidates for these offices derive their support at the precinct level, and their modest funding for publicity, from cadres of friends and political associates who hope to benefit if their "man" is elected. The activities of the latter are often the principal source of political information for the voting public. The "robust" political discourse that the plurality opinion properly emphasizes is furthered—not restricted—by the time-honored system.

Patronage hiring practices also enable party organizations to persist and function at the local level. Such organizations become visible to the electorate at large only at election time, but the dull periods between elections require ongoing activities: precinct organizations must be maintained; new voters registered; and minor political "chores" performed for citizens who otherwise may have no practical means of access to officeholders. In some communities, party organizations and clubs also render helpful social services.

It is naive to think that these types of political activities are motivated at these levels by some academic interest in "democracy" or other public service impulse. For the most part, as every politician knows, the hope of some reward generates a

major portion of the local political activity supporting parties. It is difficult to overestimate the contributions to our system by the major political parties, fortunately limited in number compared to the fractionalization that has made the continued existence of democratic government doubtful in some other countries. Parties generally are stable, high-profile, and permanent institutions. When the names on a long ballot are meaningless to the average voter, party affiliation affords a guidepost by which voters may rationalize a myriad of political choices. Voters can and do hold parties to long-term accountability, and it is not too much to say that, in their absence, responsive and responsible performance in low-profile offices, particularly, is difficult to maintain.

It is against decades of experience to the contrary, then, that the plurality opinion concludes that patronage hiring practices interfere with the "free functioning of the electoral process."... One would think that elected representatives of the people are better equipped than we to weigh the need for some continuation of patronage practices in light of the interests above identified, and particularly in view of local conditions....

Notes and Questions

1. In *CSC v. Letter Carriers*, 413 U.S. 548 (1973), and *United Public Workers v. Mitchell*, 330 U.S. 75 (1949), the Court upheld the constitutionality of the Hatch Act. The Hatch Act prohibited most partisan political activity by the great majority of federal employees. In *Elrod*, Justice Brennan distinguishes the Hatch Act cases in part by saying, "in those cases it was the Court's judgment that congressional subordination of those activities was permissible to safeguard the core interests of individual belief and association." The belief that the individual is the fundamental unit in democratic politics is central to the school of thought known as progressivism. In Chapter One of this book we were introduced to a competing school of thought, pluralism, which views the group as the fundamental unit. In this chapter, we have seen that writers like Fiorina believe that a particular form of group, the political party, must stand at the center of the political process if democracy is to succeed.

In the Hatch Act cases, as Justice Brennan wrote, severe restriction of public employees' political freedom was permitted in order to promote the value of political individualism. In *Elrod*, the state's desire to promote the value of collective activity through political parties is held insufficient to justify an equally severe restriction on public employees' political freedom. Read together, do the Hatch Act cases and *Elrod* suggest that progressivism is preferred by the Constitution over competing beliefs such as pluralism and party government? Should progressivism be a constitutionally preferred value? Are there special characteristics of patronage and public employment that might distinguish these cases from others in which competing progressivist and pluralist or party government values might be in conflict?

2. In *Branti v. Finkel*, 445 U.S. 507 (1980), a public defender was appointed by a newly-elected county legislature, and quickly proceeded to fire several attorneys in the public defender's office, allegedly because they were Democrats. The public defender sought to defend the firings, in part, on the ground that attorneys were "policymakers," and therefore not protected by *Elrod*. Justice Stevens, writing for the Court, disagreed:

> As Mr. Justice Brennan noted in *Elrod*, it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered.... Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. As one obvious example, if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. Rather, it would simply rest on the fact that party membership was essential to the discharge of the employee's governmental responsibilities.
>
> It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. The coach of a state university's football team formulates policy, but no one would seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of the state government. On the other hand, it is equally clear that the governor of a state may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Since "whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests," Justice Stevens concluded that the attorneys in the public defender's office were protected by the *Elrod* doctrine. He added, in footnote 13, that "an official such as a prosecutor" has broader public responsibilities, and that the Court was expressing no opinion on whether "the deputy of such an official could be dismissed on grounds of political party affiliation or loyalty." Justices Powell, Rehnquist, and Stewart dissented in *Branti*.

If you were an incumbent running for reelection to the county legislature, how would you respond if your opponent attacked you on grounds of incompetence in the public defender's office?

If a new public defender is unconcerned about partisanship but simply wants to employ attorneys in whom he or she has a high degree of confidence and with whom he or she feels compatible, does the Constitution permit firing the old attorneys and hiring new ones?

Considering footnote 13 in *Branti*, how would you advise a newly-elected district attorney who wishes to fire all deputies who are not members of his or her party? May a party membership test be a condition of employment in the civil division of a state attorney general's office?

Could Branti, the public defender, fire Finkel if Finkel made a speech criticizing Branti's management of the public defender's office? If he made a speech criticizing the county legislature for providing too low a budget to the public defend-

er's office? If he made a speech criticizing the county legislature for actions unrelated to the public defender's office? Cf. *Pickering v. Board of Education*, 391 U.S 563 (1968); *Bennett v. Thomson*, 116 N.H. 453, 363 A.2d 187 (1976), appeal dismissed, 429 U.S. 1082 (1977); Mark Coven, *The First Amendment Rights of Policymaking Public Employees*, 12 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 559 (1977).

3. *Branti* seems to have modified *Elrod*'s exception for "policymaking" employees, by stating that the question is whether party affiliation is "an appropriate requirement" for the position. Justice Stevens' examples of a football coach (inappropriate) and an assistant to the governor (appropriate) may seem intuitively obvious, but what is the standard of "appropriateness"? Would it be appropriate to fire a prison warden on grounds of partisan affiliation? The head of a city construction project? The director of an agency that enforces the state's campaign finance laws? The personal secretary to the mayor? With respect to the last of these questions, see *Faughender v. City of North Olmsted*, 927 F.2d 909 (6th Cir. 1991), holding the mayor's personal secretary could be fired on political grounds. What about the personal secretary to the head of a city department? What about a receptionist in the mayor's office?

Rutan v. Republican Party of Illinois
497 U.S. 62 (1990)

Justice BRENNAN delivered the opinion of the Court.

[Governor James Thompson of Illinois issued an executive order prohibiting state agencies from hiring new employees and taking similar personnel actions without express permission from himself. Allegedly, the governor implemented this freeze by conditioning new hires, promotions, recalls after layoffs, and similar advantageous or disadvantageous personnel actions, on whether the individual had demonstrated support of the Republican Party. This practice was challenged by several plaintiffs who were allegedly harmed by the freeze because they were not Republicans.]

We first address the claims of the four current or former employees....

The same First Amendment concerns that underlay our decisions in *Elrod* and *Branti* are implicated here. Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a "temporary" layoff. These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment. Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms.

We find, however, that our conclusions in *Elrod* and *Branti* are equally applicable to the patronage practices at issue here. A government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient. A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views. Like-

wise, the "preservation of the democratic process" is no more furthered by the patronage promotions, transfers, and rehires at issue here than it is by patronage dismissals. First, "political parties are nurtured by other, less intrusive and equally effective methods." *Elrod*. Political parties have already survived the substantial decline in patronage employment practices in this century. Second, patronage decidedly impairs the elective process by discouraging free political expression by public employees. Respondents, who include the Governor of Illinois and other state officials, do not suggest any other overriding government interest in favoring Republican Party supporters for promotion, transfer, and rehire.

We therefore determine that promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees....

Petitioner James W. Moore presents the closely related question whether patronage hiring violates the First Amendment. Patronage hiring places burdens on free speech and association similar to those imposed by the patronage practices discussed above. A state job is valuable. Like most employment, it provides regular paychecks, health insurance, and other benefits. In addition, there may be openings with the State when business in the private sector is slow. There are also occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards. Thus, denial of a state job is a serious privation....

We hold that the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support and that all of the petitioners and cross-respondents have stated claims upon which relief may be granted....

[The concurring opinion of Justice Stevens, responding to the dissenting opinion, is omitted.]

Justice SCALIA, with whom The Chief Justice and Justice KENNEDY join, and with whom Justice O'CONNOR joins as to Parts II and III, dissenting.

Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an "appropriate requirement." It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. See *Marbury v. Madison*, 1 Cranch 137 (1803). Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court.

The merit principle for government employment is probably the most favored in modern America, having been widely adopted by civil service legislation at both the state and federal levels. But there is another point of view, described in characteristically Jacksonian fashion by an eminent practitioner of the patronage system, George Washington Plunkitt of Tammany Hall:

> "I ain't up on sillygisms, but I can give you some arguments that nobody can answer.
>
> "First, this great and glorious country was built up by political parties; second, parties can't hold together if their workers don't get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay." W. Riordon, PLUNKITT OF TAMMANY HALL 13 (1963).

It may well be that the Good Government Leagues of America were right, and that Plunkitt, James Michael Curley, and their ilk were wrong; but that is not entirely certain. As the merit principle has been extended and its effects increasingly felt; as the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines, and the Daley Machines have faded into history; we find that political leaders at all levels increasingly complain of the helplessness of elected government, unprotected by "party discipline," before the demands of small and cohesive interest groups.

The choice between patronage and the merit principle—or, to be more realistic about it, the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts—is not so clear that I would be prepared, as an original matter, to chisel a single, inflexible prescription into the Constitution. Fourteen years ago, in *Elrod*, the Court did that. *Elrod* was limited however, as was the later decision of *Branti*, to patronage firings, leaving it to state and federal legislatures to determine when and where political affiliation could be taken into account in hirings and promotions. Today the Court makes its constitutional civil service reform absolute, extending to all decisions regarding government employment. Because the First Amendment has never been thought to require this disposition, which may well have disastrous consequences for our political system, I dissent.

I

The restrictions that the Constitution places upon the government in its capacity as lawmaker, i.e., as the regulator of private conduct, are not the same as the restrictions that it places upon the government in its capacity as employer. We have recognized this in many contexts, with respect to many different constitutional guarantees....

Once it is acknowledged that the Constitution's prohibition against laws "abridging the freedom of speech" does not apply to laws enacted in the government's capacity as employer in the same way that it does to laws enacted in the government's capacity as regulator of private conduct, it may sometimes be difficult to assess what employment practices are permissible and what are not. That seems to me not a difficult question, however, in the present context. The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amend-

ment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles is to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of other practices are to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens. I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.

I will not describe at length the claim of patronage to landmark status as one of our accepted political traditions. Justice Powell discussed it in his dissenting opinions in *Elrod* and *Branti*. [Given that tradition,] there was in my view no basis for holding that patronage-based dismissals violated the First Amendment—much less for holding, as the Court does today, that even patronage hiring does so.

II

Even accepting the Court's own mode of analysis, however, and engaging in "balancing" a tradition that ought to be part of the scales, *Elrod*, *Branti*, and today's extension of them seem to me wrong.

A

The Court limits patronage on the ground that the individual's interest in uncoerced belief and expression outweighs the systemic interests invoked to justify the practice. The opinion indicates that the government may prevail only if it proves that the practice is "narrowly tailored to further vital government interests."

That strict-scrutiny standard finds no support in our cases.... When dealing with its own employees, the government may not act in a manner that is "patently arbitrary or discriminatory," *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961), but its regulations are valid if they bear a "rational connection" to the governmental end sought to be served, *Kelley v. Johnson*, 425 U.S. 238 (1976)....

While it is clear from the above cases that the normal "strict scrutiny" that we accord to government regulation of speech is not applicable in this field, the precise test that replaces it is not so clear; we have used various formulations. The one that appears in the case dealing with an employment practice closest in its effects to patronage is whether the practice could be "reasonably deemed" by the enacting legislature to further a legitimate goal. *Public Workers v. Mitchell*. For purposes of my ensuing discussion, however, I will apply a less permissive standard that seems more in accord with our general "balancing" test: can the governmental advantages of this employment practice reasonably be deemed to outweigh its "coercive" effects?

B

Preliminarily, I may observe that the Court today not only declines, in this area replete with constitutional ambiguities, to give the clear and continuing tradition of our people the dispositive effect I think it deserves, but even declines to

give it substantial weight in the balancing. That is contrary to what the Court has done in many other contexts....

But even laying tradition entirely aside, it seems to me our balancing test is amply met. I assume, as the Court's opinion assumes, that the balancing is to be done on a generalized basis, and not case by case. The Court holds that the governmental benefits of patronage cannot reasonably be thought to outweigh its "coercive" effects (even the lesser "coercive" effects of patronage hiring as opposed to patronage firing) not merely in 1990 in the State of Illinois, but at any time in any of the numerous political subdivisions of this vast country. It seems to me that that categorical pronouncement reflects a naive vision of politics and an inadequate appreciation of the systemic effects of patronage in promoting political stability and facilitating the social and political integration of previously powerless groups.

The whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives; I do not mean, therefore, to endorse that system. But in order to demonstrate that a legislature could reasonably determine that its benefits outweigh its "coercive" effects, I must describe those benefits as the proponents of patronage see them: As Justice Powell discussed at length in his *Elrod* dissent, patronage stabilizes political parties and prevents excessive political fragmentation—both of which are results in which States have a strong governmental interest....

The Court simply refuses to acknowledge the link between patronage and party discipline, and between that and party success....It is unpersuasive to claim, as the Court does, that party workers are obsolete because campaigns are now conducted through media and other money-intensive means. Those techniques have supplemented but not supplanted personal contacts. Certainly they have not made personal contacts unnecessary in campaigns for the lower level offices that are the foundations of party strength, nor have they replaced the myriad functions performed by party regulars not directly related to campaigning. And to the extent such techniques have replaced older methods of campaigning (partly in response to the limitations the Court has placed on patronage), the political system is not clearly better off. Increased reliance on money-intensive campaign techniques tends to entrench those in power much more effectively than patronage—but without the attendant benefit of strengthening the party system. A challenger can more easily obtain the support of party workers (who can expect to be rewarded even if the candidate loses—if not this year, then the next) than the financial support of political action committees (which will generally support incumbents, who are likely to prevail).

It is self-evident that eliminating patronage will significantly undermine party discipline; and that as party discipline wanes, so will the strength of the two-party system. But, says the Court, "[p]olitical parties have already survived the substantial decline in patronage employment practices in this century." This is almost verbatim what was said in *Elrod*. Fourteen years later it seems much less convincing. Indeed, now that we have witnessed, in 18 of the last 22 years, an Executive Branch of the Federal Government under the control of one party while the Congress is entirely or (for two years) partially within the control of the other party; now that we have undergone the most recent federal election, in which 98% of the incumbents, of whatever party, were returned to office; and now that we have seen elected officials changing their political affiliation with unprecedented readi-

ness, the statement that "political parties have already survived" has a positively whistling-in-the-graveyard character to it. Parties have assuredly survived—but as what? As the forges upon which many of the essential compromises of American political life are hammered out? Or merely as convenient vehicles for the conducting of national Presidential elections?

The patronage system does not, of course, merely foster political parties in general; it fosters the two-party system in particular. When getting a job, as opposed to effectuating a particular substantive policy, is an available incentive for party workers, those attracted by that incentive are likely to work for the party that has the best chance of displacing the "ins," rather than for some splinter group that has a more attractive political philosophy but little hope of success. Not only is a two-party system more likely to emerge, but the differences between those parties are more likely to be moderated, as each has a relatively greater interest in appealing to a majority of the electorate and a relatively lesser interest in furthering philosophies or programs that are far from the mainstream. The stabilizing effects of such a system are obvious....

Equally apparent is the relatively destabilizing nature of a system in which candidates cannot rely upon patronage-based party loyalty for their campaign support, but must attract workers and raise funds by appealing to various interest groups. There is little doubt that our decisions in *Elrod* and *Branti*, by contributing to the decline of party strength, have also contributed to the growth of interest-group politics in the last decade. See, e.g., Fitts, *The Vice of Virtue*, 136 U.PA.L.REV. 1567, 1603–1607 (1988). Our decision today will greatly accelerate the trend. It is not only campaigns that are affected, of course, but the subsequent behavior of politicians once they are in power. The replacement of a system firmly based in party discipline with one in which each office-holder comes to his own accommodation with competing interest groups produces "a dispersion of political influence that may inhibit a political party from enacting its programs into law." *Branti* (Powell, J., dissenting).

Patronage, moreover, has been a powerful means of achieving the social and political integration of excluded groups. By supporting and ultimately dominating a particular party "machine," racial and ethnic minorities have—on the basis of their politics rather than their race or ethnicity—acquired the patronage awards the machine had power to confer. No one disputes the historical accuracy of this observation, and there is no reason to think that patronage can no longer serve that function. The abolition of patronage, however, prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.

> Every ethnic group that has achieved political power in American cities has used the bureaucracy to provide jobs in return for political support. It's only when Blacks begin to play the same game that the rules get changed. Now the use of such jobs to build political bases becomes an "evil" activity, and the city insists on taking the control back "downtown." *New York Amsterdam News*, Apr. 1, 1978.

While the patronage system has the benefits argued for above, it also has undoubted disadvantages. It facilitates financial corruption, such as salary kickbacks and partisan political activity on government-paid time. It reduces the efficiency of government, because it creates incentives to hire more and less-qualified

workers and because highly qualified workers are reluctant to accept jobs that may only last until the next election. And, of course, it applies some greater or lesser inducement for individuals to join and work for the party in power.

To hear the Court tell it, this last is the greatest evil. That is not my view, and it has not historically been the view of the American people. Corruption and inefficiency, rather than abridgement of liberty, have been the major criticisms leading to enactment of the civil service laws—for the very good reason that the patronage system does not have as harsh an effect upon conscience, expression, and association as the Court suggests. As described above, it is the nature of the pragmatic, patronage-based, two-party system to build alliances and to suppress rather than foster ideological tests for participation in the division of political "spoils." What the patronage system ordinarily demands of the party worker is loyalty to, and activity on behalf of, the organization itself rather than a set of political beliefs. He is generally free to urge *within the organization* the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless. The diversity of political expression (other than expression of party loyalty) is channeled, in other words, to a different stage—to the contests for party endorsement rather than the partisan elections. It is undeniable, of course, that the patronage system entails some constraint upon the expression of views, particularly at the partisan-election stage, and considerable constraint upon the employee's right to associate with the other party. It greatly exaggerates these, however, to describe them as a general "coercion of belief." Indeed, it greatly exaggerates them to call them "coercion" at all, since we generally make a distinction between inducement and compulsion....In sum, I do not deny that the patronage system influences or redirects, perhaps to a substantial degree, individual political expression and political association. But like the many generations of Americans that have preceded us, I do not consider that a significant impairment of free speech or free association.

In emphasizing the advantages and minimizing the disadvantages (or at least minimizing one of the disadvantages) of the patronage system, I do not mean to suggest that that system is best. It may not always be; it may never be. To oppose our *Elrod-Branti* jurisprudence, one need not believe that the patronage system is *necessarily* desirable; nor even that it is always and everywhere *arguably* desirable; but merely that it is a political arrangement that may sometimes be a reasonable choice, and should therefore be left to the judgment of the people's elected representatives. The choice in question, I emphasize, is not just between patronage and a merit-based civil service, but rather among various combinations of the two that may suit different political units and different eras: permitting patronage hiring, for example, but prohibiting patronage dismissal; permitting patronage in most municipal agencies but prohibiting it in the police department; or permitting it in the mayor's office but prohibiting it everywhere else. I find it impossible to say that, always and everywhere, all of these choices fail our "balancing" test.

C

The last point explains why *Elrod* and *Branti* should be overruled, rather than merely not extended. Even in the field of constitutional adjudication, where the pull of *stare decisis* is at its weakest, one is reluctant to depart from precedent. But when that precedent is not only wrong, not only recent, not only contradicted

by a long prior tradition, but also has proved unworkable in practice, then all reluctance ought to disappear. In my view that is the situation here. Though unwilling to leave it to the political process to draw the line between desirable and undesirable patronage, the Court has neither been prepared to rule that no such line exists (*i.e.*, that *all* patronage is unconstitutional) nor able to design the line itself in a manner that judges, lawyers, and public employees can understand. *Elrod* allowed patronage dismissals of persons in "policymaking" or "confidential" positions. *Branti* retreated from that formulation, asking instead "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." What that means is anybody's guess. The Courts of Appeals have devised various tests for determining when "affiliation is an appropriate requirement." See generally Susan Lorde Martin, *A Decade of Branti Decisions: A Government Officials' Guide to Patronage Dismissals*, 39 AM.U.L.REV. 11, 23–42 (1989). These interpretations of *Branti* are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision.

A few examples will illustrate the shambles Branti has produced. A city cannot fire a deputy sheriff because of his political affiliation,[u] but then again perhaps it can, especially if he is called the "police captain." A county cannot fire on that basis its attorney for the department of social services, nor its assistant attorney for family court, but a city can fire its solicitor and his assistants, or its assistant city attorney, or its assistant state's attorney, or its corporation counsel. A city cannot discharge its deputy court clerk for his political affiliation, but it can fire its legal assistant to the clerk on that basis. Firing a juvenile court bailiff seems impermissible, but it may be permissible if he is assigned permanently to a single judge. A city cannot fire on partisan grounds its director of roads, but it can fire the second in command of the water department. A government cannot discharge for political reasons the senior vice president of its development bank, but it can discharge the regional director of its rural housing administration.

The examples could be multiplied, but this summary should make obvious that the "tests" devised to implement *Branti* have produced inconsistent and unpredictable results. That uncertainty undermines the purpose of both the nonpatronage rule and the exception. The rule achieves its objective of preventing the "coercion" of political affiliation only if the employee is confident that he can engage in (or refrain from) political activities without risking dismissal. Since the current doctrine leaves many employees utterly in the dark about whether their jobs are protected, they are likely to play it safe. On the other side, the exception was designed to permit the government to implement its electoral mandate. But unless the government is fairly sure that dismissal is permitted, it will leave the politically uncongenial official in place, since an incorrect decision will expose it to lengthy litigation and a large damages award, perhaps even against the responsible officials personally.

This uncertainty and confusion are not the result of the fact that *Elrod*, and then *Branti*, chose the wrong "line." My point is that there is no right line—or at least no right line that can be nationally applied and that is known by judges.

u. The citations to lower court cases that Justice Scalia provides for each of the examples in this paragraph are omitted.

Once we reject as the criterion a long political tradition showing that party-based employment is entirely permissible, yet are unwilling (as any reasonable person must be) to replace it with the principle that party-based employment is entirely impermissible, we have left the realm of law and entered the domain of political science, seeking to ascertain when and where the undoubted benefits of political hiring and firing are worth its undoubted costs. The answer to that will vary from State to State, and indeed from city to city, even if one rejects out of hand (as the *Branti* line does) the benefits associated with party stability. Indeed, the answer will even vary from year to year. During one period, for example, it may be desirable for the manager of a municipally owned public utility to be a career specialist, insulated from the political system. During another, when the efficient operation of that utility or even its very existence has become a burning political issue, it may be desirable that he be hired and fired on a political basis. The appropriate "mix" of party-based employment is a political question if there ever was one, and we should give it back to the voters of the various political units to decide, through civil service legislation crafted to suit the time and place, which mix is best.

III

Even were I not convinced that *Elrod* and *Branti* were wrongly decided, I would hold that they should not be extended beyond their facts, viz., actual discharge of employees for their political affiliation. Those cases invalidated patronage firing in order to prevent the "restraint it places on freedoms of belief and association." The loss of one's current livelihood is an appreciably greater constraint than such other disappointments as the failure to obtain a promotion or selection for an uncongenial transfer. Even if the "coercive" effect of the former has been held always to outweigh the benefits of party-based employment decisions, the "coercive" effect of the latter should not be....

If *Elrod* and *Branti* are not to be reconsidered in light of their demonstrably unsatisfactory consequences, I would go no further than to allow a cause of action when the employee has lost his position, that is, his formal title and salary. That narrow ground alone is enough to resolve the constitutional claims in the present case....

Notes and Questions

1. The most famous patronage-based machine to survive into the 1970s was the Chicago Democratic organization headed by Mayor Richard Daley. Based primarily on historical and social science accounts of the Chicago machine and its consequences, Cynthia Grant Bowman, *"We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago*, 86 NORTHWESTERN UNIV. LAW REVIEW 57 (1991), contends that in practice patronage has not brought about the benefits attributed to it by Justices Powell and Scalia in their dissents in *Elrod* and *Rutan*. For example, addressing the contention that patronage helps disadvantaged groups to begin their climb up the societal ladder, Professor Bowman writes:

> Machines clearly did function to bring in *some* new groups during *some* historical periods. The early Chicago machine is an example of a

> patronage party which did in fact incorporate a series of ethnic groups into political life, but it did so only because it faced substantial competition both from the Republican Party and from factions within the Democratic Party. Thus, as Republican Thompson reached out to newer ethnic groups, including Blacks, and [Democrat] Cermak struggled with the Irish for control of the Democratic party, the machine competed for Polish, Czech, Jewish, and Italian votes in addition to those of the older Irish immigrants.
>
> In other cities, however, the classic urban machine did not perform a democratizing function on any consistent basis. Recent studies show that the typical Irish machine was slow to incorporate the Southern and Eastern European immigrants who arrived after the Irish. In cities other than Chicago, where Irish machines succeeded in putting together a 'minimal winning electoral coalition' without appealing to newer immigrants who might compete with the Irish for jobs and political power, urban machines had no incentive to mobilize the more recently arrived ethnic groups, and did not do so. In Boston, for example, where the Irish comprised a majority of the population and could thus control city government without relying upon the votes of any of the newer groups, the machine played virtually no role in integrating those other ethnic groups into political life. Thus, the more a machine was able to consolidate its power by use of patronage, the less likely it was to fulfill the function of broadening the number of groups involved in the political process.
>
> It is not difficult to understand why mature urban political machines did not consistently perform the democratizing functions Scalia and Powell have alleged that they did. A patronage party depends on the allocation of a scarce resource—public jobs. After the initial spurts in the growth of public employment in the late nineteenth and early twentieth centuries, it was simply not possible to increase the supply of municipal jobs without limit. Hence, the only workable strategy for a patronage party was to 'deflate' the demand for this scarce resource so that it would not exceed the supply of employment opportunities. If new groups continually entered the process, this delicate economy would be destroyed. Thus, patronage parties which have consolidated power generally have not sought to maximize participation of new groups in the political process. Instead, they are highly selective mobilizers and have emphasized the deliverability and controllability of votes over vote-maximization.

If such criticism is sound empirically, to what extent does it undermine the Powell-Scalia position? How would you expect Justice Scalia to respond to Professor Bowman?

2. Applying economic analysis to patronage, Richard L. Hasen in *An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence*, 14 CARDOZO LAW REVIEW 1311 (1993), acknowledges that patronage may produce social benefits, such as strengthening the two-party system, as well as social costs, such as corruption and inefficiency. He argues that both the social costs and the social benefits are often externalities to the politicians who decide on a day-to-day basis how much patronage there will be. As political circumstances change, politicians may opt for

either more or less patronage than is socially optimal. Although Hasen does not attempt to second-guess *Elrod* and *Rutan*, he approves of the judiciary deciding such issues, because judges will be more disinterested than the politicians who would otherwise decide.

Chapter 8

Third Parties and Independent Candidates

In Chapter 7 we gave extended attention to legal questions affecting the "major" political parties because for most of its history, the national politics of the United States have been dominated by two parties—since 1856, the Democrats and the Republicans. Somewhat less uniformly, politics at the state and local levels also have been dominated by the two major parties. Questions about the rights and obligations of the major parties therefore have the most direct and obvious influence on the functioning of democratic government.

Despite the two-party dominance, third parties and independent candidates sometimes have played a significant role in American politics. For example, in seven presidential elections since 1856, more than ten percent of the votes cast have gone to a candidate who was not a Democrat or Republican. The most recent example, of course, is the 1992 election, in which 18.9% of the votes were cast for independent candidate H. Ross Perot. Below the level of the presidency, third-party and independent candidates are occasionally elected. As a current example, Socialist Bernard Sanders has represented Vermont in the House of Representatives since 1991.

Despite their limited role in American politics, third parties and independent candidates account for more litigation than the major parties. This is hardly surprising, because the major parties are far more likely to be able to resolve their problems through legislation or other political means.[a] The most persistent form of litigation brought by third parties and independent candidates in recent decades has consisted of challenges to denial of listing on the ballot. The first principal case in this chapter, *Munro v. Socialist Workers Party*, is one of the more recent of these cases to be decided by the Supreme Court. In the remaining principal cases, third parties challenge their exclusion from publicly provided campaign benefits.

A natural question to consider at the beginning of this chapter is to what extent election laws have been responsible for the generally peripheral role played

a. For a comparison and analysis of the use of litigation by major and minor parties in cases that reach the Supreme Court, see Lee Epstein & Charles D. Hadley, *On the Treatment of Political Parties in the U.S. Supreme Court, 1900–1986*, 52 JOURNAL OF POLITICS 413 (1990).

by third parties and independent candidates in American politics. The probable answer is that election laws have been of overriding importance, but not the laws at issue in cases such as the ones considered in this chapter. It is the single-member district system in accordance with which most American elections are conducted that makes it extremely difficult for third parties to succeed or to endure. Unless a third party's support is very concentrated regionally, it can win a substantial percentage of votes but win few or no legislative seats because it cannot ordinarily win a plurality in any given district. In presidential elections, the electoral college works to the same effect, as the recent example of H. Ross Perot indicates. In 1992, Perot won 18.9% of the popular vote, but because he did not win a plurality in any state, he did not win any electoral votes.

In electoral systems with a higher degree of proportional representation than the American system, parties can win legislative representation with vote proportions much lower than the 18.9% won by Perot in 1992. Since that usually does not occur in the single-member district system, it is difficult for third parties to attract strong candidates, who will recognize the small likelihood of winning office under a third-party banner. The lack of strong candidates makes it even more difficult to attract support from voters, who may already be predisposed not to "waste" their votes on candidates and parties with no realistic chance of winning.

The strong tendency of the single-member district system to bring about a two-party system was first demonstrated in an early classic of American political science:

> The system does not operate to destroy the defeated major party because the defeated major party is able to retain a *monopoly of the opposition*. The cutting edge of the two-party system is precisely at the point of contact of the second major party and the third party (or the first minor party aspiring to become [the] third major party). What it amounts to is this: the advantage of the second party over the third is overwhelming. It usually wins all seats or very nearly all seats not won by the first party. Among all the opposition parties in the field it has by a very wide margin the best chance of displacing the party in power. Because this is true it is extremely likely that it can assemble about its banner nearly all of the elements in the country seriously opposed to the party in power and seriously interested in an early party overturn. *The monopoly of the opposition* is the most important asset of the second major party. As long as it can monopolize the movement to overthrow the party in power, the second party is important; any party able to monopolize the opposition is certain to come into power sooner or later. The second major party is able to argue, therefore, that people who vote for minor opposition parties dissipate the opposition, that the supporters of the minor parties *waste their votes*. All who oppose the party in power are made to feel a certain need for concentrating their support behind the party most likely to lead a successful opposition. As a consequence the tendency to support minor parties is checked. The tendency of the single-member district system to give the second major party a great advantage over all minor parties is extremely important. In this way it is possible to explain the *longevity* of the major parties and the instability of the minor parties. Thus, while the major parties seem to go on

> forever, what has become of, and who remembers a long series of Labor, Farmer-Labor, Workers', United Labor, Socialist-Labor, Peoples', Union, and American parties launched since the Civil War?
>
> Why are third parties with highly sectional support unable to survive? In this case, the single-member district system operates in favor of the third party and against one or the other of the major parties within the section. A third party ought therefore to be able to entrench itself in a region and maintain itself permanently. Obviously, the system of representation cannot account for the tendency of sectional third parties to fade away; the explanation must be found elsewhere. As a matter of fact, it is not necessary to go far afield for an explanation. Even more important than congressional elections are presidential elections, which might properly be described as the focus of American politics.... Now it is clear that a purely sectional party can never win a presidential election. Presidents can be elected only by combinations of sections, by parties that cross sectional lines. An exclusively sectional party is doomed to permanent futility, therefore, in the pursuit of the most important single objective of party strategy. Sooner or later exclusively sectional parties are likely to lose even their sectional support in favor of a major party which has a real chance of winning the supreme prize. For this reason narrowly sectional parties cannot displace the traditional type of major party, even though the single-member district system of electing representatives might sometimes give them an advantage.

E.E. Schattschneider, PARTY GOVERNMENT 81–83 (1942). That single-member district systems lead to two-party systems while more proportional systems lead to multi-party systems was shown to be true across a great number of democracies and over an extended period by Maurice Duverger, POLITICAL PARTIES 216–28 (2d English ed., 1959), and has therefore come to be known as Duverger's Law.[b]

Another election law that makes it difficult for third parties to prosper is the nomination of major party candidates by direct primary elections. Primaries are intended to increase the ability of voters to control the ideological direction of the major parties. If primaries in fact accomplish this purpose then they are likely to harm third parties, whose chances of winning votes depend primarily on voter dissatisfaction with the major parties. In the words of the leading empirical study of third party voting:

> The story of why people vote for third parties is a story of major party deterioration. To be sure, third parties can help their own causes by selecting high caliber candidates or by building a loyal following over the

b. For more recent commentary, see, e.g., Douglas W. Rae, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS 87–103 (1967); William H. Riker, *The Number of Political Parties: A Reexamination of Duverger's Law*, 9 COMPARATIVE POLITICS 93 (1976). Duverger's Law has greater empirical validity if it is modified, in the way suggested by Schattschneider, by recognizing that regionally concentrated third parties can survive in a single-member district system when there is no presidential election creating pressure for a two-party system. Canada and India are examples of countries in which regional third parties have had some success. See Jae-On Kim & Mahn-Geum Ohn, *A Theory of Minor-Party Persistence: Election Rules, Social Cleavage, and the Number of Political Parties*, 70 SOCIAL FORCES 575 (1992).

> years. But, overwhelmingly, it is the failure of the major parties to do what the electorate expects of them—reflect the issue preferences of voters, manage the economy, select attractive and acceptable candidates, and build voter loyalty to the parties and the political system—that most increases the likelihood of voters backing a minor party. Citizens by and large cast third party ballots because they are dissatisfied with the major parties, not because they are attracted to the alternatives.

Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, THIRD PARTIES IN AMERICA 162 (1984).

Compared to the structural reinforcement of the two-party system provided by the single-member district system and the nomination of major-party candidates by primaries, the importance of ballot access requirements and exclusion of minor parties and candidates from publicly provided benefits is probably relatively slight. Nevertheless, ballot access is unquestionably of crucial importance to any candidate or party, and for those who believe that the presence of third parties makes an important contribution to American democracy, the issues raised in the following cases are by no means insignificant.

I. Ballot Access

The issue of ballot access for parties and candidates did not arise in the 19th century, because before the introduction of the secret (or "Australian") ballot around the end of that century, the state did not typically provide a ballot at all. It was the responsibility of the voter to supply a ballot. In practice, this usually meant the parties provided printed ballots, each containing the names of their own candidates, and each distinctively colored so that observers could easily tell which party's ballot an individual was casting. This system made it relatively difficult for voters to "split their tickets," and it also made it difficult to support a party that was not well enough organized to print and distribute its own ballots.

To permit secret voting, states had to print their own ballots with the names of competing candidates, so that voters could choose in private. This meant that the state had to set rules for the eligibility of parties and candidates to be listed on the state-supplied ballots. For parties and candidates who qualified, the Australian ballot was a considerable boon, because the obstacles that hindered voters wishing to depart from the major parties were removed. But for parties and candidates who did not qualify, the Australian ballot made a bad situation worse. Although most states permit write-in votes,[c] it is not only easier to vote for a listed candidate, but unlisted candidates typically are not considered to be serious candidates.

Until 1968, the states were free to set whatever ballot qualifications they chose. In that year, a strong challenge to the Democrats and Republicans was mounted by George Wallace, running under the banner of the American Independent Party. Wallace was able to satisfy the petition requirements for listing on the ballot for every state but one, Ohio. Even in Ohio, Wallace was able to satisfy the

c. In *Burdick v. Takushi*, 112 S.Ct. 2059 (1992), the Supreme Court ruled that the Constitution does not necessarily require a state to permit write-in votes. Nevertheless, most states do permit such votes.

relatively stiff 15% signature requirement, but he was not able to do so by the early deadline of February 7 of the election year. Such an early deadline can be particularly difficult for third party and independent challenges, which may develop in response to the candidates chosen by the major parties.

In *Williams v. Rhodes*, 393 U.S. 23 (1968), the Supreme Court ordered Wallace to be placed on the Ohio ballot. Ohio's laws, according to the Court, made it "virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties," which retained automatic ballot status by receiving at least ten percent of the votes in gubernatorial elections. The Court has not relied, in *Williams* or in subsequent cases, on a constitutional right to be a candidate for public office. Rather, the Court said that Ohio's restrictions placed burdens on

> two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.

The Court rejected Ohio's claim that its strict requirements could be justified under the Equal Protection Clause by its interest in promoting a two-party system.

> The fact is, however, that the Ohio system does not favor a "two-party system"; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly.... New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.
>
> ...Concededly, the State does have an interest in attempting to see that the election winner be the choice of a majority of its voters. But to grant the State power to keep all political parties off the ballot until they have enough members to win would stifle the growth of all new parties working to increase their strength from year to year.

This language in *Williams* indicated that the Court was willing to concede a state interest in requiring some demonstration of support for a candidate or party as a prerequisite to ballot access, and in *Jenness v. Fortson*, 403 U.S. 431 (1971), the Court made it clear that more than token support could be required. *Jenness* upheld Georgia's requirement that independent candidates obtain signatures from electors equal in number to five percent of the votes cast for the same office at the last election. The deadline was the same as that for candidates who wished to be listed on the ballot as candidates in party primaries. The Court regarded the Georgia requirements as significantly less onerous than the ones struck down in *Williams*.

> Unlike Ohio, Georgia does not require every candidate to be the nominee of a political party, but fully recognizes independent candidacies. Unlike Ohio, Georgia does not fix an unreasonably early filing deadline for candidates not endorsed by established parties. Unlike Ohio, Georgia does not impose upon a small party or a new party the Procrustean requirement of establishing elaborate primary election machinery. Finally, and in sum, Georgia's election laws, unlike Ohio's do not operate to freeze the political status quo....

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. The 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to be shown in many States as a condition for ballot position, but this is balanced by the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes.

Numerous ballot access cases have found their way to the Supreme Court, but the Court has generally adhered to the pattern set in *Williams* and *Jenness*: it will uphold ballot access requirements that are difficult for many minor parties and independent candidates to satisfy, but will intervene when it believes the requirements are so severe that they pose obstacles even to parties and candidates that can demonstrate significant electoral support. The following is one of the more recent cases decided by the Court.

Munro v. Socialist Workers Party
479 U.S. 189 (1986)

Justice WHITE delivered the opinion of the Court.

The State of Washington requires that a minor-party candidate for partisan office receive at least 1% of all votes cast for that office in the State's primary election before the candidate's name will be placed on the general election ballot. The question for decision is whether this statutory requirement, as applied to candidates for statewide offices, violates the First and Fourteenth Amendments to the United States Constitution. The Court of Appeals for the Ninth Circuit declared the provision unconstitutional. We reverse.

In 1977, the State of Washington enacted amendments to its election laws, changing the manner in which candidates from minor political parties qualify for placement on the general election ballot. Before the amendments, a minor-party candidate did not participate in the State's primary elections, but rather sought his or her party's nomination at a party convention held on the same day as the primary election for "major" parties. The convention-nominated, minor-party candidate secured a position on the general election ballot upon the filing of a certificate signed by at least 100 registered voters who had participated in the convention and who had not voted in the primary election. The 1977 amendments retained the requirement that a minor-party candidate be nominated by convention, but imposed the additional requirement that, as a precondition to general ballot access, the nominee for an office appear on the primary election ballot and receive at least 1% of all votes cast for that particular office at the primary election.

Washington conducts a "blanket primary" at which registered voters may vote for any candidate of their choice, irrespective of the candidates' political party affiliation....

The events giving rise to this action occurred in 1983, after the state legislature authorized a special primary election to be held on October 11, 1983, to fill a vacancy in the office of United States Senator. Appellee Dean Peoples qualified to

be placed on the primary election ballot as the nominee of appellee Socialist Workers Party. Also appearing on that ballot were 32 other candidates. At the primary, Mr. Peoples received approximately nine one-hundredths of one percent of the total votes cast for the office,[9] and, accordingly, the State did not place his name on the general election ballot....

Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, *Williams*, and may not survive scrutiny under the First and Fourteenth Amendments....These associational rights, however, are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

While there is no "litmus-paper test" for deciding a case like this, *ibid.*, it is now clear that States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office. In *Jenness*, the Court unanimously rejected a challenge to Georgia's election statutes that required independent candidates and minor-party candidates, in order to be listed on the general election ballot, to submit petitions signed by at least 5% of the voters eligible to vote in the last election for the office in question. Primary elections were held only for those political organizations whose candidate received 20% or more of the vote at the last gubernatorial or Presidential election. The Court's opinion observed that "[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." And, in *American Party of Texas v. White*, 415 U.S. 767 (1974), candidates of minor political parties in Texas were required to demonstrate support by persons numbering at least 1% of the total vote cast for Governor at the last preceding general election. Candidates could secure the requisite number of petition signatures at precinct nominating conventions and by supplemental petitions following the conventions. Voters signing these supplemental petitions had to swear under oath that they had not participated in another party's primary election or nominating process. In rejecting a First Amendment challenge to the 1% requirement, we asserted that the State's interest in preserving the integrity of the electoral process and in regulating the number of candidates on the ballot was compelling and reiterated the holding in *Jenness* that a State may require a preliminary showing of significant support before placing a candidate on the general election ballot.

Jenness and *American Party* establish with unmistakable clarity that States have an "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot...." *Anderson v. Celebrezze*, 460 U.S. 780, 788–789, n. 9 (1983). We reaffirm that principle today.

The Court of Appeals determined that Washington's interest in insuring that candidates had sufficient community support did not justify the enactment of [the 1% requirement] because "Washington's political history evidences no voter confusion from ballot overcrowding." We accept this historical fact, but it does not require invalidation....

9. Mr. Peoples received 596 of the 681,690 votes cast in the primary.

We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access....

To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

In any event, the record here suggests that [imposition of the 1% requirement] was, in fact, linked to the state legislature's perception that the general election ballot was becoming cluttered with candidates from minor parties who did not command significant voter support. In 1976..., the largest number of minor political parties in Washington's history—12—appeared on the general election ballot. The record demonstrates that at least part of the legislative impetus for [the 1% requirement] was concern about minor parties having such easy access to Washington's general election ballot.

The primary election in Washington...is "an integral part of the entire election process...[that] functions to winnow out and finally reject all but the chosen candidates." *Storer v. Brown*, 415 U.S. 724, 735 (1974). We think that the State can properly reserve the general election ballot "for major struggles," *ibid.*, by conditioning access to that ballot on a showing of a modicum of voter support. In this respect, the fact that the State is willing to have a long and complicated ballot at the primary provides no measure of what it may require for access to the general election ballot. The State of Washington was clearly entitled to raise the ante for ballot access, to simplify the general election ballot, and to avoid the possibility of unrestrained factionalism at the general election.

Neither do we agree with the Court of Appeals and appellees that the burdens imposed on appellees' First Amendment rights by the 1977 amendments are far too severe to be justified by the State's interest in restricting access to the general ballot. Much is made of the fact that prior to 1977, virtually every minor-party candidate who sought general election ballot position so qualified, while since 1977 only 1 out of 12 minor-party candidates has appeared on that ballot. Such historical facts are relevant, but they prove very little in this case, other than the fact that [the 1% requirement] does not provide an insuperable barrier to minor-party ballot access.[11] It is hardly a surprise that minor parties appeared on the general election ballot before [the requirement was imposed]; for, until then, there were virtually no restrictions on access. Under our cases, however, Washington was not required to afford such automatic access and would have been entitled to insist on a more substantial showing of voter support. Comparing the actual experience before and after 1977 tells us nothing about how minor parties

11. [The requirement] apparently poses an insubstantial obstacle to minor-party candidates for nonstatewide offices and independent candidates for statewide offices. Since 1977, 36 out of 40 such minor-party candidates have qualified for the general election ballot and 4 out of 5 independent candidates for statewide office have so qualified.

would have fared in those earlier years had Washington conditioned ballot access to the maximum extent permitted by the Constitution.

Appellees urge that this case differs substantially from our previous cases because requiring primary votes to qualify for a position on the general election ballot is qualitatively more restrictive than requiring signatures on a nominating petition. In effect, their submission would foreclose any use of the primary election to determine a minor party's qualification for the general ballot. We are unpersuaded, however, that the differences between the two mechanisms are of constitutional dimension. Because Washington provides a "blanket primary," minor party candidates can campaign among the entire pool of registered voters. Effort and resources that would otherwise be directed at securing petition signatures can instead be channeled into campaigns to "get the vote out," foster candidate name recognition, and educate the electorate. To be sure, candidates must demonstrate, through their ability to secure votes at the primary election, that they enjoy a modicum of community support in order to advance to the general election. But requiring candidates to demonstrate such support is precisely what we have held States are permitted to do.

Appellees argue that voter turnout at primary elections is generally lower than the turnout at general elections, and therefore...the pool of potential supporters from which Party candidates can secure 1% of the vote [is reduced]. We perceive no more force to this argument than we would with an argument by a losing candidate that his supporters' constitutional rights were infringed by their failure to participate in the election. Washington has created no impediment to voting at the primary elections; every supporter of the Party in the State is free to cast his or her ballot for the Party's candidates....States are not burdened with a constitutional imperative to reduce voter apathy or to "handicap" an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot. As we see it, Washington has done no more than to visit on a candidate a requirement to show a "significant modicum" of voter support, and it was entitled to require that showing in its primary elections.

We also observe that [Washington's statute] is more accommodating of First Amendment rights and values than were the statutes we upheld in *Jenness*, *American Party*, and *Storer*. Under each scheme analyzed in those cases, if a candidate failed to satisfy the qualifying criteria, the State's voters had no opportunity to cast a ballot for that candidate and the candidate had no ballot-connected campaign platform from which to espouse his or her views; the unsatisfied qualifying criteria served as an absolute bar to ballot access. Undeniably, such restrictions raise concerns of constitutional dimension, for the "exclusion of candidates... burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day...." *Anderson*. Here, however, Washington virtually guarantees what the parties challenging the Georgia, Texas, and California election laws so vigorously sought—candidate access to a statewide ballot. This is a significant difference. Washington has chosen a vehicle by which minor-party candidates must demonstrate voter support that serves to promote the very First Amendment values that are threatened by overly burdensome ballot access restrictions. It can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election. It is true that voters must make choices as they vote at the primary, but

there are no state-imposed obstacles impairing voters in the exercise of their choices....

The judgment of the Court of Appeals for the Ninth Circuit is therefore reversed.

It is so ordered.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

...The minor party's often unconventional positions broaden political debate, expand the range of issues with which the electorate is concerned, and influence the positions of the majority, in some instances ultimately becoming majority positions. And its very existence provides an outlet for voters to express dissatisfaction with the candidates or platforms of the major parties. Notwithstanding the crucial role minor parties play in the American political arena, the Court holds today that the associational rights of minor parties and their supporters are not unduly burdened by a ballot access statute that, in practice, completely excludes minor parties from participating in statewide general elections.

I

The Court fails to articulate the level of scrutiny it applies in holding that the Washington 1% primary vote requirement is not an unconstitutional ballot access restriction....

By contrast, the standard of review set forth in our prior decisions is clear: Whether viewed as a burden on the right to associate or as discrimination against minor parties, a provision that burdens minor-party access to the ballot must be necessary to further a compelling state interest, and must be narrowly tailored to achieve that goal. [Citations] The necessity for this approach becomes evident when we consider that major parties, which by definition are ordinarily in control of legislative institutions, may seek to perpetuate themselves at the expense of developing minor parties. The application of strict scrutiny to ballot access restrictions ensures that measures taken to further a State's interest in keeping frivolous candidates off the ballot do not incidentally impose an impermissible bar to minor-party access.

Appellant argues that there is no ballot access limitation here at all, and thus no need for the application of heightened scrutiny, because minor parties can appear on a primary ballot simply by meeting reasonable petition requirements. I cannot accept, however, as a general proposition, that access to any ballot is always constitutionally adequate. The Court, in concluding here that the State may reserve the general election ballot for "major struggles," appears to acknowledge that, because of its finality, the general election is the arena where issues are sharpened, policies are hotly debated, and the candidates' positions are clarified. Nonetheless, the Court deems access to the primary adequate to satisfy minor-party rights to ballot access, even though we have characterized the primary election principally as a "forum for continuing intraparty feuds," *Storer v. Brown*, 415 U.S. 724, 735 (1974), rather than an arena for debate on the issues. Access to a primary election ballot is not, in my view, all the access that is due when minor parties are excluded entirely from the general election.

The Court's conclusion stems from a fundamental misconception of the role minor parties play in our constitutional scheme. To conclude that access to a pri-

mary ballot is adequate ballot access presumes that minor-party candidates seek only to get elected. But, as discussed earlier, minor-party participation in electoral politics serves to expand and affect political debate.... That contribution cannot be realized if they are unable to participate meaningfully in the phase of the electoral process in which policy choices are most seriously considered. A statutory scheme that excludes minor parties entirely from this phase places an excessive burden on the constitutionally protected associational rights of those parties and their adherents....

I am unconvinced that the Washington statute serves the asserted justification for the law: avoiding ballot overcrowding and voter confusion. The statute streamlines the general election, where overcrowding and confusion appear never to have been much of a problem before the 1977 amendments, at the expense of an already cumbersome primary ballot. Between 1907 and 1977, no more than six minor party candidates ever appeared on the general election ballot for any statewide office, and no more than four ever ran for any statewide office other than Governor, suggesting that the ballot was never very crowded. But in the 1983 special election that prompted this lawsuit, appellee Peoples, instead of being placed on the general election ballot with 2 other candidates, was placed on the primary ballot along with *32* other candidates: 18 Democrats and 14 Republicans.

The Court notes that we have not previously required a State seeking to impose reasonable ballot access restrictions to make a particularized showing that voter confusion in fact existed before those restrictions were imposed. But where the State's solution exacerbates the very problem it claims to solve, the State's means cannot be even rationally related to its asserted ends....

Additionally, while a State may have an interest in eliminating frivolous candidates by requiring candidates to demonstrate "a significant modicum of support" to qualify for a place on the ballot, Washington already had a mechanism that required minor-party candidates to show such support, which it retained after its imposition of the 1% primary vote requirement in 1977. Appellees did not challenge the legitimacy of the convention and petition requirements in this case, but the fact that a mechanism for requiring some showing of support previously existed casts doubt on the need for the imposition of still another requirement on minor-party candidates. Moreover, the application of the 1% requirement suggests it is overbroad, avoiding frivolous candidacies only by excluding virtually all minor-party candidates from general elections for statewide office.

The only purpose this statute seems narrowly tailored to advance is the impermissible one of protecting the major political parties from competition precisely when that competition would be most meaningful. Because the statute burdens appellees' First Amendment interests, it must be subjected to strict scrutiny; because it fails to pass such scrutiny, it is unconstitutional.

II

Even if I were prepared to adopt the nebulous logic the Court employs in preference to the mandatory strict standard of review in this case, I could not reach the majority's result. While this Court has in the past acknowledged that limits on minor-party access to the ballot may in some circumstances be appropriate, we have made equally clear that States may not employ ballot access limitations which result in the exclusion of minor parties from the ballot....

Under this reasoning, the validity of ballot access limitations is a function of empirical evidence: A minor party is not impermissibly burdened by ballot access restrictions when "a reasonably diligent independent candidate" could be expected to satisfy the ballot access requirement. *Storer*....

Washington's primary law acts as an almost total bar to minor-party access to statewide general election ballots....The Court of Appeals found that by 1984, only one minor-party candidate had been able to surmount the 1% barrier and earn the right to participate in the general election. The legislation leading to this substantial elimination of minor parties from the political arena in Washington's general elections should not be sustained as a legitimate requirement of a demonstration of significant support.

Notes and Questions

1. In his dissenting opinion, Justice Marshall asserts:

> To conclude that access to a primary ballot is adequate ballot access presumes that minor-party candidates seek only to get elected. But... minor-party participation in electoral politics serves to expand and affect political debate.

It is undoubtedly the case that many third party and independent candidates recognize that they have no chance of being elected and therefore are running for other reasons. For the government, however, the function served by elections—determining who shall hold public office—is a crucial one. In designing election procedures, should the government be permitted to exalt its own purpose over other uses to which parties and candidates may wish to put elections?

2. Critics argue that although the Court continues to pay lip service to *Williams*, in practice it has been willing to tolerate overly restrictive ballot access requirements. Thus, Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARVARD JOURNAL ON LEGISLATION 167, 184 (1991), claims that in *Jenness*, the Court

> overstated the historical ability of third parties to gain access to the Georgia ballot. The Court emphasized that, while the Ohio law [in *Williams*] had foreclosed any third-party competition, "[t]he open quality of the Georgia system is far from merely theoretical." In support of this characterization, the Court noted that the petition procedure had been used in 1966 and again in 1968. Prior to 1966, however, no candidate had ever successfully used the petition procedure to appear on Georgia's statewide ballot. The candidate who qualified in 1966 was not a minor party or independent candidate, but the Republican nominee for Governor. Thus, the differences between the Ohio and Georgia systems, in "totality," were not nearly so great as the Court's opinion in *Jenness* would make it seem.

Smith is also critical of *Munro*, whose "most devastating part" in Smith's opinion is its ruling that the state does not need to defend the validity of the interests it asserts against empirical challenge. *Id.* at 191. Smith concludes:

> The *Munro* holding that no particularized showing of state interest is required, combined with the *Jenness* test that virtually any past success

> by third parties in obtaining ballot status establishes the legitimacy of a ballot-access statute, undermines most constitutional challenges to ballot-access restrictions. In *Munro*, the Court recognized compelling state interests in imposing restrictions, which future plaintiffs are unable to challenge empirically. At the same time, plaintiffs will rarely be able to show an impermissible burden, for so long as even one third-party candidate has previously met a state's requirement, the law would meet the *Jenness* test. If the Court adheres to these rulings, ballot-access laws will be unassailable.

Id. at 192.

3. Many commentators have found the Court's ballot access doctrine nebulous and inconsistent. See, e.g., Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1102 (2d ed. 1988) ("the border between permissible and impermissible ballot access requirements remains ill-defined"). Probably the reason is that the "standard of review" employed by the Court has been shifting and unclear. In *Williams*, the Court required a compelling state interest to justify the burden on voting and associational rights. In a subsequent case, *Anderson v. Celebrezze*, 460 U.S. 780, 788–90 (1983), the Court set forth a more flexible standard that has been referred to in a number of election law cases not involving ballot access:

> Although [the] rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates. We have recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.
>
> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. *Storer*. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. The results of this evaluation will not be automatic;

> as we have recognized, there is "no substitute for the hard judgments that must be made." *Storer.*

For detailed analysis of the standard of review in the ballot access cases, see Martin E. Latz, *The Constitutionality of State-Passed Congressional Term Limits*, 25 AKRON LAW REVIEW 155, 189–97 (1991).

Despite the uncertainty that may exist regarding standard of review, if we look at the results in the ballot access cases that have reached the Supreme Court, the pattern does not seem particularly unclear. With the assistance of the Court in *Williams*, George Wallace was able to appear on every state's ballot in the 1968 presidential election. John Anderson, an independent candidate in 1980, also appeared on the ballot in all states, again with the help of the Court, which in *Anderson v. Celebrezze* repeated its 1968 performance by striking down overly restrictive Ohio requirements.[d] In 1992, Ross Perot appeared on the ballot of every state, without the necessity for Supreme Court intervention. It thus appears that under the Court's present doctrine, states cannot enforce requirements whose effect is to bar from the ballot candidates or parties with enough support to have a substantial impact on the election. As Smith argues (Note 2, *supra*), the Court permits requirements that prevent most third party and independent candidacies that cannot demonstrate the likelihood of such a substantial impact.

4. One type of case may be an exception to the foregoing generalization. The Court has been intolerant of state laws conditioning ballot appearance on the payment of filing fees. In *Bullock v. Carter*, 405 U.S. 134 (1972), the Court struck down filing fees for local offices in Texas as violative of equal protection. The decision was based in part of the excessive size of the filing fees:

> Unlike a filing-fee requirement that most candidates could be expected to fulfill from their own resources or at least through modest contributions, the very size of the fees imposed under the Texas system gives it a patently exclusionary character. Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how broad or enthusiastic their popular support. The effect of this exclusionary mechanism on voters is neither incidental nor remote. Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system.... [W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.

Two years later, the Court considered a challenge to a filing fee of $701.60 for candidates for the Los Angeles County Board of Supervisors. Considering that the supervisorial districts had populations close to two million people, the filing fee surely qualified as nominal. Nevertheless, the Court struck it down in *Lubin v.*

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d. A United States District Judge ordered that Anderson's name be placed on the ballot in Ohio, and this ruling was vindicated by the Supreme Court in 1983. Anderson also required judicial assistance to reach the ballot in Maine and Maryland.

Panish, 415 U.S. 709 (1974), finding that because there was no alternative way of qualifying for the ballot, the filing fee "inevitably renders the California system exclusionary as to some aspirants." The Court added that the state could require a candidate unable to pay the filing fee to "demonstrate the 'seriousness' of his candidacy by persuading a substantial number of voters to sign a petition in his behalf." Is *Lubin* consistent with cases like *Jenness v. Fortson*? Is it of much benefit to third parties and independent candidates?

5. In *Storer v. Brown*, 415 U.S. 724 (1974), the Court indicated it would uphold "sore-loser" statutes, which prevent losers in primaries from running as independent candidates in the general election. One of the statutes at issue in *Storer*, California Elections Code § 6830(d), went further by prohibiting a candidate from running in the general election as an independent if he or she had been affiliated with a party that was qualified to appear on the ballot within a year prior to that party's primary. The Court explained:

> The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates. The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.
>
> Section 6830(d)...carries very similar credentials. It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidacies prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.

6. In New York, the Liberal Party since the 1940s and the Conservative Party since the 1960s have played a more prominent role than third parties in other states. An important reason is that in New York, individuals may appear on the ballot as the candidate of more than one party. Thus, in New York, the Liberal Party often nominates the same candidate as the Democrats and the Conservative Party often nominates the same candidate as the Republicans. These minor parties typically receive enough votes so that major party politicians have some incentive to prove themselves sufficiently "pure" ideologically to retain the support of the relevant minor party. Most states have "anti-fusion" laws that either prevent candidates from appearing on the ballot under the label of more than one party or otherwise prevent minor parties from following the New York strategy.

See generally Daniel A. Mazmanian, THIRD PARTIES IN PRESIDENTIAL ELECTIONS 115–135 (1974); Howard A. Scarrow, *Duverger's Law, Fusion, and the Decline of American "Third" Parties*, 39 WESTERN POLITICAL QUARTERLY 634 (1986). Anti-fusion laws have been upheld against constitutional challenge. See *Twin Cities Area New Party v. McKenna*, 863 F.Supp. 988 (D.Minn. 1994); *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991), cert. denied 112 S.Ct. 2992 (1992).

7. The *Williams* line of cases that has been described in this section assumes that the candidate is eligible to be elected to and serve in the office in question. States typically have more leeway to set actual qualifications for state and local office, though not without limit. Thus, in *Turner v. Fouche*, 396 U.S. 346 (1970), the Court ruled that a requirement that appointed school board members be freeholders had no rational basis and therefore violated the Equal Protection Clause.

A plurality of the Supreme Court may have obscured the distinction between qualifications for office and requirements for access to the ballot in *Clements v. Fashing*, 457 U.S. 957 (1982). The issues in this case included an equal protection challenge to a Texas constitutional provision that disqualified judges from serving in the state legislature during the judicial term for which they had been elected, even if they were willing to resign their judicial offices. Justice Rehnquist, writing for a four-member plurality, summarized the holdings of the ballot access cases and observed that "[n]ot all ballot access restrictions require 'heightened' equal protection scrutiny." Because the disqualification in question did not impose "special burdens" based on political affiliation or viewpoint, and because the plurality regarded it as imposing merely a reasonable "waiting period" on judges who wanted to run for the legislature, the provision needed only a rational basis to be upheld. That rational basis was found in Texas' interest in discouraging judges from vacating their terms of office.

Was the plurality correct to regard this issue as controlled by the ballot access decisions? (Justice Stevens provided a fifth vote to uphold the Texas provision, but without referring to any of the *Williams* line of cases.) If Texas permitted judges to run for and serve in the state legislature before their judicial terms expired, but required that they run as write-in candidates, would the exclusion from the ballot be upheld on the authority of *Clements*?

8. Ballot access aficionados have their very own newsletter. *Ballot Access News*, available at nominal cost, is a useful source of information on legislative and judicial developments relating not only to ballot access, but to a range of election law issues. Contact Richard Winger, Box 470296, San Francisco, California 94147.

II. Minor Parties and Public Benefits

Ballot access has probably been the issue most frequently litigated by third parties and independent candidates in recent decades, but it has by no means been the only issue litigated. In this section, we shall consider the extent to which such parties and candidates may be entitled to a share of other benefits sometimes provided by the government. The principal cases consider two such benefits, public funding for election campaigns, and access to broadcast debates.

In 1974, Congress passed comprehensive amendments to the previously enacted Federal Election Campaign Act (FECA). The amended FECA provided

for campaign disclosure, a variety of limits on campaign contributions and expenditures, and public financing of presidential campaigns. Nearly every significant provision of the Act was quickly challenged in *Buckley v. Valeo*. In later chapters we shall consider in some detail both the amended FECA and the *Buckley* decision. In this chapter, we consider only the portion of *Buckley* responding to the claim that the presidential public financing provisions unconstitutionally discriminated against third parties and independent candidates.

Buckley v. Valeo

424 U.S. 1, 85–109 (1976)

PER CURIAM...

III. PUBLIC FINANCING OF PRESIDENTIAL ELECTION CAMPAIGNS

A series of statutes for the public financing of Presidential election campaigns produced the scheme now found in 26 U.S.C. § 6096 and Subtitle H of the Internal Revenue Code of 1954....

A. Summary of Subtitle H

Section 9006 establishes a Presidential Election Campaign Fund (Fund), financed from general revenues in the aggregate amount designated by individual taxpayers, under § 6096, who on their income tax returns may authorize payment to the Fund of one dollar of their tax liability in the case of an individual return or two dollars in the case of a joint return.[e] The Fund consists of three separate accounts to finance (1) party nominating conventions, (2) general election campaigns, and (3) primary campaigns.

Chapter 95 of Title 26, which concerns financing of party nominating conventions and general election campaigns, distinguishes among "major," "minor," and "new" parties. A major party is defined as a party whose candidate for President in the most recent election received 25% or more of the popular vote. A minor party is defined as a party whose candidate received at least 5% but less than 25% of the vote at the most recent election. All other parties are new parties, including both newly created parties and those receiving less than 5% of the vote in the last election.

Major parties are entitled to $2,000,000 to defray their national committee Presidential nominating convention expenses, must limit total expenditures to that amount, and may not use any of this money to benefit a particular candidate or delegate. A minor party receives a portion of the major-party entitlement determined by the ratio of the votes received by the party's candidate in the last election to the average of the votes received by the major parties' candidates. The amounts given to the parties and the expenditure limit are adjusted for inflation, using 1974 as the base year. No financing is provided for new parties, nor is there any express provision for financing independent candidates or parties not holding a convention.

For expenses in the general election campaign, § 9004(a)(1) entitles each major-party candidate to $20,000,000. This amount is also adjusted for inflation.

e. As of the 1994 tax year, taxpayers could designate three dollars on an individual return and six dollars on a joint return. —ED.

To be eligible for funds the candidate must pledge not to incur expenses in excess of the entitlement under § 9004(a)(1) and not to accept private contributions.... Minor-party candidates are also entitled to funding, again based on the ratio of the vote received by the party's candidate in the preceding election to the average of the major-party candidates. Minor-party candidates must certify that they will not incur campaign expenses in excess of the major-party entitlement and that they will accept private contributions only to the extent needed to make up the difference between that amount and the public funding grant. New-party candidates receive no money prior to the general election, but any candidate receiving 5% or more of the popular vote in the election is entitled to post-election payments according to the formula applicable to minor-party candidates. Similarly, minor-party candidates are entitled to post-election funds if they receive a greater percentage of the average major-party vote than their party's candidate did in the preceding election; the amount of such payments is the difference between the entitlement based on the preceding election and that based on the actual vote in the current election. A further eligibility requirement for minor- and new-party candidates is that the candidate's name must appear on the ballot, or electors pledged to the candidate must be on the ballot, in at least 10 States.

Chapter 96 establishes a third account in the Fund, the Presidential Primary Matching Payment Account. This funding is intended to aid campaigns by candidates seeking Presidential nomination "by a political party" in "primary elections." The threshold eligibility requirement is that the candidate raise at least $5,000 in each of 20 States, counting only the first $250 from each person contributing to the candidate. In addition, the candidate must agree to abide by [overall campaign spending limits]. Funding is provided according to a matching formula: each qualified candidate is entitled to a sum equal to the total private contributions received, disregarding contributions from any person to the extent that total contributions to the candidate by that person exceed $250. Payments to any candidate under Chapter 96 may not exceed 50% of the overall expenditure ceiling accepted by the candidate.

B. Constitutionality of Subtitle H

Appellants argue that Subtitle H is invalid [among other reasons] because Subtitle H invidiously discriminates against certain interests in violation of the Due Process Clause of the Fifth Amendment. We find no merit in these contentions....

Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. In several situations concerning the electoral process, the principle has been developed that restrictions on access to the electoral process must survive exacting scrutiny. The restriction can be sustained only if it furthers a "vital" governmental interest, *American Party of Texas v. White*, that is "achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity." *Lubin v. Panish*. These cases, however, dealt primarily with state laws requiring a candidate to satisfy certain requirements in order to have his name appear on the ballot. These were, of course, direct burdens not only on the candidate's ability to run for office but also on the voter's ability to voice preferences regarding representative government and contemporary issues. In contrast, the denial of public financing to some Presiden-

tial candidates is not restrictive of voters' rights and less restrictive of candidates'.[128] Subtitle H does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions. Any disadvantage suffered by operation of the eligibility formulae under Subtitle H is thus limited to the claimed denial of the enhancement of opportunity to communicate with the electorate that the formulae afford eligible candidates. But eligible candidates suffer a countervailing denial. As we more fully develop later, acceptance of public financing entails voluntary acceptance of an expenditure ceiling. Noneligible candidates are not subject to that limitation.[129] Accordingly, we conclude that public financing is generally less restrictive of access to the electoral process than the ballot-access regulations dealt with in prior cases. In any event, Congress enacted Subtitle H in furtherance of sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate.

It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest. In addition, the limits on contributions necessarily increase the burden of fundraising, and Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions. The States have also been held to have important interests in limiting places on the ballot to those candidates who demonstrate substantial popular support. Congress' interest in not funding hopeless candidacies with large sums of public money necessarily justifies the withholding of public assistance from candidates without significant public support. Thus, Congress may legitimately require "some preliminary showing of a significant modicum of support," *Jenness*, as an eligibility requirement for public funds. This requirement also serves the important public interest against providing artificial incentives to "splintered parties and unrestrained factionalism." *Storer*.

At the same time Congress recognized the constitutional restraints against inhibition of the present opportunity of minor parties to become major political entities if they obtain widespread support. As the Court of Appeals said, "provisions for public funding of Presidential campaigns... could operate to give an unfair advantage to established parties, thus reducing, to the nation's detriment, ... the 'potential fluidity of American political life.'"

128. Appellants maintain that denial of funding is a more severe restriction than denial of access to the ballot, because write-in candidates can win elections, but candidates without funds cannot. New parties will be unfinanced, however, only if they are unable to get private financial support, which presumably reflects a general lack of public support for the party. Public financing of some candidates does not make private fundraising for others any more difficult; indeed, the elimination of private contributions to major-party Presidential candidates might make more private money available to minority candidates.

129. Appellants dispute the relevance of this answer to their argument on the ground that they will not be able to raise money to equal major-party spending. As a practical matter, however, Subtitle H does not enhance the major parties' ability to campaign; it substitutes public funding for what the parties would raise privately and additionally imposes an expenditure limit. If a party cannot raise funds privately, there are legitimate reasons not to provide public funding, which would effectively facilitate hopeless candidacies.

1. General Election Campaign Financing

Appellants insist that Chapter 95 falls short of the constitutional requirement in that its provisions supply larger, and equal, sums to candidates of major parties, use prior vote levels as the sole criterion for pre-election funding, limit new-party candidates to post-election funds, and deny any funds to candidates of parties receiving less than 5% of the vote. These provisions, it is argued, are fatal to the validity of the scheme, because they work invidious discrimination against minor and new parties in violation of the Fifth Amendment. We disagree.[131]

As conceded by appellants, the Constitution does not require Congress to treat all declared candidates the same for public financing purposes. As we said in *Jenness*, "there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other.... Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams*." Since the Presidential elections of 1856 and 1860, when the Whigs were replaced as a major party by the Republicans, no third party has posed a credible threat to the two major parties in Presidential elections. Third parties have been completely incapable of matching the major parties' ability to raise money and win elections. Congress was, of course, aware of this fact of American life, and thus was justified in providing both major parties full funding and all other parties only a percentage of the major-party entitlement.[133] Identical treatment of all parties, on the other hand, "would not only make it easy to raid the United States Treasury, it would also artificially foster the proliferation of splinter parties." The Constitution does not require the Government to "finance the efforts of every nascent political group," *American Party of Texas*, merely because Congress chose to finance the efforts of the major parties.

Furthermore, appellants have made no showing that the election funding plan disadvantages nonmajor parties by operating to reduce their strength below that attained without any public financing. First, such parties are free to raise money from private sources, and by our holding today new parties are freed from any expenditure limits, although admittedly those limits may be a largely academic matter to them. But since any major-party candidate accepting public financing of a campaign voluntarily assents to a spending ceiling, other candidates will be able to spend more in relation to the major-party candidates. The relative position of minor parties that do qualify to receive some public funds because they received 5% of the vote in the previous Presidential election is also enhanced. Public funding for candidates of major parties is intended as a substitute for private contribu-

131. The allegations of invidious discrimination are based on the claim that Subtitle H is facially invalid; since the public financing provisions have never been in operation, appellants are unable to offer factual proof that the scheme is discriminatory in its effect. In rejecting appellants' arguments, we of course do not rule out the possibility of concluding in some future case, upon an appropriate factual demonstration, that the public financing system invidiously discriminates against nonmajor parties.

133. Appellants suggest that a less discriminatory formula would be to grant full funding to the candidate of the party getting the most votes in the last election and then give money to candidates of other parties based on their showing in the last election relative to the "leading" party. That formula, however, might unfairly favor incumbents, since their major-party challengers would receive less financial assistance.

tions; but for minor-party candidates such assistance may be viewed as a supplement to private contributions since these candidates may continue to solicit private funds up to the applicable spending limit. Thus, we conclude that the general election funding system does not work an invidious discrimination against candidates of nonmajor parties.

Appellants challenge reliance on the vote in past elections as the basis for determining eligibility. That challenge is foreclosed, however, by our holding in *Jenness*, that popular vote totals in the last election are a proper measure of public support. And Congress was not obliged to select instead from among appellants' suggested alternatives. Congress could properly regard the means chosen as preferable, since the alternative of petition drives presents cost and administrative problems in validating signatures, and the alternative of opinion polls might be thought inappropriate since it would involve a Government agency in the business of certifying polls or conducting its own investigation of support for various candidates, in addition to serious problems with reliability.

Appellants next argue, relying on the ballot-access decisions of this Court, that the absence of any alternative means of obtaining pre-election funding renders the scheme unjustifiably restrictive of minority political interests. Appellants' reliance on the ballot-access decisions is misplaced. To be sure, the regulation sustained in *Jenness*, for example, incorporated alternative means of qualifying for the ballot, and the lack of an alternative was a defect in the scheme struck down in *Lubin*. To suggest, however, that the constitutionality of Subtitle H therefore hinges solely on whether some alternative is afforded overlooks the rationale of the operative constitutional principles. Our decisions finding a need for an alternative means turn on the nature and extent of the burden imposed in the absence of available alternatives. We have earlier stated our view that Chapter 95 is far less burdensome upon and restrictive of constitutional rights than the regulations involved in the ballot-access cases. Moreover, expenditure limits for major parties and candidates may well improve the chances of nonmajor parties and their candidates to receive funds and increase their spending. Any risk of harm to minority interests is speculative due to our present lack of knowledge of the practical effects of public financing and cannot overcome the force of the governmental interests against use of public money to foster frivolous candidacies, create a system of splintered parties, and encourage unrestrained factionalism.

Appellants' reliance on the alternative-means analyses of the ballot-access cases generally fails to recognize a significant distinction from the instant case. The primary goal of all candidates is to carry on a successful campaign by communicating to the voters persuasive reasons for electing them. In some of the ballot-access cases the States afforded candidates alternative means for qualifying for the ballot, a step in any campaign that, with rare exceptions, is essential to successful effort. Chapter 95 concededly provides only one method of obtaining pre-election financing; such funding is, however, not as necessary as being on the ballot. Plainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, and this avenue is still open to all candidates. And, after all, the important achievements of minority political groups in furthering the development of American democracy were accomplished without the help of public funds. Thus, the limited participation or nonparticipation of nonmajor parties or candidates in public funding does not unconstitutionally disadvantage them.

Of course, nonmajor parties and their candidates may qualify for post-election participation in public funding and in that sense the claimed discrimination is not total. Appellants contend, however, that the benefit of any such participation is illusory due to § 9004(c), which bars the use of the money for any purpose other than paying campaign expenses or repaying loans that had been used to defray such expenses. The only meaningful use for post-election funds is thus to repay loans; but loans, except from national banks, are "contributions" subject to the general limitations on contributions. Further, they argue, loans are not readily available to nonmajor parties or candidates before elections to finance their campaigns. Availability of post-election funds therefore assertedly gives them nothing. But in the nature of things the willingness of lenders to make loans will depend upon the pre-election probability that the candidate and his party will attract 5% or more of the voters. When a reasonable prospect of such support appears, the party and candidate may be an acceptable loan risk since the prospect of post-election participation in public funding will be good.

Finally, appellants challenge the validity of the 5% threshold requirement for general election funding. They argue that, since most state regulations governing ballot access have threshold requirements well below 5%, and because in their view the 5% requirement here is actually stricter than that upheld in *Jenness*, the requirement is unreasonable. We have already concluded that the restriction under Chapter 95 is generally less burdensome than ballot-access regulations. Further, the Georgia provision sustained in *Jenness* required the candidate to obtain the signatures of 5% of all eligible voters, without regard to party. To be sure, the public funding formula does not permit anyone who voted for another party in the last election to be part of a candidate's 5%. But under Chapter 95 a Presidential candidate needs only 5% or more of the actual vote, not the larger universe of eligible voters. As a result, we cannot say that Chapter 95 is numerically more, or less, restrictive than the regulation in *Jenness*. In any event, the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make. Without any doubt a range of formulations would sufficiently protect the public fisc and not foster factionalism, and would also recognize the public interest in the fluidity of our political affairs. We cannot say that Congress' choice falls without the permissible range.

2. Nominating Convention Financing

The foregoing analysis and reasoning sustaining general election funding apply in large part to convention funding under Chapter 95 and suffice to support our rejection of appellants' challenge to these provisions. Funding of party conventions has increasingly been derived from large private contributions, and the governmental interest in eliminating this reliance is as vital as in the case of private contributions to individual candidates.... We therefore conclude that appellants' constitutional challenge to the provisions for funding nominating conventions must also be rejected.

3. Primary Election Campaign Financing

Appellants' final challenge is to the constitutionality of Chapter 96, which provides funding of primary campaigns. They contend that these provisions are constitutionally invalid (1) because they do not provide funds for candidates not running in party primaries and (2) because the eligibility formula actually increas-

es the influence of money on the electoral process. In not providing assistance to candidates who do not enter party primaries, Congress has merely chosen to limit at this time the reach of the reforms encompassed in Chapter 96.... The choice to limit matching funds to candidates running in primaries may reflect that concern about large private contributions to candidates centered on primary races and that there is no historical evidence of similar abuses involving contributions to candidates who engage in petition drives to qualify for state ballots. Moreover, assistance to candidates and nonmajor parties forced to resort to petition drives to gain ballot access implicates the policies against fostering frivolous candidacies, creating a system of splintered parties, and encouraging unrestrained factionalism.

The eligibility requirements in Chapter 96 are surely not an unreasonable way to measure popular support for a candidate, accomplishing the objective of limiting subsidization to those candidates with a substantial chance of being nominated....

For the reasons stated, we reject appellants' claims that Subtitle H is facially unconstitutional.

Notes and Questions

1. Should the Court have struck down the public financing system on the ground that it was unfair to new parties? See Marlene Arnold Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WISCONSIN LAW REVIEW 323, 363:

> One of the most persuasive arguments against the allocation formula is its discrimination against new political parties. A new party could have the support of 5 percent of the electorate, or even much more, but would receive no funding from the government because of the lack of a showing of support at the previous general presidential election. Although the new party may be entitled to a grant after the election, funds will only be dispersed to such a party in the amount of outstanding debts. Therefore, the new party must gamble that it will obtain 5 percent of the vote and find creditors also willing to gamble. The new party is thus caught in what has been described as a "Catch-22" situation: it cannot obtain public funding without a showing of electoral support, but it may not be able to get electoral support without public funding.

The appellants, who were challenging the statute, argued that this problem could have been solved by permitting eligibility for receipt of public funding to be established by petition. Nicholson criticizes the Court for rejecting this argument:

> When considering whether a means other than prior electoral support would have been a less restrictive alternative, the opinion did refer to the various possible alternatives and the major objections to them. However, the Court did not take upon itself the task of second-guessing Congress as to whether the objections to the alternative means were substantial enough to outweigh the burdens upon the first amendment interests of third parties created by the use of prior electoral support as the funding criterion. One might question whether such deference to Congress was appropriate given the first amendment rights at stake....

> The alternative of petition signatures as a means of addressing the problem of new parties was largely ignored in Appellees' briefs, other than a conclusory statement that it was not feasible. If Appellees had the burden of demonstrating "the absence of less burdensome means," it does not appear that the burden was met, at least not with respect to the use of petitions. The Court itself referred to petitions as presenting "cost and administrative problems in validating signatures." However, the benefits of such a system seem so great that such problems could perhaps be tolerated. The procedure could be used both in the general election and in the primary. Formulas which discriminate against third parties would not be necessary. The problem of lack of funding for new parties could be dealt with.

Id. at 367–70.

2. Addressing what is perhaps a more fundamental question, Nicholson challenges what the Court described as "the important public interest against providing artificial incentives to 'splintered parties and unrestrained factionalism.'" Nicholson writes:

> Evidently it was thought that the availability of funds on a more liberal basis to third parties would encourage persons to split from the major parties and form their own parties in situations where, but for the availability of funds, such factionalization would not take place. However, it seems more likely that the present statute is an artificial influence which actually discourages factionalization, because of burdens upon parties not qualifying for public subsidies. A more liberal funding formula might merely compensate for the disincentives to factionalization created by contribution limitations and disclosure laws. It seems clear from the legislative history of the Act that at least some members of Congress purposely sought to protect the two-party system not just from artificial incentives to factionalism, but also from the old fashioned natural factionalism, which has disturbed the major parties at infrequent intervals in the past....
>
> The only concern voiced by the majority opinion with respect to third parties was that the subsidies must not inhibit "the present opportunity of minority parties to become major political entities if they obtain widespread support." Apparently the Court concluded that it had not been proven that the subsidy provisions would function in such a manner. It should be noted, however, that the Court showed no solicitude for parties and candidates who have no realistic chance of gaining widespread support. The Court ignored the fact that even "hopeless candidacies" serve important first amendment functions and are also subject to other restraints under the 1974 legislation which inhibit the performance of such functions.

Id. at 364–66.

3. Should the Court have struck down the matching requirement for eligibility to receive public funding in presidential primaries? Writing before the *Buckley* decision, Joel L. Fleishman, *The 1974 Federal Election Campaign Act Amendments: The Shortcomings of Good Intentions*, 1975 DUKE LAW JOURNAL 851,

886–89, argued that the matching requirement was unconstitutional in the absence of an alternative method of qualification, such as petition signatures:

> Despite its simplicity and reliability..., a monetary eligibility criterion has a serious constitutional flaw. Instead of manifesting general public support for a contender, it reflects a candidate's support among those who can afford to spend discretionary income or capital on politics—a sizable, but nonetheless minority, proportion of the population. In view of the Court's holdings and language in the filing fee cases[,] it is difficult to see how an exclusively monetary eligibility criterion could be sustained against an equal protection attack....
>
> The Court's heavy reliance [in the filing fee cases] on the interests of a candidate's prospective supporters and on their socio-economic background is even more appropriate with respect to the subsidy-qualifying mechanism than it is to filing fees. To qualify for the subsidy, a candidate must raise the necessary funds from his supporters. If his supporters are without means sufficient to contribute, it is *their* indigency which is being discriminated against in the political arena, not *his*.

Nicholson, *supra*, at 351, adds:

> Certainly matching grants are an effective means of screening frivolous candidates from public funding, but they are grossly overinclusive. Also screened out in the process are candidates supported by the poor.

4. One independent candidate, John Anderson, was paid $4.2 million after the 1980 election because his 6.6 percent of the popular vote exceeded the five percent threshold for general election funding. Because he exceeded that threshold, Anderson would also have been eligible to receive pre-election public funding in 1984, but he chose not to be a candidate that year. See Frank J. Sorauf, INSIDE CAMPAIGN FINANCE 258 n.4 (1992).

As Sorauf points out, in effect the eligibility threshold for receiving public funds in presidential primaries has steadily declined with inflation, because the requirements have remained constant in nominal dollars. Id. at 134. Perhaps for this reason, one minor-party candidate has been able to receive matching grants during the primaries in each of the last three elections—Sonia Johnson of the Citizens party in 1984, and Lenora Fulani of the New Alliance party in 1988 and 1992. See id. at 135; VITAL STATISTICS ON AMERICAN POLITICS 264 (Harold W. Stanley & Richard G. Niemi, eds., 4th ed., 1994).

5. When state statutes have authorized provision of voter registration lists to the major parties for use in campaigning and get-out-the-vote drives, federal courts have ruled that election officials are constitutionally required to provide the lists to minor parties on the same terms. See *Libertarian Party of Indiana v. Marion County Board of Voter Registration*, 778 F.Supp. 1458 (S.D.Ind. 1991); *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984 (S.D.N.Y. 1970), aff'd., 400 U.S. 806 (1970).

A statute passed by Congress in 1978 permitted national and state committees of political parties to send mail at subsidized postage rates. In 1980, Congress amended the statute so that only parties whose presidential candidate in the most recent election had received at least five percent of the vote were eligible for the subsidy. In *Greenberg v. Bolger*, 497 F.Supp. 756 (E.D.N.Y. 1980), this exclusion

of small parties from the postal subsidy was found to violate both the First Amendment and the Equal Protection Clause.

Is *Greenberg* consistent with *Buckley*? The *Greenberg* opinion pointed out some salient differences between the two cases:

> The definitions [establishing eligibility for the postal subsidy] are derived from the Campaign Fund Act.... But, unlike the Campaign Fund Act, the 1978 Act [as amended in 1980] does not require major or minor parties to accept expenditure or contribution limitations as a condition of the receipt of public funds in the form of a postal subsidy. Moreover, the 1978 Act unlike the Campaign Fund Act makes no provision for the possible reimbursement of a political party unable to qualify for advance funds given past results (or the lack of results in the case of a newly created party), but making the requisite showing in a current election. In addition, the 5 percent requirement reflects a concern for nationwide impact neglecting the local or statewide success that some third parties enjoy.

Forbes v. Arkansas Educational Television Communication Network Foundation

22 F.3d 1423 (8th Cir.), cert. denied, 115 S.Ct. 500 (1994)

RICHARD S. ARNOLD, Chief Judge....

I

In 1992, Ralph Forbes was an independent candidate for United States Representative for the Third Congressional District of Arkansas. He had obtained enough signatures to qualify for the ballot under state law. One of the defendants, the Arkansas Educational Television Network (AETN), is an instrumentality of the State of Arkansas....

A few weeks before the general election on November 3, 1992, Forbes sued AETN and its agents[,] alleging that AETN planned to sponsor a debate among the candidates for the Third Congressional District seat, but that it intended to include only the two major-party candidates. Forbes alleged that since he had qualified for the ballot as an independent candidate, he had a right to be included in the debate or, in the alternative, a right to additional air time on AETN to express his views, as required by the equal-time provision of 47 U.S.C. § 315.[1] He claimed that AETN had denied him access to air time because of his political beliefs. Forbes also alleged that... his First Amendment rights had been violated.

---

1. 47 U.S.C. § 315(a) provides that any person legally qualified as a candidate for public office shall be afforded the same opportunities as all other candidates for that office. However,

> No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary... or
>
> (4) on-the-spot coverage of bona fide news events...
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

Finally, Forbes alleged that his exclusion from the debates had deprived "the people" of their right to vote, and he sought declaratory and injunctive relief as well as compensatory and punitive damages.

Forbes alleged that he asked AETN to include him in the debate or give him additional time, and that his request was refused. He then telephoned the Federal Communications Commission and claimed that an FCC representative told him to "go through the motions" of a proper complaint, although it would be a waste of time. Believing that pursuit of his claim through the FCC would be pointless, Forbes wrote the FCC to request that his complaint be denied speedily so that he could seek an injunction in court. Instead, the FCC responded with a letter enclosing a statement of applicable law as well as instructions on how to file a complaint with the FCC. Forbes claims that he never received the enclosed materials, although he acknowledges receipt of the letter.

Forbes then sought injunctive relief in the District Court and moved for a preliminary injunction to mandate his inclusion in the debate. He alleged that AETN's reasons for excluding him from the debate were discriminatory and were specifically designed to keep the public from learning of Forbes's views on certain policy issues. In support of this position, Forbes claimed that an official of AETN stated that the network would run "St. Elsewhere" rather than a debate that included Forbes, and that another official of AETN stated that Forbes had not been included because he was not a "serious" candidate.

The District Court denied the request for injunctive relief on October 20, 1992. [Later, the District Court granted the defendants' motion to dismiss the action on the ground that Forbes' allegations did not state a cause of action.]

II.

In reviewing a dismissal for failure to state a claim, we take the allegations well pleaded in the complaint as true. Motions to dismiss should not be granted unless it is clear beyond doubt that there is no set of facts the plaintiff could prove that would entitle him to relief....

A. Statutory Claims

First, with respect to Forbes's statutory claim, we agree with the District Court... that Forbes's complaint cannot stand. There is no private cause of action to enforce 47 U.S.C. § 315, and Forbes's proper course of action is to bring his claim before the Federal Communications Commission.... Forbes's claim that AETN improperly refused to grant him equal time, as required by § 315,... should have been brought before the FCC first and then appealed, if necessary, to a court of competent jurisdiction. See *DeYoung v. Patten*, 898 F.2d 628, 633–35 (8th Cir. 1990). (We adhere to this aspect of *DeYoung*.) Since Forbes has failed to exhaust his administrative remedies, the District Court was correct in declining to rule on his statutory claims.

...Nonetheless, we disagree with the District Court with regard to Forbes's constitutional claims, and now hold that Forbes did allege a First Amendment violation well enough to survive a motion to dismiss. We now turn to this claim.

B. First Amendment Claim

The District Court dismissed Forbes's First Amendment claim on the authority of this Court's holding in *DeYoung* that "[a] political candidate does not have

a 'constitutional right of broadcast access to air his views.'" *Id.* at 632, quoting *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 430–31 (D.C.Cir. 1980). The Court concluded that the only claim Forbes had to warrant his inclusion in the debate was under the equal-time provision of the Communications Act. Since there was no private right of action under the Communications Act..., Forbes's only remedy was through the FCC.

Generally speaking, it is true that a candidate does not have the right to demand air time. See *Kennedy for President Comm.*, *supra*.[2] Under the circumstances of the present case, we hold that Forbes did have a qualified right of access created by AETN's sponsorship of a debate, and that AETN must have a legitimate reason to exclude him strong enough to survive First Amendment scrutiny. In *DeYoung*, this Court concluded that a public television station, such as AETN, was a state actor. We adhere to this conclusion. AETN is not a private entity; it is a state-owned television network; therefore, actions taken by the station, as well as actions taken by its employees and representatives, are fairly attributable to the State and subject to the Fourteenth Amendment, unlike the actions of privately owned broadcast licensees.

As a state actor, AETN is faced with constraints not shared by other television stations. When it comes to the First Amendment claim, we conclude that *DeYoung* was wrongly decided. *DeYoung* holds that no First Amendment right to appear in a televised debate exists, at least beyond that given by § 315, and that the only remedy available to a candidate in Mr. Forbes's position is to seek remedial action through the FCC. This holding would allow a state-owned station to exclude all Republicans, or all Methodists, or all candidates with a certain point of view, except to the extent, if any, that the excluded candidates could obtain relief under the Communications Act. We believe the error of such a proposition is self-evident. The state may not, by statute or otherwise, take such a discriminatory action, absent a compelling state interest.

The AETN defendants suggest that the case should be governed by public-forum analysis. If it is, the same conclusion follows: a state agency does not have an absolute right to determine which of the legally qualified candidates for a public office it will put on the air. The reason for such an exclusion must be ascertained and measured against First Amendment standards.

In its discussions of public versus nonpublic fora, the Supreme Court has divided government property into roughly three categories. The first is the traditional public forum, such as the town square, "which by long tradition or by government fiat ha[s] been devoted to assembly and debate." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). Public television stations do not fit into this category—there is no unlimited right of access to the airwaves.

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2. In *Kennedy*, the FCC had denied a candidate's request for an opportunity to respond to the President's statements in a press conference. Since the press conference was a bona fide news event, and, therefore, the equal-time provision of the Communications Act was not triggered, the candidate argued that he had a First Amendment right to respond. The Court concluded that since there was no absolute right of access to the airwaves, the provisions of § 315 excluding bona fide news events from its requirements was not in violation of the First Amendment. As a general rule, we agree with this principle—there is no First Amendment right to appear on television upon demand. However, the stations involved in *Kennedy* were private stations. In the present case, the fact that AETN is a public station and did, Forbes alleges, sponsor its own debate alters the analysis significantly.

The second category is the limited public forum, a place that generally is not open for public expression, but that the government has opened for use for free speech for only a limited period of time, *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981), a limited topic, or a limited class of speakers. See *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). Since the key determination of whether a forum is a limited public one is the government's acquiescence in its use for expressive purposes, it is certainly possible that AETN created a limited public forum when it chose to sponsor a debate among the candidates for the Third Congressional seat. This is a determination the factfinder would have to make after carefully looking at the nature of the debate forum. If it were determined that AETN had created a limited public forum, then Forbes would have a First Amendment right to participate in the debate and could be excluded only if AETN had a sufficient government interest. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry*.

The third category of governmental property is the nonpublic forum, which consists of property not usually compatible with expressive activity. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985). Even in the context of the nonpublic forum certain minimum First Amendment requirements apply:

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Id. at 806. Since Forbes was a member of the class of speakers for whose benefit the debate was held (candidates for the Third Congressional seat), and he wished to address the topic encompassed by the debate (who should be elected to Congress), if AETN failed to include Forbes because of objections to his viewpoint, it has violated his First Amendment rights.[4] It should be noted that the Public Television Station amici acknowledge that AETN does not have the right to exclude

4. AETN and the Public Broadcasting System amici cite other circuits which they say have concluded otherwise. Most significantly, they cite *Johnson v. FCC*, 829 F.2d 157 (D.C.Cir. 1987); *Chandler v. Georgia Public Telecommunications Comm'n*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S.Ct. 71 (1991); and *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983). These cases do not precisely address the case before us. *Chandler* involved a factual situation similar to that in the case at bar; however, the Georgia Public Telecommunications Commission had offered the candidates there thirty minutes of air time to respond to the debate from which they were excluded, something AETN allegedly refused to do for Forbes. Additionally, we respectfully disagree with the Eleventh Circuit's conclusion that the First Amendment was not implicated by the Georgia public television station's actions. *Muir* did not involve a debate at all, but rather an attempt by Alabama and Texas public television viewers to force their public television stations to air a particular show. *Muir* correctly assesses the right of the public to have access to air time, but does not address the situation facing us here. *Johnson* involved a broadcast debate sponsored by a third party, not by a public television station.

Forbes simply because they disagree with his point of view. Certainly, were the answer otherwise, there would be nothing to prevent the party in power from excluding all opposing parties, or particular religions, or minorities from public-television-sponsored debates.

III.

AETN has not filed an answer to Forbes's complaint; therefore, it has not yet articulated any principled reason for excluding Forbes. AETN must provide a rational and viewpoint-neutral justification for its determination. On this record, AETN has not yet done so; therefore, Forbes has stated a claim upon which relief can be granted, especially if we credit Forbes's allegation, as we must in reviewing a Rule 12(b)(6) dismissal, that AETN planned to air "St. Elsewhere" rather than allow Forbes to debate.

So much of the judgment as dismissed Forbes's statutory claims is affirmed. So much of the judgment as dismissed his claim under the First and Fourteenth Amendment for failure to state a claim is reversed, and the cause is remanded for further proceedings consistent with this opinion. That portion of *DeYoung v. Patten* which holds that the First Amendment places no restraint, beyond that imposed by the Communications Act, on the right of state agencies to sponsor candidate debates and pick and choose which candidates may take part, is overruled.[5]

It is so ordered.

McMILLIAN, Circuit Judge, joined by JOHN R. GIBSON, Senior Circuit Judge, FAGG, MAGILL, and HANSEN, Circuit Judges, concurring in part and dissenting in part.

Although I agree with most of the majority opinion, for the reasons discussed below, I would affirm the order of the district court dismissing Forbes's complaint. Accordingly, I concur in part and dissent in part....

With respect to Forbes's first amendment claim, I...agree that there is state action...because AETN is an instrumentality of the state. It is a state-owned, noncommercial, public television station; its employees are state employees who are represented in this appeal by the state attorney general. I do not agree, however, that Forbes, even though he was a legally qualified candidate, had a first amendment right to be included in the candidate debate or that the candidate debate was a public forum for first amendment purposes. In my view, the candidate debate was a nonpublic forum. Like private commercial television, public television is not a traditional public forum; it does not extend a general invitation to the public to appear on or participate in its programs. Nor do I think the candidate debate was a limited or quasi-public forum; the format of this candidate debate was not compatible with either unrestricted public access or with unrestricted access by all of the legally qualified candidates. For this reason, I would hold that the candidate debate was a nonpublic forum.

5. Our holding applies only to debates that are sponsored by state instrumentalities. It does not apply to private-television-sponsored debates, nor to debates sponsored by third parties that are reported in good faith by public television stations.

"Control over access to a nonpublic forum can be based on...speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*. Presumably, AETN decided to limit the number of candidates in order to maintain a traditional debate format, rather than to expand the format to a panel discussion. Because AETN has yet to file an answer, AETN's reasons for designing the format of the candidate debate as it did are not known. However, it would not have been unreasonable or viewpoint-specific for AETN to have limited the candidate debate to only the two major party candidates, thus excluding minor party candidates and independent candidates, or, for that matter, to the two candidates who had the most support or who appeared to have the most likely chance of winning, for example, on the basis of poll results. It may not have been good programming, or even good politics, given voters' interest in and the occasional historical success of minor party and independent (and even fringe) candidates, to limit the candidate debate to the two major party candidates. Nonetheless, I would hold that AETN had the editorial and programming discretion to structure the candidate debate along those lines and that excluding Forbes from the candidate debate for those reasons would be viewpoint neutral.

Notes and Questions

1. Would the result have been different in *Forbes* if AETN had excluded Forbes from the debate but offered him the opportunity to appear on the air at a different time? The court hints as much in footnote 4. It distinguishes *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990), cert. denied, 112 S.Ct. 71 (1991)—in which a public television network was permitted to exclude Libertarian candidates from debates between Democrats and Republicans—on the ground that the Libertarians were offered separate air time.[f] But should such an offer justify exclusion from debates under the *Forbes* court's analysis? Would a policy of excluding all Methodist candidates from major party candidate forums be constitutional, if Methodist candidates were offered separate air time?

Is it inherently wrong for public broadcasters to pick and choose among parties and candidates to participate in debates? Does the *Forbes* decision place an impracticable burden on public broadcasters? Consider these statements of the *Chandler* majority:

> Were GPTC [i.e., Georgia Public Television] a medium open to all who have a message, whatever its nature, GPTC would function as a marketplace of ideas. GPTC, however, is not such a medium. GPTC is "created, designed, and intended for the purpose of providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia." O.C.G.A. § 20-13-5(a)(Supp. 1990). Further, as a public television station, GPTC is under an obligation to serve the public

f. As grounds for distinguishing *Chandler*, this was dubious. The *Chandler* court noted the offer of separate air time in a footnote, but made no allusion to that offer in its analysis.

interest. As testimony indicated, GPTC's employees make editorial decisions on a daily basis determining which programs to air in order to meet the needs and interests of Georgia's citizens....

It is clear that GPTC "regulated content" by making a decision to air debates between candidates of the major parties. Contrary to the district judge's order, however, this content-based decision is not viewpoint restrictive and does not violate the First Amendment.... GPTC chose to air a debate between only the Democratic and Republican candidates because it believed such a debate would be of the most interest and benefit to the citizens of Georgia. Such a decision promoted GPTC's function, was "reasonable" and was "not an effort to suppress expression merely because public officials oppose the speaker's views." *Cornelius*....

Our view does not mandate, authorize or predict Orwellian state thought control through selective airing of viewpoints on public television stations. Without deciding, we can safely predict that the use of state instrumentalities to suppress unwanted expressions in the marketplace of ideas would authorize judicial intervention to vindicate the First Amendment. Short of that, public television stations must, no matter what may be the wishes of state government personalities, abide by the dictates of 47 U.S.C. § 315 regarding fairness and balance or lose their licenses.

The dissent is facially appealing insofar as it deplores the failure of the appellants to invite just one more participant to each program. Whether that is good policy is, we believe, for the program decisions of the station. Were we to hold that such an invitation is required by the Constitution, we could see no principled basis upon which that rule could be limited to the candidate who has obtained a ballot position and not extended to all other serious candidates. A decision to air the debate between the two front runners, or the three who will appear on the ballot, or others, is appropriately made by the programmers undertaking to provide an educational program of sufficient interest to attract viewers. The mixture of ideas, protected by the First Amendment, is just as protected when offered by a write-in candidate as by one on the ballot by petition, by primary election, or by party convention. We are not willing to establish a precedent that would require public television stations to forego the broadcast of controversial views touching upon important public issues—environment, ecology, animal rights, ozone depletion—lest the airing of such programs require the inclusion of a cacophony of differing views on each subject. The values sought to be fostered by the First Amendment would be frustrated, not furthered, by the fitting of such harnesses on public television.

2. Footnote 4, in its distinguishing of *Johnson v. FCC*, 829 F.2d 157 (D.C.Cir. 1987), also suggests that the result in *Forbes* might have been different if, instead of sponsoring the debate itself, AETN had aired a debate limited to the major party candidates but sponsored by some other organization. Should the question of who sponsors the debate make a difference?

3. Presumably, the majority would have ruled against Forbes if the defendant had been a private, commercial broadcaster. Because AETN was a government instrumentality, its broadcast decisions were "state action," whereas it would be

much more difficult for Forbes to establish state action if he were excluded from a debate by a private broadcaster.

For an intriguing suggestion, albeit in a different context, that public broadcasting should have preferred status over commercial broadcasting under the First Amendment, see Donald W. Hawthorne & Monroe E. Price, *Rewiring the First Amendment: Meaning, Content and Public Broadcasting*, 12 CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL 499 (1994). Hawthorne and Price propose that

> just for a moment, let's not be ruled by the mechanical apparatuses that have become fixtures of First Amendment doctrine. Let's not divide the world into hyphenated categories of speech. Let's not be overwhelmed by the step-by-step analysis that has the appearance of the careful machine, but may doom us to nonsense. Let's ask what's at stake, let's determine the saneness or craziness of various outcomes, and ask, if necessary, whether the conventional modes of thinking about the relationship between Congress and the media, the complex gradations and fusty cubbyholes of the received tradition, need some reconsideration.

Id. at 500. If we accept Hawthorne and Price's invitation, will we conclude that the "state action" doctrine in the context of the *Forbes* problem is a "mechanical apparatus" that dooms us to "nonsense"? Should we conclude that whatever the correct result in *Forbes*, the result should be the same whether the sponsor is a public or private broadcaster?

4. The "public forum doctrine," discussed in *Forbes*, is a complex and controversial doctrine established by the Supreme Court for adjudicating claims of a right to use government-owned facilities for speech purposes. Many of the leading cases are cited in *Forbes*. For overviews, see William B. Lockhart et al., CONSTITUTIONAL LAW 911–35 (7th ed. 1991); Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 986–97 (2d ed. 1988). The many excellent commentaries include Robert C. Post, *The History and Theory of the Public Forum*, 34 UCLA LAW REVIEW 1713 (1987); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VIRGINIA LAW REVIEW 1219 (1984).

5. *Forbes* and similar cases raise two distinct issues: first, whether broadcasters ought to be required by law to open candidate debates to at least some third party and independent candidates; and second, whether such a requirement should be imposed by courts or, alternatively, by legislation. Keith Darren Eisner, Comment, *Non-Major-Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 973 (1993), argues strenuously for a *legislative* requirement of inclusion, but he is skeptical about judicial imposition:

> Even if the judicial treatment of minor-party candidates seeking inclusion in nationally televised presidential debates were more solicitous than it has been... the judiciary is not the appropriate body to grant relief to such candidates. Judicially mandated inclusion would likely be a simplistic, narrow, fact-specific determination that would not concern itself with the necessarily complex, fine-tuned political judgments that need to be made. Such inclusion would likely encourage a spate of lawsuits by third-party or independent candidates of varying national stature, each claim-

> ing to be similarly situated to a candidate who has already been granted judicial relief.
>
> Which third-party or independent candidates should be included in the debates? Certainly, practical considerations dictate that allowing dozens of fringe candidates to participate in a nationally televised debate with the two major candidates is neither wise nor predictable. What realistic criteria can be formulated to determine which third-party or independent candidates to include and which to exclude? How can one be certain that the major parties will agree to participate in such debate? The task of answering these and similar questions, of ironing out solutions to political problems, is a job for which the legislature is uniquely qualified. Only Congress has the time, the resources, and the knowledge to restructure, in programmatic fashion, nationally televised debates.

Id. at 1009–10.

6. In this chapter, we have considered cases in which third parties and independent candidates have sought entitlement to benefits—ballot access, public funding, and participation in broadcast debates—that were being provided to major party candidates. In these cases, the third parties and independent candidates claim a constitutional right to be treated the same as major parties. In other cases, third parties or independent candidates seek to be relieved of burdens that are imposed on major party candidates. In such cases, third parties and independent candidates claim a right to differential treatment.

An important example is the claim of some third parties to exemption from campaign financial disclosure requirements. In *Buckley v. Valeo*, *supra*, the Supreme Court upheld generally the constitutionality of disclosure requirements. However, the Court stated that where a third party could show that disclosure might subject it, its contributors, or its vendors to public or private harassment, the third party could be entitled to a constitutional exemption from the requirement of itemizing contributions and expenditures. In *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), the Court ruled that the Socialist Workers Party had made a sufficient showing and must be granted an exemption.

Chapter 9

Bribery

To this point in this book, our focus has been primarily on the act of voting and the mechanisms by which votes are aggregated to produce representation or, in Chapter 6, direct effects on public policy. The remainder of the book will consider influences on the vote and on the relation between such influences and the functioning of democratic government. Our central focus will be the system of campaign finance.

One of the main reasons campaign finance has become a prominent issue in American politics is the belief of many that the raising of campaign funds provides the occasion for a great deal of conduct that is corrupt or improper. As we shall see in Chapter 10, whether and under what circumstances campaign contributions are corrupt is a point of practical and theoretical controversy. The law of bribery, which attempts to deal with the most obviously corrupt forms of political activity, thus provides an appropriate preface to our consideration of campaign finance. In addition, developments in recent years have made the law of bribery of increasing practical importance to people in and around politics.

Bribery was a common law offense, applicable originally only to official actions of a judicial nature, but extended gradually during the eighteenth and nineteenth centuries to all official actions. See generally *State v. Ellis*, 33 N.J.L. 102 (1868). Today, bribery is generally a statutory offense. It is not only one of the oldest legal concepts developed to protect the integrity of government and politics, but it is one of the most basic.[a] Most people probably would agree with the Supreme Court's characterization of bribery laws as dealing "with only the most blatant and specific attempts of those with money to influence governmental action." *Buckley v. Valeo*, 424 U.S. 1, 28 (1976). The bribe is at the heart of our concept of corruption, whatever other conduct may be included within that concept.

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a. For a comprehensive history of the evolution of the concept of bribery throughout the course of western civilization, see John T. Noonan, Jr., BRIBES (1984). For a cross-section of social scientific research on bribery and corruption, see the anthology, POLITICAL CORRUPTION: A HANDBOOK (Arnold J. Heidenheimer, Michael Johnston & Victor T. LeVine, eds., 1989). Among the worthwhile surveys of corruption in American politics and government are Michael Johnston, POLITICAL CORRUPTION AND PUBLIC POLICY IN AMERICA (1982), and Larry L. Berg, Harlan Hahn & John R. Schmidhauser, CORRUPTION IN THE AMERICAN POLITICAL SYSTEM (1976). For an economic analysis of corruption, see Susan Rose-Ackerman, CORRUPTION: A STUDY IN POLITICAL ECONOMY (1978).

While bribery prosecutions are not rare and the appellate reports contain numerous bribery cases, the bribery laws have received surprisingly little attention, except by participants and courts in specific bribery prosecutions. In this chapter we will be particularly concerned with bribery of policy-making officials, and with the question of what counts as a bribe in situations that may arise commonly in politics. As you read the chapter, think about these questions:

1. What are the elements of the crime of bribery? Which elements seem to depend on the specific language of the statute and which elements, if any, seem to be intrinsic to the crime of bribery?

2. How accurate is the Supreme Court's characterization, quoted above, of the coverage of bribery laws as they are written and as they have been interpreted by the courts? Is bribery limited to the most "blatant and specific" conduct?

3. Are the bribery statutes too vague, either as a matter of constitutional law or as a matter of fairness and effectiveness? Can you think of ways to make them clearer? At what cost, if any?

4. What should be the precise role of the bribery laws, especially in relation to other laws seeking to promote the fairness and integrity of the political system, such as those regulating campaign finances, lobbying practices, and conflicts of interest? Should the bribery laws be used solely against individuals who obviously have violated widely accepted norms, or should prosecutors and judges employ them aggressively as instruments of reform, to eliminate practices that are questionable or worse but may be widespread?

5. In particular, should *federal* prosecutors and judges use federal bribery and related statutes as an instrument for the reform of *state* and *local* political practices? As we shall see, in recent years federal prosecutors have vigorously pursued state and local officials in some states, but the United States Supreme Court has, in some recent decisions, partially curtailed their ability to do so. Should federal prosecutorial oversight of state and local government be expanded? Or should the Supreme Court go even further to limit such prosecutions?

6. Do the bribery statutes prohibit those acts and only those acts that are most plainly corrupt from a common sense standpoint? Should they? Are you sure you have a non-vague sense of what is a plainly corrupt act? Are you confident that you know a corrupt act when you see one?

It is difficult to think of the meaning of corruption without relying on one's conception of how the democratic process ought to function. Indeed, perhaps the best reason for studying the law of bribery is that the subject provides a concrete setting for evaluating and applying democratic norms. To illustrate this, Section I of this chapter deals with unusual and relatively simple cases in which bribery of a candidate is alleged. Competing conceptions of political competition may have a major influence on how one believes such cases should be resolved. In Section II we consider the far more common and far more complex case of bribery of a public official.[b]

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b. Anyone doing research on bribery and related subjects can benefit from consulting Elaine R. Johansen, POLITICAL CORRUPTION: SCOPE AND RESOURCES: AN ANNOTATED BIBLIOGRAPHY (1990)

I. Bribery of Candidates

People v. Hochberg

62 App.Div.2d 239, 404 N.Y.S.2d 161 (1978)

MIKOLL, Justice.

The People charged that the defendant, Assemblyman Alan Hochberg, met with one, Charles Rosen, in January and February, 1976, to secure Rosen's promise not to run against him in the 1976 Primary for the Assembly in exchange for Hochberg's promise to give Rosen a $20,000 a year job in the Legislature, a session job for Rosen's brother-in-law paying approximately $3,000, and a $5,000 political campaign contribution. The defense contended that Hochberg's discussions with Rosen were for the purpose of establishing a working political coalition between Rosen, the political group in Co-op City which evolved during the rent strike and defendant's group in Pelham Park, as well as filling positions on his legislative staff with qualified persons.

The defendant was convicted of violating section 421 (subd. 5) of the Election Law (Penal Law, § 110.00) which prohibits the fraudulent or wrongful doing of any act tending to affect the result of a primary election[c]; section 448 of the Election Law which prohibits any person, while holding public office, from corruptly using or promising to use his official authority to secure public employment upon consideration that the person so to be benefited or any other person will give or use their political influence or action in behalf of any candidate, or upon any other corrupt condition or consideration; and section 77 of the Public Officers Law which makes it a felony for any member of the Legislature to ask, receive, consent or agree to receive "any money, property or thing of value or of personal advantage" for performing any discretionary act which he may exercise by virtue of his office....

The People's evidence established that defendant was the State Assemblyman from the heavily Democratic 81st Assembly District (A.D.) located in the Bronx, New York. He was to be a candidate for re-election in the 1976 elections for the term of office commencing January 1, 1977. The district was divided into two sections, 81st A.D. West, which consisted of an area known as Pelham Parkway where defendant resided and which area he controlled and 81st A.D. East, known as Co-op City, a large housing development community of about 60,000 people, where Charles Rosen, Chairman of Steering Committee III, was the very popular leader of a rent strike supported by 86% of the residents. Co-op City was 99% Democratic in party affiliation and comprised about 40% of the Democratic primary vote in the district. Pelham Parkway supplied about 60% of that vote. Success in the Democratic primary was tantamount to election in the 81st A.D.

[In 1975–76, the Democratic Party in the 81st A.D. was split between regular and reform factions. Defendant Hochberg attempted to form an alliance with a Democratic leader, Larry Dolnick, who also was associated with Rosen as a leader of the rent strike. He informed Dolnick that he, Hochberg, wanted to be

c. Does such a generally worded statute cover the defendant's conduct in this case? See *People v. Lang*, 36 N.Y.2d 366, 368 N.Y.S.2d 492, 329 N.E.2d 176 (1975). -Ed.

reelected to the Assembly in 1976 and then run for Civil Court Judge in 1977. He offered to support Dolnick to fill the Assembly vacancy that would result. When Dolnick said he was not interested in public office, Hochberg offered Dolnick a legislative staff job at a salary of $19–20,000 or a job for less where "he wouldn't have to appear." Finally, Hochberg offered to contribute $750 to the New Democratic Club, of which Dolnick was a leader.]

Defendant told Dolnick that he did not want a primary in 1976 because it would be expensive. On different occasions he inquired of Dolnick whether Charles Rosen intended to run against him. Dolnick said Rosen did not. However, defendant said he wanted to hear it from "the horse's mouth" and wanted Dolnick to set up a meeting. He stated that Rosen would be a viable candidate, that a primary campaign for the Assembly would cost upwards of $25,000 and that he wanted to run for Civil Judge in 1977 and that that was the reason he wanted to be sure Rosen would not run. Dolnick thereafter advised Rosen that the defendant wanted to talk to him and told Rosen of the offers the defendant had made to him.

Charles Rosen testified that he visited the office of the Special Prosecutor for Nursing Homes in December, 1975, to discuss defendant's connection with the Nursing Home Industry. He mentioned what he characterized as defendant's "third party bribe" offer and the Special Prosecutor subsequently suggested that Rosen meet with the defendant to allow him to repeat the "bribe."

On January 27, 1976, Dolnick and Rosen went to the Special Prosecutor's office and arrangements were made to record the meeting defendant requested. The first tape recording played at trial revealed that Dolnick, Rosen and defendant met at Dolnick's apartment on January 30, 1976, where defendant stated he did not want a primary in 1976, that he wanted to run for the bench in 1977 and that he wanted their support for that office. The discussion included references to defendant's job offer to Dolnick and his proposed $750 contribution for the New Democratic Club campaign. At this meeting defendant stated that he was willing to help Rosen achieve his dreams because the $25,000 he would probably have to spend in a tough primary against Rosen would kill his judgeship race. Defendant stated that he would not have the resources for two campaigns. Defendant offered the $20,000 job on his staff to Rosen but said they would have to work it out with Dolnick first because he had offered the same job to him. Defendant also said he would raise $5,000 for Rosen's 1978 Special Election campaign for the Assembly by recommending that other people contribute to Rosen's campaign fund.

On February 5, 1976, Rosen and the defendant met alone at the Larchmont Diner. The tape recording of this meeting disclosed that defendant offered to place Rosen in a $3,000 job on his committee at the current session. It was agreed Rosen could not take it, but that any name would be acceptable to defendant as a "stand-in" for Rosen. That conversation went like this:

> ROSEN: Now, you talked about this job on your committee. I can't take that job.
>
> HOCHBERG: Who can? Is that a thought?
>
> ROSEN: That somebody would be a stand-in.
>
> HOCHBERG: Right. Does it look bad if your wife?
>
> ROSEN: What about my sister-in-law...or my brother-in-law[?]

HOCHBERG: Matter of fact...as I told you, as of Monday, at least for the figure I had quoted you they can...come up and sign on. Immediately....

ROSEN: So who will know.

HOCHBERG: That's right. All right. Thats. That's that.

Defendant further stated in the taped conversation that he could guarantee Rosen $5,000 for his Special Election campaign and that the $3,000 session job was evidence of his good faith in that it would be completely paid before the primary. Rosen testified that in addition defendant said, "I will give you ___" and then proceeded to write on a napkin the figure $5,000, asking him to nod if it was acceptable.

He also said that if the rent strike was not over, Rosen's stand-in could be placed in the $20,000 job. When Rosen asked defendant not to put the stand-in's name on the payroll until Wednesday instead of the Monday, as planned, the defendant made reference to the stand-in losing. Rosen replied, "Schmuck, he's losing nothing, I'm getting the money." Defendant agreed, "But that's it, you're losing, why...?" Rosen explained he had to talk the matter over with his wife.

At a subsequent recorded meeting on February 8, 1976, Rosen advised the defendant that the "stand-in" would be in Albany the following day. Rosen asked him when the arrangement regarding the $5,000 contribution which he had written on the napkin would be consummated. Defendant said that he had an "excellent mechanism to protect both of us." Rosen could set up a bank account in the name of a campaign committee and contributions could be made to that entity by defendant. "No problems, it's perfectly legal." he assured Rosen.

The stand-in for Rosen, his brother-in-law, Chris Johnson, who was equipped with a recording device, arrived in Albany the next day and defendant accompanied him to the necessary offices so that he could be put on the payroll. Defendant told Johnson that he would not have to come to Albany again but he would like Johnson to answer some mail at home.

The defense, through cross-examination of Rosen, and the testimony of defense witness, Philip Luce, sought to establish that Rosen was biased against defendant in that Rosen was a militant communist, out to destroy the government of the United States and in the process to destroy Assemblyman Hochberg as a political force in the community.[d] At the same time, through cross-examination of Dolnick and Rosen, the defense attempted to show that the discussions with Rosen were merely political in nature, made to establish a political coalition in the 81st Assembly District. The defendant also attempted to develop a basis for the defense of entrapment through cross-examination and the establishment of bias on the part of Rosen towards defendant. In addition, the defense offered the testimony of several character witnesses.

Defendant on this appeal first contends that there was a failure to prove beyond a reasonable doubt that the offers made by defendant were contingent on Rosen not running in the primary since they were made as part of a larger political accommodation involving the 81st Assembly District. We disagree. While certainly on this record a question of fact was created for the jury, there was suffi-

d. Aside from the obvious drawbacks of this defense tactic, consider its effect on the more substantial defense described in the following sentence. -ED.

cient evidence for the jury to find that the job offers were made on the condition that Rosen not run in the primary. Defendant said he did not want a primary against Rosen, that it would cost him $25,000 and would "kill his judgeship race," because he would not then have the financial resources for such a race. Defendant's knowledge that the offers were made contingent upon Rosen's not running in the primary appears from his statement in reference to the offer of the $3,000 session job, that: "That's my good faith... it is completely paid... before the petitions are filed." Further, the fact that the $20,000 and the $3,000 staff jobs were offered by defendant without regard to the duties to be performed or the skills required indicated the presence of an ulterior motive. Defendant's reference to their "agreement," their "deal" and "personal *quid pro quo*" during both meetings with Rosen, in connection with their discussions, along with his caution to Rosen to "deny everything" is sufficient to establish that defendant attempted to condition the job offers on Rosen's promise not to run in the primary.

It is also urged by defendant that the People failed to prove that he accepted "or thing of value or of personal advantage." This is without merit. Unlawful fees and payments (Public Officers Law, § 77) are obviously a form of bribery. The benefit accruing to the public official need not be tangible or monetary to constitute a bribe (*People v. Hyde*, 156 App.Div. 618, 141 N.Y.S. 1089; *People ex rel. Dickinson v. Van De Carr*, *infra*). Here, Rosen's agreement not to run in the 1976 Primary was a sufficiently direct benefit to the defendant to be included within the term "thing of personal advantage."

Defendant next claims that there was a failure to prove that he acted with a wrongful intent because the People failed to prove that he knew he was violating sections 421 (subd. 5) and 448 (subd. 1) of the Election Law. We find this contention is without merit. There are sufficient facts in the record from which the jury could find that defendant acted with a corrupt intent (*People v. Lang*, 36 N.Y.2d 366, 370–371, 368 N.Y.S.2d 492, 495–497, 329 N.E.2d 176, 179–180). The trial court charged that a corrupt intent involved "an intentional and knowing disregard of the law." "Intentional" requires a conscious objective to engage in the prohibited conduct while "knowing" requires an awareness that one's conduct is of such nature or that such circumstances exist (Penal Law, § 15.05, subds. 1 and 2). Here, evidence existed that defendant used or promised to use his authority as a legislator to secure staff jobs for Rosen and Johnson with the intent and purpose of obtaining Rosen's promise to refrain from entering the primary in violation of section 448 (subd. 1) of the Election Law. Likewise, evidence existed that defendant deliberately attempted to cause Rosen to refrain from entering the primary in exchange for the said jobs and offers of campaign contributions in violation of section 421 (subd. 5) of the Election Law.

Defendant urges that, at best, the evidence only supports attempted unlawful fees and payments and attempted corrupt use of position or authority, in that, Rosen testified that he never intended to run in the primary. The argument must be rejected since both crimes encompass an attempt. Unlawful fees and payments requires only the mere asking, consenting or agreeing to receive anything of value or personal advantage in exchange for performing a discretionary act. Corrupt use of position or authority includes only corruptly *promising* to use official authority in exchange for a promise not to enter the primary.

Further, defendant argues that because Rosen said he never had the intention to run in the primary, there could be no actual *effect* on the primary, as required

by section 448 (subd. 1) of the Election Law, and that likewise, Rosen's promise not to run in the primary was not a thing of value as required under section 77 of the Public Officers Law. This argument is defeated by the fact that Rosen's state of mind was a present but transient state of mind at the time, subject to change and unbound by the obligations inherent in a promise not to run. Such a promise would take away his unfettered freedom to be a candidate and change the transitory nature of his state of mind to permanency. Thus, the promise not to run affected the primary by removing Rosen as a viable potential primary candidate and, also, consequently, was a thing of value or personal advantage to defendant.

Defendant contends that the statutes under which he was convicted are (1) unconstitutional in that they are overbroad and inhibit First Amendment activities relative to free political discussion; and (2) unconstitutionally vague in prohibiting the use of official position or authority in exchange for the benefit of another's "political influence or action" or "upon any other corrupt condition or consideration." We find the first contention is without merit. The statutes place reasonable restrictions on the use of official position and authority which is corruptive of a free elective process. No one has a constitutional right to corruptly use official position or authority to obtain political gain. Secondly, the statutes here under attack are sufficiently definite to give a reasonable person notice of the nature of the acts prohibited. They are generally aimed at corrupt bargaining to obtain public office and specifically at the use of the public payroll in such bargains. In view of the myriad ways in which the objects sought to be prohibited may be accomplished, laws framed with narrow particularity would afford easy circumvention of their purpose and be ineffectual. Thus, the statutes are neither impermissibly vague nor overbroad. A person of ordinary intelligence would realize that it is illegal to offer Assembly staff positions to another as a payoff not to run against him in an election for public office....

Judgment affirmed.

Notes and Questions

1. Hochberg's first contention is that there was insufficient proof "that the offers made by defendant were contingent on Rosen not running in the primary since they were made as part of a larger political accommodation involving the 81st Assembly District." Is the defendant arguing that Rosen's not running was no part of the "larger accommodation," or that a deal that includes Rosen's agreement not to run is permissible so long as the agreement is part of a "larger political accommodation"? How does the court interpret this contention? Why is the contention unsuccessful? If the second meaning is intended, is the contention persuasive?

2. The court states in response to one of Hochberg's claims that under the evidence the jury could have found "that defendant acted with a corrupt intent." In this passage, the court is referring to the convictions under both Sections 421 and 448 of the Election Law. The latter section states that a violator must act "corruptly," but Section 421(5) contains no such requirement. Was the court mistaken in assuming that the prosecutor had to prove that Hochberg acted "corruptly" in order to violate Section 421(5)?

3. You are consulted by Assemblyman Alex Alvarez, the favored candidate in next year's Democratic primary for an open State Senate seat. Barbara Bell has

been mentioned as a possible opponent who might give Alvarez a strong race. Yesterday Bell had a meeting with Alvarez, during which she offered to run in the primary for the Assembly seat Alvarez will be vacating instead of challenging Alvarez for the Senate, if Alvarez will agree to support Bell in the Assembly primary and help her to raise money. Alvarez anticipates a tough general election contest against the likely Republican candidate and therefore would like to avoid strong opposition in the primary. He has no strong feelings one way or the other about Bell as a candidate for the Assembly. All things considered, he would like to accept Bell's offer if he may do so legally. How would you advise him, in New York? What would your advice be in California, where Elections Code § 18205 provides:

> A person shall not... advance, pay, solicit, or receive... any money or other valuable consideration... in order to induce a person not to become or to withdraw as a candidate for public office....

Aside from whatever legal advice you would give, do you regard Bell's offer as improper? Would your legal or ethical judgment be different if the proposal was first made by the Democratic state chair, who thought that the proposed arrangement would improve the Democrats' chances of winning both the Senate and the Assembly seats?

If one purpose of the New York and California statutes is to encourage and promote electoral competition, which solution to the problem would best promote competition in primary elections? Which solution would best promote competition in general elections? Would a person adhering to Morris Fiorina's view of the party system regard it as more important to promote competition in the primaries or in general elections? See generally Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA LAW REVIEW 784, 791–95 (1985).

4. *A personal postscript.* The article just cited was theoretically oriented and stated that "many of the transactions identified in this Article as definite or likely bribes are engaged in by public officials and those who deal with them on virtually a daily basis, with only the remotest chance of triggering a bribery prosecution." *Id.* at 789. It was therefore a surprise to read in the *Los Angeles Times* only a few months after the article was published that Representative Bobbi Fiedler was being indicted on the basis of alleged facts resembling those of the Alvarez-Bell problem set forth in Note 3.

Fiedler was a California member of the House of Representatives who was planning to run in the 1986 Republican primary for the right to run against then Democratic Senator Alan Cranston. She and her aide, Paul Clarke, were accused of attempting to induce another potential candidate, Ed Davis, to withdraw from the race by offering Davis assistance in raising funds to pay off a considerable deficit that he had incurred. According to the indictment, this offer violated California Elections Code §18205, quoted above.[e] So far as is known, it was the first time anyone had ever been prosecuted under the section, which had originally been enacted in 1893.

About a week after the indictment I was retained to serve on the defense team, in part because my article supported the position that the allegations

e. The section had a different number in 1986, but its language has not been changed.

against Fiedler and Clarke did not violate California law even if they were true. As it turned out, there was so little evidence against Fiedler that the Los Angeles District Attorney agreed to the charge against her being dismissed. Although we believed the evidence against Clarke was equally weak, the District Attorney disagreed and pursued the case against him. We moved to have the case dismissed on a variety of legal grounds, including our contention that an offer of *political* benefits such as assistance in raising funds to pay off a campaign deficit did not constitute "valuable consideration" under Section 18205.

The good news from my perspective was that the Superior Court granted the motion to dismiss, and the District Attorney decided not to appeal. The bad news was that instead of deciding whether the statute covered political benefits in exchange for a withdrawal of candidacy, the court ruled on the very narrow ground that the list of verbs in Section 18205 does not include "offer." Thus, although a candidate who *solicits* a benefit in exchange for withdrawing is covered, a person who *offers* a benefit to a candidate in exchange for a withdrawal is not.

The Fiedler-Clarke case was very widely publicized. Furthermore, the events just described took place shortly before the California deadline for candidates to file for public office. Consequently, I received inquiries from several politicians who asked whether they could engage in variations on the Alvarez-Bell problem. What advice would you have given? Would your advice have been influenced by the pendency of the Fiedler-Clarke case? By the result, once the Fiedler-Clarke case had been dismissed?

Prior to my joining the Fiedler-Clarke defense team, I was interviewed by a large number of reporters, because I was virtually the only person who had done any research on the issue who was not connected to either the prosecution or (at that time) the defense. One of the reporters was from the *New York Times*, and in that interview I pointed out that *Hochberg*, a New York decision, was the closest judicial precedent to the Fiedler-Clarke case. The next morning, among my phone messages was one from Alan Hochberg!

After trying to remember exactly what I had said to the *New York Times* and briefly wondering whether I ought to consult a specialist in the law of defamation, I returned Hochberg's call. Far from being offended, Hochberg expressed considerable interest in the Fiedler-Clarke case and offered his services if there were any way he could assist them. Hochberg told me that as a result of losing his appeal he had served a prison term and had also been disbarred. He found occupation as a taxi driver, but one day, while he was sitting in his parked cab, another vehicle ran into it and disabled him. A judicial decision that to me had previously been an abstract treatment of an interesting intellectual problem suddenly took on a very human face.[f]

5. In *Kaisner v. State*, 772 S.W.2d 528 (Tex.App. 1989), the defendant was an incumbent sheriff running in a Republican primary for reelection. Because his 41% share of the vote was less than a majority, Texas law called for a runoff against the second-place candidate, one Robinson. Defendant was convicted of bribery for offering Robinson the job of Chief Deputy Sheriff if Robinson withdrew from the runoff election. The bribery statute applied to a "public servant,"

f. Just before this book went to press, I spoke with Hochberg again. He reported that in all respects his life has gotten back on track in the past decade and has offered him considerable satisfaction.

which was defined in the Texas Penal Code as including "a candidate for nomination or election to public office." The Texas Court of Appeals affirmed the conviction, stating that the decision to withdraw as a candidate "would have been the exercise of discretion as a public servant." The court went on:

> Appellant's argument is that the offer of a job to a political opponent falls within the traditional notion of political patronage and is therefore outside the statutory prohibition. We disagree. No such exception, justification or defense was authorized by the legislature. While it may have been acceptable or traditional behavior in Texas or other jurisdictions to "buy off" opponents, it is certainly within the province of the legislature to criminalize such acts.

6. In *Grunseth v. Boschwitz*, Hennepin County, Minnesota, District Court, 4th Judicial District, File No. 93-15958 (Feb. 1, 1994), Rudy Boschwitz and Jon Grunseth were Republican candidates, respectively, for senator and governor. Grunseth received some unfavorable publicity, to the point that Boschwitz regarded Grunseth's presence on the ticket as a liability in his own race. Boschwitz encouraged Grunseth to withdraw his candidacy and allegedly offered to pay $100,000 of Grunseth's campaign deficit. Grunseth withdrew but Boschwitz did not pay. Grunseth sued Boschwitz for damages in breach of contract. The court, in an unreported opinion, granted summary judgment for Boschwitz. Contracts are not enforceable if they violate public policy, and the alleged contract in this case was believed by the judge to violate Minn. Stat. Chapter 211B:

> A person may not reward or promise to reward another in any manner to induce the person to be or refrain from or cease being a candidate. A person may not solicit or receive a payment, promise, or reward from another for this purpose.

7. Hochberg was convicted of bribery both in his capacity as a public official *and* in his capacity as a candidate. The remainder of this chapter will concern itself with bribery of public officials. Most such bribery cases involve relatively lower level or even ministerial officials. We shall concentrate on bribery in connection with higher level public policymaking. At higher levels, most decisionmaking is inherently discretionary and officials are subject to various pressures. To the extent that it is unclear what counts as a bribe, does this reflect lack of an underlying consensus on what pressures on officials are desirable, or at least acceptable, in a democratic society?

II. The Elements of Bribery

The wording of bribery statutes in the United States varies considerably, and in some instances the variations are or may be significant. Nevertheless, for the most part the elements of the crime are similar. The federal statute, 18 U.S.C. § 201, is representative. Subsection (a), which contains definitions, is followed by subsections (b)(1) and (2), defining, respectively, bribery and acceptance of a bribe:

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official... or offers or promises any public official ... to give anything to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official... to commit... or allow, any fraud... on the United States; or

(C) to induce such public official... to do or omit to do any act in violation of the lawful duty of such official or person...;

(2)being a public official... directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit... or allow, any fraud... on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official...;

...

shall be fined... or imprisoned... or both....

There are five elements to the crime defined in this and most other American bribery statutes:

1. There must be a *public official.*
2. The defendant must have a *corrupt intent.*
3. A benefit, *anything of value*, must redound to the public official.
4. There must be an *intent to influence* the public official (or to be influenced if the recipient of the bribe is the defendant).
5. That which is intended to be influenced must be an *official act.*

Of these elements, are all present in *Hochberg*? Which, if any, might be doubtful?

Of the five elements only the first, that the bribee must be a public official, is relatively straightforward. It is true that the boundary between the public and private sectors is often unclear, and there can be difficult questions as to whether officials in entities that straddle both sectors are "public officials" within the meaning of a bribery statute. In addition, some state bribery statutes apply to persons who are not public officials, such as party officials or, as in *Hochberg*, candidates for public office. But this element of the crime ordinarily is not in issue. The materials that follow in this chapter will consider the remaining four elements.

First, however, the elements of bribery should be contrasted with those of the lesser offense of giving or receiving an unlawful gratuity. The federal statute, 18 U.S.C. § 201(c), is again representative:

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official... for or because of any official act performed or to be performed by such public official...; or

> (B) being a public official...otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official...;
>
> ...
>
> shall be fined...or imprisoned...or both.

A comparison of the elements of the unlawful gratuity offense with bribery yields the following:

1. The requirement that there be a public official is substantially the same, except that a transaction involving a former official can be an unlawful gratuity but not a bribe. This is because a bribe must look forward to an official act, whereas an unlawful gratuity may look forward or backward.

2. The actions proscribed by the bribery subsection must be done "corruptly." There is no such requirement for an unlawful gratuity.

3. The requirement that a benefit, "anything of value," must redound to the benefit of the official is identical to the bribery requirement, except that under the bribery provision the benefit may be received by the official or any other person, while under the unlawful gratuity provision the benefit must be received by the official "personally."

4. While there must be an intent that the benefit pass to the official "for or because of" the official act, there need be no intent, as in bribery, that the official be influenced by the benefit.

5. The requirement of an official act is seemingly identical for bribes and unlawful gratuities.

If, during an election year, a voter strongly favors a particular bill and mails $25 campaign contributions to each of the three members of the House of Representatives from her state who voted in favor of the bill, is the voter guilty of making an unlawful gratuity?

A. Corrupt Intent

What does the word "corruptly" in 18 U.S.C. § 201(b) mean? Is a gift or benefit to a public official made with the expectation that the gift or benefit will influence the official's conduct in a manner beneficial to the donor always a bribe under the federal statute? Is it the presence of such an expectation that is meant by "corrupt"? If so, is the word "corruptly" surplusage? Courts will read the requirement of a corrupt intent into a bribery statute where it is not stated expressly. E.g., *State v. O'Neill*, 700 P.2d 711 (Wash. 1985). Indeed, at least one court has done so even when the bribery statute has been amended to omit the word "corruptly." *State v. Alfonsi*, 147 N.W.2d 550 (Wisc. 1967). What is the significance, if any, of these holdings?

Could there be a bribe without an expectation that the gift or benefit will influence the public official's conduct? Is such an expectation necessary for a violation of 18 U.S.C. § 201(c)?

Compare with the federal statute these definitions from the California Penal Code:

Section 7(6): The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity.

Section 7(3): The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.

Does the definition of "corruptly" in Section 7(3) help you answer any of the questions above? What does the word "unlawfully" in Section 7(6) mean? What does the word "wrongful" in Section 7(3) mean?

Problem

Linda Lewis, a newly-elected president of the state labor federation, issues a public statement that is reported in the press to the effect that the most important item on labor's legislative agenda is to defeat bill number 100. Accordingly, the federation will support and contribute to those legislators and only those legislators who vote against the bill. Senator Sam Scott, who has been publicly uncommitted on bill number 100 and who is in a difficult struggle for reelection, has decided, after taking into account his need for a contribution from the labor federation as well as many other considerations, including the merits of the bill, that he would like to vote against the bill. He also would like to accept the contribution. How would you advise him?

Senator Susan Smith, who was publicly and firmly opposed to the bill prior to Lewis' statement, also would like to vote against the bill and accept a contribution. How would you advise her?

If both senators vote against the bill and accept a contribution, is Lewis guilty of bribing either or both state senators under the language of the federal bribery statute? Under the California statute? Is she guilty of making one or more unlawful gratuities under the language of the federal statute? Should her conduct be prohibited?

Whether or not they have violated the law, is Lewis acting unethically? Senator Scott? Senator Smith?

B. Anything of Value

The standard bribe, as it usually is thought of, consists of a payment of money to an official for the official's personal use. On the official's part, it is motivated by venality. However, it is clear from the language of the statutes ("anything of value") and numerous judicial decisions that bribery is not limited to the "standard" case. Still within the category of venality, loans to an official, business transactions resulting in a sales commission for the official, and numbers for the official in an illegal lottery are among the diverse personal benefits that have been held to be bribes. Some statutes, including 18 U.S.C. § 201(b), expressly include benefits provided to third persons.

The most interesting questions that arise regarding the benefit to the official under bribery laws involve benefits that are political rather than personal. Of central importance are campaign contributions. Without apparent exception, Ameri-

can courts have held that a campaign contribution is a "thing of value" for purposes of bribery statutes. See Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA LAW REVIEW 784, 808–09 (1985). The difficult question is not *whether* a campaign contribution may be a bribe but *when* it is a bribe. We shall consider that question in the following section.

What about political benefits, other than campaign contributions, that are provided to influence an official act? Could an endorsement of a public official running for election by an individual or an organization be a bribe if it is given with intent to influence or in exchange for some official action? If the individual or organization is very influential in the official's district, might not the endorsement have considerable value? Would you regard such an occurrence as improper? Would it depend on the surrounding circumstances? What if the organization's endorsement were a prerequisite to a campaign contribution by the organization? See Lowenstein, *supra*, at 809–11.

Another type of political benefit can come in the form of official actions performed by other government officials. "Logrolling" is the term commonly used when legislators trade votes. For example, suppose Carol represents a corn-growing district and William represents a wheat-growing district. If Carol is sponsoring a corn bill and William a wheat bill and each agrees reciprocally to vote for the other's bill in committee, have they bribed each other? Which, if any, of the elements of bribery are not present? In the following case, the "logroll" is not between two legislators but between a legislator and an executive branch official.

People ex rel. Dickinson v. Van de Carr

87 App.Div. 386, 84 N.Y.S. 461 (1903)

LAUGHLIN, J.:

[Dickinson, the relator, was an alderman of New York City charged with violating Penal Code § 72, a bribery statute. Rather than plead guilty or innocent, he filed a "traverse," an old-fashioned means of seeking dismissal of the case without trial.] The testimony showed that John McGaw Woodbury, the commissioner of street cleaning of the city of New York, wrote a letter to the relator on the 23d day of September, 1902, saying: "In reply to your letter of September 20th, I would say that the department is so short of horses, particularly in the borough of Brooklyn, that we have been very strict with the drivers during the warm weather to prevent any possibility of overheating or damaging the stock. We are many behind our complement. Should, however, the Honorable Board grant me the moneys for new stock and plant, this would give employment to more drivers, and as the heavy season comes on, having made a note of your favorable recommendation, the case of Covino will be reconsidered;" that on the thirtieth day of the same month the relator wrote and mailed a letter to Commissioner Woodbury in reply saying: "If you will reinstate Antonio Covino, who I think was too severely punished by being dismissed from your department, I will vote and otherwise help you to obtain the money needed for a new plant in Brooklyn;" and at this time there was pending in the board of aldermen a bill to authorize an issue of corporate stock "for new stock or plant for Department of Street Cleaning, Borough of Brooklyn."

...Section 72 of the Penal Code provides as follows:

> Officer accepting bribe—A [public official] who asks, receives, or agrees to receive a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, judgment, action, decision, or other official proceeding, shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable by imprisonment...or fine...or both....

It will be observed that the clause "asks, receives or agrees to receive a bribe, or any money, property, or value of any kind, or any promise or agreement therefor," is disjunctive. It first specifically includes certain officers who ask, receive or agree to receive a *bribe*. In the absence of any statute defining a bribe, we must have recourse to the decisions and text writers to determine what was embraced in that term at common law. Bribery was an indictable offense at common law, and although in the early days it was limited to judicial officers and those engaged in the administration of justice, it was later extended to all public officers. It was variously defined as taking or offering an "*undue reward*" or a "*reward*" to influence official action. Bribery is defined in the American and English Encyclopædia of Law to be "the giving, offering or receiving of anything of value, or any valuable service, intended to influence one in the discharge of a legal duty." The cases of bribery that have been before the courts of this State, so far as brought to our attention, have related to the offering or giving of property or something of intrinsic value. The relator claims that, inasmuch as no money or property was asked or agreed to be received by him to influence his official action, he has not violated this statute. In view of the circumstances disclosed his letter is open to the inference that he desired to obtain a political or other personal advantage from or by securing Covino's reinstatement in the public service, and that he took advantage of the known desire on the part of the street commissioner to obtain this appropriation of public moneys, to improperly influence the action of the street commissioner on the application of Covino for reinstatement, by offering, in case that were done, to vote for and further the desired...appropriation, and impliedly threatening in case of refusal to withhold his support therefrom. The interests of the public service require that public officers shall act honestly and fairly upon propositions laid before them for consideration, and shall neither be influenced by nor receive pecuniary benefit from their official acts or enter into bargains with their fellow-legislators or officers or with others for the giving or withholding of their votes conditioned upon their receiving any valuable favor, political or otherwise, for themselves or others. It was the duty of the relator to act fairly and honestly and according to his judgment upon the proposition of the street commissioner. It does not appear to have been the mandatory duty of the board of aldermen to favor the recommendation of Commissioner Woodbury. In these circumstances it was the duty of relator to favor or oppose the recommendation according to its merits or demerits. If in his judgment it should have been disapproved, he should have opposed it, and he should not bargain to vote for it upon obtaining an agreement from the street commissioner to reinstate Covino. It is quite as demoralizing to the public service and as much against the spirit and intent of the statute for a legislator or other public official to bargain to sell his vote or official action for a political or other favor or reward as for money. Either is a bribe, and they only differ in degree. Nor should he, by holding out this

inducement, have tempted the commissioner to act favorably upon Covino's application for reinstatement. This was undue influence and would be detrimental to the public service. In addition to the word "bribe" in section 72 of the Penal Code other words are employed sufficiently broad to reach this case. It is a violation of the statute for a public officer to ask, receive or agree to receive "property or value of any kind or any promise or agreement therefor" upon any agreement or understanding that his vote or official action shall be influenced thereby. It is clear that the words "value of any kind," as here used, are more comprehensive than "property." The benefit which the relator expected to receive from the reinstatement of his constituent would, we think, be embraced in the meaning of this clause and would also constitute a bribe. We are, therefore, of the opinion that the facts tend to show that the relator has offended against the provisions of section 72 of the Penal Code and that he was properly held to answer upon the charge....

Order affirmed.

Notes and Questions

1. American legislators at all levels see it as one of their primary functions to intercede in behalf of their constituents in dealings with executive agencies of the government. Whether or not they are usually as direct in their negotiations as was the defendant in *Van de Carr*, there is never any doubt that the basis of the legislator's influence with the agencies is the legislature's control over each agency's budget, programs, salaries, governing statutes and the like. Is such intercession by legislators wrong? What harm results? See generally Morris P. Fiorina, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989). Can it be argued that the practice is beneficial? In any event, is such intercession by a legislator a bribe?

2. Can a campaign contribution by one legislator to another be a bribe if given in exchange for or to influence a vote on a bill? What if the donor is a candidate for Speaker or Majority Leader and the contribution is in exchange for or to influence the recipient's vote on the donor's candidacy? What if the "donor" legislator does not actually make a contribution, but agrees to help the recipient raise money? Can it be a bribe for one legislator to vote for a bill favored by a second legislator in exchange for or to influence the second legislator's vote in a contest for a leadership position? Consider *People v. Montgomery*, 61 Cal.App.3d 718, 132 Cal.Rptr. 558 (1976), in which the bribery conviction of a city council member was upheld. The offense consisted of agreeing to give favorable consideration to another council member's favored projects in return for the other member's vote for the defendant for mayor, an office that was filled by vote of the city council. Defendant did not raise on appeal the question whether such an agreement could constitute a bribe. If he had, how should the court have ruled? Is *Van de Carr* relevant?

3. Consider again the problem of Carol and William, set forth above immediately before *Van de Carr*. Does *Van de Carr* suggest that "logrolling" in its most traditional form constitutes bribery? If so, would a current-day court be likely to reach the same conclusion?

Some states have constitutional or statutory provisions making logrolling unlawful. See, e.g., California Penal Code § 86: "Every member of either of the

houses composing the Legislature of this state who...gives...any official vote in consideration that another Member of the Legislature shall give any such vote either upon the same or another question, is punishable by imprisonment...."

Such prohibitions are old and, to say the least, rarely enforced.

4. Elizabeth, a well-known businesswoman who would be a strong challenger for a city council seat, tells Frank, the incumbent council member, that she will agree not to run against him if he helps her obtain a zoning variance for a commercial development that she wants to build. Has Elizabeth offered Frank a bribe? Is this problem identical to *Hochberg* and *Kaisner*? See Lowenstein, *supra*, 32 UCLA LAW REVIEW at 812–13.

C. Intent to Influence

Bribery often is assumed to require a *quid pro quo*, an agreement that in exchange for such and such a benefit, the official will perform such and such an official act in the desired manner. It is often easy to accomplish a corrupt purpose while avoiding an express agreement and it is usually difficult to prove the existence of such an agreement even if it has occurred. As a result, bribery has a reputation as a crime of narrow scope.

However, the supposed *quid pro quo* requirement is equivocal. On its face, the typical bribery statute does not require an agreement. There are some statutes that require the benefit to be given as "consideration" for the desired official act. *E.g.*, Texas Penal Code Ann. 36.02. This language could support an interpretation that an agreement is required. Most of the statutes, however, including the federal bribery statute, require only that the benefit be given (or received) with an intent to influence (or to be influenced regarding) the official action.

In this section we shall consider the "intent to influence" element of bribery, with particular focus on cases in which the "thing of value" is a campaign contribution. Many contributions are made in the hope that they will "influence" the recipient to act favorably to the donor. Specific "exchanges" of contributions for particular official actions (such as favorable votes on legislation) are less common. We saw in the preceding section that courts generally hold that campaign contributions *may* be bribes. In this section we shall consider *when* they are bribes.

State v. Agan
384 S.E.2d 863 (Georgia 1989)

HUNT, Justice.

We granted certiorari to the Court of Appeals in *Agan v. State*, 191 Ga.App. 92, 380 S.E.2d 757 (1989) to review that opinion, with emphasis upon "[t]he correct interpretation of the offering of a bribe, as prohibited by OCGA § 16-10-2(a)(1), and the acceptance of a 'campaign contribution,' as defined in OCGA §21-5-3(6)."

The facts, more fully set forth in the Court of Appeals' opinion, are summarized as follows. Agan, the Honorary Turkish Consul in Atlanta, sought a building height variance for the construction of a hotel on his property. Agan and Sarper, an Emory University professor, had discussed with officials of the Emory Medical Clinic a plan to bring Turkish patients to the Clinic who would stay at

the hotel. The Dekalb County Commission had twice rejected Agan's application for a variance. Agan submitted a third application, and spoke with two Dekalb County commissioners, Lanier and Fletcher, inquiring what Agan could do to insure the approval of his application. Agan told Fletcher he had a number of friends in the local Turkish-American Association who wished to contribute to Fletcher's campaign. At a meeting between Agan and Fletcher, Agan urged Fletcher to support the variance application, then left Fletcher with four checks totaling $3,700.00, made to Fletcher personally, and marked "for campaign contribution," despite Fletcher's protests that he did not even have a campaign bank account. The checks were drawn on the accounts of Sarper and three others who testified they were reimbursed for the checks by Agan and believed Agan wanted contributions to come from different people in order to give the impression he enjoyed broad support in the Turkish community. After another meeting between Agan and Fletcher in which Agan reiterated his need for the variance, Agan presented Fletcher with a fifth check for $800.00 marked as a campaign contribution, from a third party. Agan, accompanied by Sarper, also met with Lanier to discuss the variance. As they left Lanier's office, Sarper gave Agan an envelope at Agan's request and, back in Lanier's office, without Sarper, Agan presented Lanier with the envelope containing Sarper's check to Lanier for $3,000.00 marked "campaign contribution," despite Lanier's statement to him that he was not up for re-election for three years....

Sufficiency of the Evidence

1(a). The Court of Appeals correctly determined... that a rational trier of fact could have found the essential elements of the crime of bribery to have been established beyond a reasonable doubt in regard to Agan. There was ample evidence at trial that Agan gave payments to Lanier and Fletcher for the specific purpose of influencing their votes on his application for a building height variance, thus committing the crime of bribery. See Division 2(a) below....

The Charge

2(a). The state contends the Court of Appeals erred in holding the trial court's charge constituted reversible error. The trial court charged the jury on the definition of the offense of bribery as set forth in OCGA § 16-10- 2(a)(1), which provides that:

> [a] person commits the offense of bribery when... [h]e gives or offers to give to any person acting for or on behalf of the state or any political subdivision thereof... any benefit, reward, or consideration to which he is not entitled with the purpose of influencing him in the performance of any act related to the functions of his office.

The trial judge then stated to the jury that "the word 'entitled' does not have any specific or extraordinary or particular legal terminology or definition. I will charge you the word 'entitle' means to give a deed or title to." Regarding the Ethics in Government Act, OCGA § 21-5-1 et seq., the court charged:

> A campaign contribution means a gift, an advance or deposit of money or anything of value, conveyed or transferred for the purposes of influencing the nomination for election or election of any person for office.... [A]

> campaign contribution, as I have just defined for you, can be made directly to the candidate... [U]nder Georgia Law campaign contributions can be made for use in future campaigns for elective office...: [I]t is not the use to which the money may be put, but it is the purpose for which the money was paid that controls.

2(b). The Court of Appeals found the trial court's charge faulty for failing to read the bribery statute, OCGA § 16-10-2, in conjunction with the Ethics in Government Act, OCGA § 21-5-1 et seq., which defines political contributions and sets forth the manner in which they may be received and reported. In particular, the Court of Appeals held the language of the bribery statute prohibiting the giving or offering to a public officer of a benefit to which that officer "is not entitled," is to be read very narrowly to proscribe the giving or offering to a public official of a benefit to which that officer "*is not qualified or privileged to receive or has no grounds or right to seek, request, or receive.*" [Emphasis supplied]. The Court of Appeals further held

> a campaign contribution, whether made to a candidate in the heat of a campaign or to encourage or influence the official after he is elected, is something which a candidate or elected official is qualified or privileged to request or receive and thus something to which he is "entitled" within the meaning of OCGA § 16-10-2.

We interpret this holding as meaning, in effect, that if money given to an office holder qualifies as a campaign contribution, requiring reporting under the Ethics in Government Act, OCGA § 21-5-1 et seq., then it cannot be a bribe. With this conclusion we respectfully disagree.

The Ethics in Government Act has in no manner altered the bribery statute. The Act simply defines a campaign contribution and, having defined, requires disclosure. Specifically, nothing in the Act permits a public officeholder to request or receive anything of value "to which he is not entitled with the purpose of influencing him in the performance of any act related to the functions of his office or employment...." (OCGA § 16-10-2(a)). Nor is the term "entitled," as contained in the bribery statute, modified in any way by the Ethics in Government Act. Other than those emoluments of public office that are expressly authorized and established by law, no holder of public office is entitled to request or receive—from any source, directly or indirectly—anything of value in exchange for the performance of any act related to the functions of that office.[2]

As noted above, the Court of Appeals found the trial court's definition of the term "entitled" misleading because it failed to inform the jury that a public official is entitled to receive campaign contributions. Although we reverse this holding, we note the trial court's charge on the meaning of "entitled," see Division 2(a) above, was somewhat inapt. However, because the more appropriate meaning of "entitled" is more restrictive than the definition given by the trial court, we view any error as helpful to the accused, and harmless.

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2. Our holding means that a transfer that is a bribe as defined by OCGA § 16-10-2 also may come within the definition of "contribution" as contained in the third sentence of OCGA § 21-5-3(6). The fact that such a transfer must be reported does not change its character as a bribe.

Constitutionality of the Bribery Statute

Vagueness Challenge

3. We find no merit to Agan's contention that OCGA § 16-10-2(a) is unconstitutionally vague, hence void....

First Amendment Challenge

4. Agan contends the bribery statute must be interpreted as condemning only a payment to a public officer who agrees to a clearly delineated *quid quo pro*, i.e., an explicit purchase of an explicit official act. Were that not so, he insists, the bribery statute would be an impermissible restraint upon free speech under the First Amendment to the Constitution of the United States. He relies principally upon *Buckley v. Valeo*, 424 U.S. 1 (1976).

In *Buckley*, the Supreme Court examined the application of the First Amendment to limitations upon campaign expenditures by a candidate for public office, and limitations upon amounts that might be contributed to a campaign, finding a violation of the right of free speech for the former, and none for the latter. The holdings in *Buckley* do not apply to the bribery statute, which places no limitation upon amounts of contributions or expenditures, but, rather, restricts the purposes for which any "benefit, reward or consideration" may be offered or given to, or solicited or accepted by, a public officer. Even assuming the First Amendment might relate to the purposes of political transfers, it cannot be understood to shield the bribing of a public officer.[3]

Citizens of Georgia have every right to try to influence their public officers—through petition and protest, promises of political support and threats of political reprisal. They do not have, nor have they ever had, the "right" to buy the official act of a public officer. OCGA § 16-10-2(a). Public officers are not prohibited from receiving legitimate financial aid in support of nomination or election to public office. They do not have, nor have they ever had, the "right" to sell the powers of their offices.[4] OCGA § 16-10-2(b). The bribery statute does not serve to weaken free speech. It serves to strengthen free government....

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3. "Where the letter of the statute results in absurdity or injustice or would lead to contradictions, the meaning of general language may be restrained by the spirit or reason of the statute." *Sirmans v. Sirmans*, 149 S.E.2d 101 (Ga. 1966). That logic should apply alike to all legal authorities, including the Constitution.

We decline to follow the "rule," as urged by Agan, of *People v. Brandstetter*, 430 N.E.2d 731 (Ill.App. 1982), that: "[P]ublic officials are 'authorized by law' to receive campaign contributions from those who might seek to influence the candidate's performance as long as no promise for or performance of a specific official act is given in exchange." In that case, a political activist was convicted of bribery for handing to a state legislator a note that read: "Mr.——, the offer for help in your election & $1000 for your campaign for Pro ERA vote."

While Brandstetter's conviction was affirmed on appeal, we are concerned that its "rule" would proliferate corrupt practices. As example, note this story in *The Atlanta Journal and Constitution* of July 8, 1989: "A millionaire who handed out $10,000 checks on the [Texas] Senate floor while legislation that interested him was pending said the checks were political contributions, not an attempt to bribe lawmakers. 'It would be difficult to make it into a bribery case,' said [the district attorney], who believes it's time to change Texas's loose campaign finance laws. 'In Texas, it's almost impossible to bribe a public official as long as you report it....'"

4. The acceptance of a bribe is an egregious conflict of interest, and will vitiate official acts that otherwise appear to be lawful. [The footnote goes on to refer to several Georgia decisions

Notes and Questions

1. In a portion of the *Agan* opinion that is not reprinted here, the court ruled that Agan was entitled to a hearing to determine whether he had been a victim of selective prosecution. To succeed, Agan would have to show that others similarly situated had not been prosecuted and that he had been singled out for an improper reason, such as his Turkish ethnicity. At the hearing that ensued, the trial court ruled against Agan. This ruling was affirmed in *Agan v. State*, 417 S.E.2d 156 (Ga.App. 1992), affirmed 426 S.E.2d 552 (Ga.), cert denied 114 S.Ct. 74 (1993). The Georgia Court of Appeals decision on this appeal included the following:

> [A]ppellant has not shown that others in a similar situation were not prosecuted. While appellant did show that other developers made contributions while they had zoning matters pending, he failed to show that the contributions of those developers were accompanied by the following factors attendant to the contributions made by appellant: the contributions were made at a time when the commissioners did not have an active campaign structure; appellant propounded his zoning request at the same meeting that he gave the contributions, in envelopes, directly to the commissioners; at the same meetings, appellant promised future contributions; the checks were make out to the commissioners personally rather than to their campaigns; appellant was very persistent in talking to the commissioners and giving them contributions; a videotape of the contact with the commissioners was made and was available as evidence; the votes of either of the two commissioners involved were necessary for appellant's zoning to be passed; and the two commissioners approached the district attorney with the evidence of the bribe. When all these factors coalesce, appellant's situation becomes of a different category than the situations attempted to be shown at the hearing. We find no evidence that anyone else crossed the line of illegality as did appellant. While the district attorney indicated that other situations may appear improper, appellant failed to show that the district attorney knew or should have known of other situations in which the line of illegality was crossed.

Suppose any or all of the factors mentioned in this passage had not been present in Agan's case, but that Agan was convicted on the same jury instructions that occurred in the actual case. Would the Georgia Supreme Court have reversed the conviction?

2. It is commonly said that one of the elements of bribery is "consideration," or what is often referred to as a *quid pro quo*.[g] Did the trial judge's instructions that were upheld in *Agan* require a *quid pro quo*? Does 18 U.S.C. § 201(b)? Should a *quid pro quo* be required? If not, what more than a gift to the official and an official act favorable to the donor should be required for a bribe? Following are excerpts from three *federal* decisions of the 1970s and early 1980s interpreting *state* bribery statutes. Do they provide answers to these questions?

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in which zoning and other decisions were set aside at the behest of private citizens because they were infected by corruption or conflict of interest.]

g. This is a Latin phrase whose literal translation is "something for something." See David Mellinkoff, MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 116 (1992.)

In *United States v. Isaacs*, 493 F.2d 1124, 1145 (7th Cir.), cert. denied, *sub nom., Kerner v. United States*, 417 U.S. 976 (1974), the court said (construing the Illinois bribery statute):

> [B]ribery occurs when property is accepted by a public official with knowledge that it is offered with intent to influence the performance of any act related to his public position. No particular act need be contemplated by the offeror or offeree. There is bribery if the offer is made with intent that the offeree act favorably to the offeror when necessary.

Suppose it is shown that an interest group makes sizeable campaign contributions to all the members of a legislative committee that hears bills affecting the group. Contributions are made to members of the committee without regard to party or ideology. This would not be an unusual occurrence. See, e.g., Fred Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZONA LAW REVIEW 603, 607–11 (1980). Under *Isaacs*, does such a showing constitute a prima facie case of bribery?

In *United States v. Arthur*, 544 F.2d 730 (4th Cir. 1976), defendant was an officer of a national bank in West Virginia, charged with misapplying bank funds in violation of federal law. In particular, he was charged with using bank funds for bribery, "to entertain, do favors and buy gifts for state and local officials who might be influential in securing government deposits for the bank." The Court of Appeals found improper a jury instruction that

> The payment of money to government officials for the purpose of obtaining deposits of government funds in the bank and to influence the judgment of such officials in connection with such deposits is, in itself, illegal in that such activity constitutes the bribery or attempted bribery of public officials.

The appellate court wrote:

> It is universally recognized that bribery occurs only if the gift is coupled with a particular criminal intent.... That intent is not supplied merely by the fact that the gift was motivated by some generalized hope or expectation of ultimate benefit on the part of the donor, *see United States v. Brewster*, *infra*.... "Bribery" imports the notion of some more or less specific *quid pro quo* for which the gift or contribution is offered or accepted....
>
> This requirement of criminal intent would, of course, be satisfied if the jury were to find a "course of conduct of favors and gifts flowing" to a public official *in exchange for* a pattern of official actions favorable to the donor even though no particular gift or favor is directly connected to any particular official act.... Moreover, as the Seventh Circuit has held, it is sufficient that the gift is made on the condition "that the offeree act favorably to the offeror when necessary." *United States v. Isaacs*.[h] ... It does not follow, however, that the traditional business practice of promoting a favorable business climate by entertaining and doing favors for potential customers becomes bribery merely because the potential cus-

h. Is this an accurate paraphrase of *Isaacs*? -ED.

> tomer is the government. Such expenditures, although inspired by the hope of greater government business, are not intended as a *quid pro quo* for that business: they are in no way conditioned upon the performance of an official act or pattern of acts or upon the recipient's express or implied agreement to act favorably to the donor when necessary.

The *Arthur* court also pointed to the West Virginia bribery statute, which referred to "[a]ny pecuniary benefit *as consideration for* the recipient's official action as a public servant or party official...." West Virginia Code Ann. § 61-5A-3 (Supp. 1975) (emphasis added). The use of the word "consideration" helped indicate that the statute "was not intended to depart from the general rule as to the requisite criminal intent discussed above." Because the jury instruction did not set forth with sufficient clarity the "crucial distinction between 'goodwill' expenditures" and bribes, which require criminal intent based on a *quid pro quo*, the case was remanded.

In *United States v. L'Hoste*, 609 F.2d 796 (5th Cir), cert. denied 449 U.S. 833 (1980), defendants were convicted of federal conspiracy and racketeering offenses based on charges that they obtained numerous no-bid, cost-plus sewer contracts in violation of the Louisiana bribery statute. There was evidence that the defendants' company received the preponderance of such contracts during the period in question and that inadequate supervision of performance under the contracts had permitted various types of fraud. There was also evidence that during this period the defendants gave various gifts to the public officials responsible for the contracts, including construction and landscaping work at their residences, trips to places such as Mexico, Las Vegas, and Hawaii, and campaign contributions. The conviction was affirmed on appeal. In upholding the trial court' refusal to give a jury instruction requested by the defendants, the appellate court wrote:

> In the instructions formally requested by the defendants, the final sentence states: "If you find that the gifts were made, but that the gifts were motivated by no more than customary business reasons... then you should find that bribery did not take place."... The jury would have been bound to treat as innocent any gifts made for customary business reasons. This, in our view, would be a rank misapplication of the Louisiana bribery law. Customary business practice could embrace all sorts of extravagant favors intended to influence important business decisions. The type of favor, the manner in which it is given, and its timing are things a businessman no doubt considers in courting his client; he has an economic incentive to employ his resources in a manner that will produce the greatest return. It is obvious that the same incentive motivates the businessman in their commercial dealings with governmental bodies; by the size and timing of their favors, however, they may transgress the bribery laws. In our view, the instruction proposed by the defense would have foreclosed such a finding of such transgression.
>
> ...As we have observed, certain practices designed to promote business in the private sector may very well be intended as a *quid pro quo* for that business. Yet, in the public sector, the same practices may run counter to a bribery statute. Even if appellants' theory is correct—that some *quid pro quo* must be found to satisfy the requisite criminal intent for bribery—the [rejected instruction] misstated the law.... In summary,

> defendants wanted the jury to be bound to find that any favor falling within the amorphous categories of "customary" or "traditional" business practice was not bribery, when it easily could have been.

The *L'Hoste* court distinguished *Arthur*, in part, on the ground that the Louisiana bribery statute requires only "intent to influence" official action, whereas the West Virginia statute required consideration.

3. The cases discussed in Note 2 involved enforcement of federal statutes that incorporated *state* bribery laws. Some of the more significant interpretations of the *federal* bribery laws during the 1970s arose out of some transactions between Senator Daniel Brewster of Maryland and lobbyist Cyrus Anderson. Brewster was a member of the Senate Post Office and Civil Service Committee, and Anderson's client, mail-order catalogue merchant Spiegel, Inc., had a strong interest in keeping postal rates as low as possible. Anderson made several payments to Brewster during a period when potential postal rate increases were either pending or foreseeable. In 1967, when these payments were made, campaign reporting and accounting requirements were minimal. The payments could reasonably have been characterized as either campaign contributions or personal payments to Brewster. Brewster and Anderson were accused of both bribes and unlawful gratuities.

Preliminarily, Brewster objected that for a member of Congress to be charged with bribery or an unlawful gratuity in connection with legislative business would violate the Speech or Debate Clause in Art. I, § 6 of the Constitution, which reads in part:

> The Senators and Representatives... shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

In *United States v. Brewster*, 408 U.S. 501 (1972), the Supreme Court ruled that the Speech or Debate Clause does not preclude charging members of Congress with bribery, but that the prosecution's case may not depend on either legislative acts or on the motivation for legislative acts. The Court's theory was that the offense of bribery is completed when the benefit is sought or accepted with the proscribed intent, regardless of the actual official behavior that ensues. Although, as you might imagine, the Court's ruling in *Brewster* poses challenging practical problems for prosecutors and judges in bribery cases in which members of Congress are charged, the Court reaffirmed its position in *United States v. Helstoski*, 442 U.S. 477 (1979). However, the Court has not extended the privilege to officials other than members of Congress. In *United States v. Gillock*, 445 U.S. 360 (1980), it declined to protect state legislators who are defendants in federal prosecutions from having their legislative acts introduced as evidence against them.

After the Supreme Court had ruled that Brewster could be prosecuted, he and Anderson stood trial. Anderson was convicted of bribery.[i] Brewster was convicted of accepting unlawful gratuities but was acquitted of the bribery charges. Brew-

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i. For Anderson's appeal, see *United States v. Anderson*, 509 F.2d 312 (D.C.Cir. 1974), cert. denied 420 U.S. 991 (1975).

ster appealed on the grounds, among others, that the unlawful gratuity statute is unconstitutionally vague and overbroad, and that the trial judge's instructions to the jury were inadequate to distinguish conduct falling within three categories: 1) guilt of bribery, 2) guilt of unlawful gratuity, and 3) innocence. In a long and difficult opinion, the Court of Appeals upheld the constitutionality of the unlawful gratuity statute but reversed Brewster's conviction because of the jury instructions. UNITED STATES v. BREWSTER, 506 F.2d 62 (D.C.Cir. 1974). We shall consider here excerpts from the opinion bearing on the meaning of the bribery and unlawful gratuity offenses. In the context of deciding that the crime of unlawful gratuity is a "lesser included offense" within the crime of bribery, the court wrote:

"To accept a thing of value '*in return for*: (1) *being influenced* in [the] performance of any official act' (section (c)(1), emphasis supplied)[j] appears to us to imply a higher degree of criminal intent than to accept the same thing of value 'for or because of any official act performed or to be performed' (section (g)). Perhaps the difference in meaning is slight, but Congress chose different language in which to express comparable ideas. The bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act."

Addressing Brewster's constitutional arguments, the court wrote:

"We cannot agree with defendant's contention that 'as applied to the fund-raising activities of an elected political office-holder, the terms of 201(g) are hopelessly and unconstitutionally vague,...' It is here in his argument that the defendant seeks to profit by confusing (1) the absence in the gratuity section of the bribery section's requirement of an intent 'corruptly' to accept the funds, with (2) the absence of any criminal intent at all in the gratuity section. To the contrary, the gratuity section does require a criminal intent, expressed by the language 'otherwise than as provided by law for the proper discharge of official duty...for or because of any official act performed or to be performed by him.'

"Not only must the criminal intent defined by section (g) be proved, but also the prosecution must prove that the legislator accepted the thing of value 'for himself.' Thus, if a legislator knew that a contribution was being given for an official act, received the contribution and knowingly applied it to his own uses, the intent requirement of the illegal gratuity section (g) would be met.

"...Hence, section 201(g) is not impermissibly vague even under the standards applied to statutes governing the conduct of average citizens....

"The defendant further argues that section 201(g) is unconstitutionally overbroad because it reaches legitimate campaign contributions, which arguably can be characterized as the sort of political, associational activity protected by the First Amendment. To the contrary, however, a public official's acceptance of a thing of value unrelated to the performance of any official act and all bona fide

j. Although the content of 18 U.S.C. § 201 was substantially the same when *Brewster* was decided as it is now, the numbering was different. The definition of bribery, currently in Section 201(b), was then divided between Section 201(b) for making a bribe and Section 201(c) for receiving one. The definition of unlawful gratuities, currently in Section 201(c), was divided between Section 201(f) for the donor and Section 201(g) for the recipient.

contributions directed to a lawfully conducted campaign committee or other person or entity are not prohibited by 201(g). What is outlawed is only the knowing and purposeful receipt by a public official of a payment, made in consideration of an official act, for himself....

"...By crediting the prosecution's version of events, the jury could have found, first, that Senator Brewster received sums of money from Anderson, not out of general support based on his past record or insubstantial hopes for the future, but in well-founded consideration for his forthcoming official action on specific proposed or pending postal rate legislation. Second, the record evidence sustains the inference that Brewster had 'knowledge that the donor was paying him compensation for an official act.' Third, the jury could have found that Brewster personally received the money and applied it for his personal use. The Government's evidence thus indicates that the defendant engaged in conduct which falls squarely within the prohibitions of section 201(g)...."

Addressing the trial court's instructions, which attempted to differentiate the two offenses from each other and innocent conduct, the *Brewster* opinion included the following:

"Although we have held the bribery and illegal gratuity statute not to be unconstitutionally vague or overbroad as applied to elected federal officeholders, we do not cite it as a model of clarity and nicely drawn distinctions. We do find that the prohibited acts are sufficiently well defined for the guidance of any public official such as Brewster or person such as defendant Anderson in relation to a public official. And further, we believe that it is possible to draw an intelligible charge to the jury defining the difference between prohibited offenses and legal conduct in the making of political contributions....

"We do not fault the District Judge here for his failure to illuminate the obscure; it may not be easy under this statute to make the tripartite distinction, although we think it is clearly possible to draw instructions making sufficiently clear the line between guilt and innocence under each subsection of section 201 taken separately. Here the real problem for the trial judge came when he had to explain the differences between receipt of a bribe, an illegal gratuity, or an innocent contribution. The difficulty in this respect will not occur on remand; since defendant Brewster has been acquitted of all charges under the bribery section, he can be retried only on the charges under the illegal gratuity section (g)....

"In distinguishing between the two offenses, the District Judge told the jury that in order to find the defendant Brewster guilty under the bribery section on any count, they must find that the defendant Brewster *corruptly* accepted or received, etc., the amounts of money set forth in each count. The judge went on to instruct that they must find that the money was received by the defendant *or* by a committee on his behalf 'with his knowledge of, in return for his *being influenced* in the future *in his performance* of official acts.' The judge then defined 'corruptly' as 'to do an act corruptly means to do it voluntarily and with a bad or evil purpose to accomplish an unlawful result.'

"Then going to the lesser included offense under the gratuity section (g), the judge first carefully pointed out that under this section it was *not* necessary for the prosecution to prove 'that the defendant did so *with the corrupt intent to be influenced in the performance* of his duty as a public official.' The judge then went on to specify what the Government must prove beyond a reasonable doubt, *i.e.*, 'that such sums of money were received by defendant Brewster *for or because*

of official acts to be performed in the future by him....' The language used earlier, 'with knowledge of, and in return for,' to describe the greater offense was not used here in description of the proof necessary to convict of the lesser offense. Yet, what is the *difference to the auditor* of 'received... with his knowledge of, in return for his being influenced in the future in his performance of official acts' from 'receiv[ed]... for or because of official acts to be performed in the future by him'? There is a semantic difference, of course, but can the words reasonably be expected to add up to something different in the mind of the jury?

"While the trial judge correctly stated... that the sums must be found to have been received respectively either 'by the defendant Brewster or by a committee on his behalf' [for a bribe] or 'by the defendant Brewster' [for an unlawful gratuity], yet at no place did the judge emphasize to the jury that, to convict under the lesser included offense gratuity section, it was necessary for the jury to find that Brewster had received the sums 'for himself,' not for any committee.

"Nor did the judge instruct the jury that under the evidence they might find that payments to the Committee were the same as payments to Brewster himself. While it was necessary under the gratuity section (g) that the jury find that Brewster received the funds 'for himself,' yet such a finding could have rested on another finding that the Committee was merely a conduit for Brewster. But if the Committee was not an alter ego for Brewster, any payments it received were not funds received by Brewster 'for himself' and could not support a conviction under section 201(g).

"Thus, the jury was given no guidance to consider, first, the essential difference between the two sections of the statute as to for whom the funds must have been received in order to constitute the offense; and, second, whether receipt of funds for the Committee was equivalent to receipt of funds for Brewster.

"In defining the proof necessary to convict under the lesser included offense, the judge further instructed that there must be proof that the act of the defendant in receiving the money 'was done for or because of acts to be performed by him in his official capacity, and was done *willfully and knowingly* rather than by mistake or accident.' In the context of the whole instruction, what does 'willfully and knowingly' mean? What difference, perceptible to the jury, is there from the instruction under the greater offense that the defendant or committee had to receive the money with 'his knowledge of, in return for being influenced'?

"More importantly, since 'willfully and knowingly' could mean that defendant Brewster *knew* when he accepted the money that he was receiving the contribution because of his record of performance in this field of postal legislation, and that if he continued such legislative actions in the future (particularly the near future) he would likely receive further contributions, how does this instruction distinguish the contribution found to be illegal here from a perfectly legitimate contribution? No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence.

"The likelihood of misunderstanding because of the failure at this point to distinguish between criminal and innocent acceptance of funds was enhanced by the very next sentence of the instruction on the lesser included gratuity offense: 'There need *not* be proof, however, that there was *any corrupt intent* on the part

of defendant Brewster to be influenced in the performance of an official act.' Did this instruction rule out any criminal intent whatever under the lesser included gratuity offense? However ill-defined it may be in the exact words of the statute, there is and must be a general criminal intent on the part of the defendant to support a conviction under the gratuity section (g).

"Conscious of his duty to make clear the difference between guilt under either section of the statute and normal innocent acts, the District Judge further told the jury that 'campaign contributions given to legislators with whose general positions... a contributor agrees and in the hope only that the position will continue, is entirely proper and legal. Therefore, in order to find a violation of 201(g) you must find that defendant Brewster received the monies in question *knowing* that it was given and was *accepted for or because of an official act* he is going to undertake in the future with respect to a particular legislative matter.'

"This does help differentiate in the jury's mind between criminal and innocent acceptances of funds..., but only at the cost of muddying whatever clarity had been achieved earlier in distinguishing between the two criminal offenses. What is the difference between the intent defined by 'knowing' plus the other language of the instruction here under section (g), and the intent required by 'corruptly,' as 'corruptly' was defined by the trial judge under section (c) earlier? And what is the difference between 'accepted for or because of an official act... with respect to a particular legislative matter' here under section (g), and 'in return for his being influenced in the future in his performance of official acts,' as the judge had charged was necessary to convict under section (c)?

"Perhaps by focusing on this paragraph of the instructions alone, and by ignoring the foregoing, the jury would have been able to tell the difference between an innocent contribution and guilt on some charge, but which charge? And, of course, we cannot think that the jury paid attention only to this part of the instruction; they were obligated to digest the whole of it.

"We think the whole of it was indigestible, and we do not purport to prescribe for this case or in the abstract for all cases a complete recipe or formula to enable the jury to make an intelligent determination of guilt when both offenses are charged. From our lengthy previous discussion of the graphic distinctions between the two statutes we trust a trial judge can distill the elements on which the jury should be instructed to focus. We have laid emphasis under the bribery section on 'corruptly... in return for being influenced' as defining the requisite intent, incorporating a concept of the bribe being the prime mover or producer of the official act. In contrast under the gratuity section, 'otherwise than as provided by law... for or because of any official act' carries the concept of the official act being done anyway, but the payment only being made because of a specifically identified act, and with a certain guilty knowledge best defined by the Supreme Court itself, *i.e.*, 'with knowledge that the donor was paying him compensation for an official act... [E]vidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient....'

"A note of caution to the prosecution: in future cases before the prosecution asks for charges to the jury under both the bribery section (c) and the gratuity section (g), it should be satisfied that the charge proposed is designed to avoid the pitfalls we have found here. The prosecution might elect the safer course of only going to the jury under either the bribery section (c) or the gratuity section (g), but not under both.

"The danger inherent in the situation calling for the trial judge to distinguish sharply among guilt under the bribery section, guilt under the gratuity section, and innocence under either or both, is that the jury is subconsciously tempted to compromise. If the line between the greater and lesser offense is muddy, if the distinction between knowingly accepting an illegal gratuity and cheerfully acknowledging a legitimate campaign donation is dim, then why should not the jury take the 'middle ground,' *i.e.*, find the defendant guilty of the offense carrying the lesser penalty? This may have happened here. A defendant is entitled to more than a possible jury room compromise, he is entitled to have his guilt or innocence voted up or down on the clearest possible lines of distinction."

Under *Brewster*, can a campaign contribution be an unlawful gratuity to a member of Congress? If so, does it matter whether the contribution is made directly to the individual candidate for reelection or, as is virtually always the case, to a campaign committee established for his or her reelection?

Under *Brewster*, is a campaign contribution to a member of Congress a bribe if it is made in the hope and the belief that it will make the member more likely to vote on a particular matter in favor of the contributor? If it is made in the hope and belief that it will make the member more likely to favor the contributor when the opportunity arises?

Brewster has been criticized by Joseph R. Weeks, *Bribes, Gratuities and the Congress: The Institutionalized Corruption of the Political Process, the Impotence of Criminal Law to Reach It, and a Proposal for Change*, 13 JOURNAL OF LEGISLATION 123, 130–31 (1986):

> The *Brewster* "perfectly legitimate, honest campaign contribution" exception to [the unlawful gratuity offense] is not based on the statutory language. Although Congress is certainly free to create an exception in the statute for campaign contributions or, indeed, to exempt its members entirely from the reach of section 201, it has consistently rejected suggestions that it do so. The rationale for a campaign contribution exception to section 201, as suggested by the *Brewster* discussion, instead appears to be a kind of "rule of necessity." Since it is known that members of Congress regularly accept campaign contributions and it is thought that such a practice is required as a practical matter to become or remain an elected federal officeholder, campaign contributions are deemed innocent and thus not capable of restriction by section 201....
>
> [But such arguments] are both amoral and, at their core, a repudiation of the concept of democratic government. They accept as not only not improper but, indeed, an expected and perhaps creditable example of democracy in action for elected officials to seek and accept campaign contributions in exchange for being influenced in their legislative conduct. The arguments thus endorse not simply the receipt of gratuities but outright bribes as appropriate conduct by federal officeholders. Such arguments simply ignore the familiar concept of universal and equal suffrage as well as the historic American abhorrence for legislative decision-making based on the profit motive.

4. The foregoing cases indicate that coming into the 1980s, the federal courts had no clear and uniform understanding of what was required by way of an "intent to influence" under federal or state bribery laws or when a campaign con-

tribution could be a bribe or an unlawful gratuity. In the meantime, federal prosecutors became increasingly aggressive in attempting to enforce anti-corruption laws against state and local elected officials and, in some cases, against members of Congress. For example, several officials and lobbyists in California and South Carolina have been imprisoned in recent years because of federal "sting" investigations of corruption in and around the state legislatures. Three cases decided by the Supreme Court—*McNally v. United States* (1987), *McCormick v. United States* (1991), and *Evans v. United States* (1992)—reflect apparent concern with the extent of federal engagement in anti-corruption activity in states and localities as well as possible concern with the potential reach of anti-corruption laws.

In order to understand the possible significance of these decisions, it will be helpful to bear in mind four possible situations in which bribes may be prosecuted. First, federal prosecutors may bring charges against federal officials under federal bribery statutes, such as 18 U.S.C. § 201.[k] Second, federal prosecutors may bring charges against state or local officials under federal statutes that establish federal standards that may be imposed, under specified circumstances, on state and local officials.[l] The most commonly used statutes of this type have been the Hobbs Act, 18 U.S.C. § 1951, and the Mail Fraud law, 18 U.S.C. § 1341. Third, federal prosecutors may bring charges against state or local officials under federal statutes that, in effect, incorporate the standards of "predicate" statutes, including state bribery statutes.[m] Under statutes of this type, violation of one or more predicate statutes, combined with certain additional circumstances, becomes a federal violation. The most important statutes under this heading are the Travel Act, 18 U.S.C. § 1952, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68. Statutes of the second and third types require that the corrupt activity impinge on some federal interest, such as by affecting interstate commerce or involving use of the mail, but these requirements are often satisfied and therefore may have little effect in restraining federal enforcement of corrupt activity. Finally, state prosecutors may prosecute state or local officials under state bribery laws.[n]

McNally, *McCormick*, and *Evans* each involved the second situation. Accordingly, they did not entail interpretation of the federal or state bribery statutes. Nevertheless, the decisions are of considerable interest, both theoretical and practical. From a practical standpoint, various factors can inhibit anti-corruption investigations and prosecutions by state and local officials. Federal prosecutions under the Hobbs Act (construed in *McCormick* and *Evans*) and other statutes are the most visible and possibly the most numerous anti-corruption actions affecting state and local government.[o] Furthermore, it is at least possible that these decisions will affect bribery statutes themselves. The Supreme Court may bring similar views to bear when it comes to interpreting the federal bribery statute, and

k. *Brewster* is an example of this type of case.

l. *McNally*, *McCormick*, and *Evans* all fall into this category.

m. *Isaacs*, *Arthur*, and *L'Hoste* were in this category.

n. *Agan*, of course, is an example of this type of case.

o. By one count, nearly six thousand state and local officials were convicted of federal corruption charges between 1977 and 1987. See Kenneth J. Meier & Thomas M. Holbrook, *"I Seen My Opportunities and I Took 'Em:" Political Corruption in the American States*, 54 JOURNAL OF POLITICS 135, 136 (1992).

state courts may find the views of the Supreme Court persuasive when construing their own statutes.

McCormick is the most significant of the cases for our purposes, but each is worth noting. In the first case, *McNally v. United States*, 483 U.S. 350 (1987), Kentucky public officials and others who participated in a scheme to divert state insurance business to benefit either themselves or their political allies were convicted of violating the federal Mail Fraud statute, 18 U.S.C. § 1341, which read:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,... for the purpose of executing such scheme or artifice [uses the mails or causes them to be used], shall be fined... or imprisoned... or both.

Although the diversion of insurance business for defendants' benefit did not actually cost the state any money, they were convicted on an interpretation of the Mail Fraud law that had been accepted by several lower courts, holding that the statute's prohibition extends to "schemes to defraud citizens of their intangible rights to honest and impartial government."

In *McNally*, the Supreme Court rejected this view, holding that the Mail Fraud law "clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." Among several other reasons for this conclusion, the Court stated a preference to avoid an interpretation that "involves the Federal Government in setting standards of disclosure and good government for local and state officials."[p]

In your opinion, is the setting of standards of good government for states and localities an appropriate function for the federal government?

McCormick v. United States

500 U.S. 257 (1991)

Justice WHITE delivered the opinion of the Court.

This case requires us to consider whether the Court of Appeals properly affirmed the conviction of petitioner, an elected public official, for extorting property under color of official right in violation of the Hobbs Act, 18 U.S.C. § 1951.

I

[McCormick was a member of the West Virginia state legislature who represented a district that had suffered from a shortage of doctors. In 1984, he supported legislation to permit foreign medical school graduates to practice under temporary permits while they were studying for the state licensing examinations. During his reelection campaign, McCormick told the lobbyist for an organization of the foreign medical graduates "that his campaign was expensive, that he had paid considerable sums out of his own pocket, and that he had not heard any-

p. The practical effect of *McNally* was short-lived, as Congress in 1988 adopted a new section stating that for purposes of the Mail Fraud law, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. §1346.

thing from the foreign doctors." The lobbyist raised some money from the members of his group and gave McCormick an envelope containing $900 in cash. West Virginia law prohibited cash contributions over $50, and neither McCormick nor the organization reported the gift as a campaign contribution.

McCormick was convicted of extortion under the Hobbs Act, which provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce... by way of robbery or extortion... in violation of this section shall be fined... or imprisoned... or both.
>
> (b) as used in this section—
>
> ...
>
> (2) The term "extortion" means the obtaining of property from another with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.]

II

McCormick's challenge to the judgment below affirming his conviction is limited to... his claim that the payments made to him by or on behalf of the doctors were campaign contributions, the receipt of which did not violate the Hobbs Act.... McCormick does not challenge any rulings of the courts below with respect to the application of the Hobbs Act to payments made to nonelected officials or to payments made to elected officials that are properly determined not to be campaign contributions. Hence, we do not consider how the "under color of official right" phrase is to be interpreted and applied in those contexts....

B

We agree with the Court of Appeals that in a case like this it is proper to inquire whether payments made to an elected official are in fact campaign contributions, and we agree that the intention of the parties is a relevant consideration in pursuing this inquiry. But we cannot accept the Court of Appeals' approach to distinguishing between legal and illegal campaign contributions. The Court of Appeals stated that payments to elected officials could violate the Hobbs Act without proof of an explicit *quid pro quo* by proving that the payments "were never intended to be *legitimate* campaign contributions."...

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by pri-

vate contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.

This is not to say that it is impossible for an elected official to commit extortion in the course of financing an election campaign. Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

This formulation defines the forbidden zone of conduct with sufficient clarity. As the Court of Appeals for the Fifth Circuit observed in *United States v. Dozier*, 672 F.2d 531, 537 (1982):

> A moment's reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.

The United States agrees that if the payments to McCormick were campaign contributions, proof of a *quid pro quo* would be essential for an extortion conviction and quotes the instruction given on this subject in 9 Department of Justice Manual § 9-85A.306, p. 9-1938.134 (Supp.1988-2): "[C]ampaign contributions will not be authorized as the subject of a Hobbs Act prosecution unless they can be proven to have been given in return for the performance of or abstaining from an official act; otherwise any campaign contribution might constitute a violation."

We thus disagree with the Court of Appeals' holding in this case that a quid pro quo is not necessary for conviction under the Hobbs Act when an official receives a campaign contribution.[10] By the same token, we hold, as McCormick urges, that the District Court's instruction to the same effect was error.

III

[I]t is true that the trial court instructed that the receipt of voluntary campaign contributions did not violate the Hobbs Act. But under the instructions a contribution was not "voluntary" if given with any expectation of benefit; and as we read the instructions, taken as a whole, the jury was told that it could find McCormick guilty of extortion if any of the payments, even though a campaign contribution, was made by the doctors with the expectation that McCormick's official action would be influenced for their benefit and if McCormick knew that the payment was made with that expectation. It may be that the jury found that

10. As noted previously, McCormick's sole contention in this case is that the payments made to him were campaign contributions. Therefore, we do not decide whether a *quid pro quo* requirement exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value.

none of the payments was a campaign contribution, but it is mere speculation that the jury convicted on this basis rather than on the impermissible basis that even though the first payment was such a contribution, McCormick's receipt of it was a violation of the Hobbs Act....

V

Accordingly we reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

Justice SCALIA, concurring.

I agree with the Court's conclusion and, given the assumption on which this case was briefed and argued, with the reasons the Court assigns. If the prohibition of the Hobbs Act against receipt of money "under color of official right" includes receipt of money from a private source for the performance of official duties, that ambiguously described crime assuredly need not, and for the reasons the Court discusses should not, be interpreted to cover campaign contributions with anticipation of favorable future action, as opposed to campaign contributions in exchange for an explicit promise of favorable future action.

I find it unusual and unsettling, however, to make such a distinction without any hint of a justification in the statutory text: § 1951 contains not even a colorable allusion to campaign contributions or *quid pro quo*s. I find it doubly unsettling because there is another interpretation of § 1951, contrary to the one that has been the assumption of argument here, that would render the distinction unnecessary. While I do not feel justified in adopting that interpretation without briefing and argument, neither do I feel comfortable giving tacit approval to the assumption that contradicts it....

It is acceptance of the assumption that "under color of official right" means "on account of one's office" that brings bribery cases within the statute's reach, and that creates the necessity for the reasonable but textually inexplicable distinction the Court makes today. That assumption is questionable. "The obtaining of property... under color of official *right*" more naturally connotes some false assertion of official *entitlement* to the property. This interpretation might have the effect of making the § 1951 definition of extortion comport with the definition of "extortion" at common law. One treatise writer, describing "extortion by a public officer," states: "At common law it was essential that the money or property be obtained under color of office, that is, under the pretense that the officer was entitled thereto by virtue of his office. The money or thing received must have been claimed or accepted in right of office, and the person paying must have yielded to official authority." 3 R. Anderson, Wharton's Criminal Law and Procedure 790–791 (1957).

[W]here the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion—and like all bribery laws I am aware of (but unlike § 1951 and all other extortion laws I am aware of) it punishes not only the person receiving the payment but the person making it. McCormick, though not a federal official, is subject to federal prosecution for bribery under the Travel Act, 18 U.S.C. § 1952, which criminalizes the use of interstate commerce for purposes of bribery—and reaches, of course, both the person giving and the person receiving the bribe.

I mean only to raise this argument, not to decide it, for it has not been advanced and there may be persuasive responses. See, e.g., James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA LAW REVIEW 815, 837–889 (1988) (arguing that under early common law bribery and extortion were not separate offenses and that extortion did not require proof of a coerced payment). But unexamined assumptions have a way of becoming, by force of usage, unsound law. Before we are asked to go further down the road of making reasonable but textually unapparent distinctions in a federal "payment for official action" statute[,] I think it well to bear in mind that the statute may not exist.

Justice STEVENS, with whom Justice BLACKMUN and Justice O'CONNOR join, dissenting....

In my opinion there is no statutory requirement that illegal agreements, threats, or promises be in writing, or in any particular form. Subtle extortion is just as wrongful—and probably much more common—than the kind of express understanding that the Court's opinion seems to require.

Nevertheless, to prove a violation of the Hobbs Act, I agree with the Court that it is essential that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver, either through the use of force or the use of public office. In this sense, the crime does require a "*quid pro quo*."...

This Court's criticism of the District Court's instructions focuses on this single sentence:

> Voluntary is that which is freely given without expectation of benefit.

The Court treats this sentence as though it authorized the jury to find that a legitimate campaign contribution is involuntary and constitutes extortion whenever the contributor expects to benefit from the candidate's election. In my opinion this is a gross misreading of that sentence in the context of the entire set of instructions.

In context, the sentence in question advised the jury that a payment is voluntary if it is made without the expectation of a benefit that is specifically contingent upon the payment. An expectation that the donor will benefit from the election of a candidate who, once in office, would support particular legislation regardless of whether or not the contribution is made, would not make the payment contingent or involuntary in that sense; such a payment would be "voluntary" under a fair reading of the instructions, and the candidate's solicitation of such contributions from donors who would benefit from his or her election is perfectly legitimate. If, however, the donor and candidate know that the candidate's support of the proposed legislation is contingent upon the payment, the contribution may be found by a jury to have been involuntary or extorted.

In my judgment, the instructions, read as a whole, properly focused the jury's attention on the critical issue of the candidate's and contributor's intent at the time the specific payment was made....

I respectfully dissent.

Notes and Questions

1. Is Justice Stevens' conception of a *quid pro quo* the same as the majority's?

2. From a practical standpoint, the important question about *McCormick* is where it leads. Does the same *quid pro quo* requirement apply to benefits that are not campaign contributions? When campaign contributions are at issue, will the same *quid pro quo* requirement be read into other federal anti-bribery statutes, especially 18 U.S.C. § 201? Will state and federal courts read the same requirement into *state* bribery laws? Will the Supreme Court and other courts adhere to *McCormick*'s strict definition of the *quid pro quo* requirement wherever it is applicable? The rest of the section is devoted mainly to these questions.

3. Should the *McCormick* requirement of an "explicit promise or undertaking" be applied to a Hobbs Act prosecution when the benefit provided to the official is not a campaign contribution? In *United States v. Montoya*, 945 F.2d 1068, 1074 n.2 (9th Cir. 1991), the court wrote:

> In his defense to several of the extortion charges, Montoya has argued that the cash payments he received were legitimate honoraria. Although *McCormick* involved claimed campaign contributions, we see no rational distinction between cash payments claimed by the official to be lawful campaign contributions or those alleged to be legitimate honoraria. The critical question is whether the payments were induced and whether a *quid pro quo* exists, not how an official labels the payments in his defense to a charge that the payments were extorted.

Do you agree? In *United States v. Torcasio*, 959 F.2d 503, 506 (4th Cir. 1992), cert. denied 113 S.Ct. 1253 (1993), a different court rejected the claim that *McCormick* required the government to prove a specific *quid pro quo* in a case not involving campaign contributions.

4. Is the question addressed in Note 3 affected by EVANS v. UNITED STATES, 113 S.Ct. 1881 (1992), the third and last Supreme Court decision in our series? The central issue in *Evans* was whether the word "induced" in paragraph (b)(2) of the Hobbs Act means that the official must ask for or in some other way initiate or actively bring about the forbidden transaction.[q] The majority opinion in *Evans* is introduced by the statement:

> We granted certiorari to resolve a conflict in the Circuits over the question whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion "under color of official right" prohibited by the Hobbs Act. We agree with the Court of Appeals for the Eleventh Circuit that it is not, and therefore affirm the judgment of the court below.

Evans, a member of the Board of Commissioners of DeKalb County, Georgia, had numerous conversations over a period of a year-and-a-half with an undercover FBI agent posing as a real estate developer seeking to rezone a tract of land. All

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q. Paragraph (b)(2), it will be recalled, reads:
The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

or nearly all of the conversations were initiated by the agent. Near the end of the period, the agent gave Evans $7,000 in cash and a campaign contribution of $1,000. The jury could have found that Evans

> accepted the cash knowing that it was intended to ensure that he would vote in favor of the rezoning application and that he would try to persuade his fellow commissioners to do likewise. Thus, although petitioner did not initiate the transaction, his acceptance of the bribe constituted an implicit promise to use his official position to serve the interests of the bribe-giver.

The jury instructions correctly anticipated *McCormick*, advising that a campaign contribution by a person with business pending before an official was not sufficient for a violation of the Hobbs Act. But if the official "demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution." Evans' objection to the jury instruction was that it permitted a conviction based on a mere "acceptance" of money in exchange for favorable official action, without requiring a demand or any affirmative act of inducement.

Relying in large part on historical research and analysis contained in James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA LAW REVIEW 815 (1988), the Court concluded inducement by the official was not an element of the offense.

> At common law, extortion was an offense committed by a public official who took "by colour of his office" money that was not due to him for the performance of his official duties. Extortion by the public official was the rough equivalent of what we would now describe as "taking a bribe." It is clear that petitioner committed that offense.

The court found that this conclusion was confirmed by the language of the Hobbs Act.

> First, we think the word "induced" is a part of the definition of the offense by the private individual, but not the offense by the public official. In the case of the private individual, the victim's consent must be "induced by wrongful use of actual or threatened force, violence or fear." In the case of the public official, however, there is no such requirement. The statute merely requires of the public official that he obtain "property from another, with his consent,... under color of official right." The use of the word "or" before "under color of official right" supports this reading.

Alternatively, the Court ruled that even if "inducement" were required, it would make no practical difference.

> Second, even if the statute were parsed so that the word "induced" applied to the public officeholder, we do not believe the word "induced" necessarily indicates that the transaction must be *initiated* by the recipient of the bribe. Many of the cases applying the majority rule have concluded that the wrongful acceptance of a bribe establishes all the induce-

ment that the statute requires. They conclude that the coercive element is provided by the public office itself.

Finally, since a portion of the payment to Evans was a campaign contribution, the Court briefly addressed *McCormick*.

> We reject petitioner's criticism of the instruction and conclude that it satisfies the *quid pro quo* requirement of *McCormick*, because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts[r]; fulfillment of the *quid pro quo* is not an element of the offense.... We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.[s]

Referring to the last sentence of this quotation, Justice Kennedy, concurring in *Evans*, said that "this language requires a *quid pro quo* as an element of the Government's case in a prosecution" under the "color of official right" portion of the Hobbs Act. In other words, Kennedy interpreted the majority opinion as extending *McCormick* to all "color of official right" cases, whether or not the payment to the official is a campaign contribution. Do you agree?

Some federal courts have accepted Kennedy's view, generally without much analysis. See, e.g., *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1994); *United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993). Some federal judges have maintained that *Evans* did not and had no occasion to extend *McCormick* beyond campaign contributions, but these views do not appear to have been stated in the form of holdings. See *United States v. Blandford*, 33 F.3d 685, 695–97 (6th Cir. 1994); *United States v. McDade*, 827 F.Supp. 1153, 1171 n.8 (E.D.Pa. 1993), affirmed on other grounds, 28 F.3d 283 (3d Cir. 1994), cert. denied 115 S.Ct. 1312 (1995) (dictum).

5. Both *McCormick* and *Evans* arose under the Hobbs Act, whose definition of extortion is stated in general terms. Is the requirement of a *quid pro quo* applicable to cases in which campaign contributions are prosecuted under bribery statutes whose elements are specified in greater detail, such as 18 U.S.C. § 201? In *United States v. McDade*, 827 F.Supp. 1153, 1171 (E.D.Pa. 1993), affirmed on other grounds, 28 F.3d 283 (3d Cir. 1994), cert. denied 115 S.Ct. 1312 (1995), the court expressed the view that *McCormick* is probably inapplicable to Section 201(c), the unlawful gratuities prohibition:

> Any comparison of *McCormick* to the case at bar must, of course, start with the obvious observation that *McCormick* was a Hobbs Act case, while the current argument is about the gratuities statute. It is thus doubtful whether *McCormick* controls at all.

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r. Note that in its description of what the jury presumably found, quoted above, the Court referred to an *implicit* promise. Compare this to *McCormick*'s requirement of an *explicit* promise or undertaking. -ED.

s. The majority opinion in *Evans* was written by Justice Stevens, who had dissented in *McCormick*. Part III of Stevens' opinion specifically rejected the theory that Justice Scalia had advanced tentatively in *McCormick*, that public officials violate the Hobbs Act only when the payment is obtained by a false pretense of official right. Justice Thomas, joined by Scalia and Chief Justice Rehnquist, dissented in *Evans* on this theory.

Do you agree? If so, would you also regard *McCormick* as inapplicable to a bribery prosecution under Section 201(b)?

A similar question arises when state and local officials are prosecuted under federal statutes that incorporate state bribery laws. Violations of the state laws can constitute "predicate" offenses that, when added to other elements, result in a federal crime. For example, RICO, 18 U.S.C. §§ 1961–1968, defines a "pattern of racketeering activity" as at least two acts of racketeering activity, which can include violations of state bribery laws. Section 1962(c) defines the circumstances in which a "pattern of racketeering activity" violates RICO. If the transaction that allegedly violates a state bribery law in a RICO prosecution is a campaign contribution, must the *quid pro quo* requirement of *McCormick* be satisfied?

In *United States v. Mokol*, 957 F.2d 1410 (7th Cir.), cert. denied 113 S.Ct. 284 (1992), a RICO conviction was based on predicate violations of the Indiana bribery statute, which applied to gifts made "with intent to control the performance of an act related to the employment or function of the public servant." The payments in *Mokol* were arguably campaign contributions and the Indiana bribery statute's requirement of "intent to control" is apparently narrower than the federal bribery statute's "intent to influence." Nevertheless, the appellate court affirmed on the ground that "all parties understood the payment would influence the exercise" of the defendant's official duties. No reference was made to *McCormick*.

In dictum the following year, the same court addressed the question more directly:

> *McCormick* recognized several realities of the American political system. Money fuels the American political machine. Campaigns are expensive, and candidates must constantly solicit funds. People vote for candidates and contribute to the candidates' campaigns because of those candidates' views, performance, and promise. It would be naive to suppose that contributors do not expect some benefit—support for favorable legislation, for example—for their contributions. To hold that a politician committed extortion merely by acting for some constituents' benefit shortly before or after receiving campaign contributions from those constituents "would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the nation." *McCormick*. Only statutory language much more explicit than that in the Hobbs Act would justify a contrary conclusion. *Id.*
>
> ... Given the minimal difference between extortion under color of official right and bribery, it would seem that courts should exercise the same restraint in interpreting bribery statutes as the *McCormick* Court did in interpreting the Hobbs Act: absent some fairly explicit language otherwise, accepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act. Vague expectations of some future benefit should not be sufficient to make a payment a bribe.
>
> The Indiana bribery statute contains no clear language that would lead one to conclude that it criminalizes normal campaign contributions

> even if closely followed by official action favorable to the contributor.... But *McCormick* interpreted a federal statute; it created a rule for interpreting federal statutes, not a universal rule of statutory construction. It is the job of Indiana's courts to interpret Indiana's bribery statute, and we are bound by the Indiana courts' construction. So, the question is: would Indiana's courts follow *McCormick* in interpreting Indiana's bribery statute?

United States v. Allen, 10 F.3d 405, 410–11 (7th Cir. 1993). The court was unable to answer this question, because none of the Indiana state cases construing the bribery statute involved campaign contributions. Furthermore, no answer was needed, because although the defendant had been convicted under RICO, he had been acquitted of the bribery predicate offenses.

6. In Notes 3 through 5 we considered whether the *quid pro quo* required by *McCormick* is applicable in various situations. Now we must consider the nature of that requirement. *McCormick* says there is a violation "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." This formulation has the virtue at least of being relatively clear. But does it serve to distinguish corrupt from innocent conduct? Not according to Dennis F. Thompson, *Mediated Corruption: The Case of the Keating Five*, 87 AMERICAN POLITICAL SCIENCE REVIEW 369, 374–75 (1993):

> There is... no good reason to believe that connections between contributions and benefits that are proximate and explicit are any more corrupt than connections that are indirect and implicit. The former may be only the more detectable—not necessarily the more deliberate or damaging—form of corruption.

The *McCormick* formulation is criticized as both unnecessary and too restrictive by James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1695, 1710–11 (1993):

> It appears that Justice White was concerned about either the unjust conviction of public officials for innocent campaign contributions or the chilling effect on campaign financing. He doesn't give any examples of the pre-existing law being too vigorously applied. Indeed, I can't think of a single case in which a conviction for extortion has withstood challenge when the official acted properly and the court applied the usual common law rule requiring that the official taking be wrongful or corrupt. Certainly, even Congress can't claim that the pre-existing law chilled too many large contributions. If we ask whether we have too little influence peddling in the context of campaign finances, too much influence peddling, or an optimal amount, I think everyone thinks that we have too much. So over-deterrence isn't a problem....
>
> Let's look at two situations, both involving corrupt takings without an explicit quid pro quo:

(1) An elected judge approaches a lawyer in a major case pending before the judge and says, "I haven't heard from you yet. Would you donate $100,000 to my re-election fund?" Result: not official extortion under Justice White's test.
(2) An elected legislator approaches a businessman and says, "If you pay me $100,000 for my campaign, I can't promise you how I'll vote on the many pieces of legislation affecting your company—that would be illegal. But if you contribute, I *predict* that I will vote your way." Result: not official extortion under Justice White's test.

Although both of these situations would have been Hobbs Act extortion under color of official right before *McCormick*, were one to judge only from Justice White's odd opinion in *McCormick*, they wouldn't be now. Quid pro quos may or not be implied in these situations, but they certainly aren't explicit. Neither explicitly promises any specific action.

Must the *McCormick* test be applied as strictly as Professor Lindgren suggests? See *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir.), cert. denied 113 S.Ct. 332 (1992). Whether or not it must be, is the test as stated in *McCormick* still in effect? We have seen that in *Evans*, Justice Stevens' summary of the majority's holding was "that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." Was the phrase "in return for" intended to set forth a standard, as opposed to being simply a general reference to some connection, whatever it might be, that must exist between the payment and the official acts? If it was intended to set forth a standard, is it different from the *McCormick quid pro quo* requirement?

Justice Kennedy, concurring in *Evans*, set forth his conception of *quid pro quo*:

> The requirement of a *quid pro quo* means that without pretense of any entitlement to the payment, a public official violates [the Hobbs Act] if he intends the payor to believe that absent payment the official is likely to abuse his office and his trust to the detriment and injury of the prospective payor or to give the prospective payor less favorable treatment if the *quid pro quo* is not satisfied. The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it.

Is Kennedy's conception of *quid pro quo* different from *McCormick*'s? From Stevens' phrase, "in return for"?

In *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993), cert. denied 114 S.Ct. 929 (1994), a defendant convicted under the Hobbs Act argued that there had been no proof of a *quid pro quo*. After quoting the above passage from Justice Stevens' opinion in *Evans*, the court wrote:

> After receiving the $30,000 payment, [defendant Coyne, County Executive of Albany County, New York,] made numerous contacts on Crozier's behalf, lobbying legislators for changes that would increase Crozier's fees.

> Proof of an explicit promise at the time of payment to perform certain acts is not necessary and the jury was free to infer that Coyne accepted the $30,000 knowing that it was payment related to his using his influence as County Executive on Crozier's behalf as specific opportunities arose.

In *United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995), the court described the *quid pro quo* requirement as "not onerous." Hairston was an alderman of Winston-Salem, North Carolina. In one count he was convicted for a loan he received from a real estate developer who owned property in his ward and would need support for its rezoning, though no rezoning petition was pending at the time of the loan. The developer thought that to keep Hairston's support he "had to" make the loan. Id. at 367. The court found that these facts satisfied the *Evans quid pro quo* requirement.

Is the *quid pro quo* that suffices in *Coyne* and *Hairston* the same as what was required in *McCormick*? Does it satisfy Stevens' formulation in *Evans*? Kennedy's? The payments in *Coyne* and *Hairston* were not campaign contributions. Would the results have been different if they were?

7. *McCormick* and the other cases we have been considering are based on the premise that a requirement of a *quid pro quo* will prevent extortion and bribery laws from overly broad coverage that may criminalize innocent or at least tolerable conduct. This premise is challenged by Lindgren, *supra*, 141 UNIVERSITY OF PENNSYLVANIA LAW REVIEW at 1736–38, who nonetheless finds Justice Stevens' "in return for" formulation in *Evans* an acceptable standard:

> The problem that the Court is trying to solve is that elected officials often receive contributions from people with pending government business. Such contributions aren't necessarily corrupt. The old way to separate corrupt takings from noncorrupt contributions was to ask the ultimate question: Are they corrupt or wrongful? It appears that the Court thinks that a quid pro quo requirement does the same job separating wrongful takings from legitimate contributions. But does it?
>
> Consider these explicit quid pro quos that aren't corrupt (or at least aren't corrupt enough to count as official extortion):
>
> > (1) A legislator says to a trucking company owner, "If you make this large contribution to my campaign, I promise you three things. First, I won't vote on any trucking legislation without calling you first. Second, when you call me, I will drop whatever official business I am doing to take your call personally. Third, when you or your clients come to town, I will rearrange my schedule whenever possible to entertain you in the legislative dining room. I can't promise you how I'll vote, but you can buy what any large contributor buys: direct access to me."
> >
> > (2) A legislator says to a large contributor, "If you give me a large contribution, I'll consult you on my choice of my next chief of staff. Understand me, he'll be working for me, not you. But I promise you that I'll pick someone you can work with."
>
> The contributor gets an explicit quid pro quo—access to the legislator or consultation on a staff appointment. Someone with very high ethi-

cal standards may view these last two examples as corrupt, but the Supreme Court probably wouldn't. Indeed, the legislators' willingness to state the deals clearly suggests that they wouldn't think they are corrupt. Yet both situations might meet Justices White's, Stevens's, and Kennedy's reciprocity tests, at least without a specific filter that the agreements be corrupt. Only by bringing in the corrupt intent element...can a jury make sense of these examples. Thus, if these examples don't involve obtaining property corruptly or wrongfully, even an explicit quid pro quo isn't enough for extortion.

But then, what does the explicit quid pro quo requirement add other than noise? If one must test extortion by whether it's corrupt in any event, a reciprocity requirement only adds another layer that may exculpate those otherwise guilty of wrongful extortion. The nature of the exchange must be examined in any event.

The obvious objection to relying on the corruption requirement alone is its vagueness. A quid pro quo requirement will give better notice than a simple corruption requirement. Anytime you're dealing with behavior as complex as promises and threats, you can't nail down every possible permutation in advance. The best approach is to use judicial decisionmaking to clarify ambiguities and give guidance to triers of fact. *Evans* does this by requiring reciprocity.

The Court of Appeals for the Fourth Circuit tried a softer, more nuanced approach in its *McCormick* opinion, 896 F.2d 61, 66 (4th Cir. 1990). It set out these criteria for distinguishing a corrupt campaign contribution from extortion:

> Some of the circumstances that should be considered in making this determination include, but are not limited to, (1) whether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment.

In particular, large cash payments not properly recorded are a tipoff that something is very likely wrong. The Supreme Court in *McCormick* rejected these criteria, although they seem fairly sensible. Certainly, they're preferable to *McCormick's* perverse explicitness requirement. In *Evans*, the Court has moved away from an *explicit* quid pro quo to a much less strict reciprocity requirement. While not required by the legislative history of the Hobbs Act or the common law history of extortion, *Evans'* reciprocity requirement does limit the statute to the most common and easily prosecuted form of serious corruption: "a public official [who] has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."

8. Meanwhile, back in the states, *Agan* is one of very few recent cases defining the circumstances under which bribery statutes apply to campaign contributions. In *People v. Deegan*, 509 N.E.2d 345 (N.Y. 1987), the New York Court of Appeals said without supporting analysis that evidence was sufficient to support a bribery charge when it supported an inference that an elected official "changed his vote on a proposed rate increase...in exchange for a promise of future campaign contributions." Was such an exchange necessary for a conviction? In *People v. Bac Tran*, 603 N.E.2d 950 (N.Y. 1992), which did not involve campaign contributions, the Court of Appeals considered the effects of changes in the New York bribery statute in 1965 that substituted the requirement of an "agreement or understanding" for the previous requirement of an "intent to influence." The court regarded this change in language as signaling "a new and different notion. The key element was changed on its face to something qualitatively and quantitatively higher than the long-standing, simple 'intent to influence.'" In particular, a benefit conferred with only "the hope that the public servant would be influenced thereby" did not constitute a bribe. "Ironically," the court added, "the crime of attempted bribery...may be proved when a prosecutor satisfies its burden of proof by a showing of only intent."

In a few states, bribery statutes avoid the problem by specifically exempting many contributions. Thus, Texas Penal Code § 36.02(a)(4) and (d) exempt campaign contributions from the bribery statute if they are made and reported in accord with Texas campaign finance regulations, unless the contribution is offered or accepted "pursuant to an express agreement to take or withhold a specific exercise of official discretion if such exercise of official discretion would not have been taken or withheld but for" the contribution. In *People v. Brandstetter*, 430 N.E.2d 731 (Ill.App.), cert. denied 459 U.S. 988 (1982), several Illinois statutes were read together to reach a result similar to that set forth in the Texas statute. In *Brandstetter*, the defendant was a volunteer active in the effort to persuade the Illinois legislature to ratify the Equal Rights Amendment. She handed a legislator a hand-written note reading: "Mr. Swanstrom the offer for help in your election & $1000 for your campaign for Pro ERA vote." On the basis of this note, her bribery conviction was affirmed.[t]

A statutory exemption in Oregon goes further than those in Texas and Illinois. Oregon Revised Statutes § 162.015(1) requires a "pecuniary benefit" for a bribe, but "pecuniary benefit" is defined by Section 162.005(1) to exclude "a political campaign contribution reported in accordance with" Oregon campaign finance regulations. The exclusion appears to apply even if the contribution is made expressly in exchange for a particular official action.[u]

D. Official Act

Officials have private lives within the bounds of which they presumably are free to be influenced by whatever considerations they choose. Between those actions that clearly are performed in an official capacity and those that are clearly private, there are actions that have mixed public and private elements, particular-

t. Review, in light of this paragraph, footnote 3 of the *Agan* decision.

u. In *State v. Gyenes*, 855 P.2d 642 (Or.App. 1993), the exclusion was extended to certain cases in which the contribution is not reported.

ly in the case of higher level officials whose "influence" is likely to extend beyond their legally defined powers.

State v. Bowling
427 P.2d 928 (Ariz. App. 1967)

MOLLOY, Judge.

The defendants in this action appeal from convictions...of receiving a bribe, while a member of the Arizona State Legislature, '...upon an understanding that their official opinions, judgments and actions should be influenced thereby...'.

The facts giving rise to these charges are substantially without dispute. A resident of Pima county by the name of Jerry Hanson, the co-proprietor of a tavern, was desirous of obtaining a new liquor license for his business, which would permit the sale of additional types of liquor. He had a conversation with Bowling, one of the defendants, who was at the time a member of the House of Representatives of the Arizona State Legislature, about assistance in obtaining such license. Bowling informed Hanson that he might be able to assist him, and arranged a meeting between Hanson, himself, and the other defendant, Cook, who was also a member of the Arizona House of Representatives. Hanson testified that Cook was introduced to him only as a legislator, while Bowling testified that Cook was introduced as a real estate broker. At this meeting, Hanson was informed that it would cost approximately $5,000 for the license over and above regular license fees and at a subsequent meeting, it was agreed that Hanson would pay $4,200, over and above the normal license fees, if the liquor license was obtained for him.

An application for such a license was duly submitted and a personal conference with Mr. John Duncan, Superintendent of Liquor Licenses and Control for the State of Arizona, followed, with Hanson, Bowling and Cook all speaking in behalf of the issuance of the license. The statements made in support of issuing the license were in the nature of character references for Hanson and his father, who was a partner in the tavern, and included the argument that such a license was needed because two families were to be supported from this one business. There was no showing in the evidence of any inducements being offered to Mr. Duncan to issue the license nor of any improper persuasions advanced. The testimony is undisputed that Hanson was fully qualified under applicable law for the issuance of the license and that the location as to which the license application pertained fulfilled all of the legal requirements for such a license.

About a month after the conversation with Duncan, Cook contacted Hanson to inform him that the license had been issued, and Cook together with Bowling, brought the license to Hanson's home, where Hanson gave them $4,200 in cash. Bowling testified that all of this money was received and retained by Cook; Cook did not take the stand during the trial....

Applicable law gives to the Superintendent of Liquor Licenses and Control carte blanche discretion in selecting the recipients of the 'quota' of new licenses available each year....The statutes do not provide for a hearing at which various applicants may be given the opportunity to establish better entitlement. [T]here were approximately thirty-five applicants for [the Pima County quota of] eleven licenses....

[Appellants were convicted of] the acceptance of a bribe by a legislator as proscribed in A.R.S. § 13-286, reading as follows:

> A member of the legislature who asks, receives or agrees to receive a bribe upon an understanding that his *official* vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of a question or matter upon which he may be required to act in his *official capacity*, or casts, or offers or promises to cast, an *official* vote in consideration that another member of the legislature will cast such vote, either upon the same or another question, shall be punished by imprisonment.... (Emphasis added)

The appellants contend that there is a complete absence of any proof that there was any understanding, that the 'official vote, opinion, judgment or action' of these defendants would be influenced by the monies received as established in this record. A leading case in Arizona in this area of our law, *State v. Hendricks*, 66 Ariz. 235, 186 P.2d 943 (1947), quotes with approval from 1 Burdick, Law of Crime § 291, as follows:

> The act intended to be influenced must be connected with one's official or public duty, although the duty may possibly arise only in the future, but if the act is associated with official duty, it is immaterial whether the bribed person has, or has not, authority to do that specific thing, since the essence of the crime is the fact that he agreed to do it under color of office.

The court in *Hendricks* proceeded to expound on this requirement as follows:

> The rule requiring that the matter in which the bribe is attempted be related to the officer's duty before it can be a crime, is a wise one. The possible perversion of justice is the touchstone and guide. And though it might be morally improper and may well involve some other crime to give or offer money to an officer to do an act totally unrelated to his job, it would not be bribery.

...No statute has been called to our attention which in any way suggests that a legislator has a duty to solicit liquor licenses before the Superintendent of Liquor Licenses and Control. Under our statutes, there is little connection between a member of the lower house of our legislature and this licensing agency. The Superintendent is appointed by the Governor of this State with the advice and consent of the State Senate and it is only the Governor who may remove him, subject to review in the court. That there is an inherent impropriety in the defendants' solicitation, however, is apparent when it is remembered that they made no disclosure to the Superintendent that they were appearing before him for remuneration and that as legislators they had some control over his salary and over all monies expended by his department.

We accept the proposition, urged by the State, that the official duties of a public officer need not be prescribed by statute but may be imposed by regulation or by usage and custom. Cited decisions, such as *United States v. Birdsall*, 233 U.S. 223 (1913), *Daniels v. United States*, 17 F.2d 339 (9th Cir. 1927), and *Cohen v. United States*, 144 F.2d 984 (9th Cir. 1944), so hold.

...In these cases we see proof that is lacking here. In order to satisfy the requirements of these cases, we believe there would have to be substantial proof that there was a custom or usage for legislators to make fair and impartial—and hence "official"—recommendations to the Superintendent of Liquor Licenses and Control as to which applicants should receive an available license.

Apparently realizing a deficiency in this regard, the prosecuting attorney elicited from the witness Hanson the following testimony:

> Q I believe you testified before the jury went out that you were familiar around 1963 of the habit, custom and tradition here in Pima County for applicants obtaining licenses out of Mr. Duncan's office; is that correct?
>
> A Yes.
>
> Q What is that habit, custom and usage, sir? What was it at that time?
>
> A Going through a legislator to obtain one.
>
> Q In what capacity did you have to go through a legislator?
>
> A Money.

The foundation for this testimony was that Mr. Hanson was acquainted with 90 per cent of the bar owners in Tucson; that he had been on a board of directors and a member of the Retail Liquor Dealers Association; and that he knew from "hearsay" that it was customary to go through a legislator to get a liquor license. There was no other evidence of similar import. The proof presented leaves one with the innuendo that it is customary for legislators to accept money to do exactly what the defendants did in this case. However, Hanson was unable to give the name of any other legislator who had ever acted similarly and professed to know, without giving any names, only four other instances when a license had ever been secured through a legislator.

This proof, we hold, fails to close the gap in the establishment of criminality in two respects. First, the proof submitted in no way tends to prove that there was an obligation under any custom or usage for the legislator to make a good faith recommendation on the merits of the issuance of liquor licenses. Absent this, it is our belief that the purported custom only tended to show conduct of other legislators equally unsavory, but equally outside of the "official" duties of legislators.

Secondly, we do not believe that the testimonial qualifications of Hanson were such as to establish in sufficient probative force a custom and usage so as to predicate a conviction in a criminal court thereon. Generally, proof of custom is said to require "clear and satisfactory" evidence. The testimony of Hanson as to this "custom and usage" fails to rise above common gossip. We hold this unsupported testimony to be insufficient to meet the standard above expressed.

In attempting to show the inapplicability of the bribery statute to the subject conduct, the appellants ask in their brief:

> Would they violate the statute by accepting remuneration for a speaking engagement on behalf of a local candidate for office? How about a legislator-attorney who represents a property holder on a variance before a local zoning board? Or a legislator-physician who accepted a free dinner to speak for or against medicare?

While we can see a distinction in degree of impropriety between these postulated activities of a legislator and that presented here, we are of the opinion that the subject statute draws no discernible line separating this type of concededly non-criminal conduct from that sought to be punished as a felony in this action. That the legislature has the power to delineate for punishment the type of conduct under consideration is not the question before us,[8] but rather whether it had done so at the time of the commission of these acts. We hold that it had not.

The decision reached here we believe to be in accord with all case law called to our attention. The State has cited no decision holding similar "influence peddling" by a legislator to be a violation of a bribery statute. *State v. Nadeau*, 105 A.2d 194 (R.I. 1954), held that a city councilman could not be bribed to favor a particular candidate for appointment to the city police force, because appointments to the city police force under pertinent law were within the authority of a board of police commissioners, of which the city councilman was not a member and over which he had no control. *State v. Hibicke*, 56 N.W.2d 818 (Wis. 1953), holds that a police constable could not be bribed to recommend to a town council the issuance of a trailer-camp license to a particular applicant because the making of such recommendation was not a part of the constable's "duty in law enforcement." *People v. Leve*, 16 N.W.2d 72 (Mich. 1944), held, under a similar statute, that it was reversible error to instruct a jury that a conviction might lie if the defendant had agreed that "his vote, opinion or judgment *or 'influence'*" (emphasis added) be given in any particular manner. The court said:

> In the instant case the statute provides for vote, opinion or judgment. It does not make it a crime to use influence.

For the reasons expressed herein the judgment is reversed and judgment of acquittal... is ordered to be entered as to both defendants.

HATHAWAY, C.J., and KRUCKER, J., concur.

Notes and Questions

1. Do you think Bowling and Cook acted improperly? Did the court think they acted improperly? Would your opinion be affected if Bowling and Cook had let their services for Hanson and the compensation they received be known publicly? Would your opinion be affected if Bowling and Cook were lawyers and it was customary for applicants to be represented by counsel at interviews with the Superintendent?

2. Did the prosecution lose on appeal in *Bowling* because as a matter of law the legislators were not acting in their official capacity or because of a failure of proof? If the latter, what factual showing was necessary?

3. The most notorious incident of influence-peddling in recent years was the affair of the "Keating Five," who consisted of four Democratic senators—Alan

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8. We note in passing that the [Arizona legislature has adopted a new statute] dealing with the subject of "ethics" of members of the legislature. [A subsection of the new statute,] pertaining to the acceptance of compensation for services rendered in relation to any matter or proceeding pending before a state agency, would appear to [criminalize] conduct similar to that charged herein.....

Cranston (California), Dennis De Concini (Arizona), John Glenn (Ohio), and Donald Riegle (Michigan)—and one Republican—John McCain (Arizona). A brief account of the affair is given by Dennis F. Thompson, *Mediated Corruption: The Case of the Keating Five*, 87 AMERICAN POLITICAL SCIENCE REVIEW 369, 369–70 (1993):

> They were brought together by Charles Keating, Jr., now in prison in California, convicted on charges of fraud and racketeering. As chairman of a home construction company in Phoenix, he bought Lincoln Savings and Loan in California in 1984 and began to shift its assets from home loans to high-risk projects, violating a wide variety of state and federal regulations in the process. In 1989, Lincoln collapsed, wiping out the savings of twenty-three thousand (mostly elderly) uninsured customers and costing taxpayers over two billion dollars. It was the biggest failure in what came to be the most costly financial scandal in American history. Lincoln came to symbolize the savings-and-loan crisis.
>
> [Keating's] most visible political lobbying was directed against the new rule prohibiting direct investment by savings-and-loans, which many legitimate financial institutions and many members of Congress also opposed. His most prominent and persistent target was Edwin Gray, the head of the three-member bank board that regulated the industry, himself a controversial figure.
>
> The fateful meeting that would forever link the Keating Five took place on April 2, 1987, in the early evening in DeConcini's office. The senators asked Gray why the investigation of Lincoln and their "friend" Keating was taking so long. Gray said later that he was intimidated by this "show of force." Toward the end of the meeting, he suggested that the senators talk directly to the San Francisco examiners who were handling the Lincoln case. And so they did, a week later.... The senators told the examiners that they believed that the government was harassing a constituent. After the regulators reported that they were about to make a "criminal referral" against Lincoln, the senators seemed to back off.
>
> After that meeting, McCain, Riegle, and Glenn had no further dealings of significance with Keating. Glenn arranged a lunch for Keating and House Speaker Jim Wright the following January, but the committee concluded that although this showed "poor judgment," Glenn's actions were not "improper." McCain had already broken off relations with Keating, who had called him a "wimp" for refusing to put pressure on the bank board. Cranston and DeConcini continued to act on Keating's behalf.
>
> The Keating Five, particularly DeConcini and Cranston, certainly provided this constituent with good service. Since an act of corruption typically involves an exchange of some kind, we have to ask, What did the Senators get in return? The answer is $1.3 million, all within legal limits. But this figure and this fact, handy for headline writers, obscures some important details (especially the timing and uses of the funds) that should affect our assessment of corruption.
>
> In February 1991, the Ethics Committee rebuked four of the Senators—DeConcini and Riegle more severely, McCain and Glenn less so—and said that further action was warranted only against Cranston. Then

> in November, after much behind-the-scenes political negotiation, the committee reported to the full Senate that Cranston had "violated established norms of behavior in the Senate." To avoid a stronger resolution by the committee (which would have required a Senate vote), Cranston formally accepted the reprimand. In a dramatic speech on the floor, he also claimed that he had done nothing worse than had most of his colleagues in the Senate.[v]

Thompson recognizes that "constituency service" is a common function performed by legislators, though he questions whether it should be accorded the legitimacy it often receives. Implicitly, therefore, Thompson rejects the approach of *Bowling* of attempting to classify a transaction as a bribe by determining whether the legislator's behavior is or is not "official."

Thompson also rejects two additional approaches, which he calls the "competitive politics" theory and the "pervasive corruption" theory. The first he defines as treating influence-peddling such as that engaged in by the Keating Five as "part of a normal competitive process, in which all politicians are encouraged by the political system to solicit support and bestow favors in order to win elections." The second holds that most politicians engage in conduct similar to the Keating Five, either because they are corrupt or they "are forced by the system to act in corrupt ways." He goes on:

> These two common interpretations seem to be different. Indeed, they seem to be opposites, since one finds corruption where the other does not. But on closer inspection, their concepts of corruption turn out to be fundamentally similar. We can begin to see the similarity in the fact that they both conclude that the conduct of the Keating Five is not morally distinguishable from that of most other politicians. On both accounts, the Keating Five were simply intervening with administrators on behalf of a campaign contributor, a common practice. The competitive politics theory accepts the practice, the pervasive corruption theory condemns it. But on neither theory do the details of the case (e.g., what kind of intervention) make any difference in the moral assessment.

Id. at 370.

Among the details of the Keating Five affair that Thompson believes permit moral condemnation of the senators are: that although the senators would regularly intervene in behalf of constituents whether or not they were contributors, the nature of the intervention—"[f]ive senators meeting in private with regulators on a specific case"—was extraordinary; that the intervention went well beyond a status inquiry, which Thompson regards as "perfectly proper," to the point of appearing to the regulators more like a threat; and that the contributions were extraordinarily large and, in some cases, involved "ideological incongruence," as when the conservative Republican Keating gave to the liberal Democrat Cranston.

In commenting on the Senate Ethics Committee's report, Thompson writes:

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v. An account of the Keating Five affair in the context of the savings and loan scandal generally is contained in Peter DeLeon, THINKING ABOUT POLITICAL CORRUPTION 130–163 (1993). Both Thompson and DeLeon provide references to more detailed accounts.

> The committee found the contributions and services [in Cranston's case] to be "substantially linked" through an "impermissible pattern of conduct," but they stopped short of finding "corrupt intent." Why did the committee decline to find corruption here? The connection, it would seem, could hardly be closer.... Part of the answer probably is that "corrupt intent" is the language of the bribery statutes, and the committee did not dare suggest that campaign contributions could be bribes. The line between contributions and bribes must be kept bright.
>
> But *is* the line so bright?... Courts have not been able to provide a principled way of distinguishing the two.

Id. at 374. On this note, we may end this chapter about where it began.

Chapter 10

Perspectives on Campaign Finance

The next several chapters consider efforts to regulate and reform the system of campaign finance in American politics, as well as the constitutional constraints on such efforts. In this chapter we shall consider excerpts from a number of writings illustrating a variety of views on this controversial issue.

Before turning to the excerpts, it will be well to review a few of the basic facts and figures relating to campaign finance. More information will be presented in the subsequent chapters, as it is pertinent to the subjects under consideration. But there is no need for this book to attempt a comprehensive description of the campaign finance system, because nowadays there is a steady stream of books that do this very well. Among the worthy volumes published in recent years that consider the issue broadly are Herbert E. Alexander & Anthony Corrado, FINANCING THE 1992 ELECTION (forthcoming, 1995); Herbert E. Alexander, FINANCING POLITICS: MONEY, ELECTIONS & POLITICAL REFORM (4th ed., 1992); Frank J. Sorauf, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES (1992); Frank J. Sorauf, MONEY IN AMERICAN ELECTIONS (1988).[a]

If one looks broadly at campaign finance over the past several decades, the dominant theme is growth. A recent estimate of total spending on all political campaigns in the United States for the two-year presidential cycle 1991–92 put the figure at just over $3.2 billion. The following comparison with earlier presidential cycles shows the growth in spending that has occurred.[b]

Years	Nominal Dollars (millions)	1992 Dollars (millions)	Years	Nominal Dollars (millions)	1992 Dollars (millions)
1951–52	140	735	1975–76	540	1,367
1955–56	155	789	1979–80	1,200	2,250
1959–60	175	818	1983–84	1,800	2,460
1963–64	200	890	1987–88	2,700	3,235
1967–68	300	1,222	1991–92	3,220	3,220
1971–72	425	1,427			

a. Perhaps the classic work on American campaign finance is Alexander Heard, THE COSTS OF DEMOCRACY (1960). Of course, it is now hopelessly obsolete, but it remains a source of wisdom.

b. The nominal dollar figures are from Herbert E. Alexander & Anthony Corrado, FINANCING THE 1992 ELECTION (forthcoming, 1995). Other data in the next several paragraphs are from the same source. I gratefully acknowledge Professor Alexander's cooperation in making portions of the typescript available prior to its publication.

Of the $3.2 billion spent in the 1991–92 cycle, Alexander and Corrado report that that $550 million was spent on presidential campaigns; $678 million on congressional campaigns; $515 million on campaigns for state office; $350 million on campaigns for local office; and $175 million on ballot measure campaigns. The remainder was spent for more general campaign purposes by political organizations, including political parties (but not including money that these organizations contributed to candidates or spent directly to support particular candidates).

There are many reasons for the increase in campaign spending. One is that the goods and services that campaigns spend their money on have gotten more expensive. The price of such items as television advertising and postage have gone up more rapidly than the consumer price index. Therefore, in one sense, even the right-hand column above overstates the growth of campaign spending, if we are interested in how many goods and services campaigns are buying. But the money that campaigns spend have to be raised, and presumably the right-hand column is a roughly accurate indicator of the value of the funds contributors have been willing to provide to campaigns.

Some things purchased by campaigns have become cheaper, especially computer technology. But this has not lowered campaign costs; it has simply made it possible—and therefore necessary, because campaigning is a competitive enterprise—for campaigns to function at a level of sophistication that was not previously possible. For example, campaigns now routinely engage in polling and targeted mail activities that would not have been imaginable one or two or three decades ago.

For these and many other reasons, the rise in campaign spending has been inexorable. True, the above figures indicate that the increase has not occurred in a straight line and that, indeed, there was no increase at all from 1988 to 1992, when inflation is taken into account. But it would be hazardous to assume on the basis of one election that the period of increase has come to an end. For evidence of this, consider one sector of campaign spending, congressional elections. Once inflation was considered, congressional spending showed little or no growth between 1984 and 1990. One of the leading students of campaign finance concluded:

> In short, the sharp growth of money in the late 1970s and the early 1980s, and the apocalyptic predictions based on it, seems to have been temporary, a trend now overtaken by new events and a maturing of the [regime of campaign finance governed by federal legislation adopted in 1974].[c]

Yet, according to Alexander and Corrado, congressional campaign spending in 1992 was more than 50 percent higher than in 1990 (slightly less in constant dollars).

Many people regard the steady increase in campaign spending as a problem in itself. Most politicians, journalists, academics, and other close observers of electoral politics do not share this view. They point out that the total amount spent on political campaigns is miniscule compared, say, to what is spent to advertise commercial goods and services, or to government budgets generally. They main-

c. Frank J. Sorauf, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 13 (1992).

tain that communication is central to a democratic system and there is no reason to assume that such communication will be costless.

Part of the public sentiment against the growth of campaign spending probably reflects disapproval of the content of political advertising, which is often negative, misleading, superficial, strident, or all of the above. Many close observers of politics share this disapproval, though no one seems to have come up with a very good idea for what can be done about it.

Aside from the content of campaigning, close observers tend to be less concerned about the growth in spending in itself than about some of the stresses and strains that accompany that growth. As the following pages will show, there are many such concerns, and different observers have very different ideas about how important they are. Probably debate has centered primarily around the distribution of campaign resources and the implications that the distribution has for electoral competition; and on the pressures that are generated by the need to raise increasing amounts of campaign contributions.

With this introduction, we shall move on to the excerpts that make up the bulk of this chapter. The first is from a book published in 1975. The major contemporary statute regulating campaign finance at the federal level was adopted in 1974. Most states also adopted significant new campaign finance regulations at about the same time. Thus, the comprehensive survey of the various goals of reform contained in the first excerpt was written at a time of considerable reform activity, but before the consequences of the new reforms could be known. The remaining excerpts are more recent and therefore reflect developments since the reform legislation was passed.

As you read each excerpt, consider the following questions. Which aspects of the campaign finance system are of greatest concern to the writer? To what extent do you agree with the writer's diagnosis of the problems related to campaign finance? What regulations or reforms, if any, would be responsive to the problems the writer perceives? What side effects, desirable or undesirable, would accompany any such reforms?

David W. Adamany & George E. Agree, Political Money (1975)

Excerpts from Chapters 1–3

In a town meeting democracy, the question of political finance has little significance. Issues are defined in common, and the voters and candidates know and have equal access to each other. The wealth or lack of it at a speaker's disposal may influence the degree of respect he is accorded, but it can hardly influence whether he is heard or affect his ability to say what he wants to say.

In a modern mass society, in which democracy must be representative rather than direct, the question of political finance can be of decisive importance.

Money and Democracy

In the United States as in other democratic countries, political activity has traditionally been financed through private, voluntary contributions to parties and candidates. Since all citizens have an equal right to political participation, traditional democratic theory assumes that all interests and points of view will receive financial support and expression in proportion to the numbers of their adherents. In fact, however, since all persons do not have equal financial means,

the views and interests of the wealthy are expressed far out of proportion to their numbers.

Financial means, of course, are just one of the inequalities in a democracy. Other political resources are also spread unevenly among individuals and classes. Specific traits—an imposing stature, attractive face, commanding voice, personal charisma, high energy level or intellect—aid one candidate or one citizen activist as against others. And some political resources other than money are closely linked to the social and economic system. Education helps one to understand issues and master the skills of politics. Leisure time gives one opportunities to engage in political activity. Prestige and community standing help one to be listened to attentively. Of course, incentives to political interest or activity are unequal. Money may affect even the cloudy realm of personal motivation. Those with family traditions of political activism, with a sense of personal effectiveness, with high needs for and expectations of ego satisfaction may be more likely than others to engage in political activity.

But at the outset inequalities of money are probably greater than inequalities in time, energy, education, and personal traits. Other political resources—though admittedly more widespread among the well-off—are also frequently found among other social economic groups and, more important, can be more readily developed by activists within those strata.

Those with money are more likely than those without it to participate in politics. The wealthy have continuing interests to defend, an understanding of the continuity of those interests, a quicker appreciation of the immediate and long-term advantages of political participation, and a social milieu that favors political activism. In other sectors of the society, political awareness and activism tend to be spurred by visible and exciting events, whereas the participation of the moneyed is linked to ongoing institutions and social structures.

Money, unlike other political resources, is liquid. Dollars are easily moved from across the nation into, say, Alabama to assure that a senior senator, chairman of a powerful committee affecting national financial interests, will retain his seat in the world's greatest deliberative body and, therefore, the influential chairmanship that would otherwise go to the second-ranking majority party senator, perhaps a liberal midwestern maverick. The citizen outside Alabama who can give only his time, energy, or skills cannot easily use them to affect the Alabama senatorial election. But dollars are legal tender anywhere in the United States.

Money moves silently as well as easily. Cash leaves no tracks. Checks can be laundered—passed through intermediates, individuals or committees. Transfer payments among committees can obscure the original source of funds, whereas the citizen who serves on a political committee, canvasses his neighbors, posts a sign on his car or lawn, attends a caucus, or in other ways uses his time, energy, and skills can hardly conceal his attempt to influence politics. The public can evaluate who he is, what he wants, and what his support implies about his candidate or party.

Finally, money can buy most non-economic political resources. It can pay canvassers, or skilled campaign managers, or publicists, or researchers. It cannot endow a candidate with intelligence, but it can buy him a brain trust. It cannot change his voice or face, but it can hire a make-up man, a voice coach, and a clever film editor. Those with money can buy virtually any of the resources that other citizens give directly.

The inequality of wealth among citizens would by itself jeopardize democracy. But in a modern industrial society, financially powerful business, labor, and other organizations which have no standing as part of the electorate and to which no one has ever dreamed of extending the franchise have acquired, by deploying money, a kind of corporate citizenship. Much political giving today is not really private but institutional in character.

Historically, the influence of money has been held in check by the press, public interest groups, social movements, and other non-economic forces in society. But time and again the final check has been the authority of voters and the vigor of opposition politicians to hold office-holders accountable in elections.

In recent years, traditional voter loyalties, class identification, and political organizations have withered. Split-ticket balloting and highly unpredictable election outcomes reveal that voters are increasingly without electoral moorings. Long-accepted political leaders and institutions no longer influence voters. A better educated, highly mobile, and increasingly middle class electorate receives its campaign information not from neighborhood precinct workers but from the communications media.

In politics, a long-static pattern of organizations and institutions has been displaced by technology. Technology is for sale, at prices that stagger old-line politicians. Public opinion polls, broadcast media time, film producers and editors, computers and their attending armies of technicians, and advance men to organize the carnivals that gull newsgatherers are expensive.

Campaign costs have not only made politicians more vulnerable to pressures from those who have money, they have also made the wealthy more vulnerable to extortion by the politicians. Whether they want to or not, those who are regulated by or otherwise economically dependent on government—as is virtually every business and profession in a modern post-industrial society—often feel that they must contribute to politics when solicited. Asked why he had authorized the illegal contribution of company funds to meet the solicitation of presidential money managers, the chairman of the board of one of the nation's largest corporations replied, "A large part of the money raised from the business community for political purposes is given in fear of what would happen if it were not given." ...

Even fund raisers are deeply troubled by the present system. At a recent Senate hearing, members of the Senate and Joseph Cole, finance chairman of the Democratic National Committee, spoke frankly about financing campaigns:

> *Mr. Cole*: And I would comment on one other point, and that is the large contribution, a subject with which I have considerable experience. I tell you that this is the most unattractive and difficult thing about running for public office today. When I watch a presidential candidate demean himself and drive himself to rush to spend a minute or two for a potential large contributor instead of tending to his business or tending to the issues of the campaign, the priority that is given to win favor with these large contributors is very disheartening to observe....
>
> *Senator Pastore*: It is personal pride and self-respect. I, myself, have always been embarrassed and humiliated and had butterflies when I had to do these things. You almost feel like a beggar. If you are independent, it isn't a matter of whether or not you will become beholden, it is a matter of whether or not you are putting your self-respect on the line....

> *Senator Moss*: If the Senator will yield, I feel the same thing. I have had my campaign men say, "Now, look, Senator, if you will just pick up the phone and say a few words to Joe, we can go over and pick up some money." I say, "To heck with it: I have got nothing to say to him."

Senator Hugh Scott, pleading with the Senate to support his public financing amendment... put it bluntly:

> No member of this body could be honest with himself if he did not admit that in running for reelection, he had found it necessary to accept contributions, often large contributions, certainly large contributions, from those contributors who were willing to support his cause. I would have said [who] believed in his cause, but I do not know. I only know they supported him, but those contributions have inevitably raised a sense of obligation. Deny it how we will, the sense of obligation persists, and all of us have been involved in the exercise. I have used it myself.... I have to ask myself, what is the obligation involved. I wonder, when someone comes back later and asks me to do something—hopefully they ask me to do something I can do—-would he embarrass me by asking me to do something that I should not do.

Few politicians in modern presidential politics have been as underfinanced as Hubert Humphrey in both 1960 and 1968. He has added his voice to the others in the Senate calling for public financing of elections:

> I have been in a number of campaigns, and I enjoy the campaigns.... But the most demeaning, disenchanting part of politics is related to campaign finance.... Most of us, when we campaign, are on the telephone, calling up our friends, calling up committees, meeting with people, often times begging for help. Searching for campaign money is a disgusting, degrading, demeaning experience. It is about time we cleaned it up.

The Problems of Reform

The first problem of reform is to enable a nation with a private property economy and, consequently, a massive inequality of individual and institutional means to preserve opportunities for all its citizens to participate equally or nearly equally in financing politics. One possible solution is to limit the size of contributions to an amount that everyone, or nearly everyone, can afford. This approach, on its own and if enforced, would produce a genuine equality of opportunity; but it might also impoverish parties and candidates, stifling the competition necessary in a democracy.

An effective adversary process in elections requires that at least two candidates have sufficient campaign funds to establish their personal identities and qualifications, to advance their programs and ideologies, to criticize the records and positions of their opponents, and to link themselves to a party or to other candidates holding the same views. Constituencies where public opinion is fragmented rather than polarized may require more than two candidates. Without adversary campaigns elections are as irrelevant to democracy as the balloting in authoritarian nations with one-party systems.

These conditions may seem simple—even simple-minded. Yet the posture of too many reformers and large segments of the public is that we must curb the

amount of money spent in campaigns. Instead, we must ask, "Do we spend enough money in American campaigns?" In 1968, campaigns to nominate and elect 524,000 public officials cost about $300 million; in the same year, a single soap company, Proctor and Gamble, spent $275 million on advertising. Democratic elections, one hopes, are far more important to Americans than detergents.

In 1972, national, state, and local governments spent almost $350 billion, about 40 percent of our national income. The $425 million Americans spent on campaigns to elect the men and women who manage these expenditures is piddling by comparison. And despite our unusually large number of elective offices, Americans spend proportionately less on politics than do the people of most other democracies. Swedes, for instance, spend four times as much per capita, even though the government carries the financial burden of registering voters and supports the parties with free radio and television time.

Hence, the second problem of political finance reform is to structure a system that will provide enough money for vigorous, competitive campaigns for public office.

A recurring pattern in the United States is the great disparity in campaign expenditures between opposing candidates for the same office. Although the personalities of the candidates, their stands on issues, their party affiliations, the public relations and prestige advantages of incumbency, the strength of local party organizations, and other considerations all may affect the outcome of an election, a candidate who is at a financial disadvantage may be unable to get a fair hearing for his case. The public's interest here is not, of course, the candidate's opportunity to promote his own career, but their opportunity to hear from candidates in a balanced way. Only if the hearers get enough information from two or several candidates can they intelligently exercise their control over government at the polls....

All candidates are not, however, entitled to equality in campaign financing. Some are frivolous, representing no substantial viewpoint in the nation. Others may speak for older interest groups or parties, once powerful but now in decline (like the Whigs after the emergence of the Republican party in the 1850s). On the other hand, newly emerging groups with no track record in elections may express the discontents of many Americans. Robert La Follette in 1924 and George Wallace in 1968 were spokesmen for large movements, but they could not demonstrate by any past history that they or their ideas would claim widespread loyalty. The third problem of political finance is to ensure that each candidate is entitled to a fair share of the financial resources through a formula flexible enough to acknowledge newly emerging as well as established movements without rewarding frivolous candidacies or propping up decaying political organizations.

The fourth problem of reform is to free candidates and elected officials from undesirable or disproportionate pressure and influence from contributors and to free citizens from pressure by politicians to give financial support to candidates or parties.

Many who give money to politics expect something in return. They may merely expect candidates to keep their pledges on foreign and domestic affairs or to conduct government in an honest and economical manner. But some contributors have more selfish motives. Contractors may contribute generously in order to protect their business arrangements with government. The underworld may contribute to buy protection for illicit activities....

Conversely, politicians may invoke the powers of government in demanding financial support. The Finance Committee for the Reelection of [President Nixon] set quotas for companies and for wealthy individuals based on the volume of government business or personal net worth. Extortion, or practices that differ only in being more genteel, are the Janus face of undue influence by contributors.

These practices require no explicit promise or threat. Merely giving large sums influences government. It advances some views ahead of others in the electoral arena. It makes officeholders attentive to the views of those who provide their campaign funds. It furnishes access to decision makers at critical moments. It subtly invites preference in government contracts, appointments, and other activities for those who have been helpful in financing elections. On its other face, money can be extracted from citizens without threats. Every request from an elected official who influences legislation or regulatory activity is an implicit demand. The contributor fears the consequences of failing to respond. He fears that his competitors may gain an advantage if they are more generous than he. Private contributions in these circumstances defile democratic ideals.

Where explicit understandings accompany either solicitation or giving, the issue is not pressure or influence but corruption in its legal sense. Preventing corruption is thus the fifth problem of reform....

"No America without democracy, no democracy without politics, no politics without parties," runs the opening passage of one our best-known books about the nation's party system. And if we address the problem of financing candidates but ignore the funding woes of parties, we upset delicate balances between the party organization and the party's officeholders. These relationships should not be tampered with lightly in a nation whose politics may be moving toward more ideologically coherent and possibly even more organizationally centralized parties. If parties are indispensable to democracy (and even the most hostile among us can scarcely imagine our politics without them) and if delicate balances between officeholders and party organizations mark our evolving political system, then whether and how to finance political parties is the sixth problem facing advocates of reform.

A seventh objective of reform is to enhance public confidence in the electoral system. On one level, a relatively equal opportunity for citizens to participate in political finance should cause more people to feel that they are effective in politics and that the system responds to them. Enough money for campaigns and a fair opportunity for candidates to be heard should mute much of the present sentiment that only the rich or those supported by the rich can run for office. Steps to curb pressure, influence, and corruption through campaign contributions should diminish popular belief that the governmental tune can be called only by wealthy piper payers. Probably support of political parties will do the least to nourish public confidence in our politics, but enough money, fairly apportioned money, and clean money for parties as well as candidates should at least neutralize the image of corruption and wrongdoing in our political arrangements.

But campaign finance reform has deeper implications for public confidence in government. The failure or ineptitude of government in meeting public wants is a far greater cause of citizen disaffection than the financing of political campaigns. Officials elected without effective opposition, because challengers cannot find financing, are unlikely to be responsive to popular needs. And officials who are attentive to interest groups, because they provide campaign money, are unlikely to

govern in ways that satisfy the needs or win the confidence of the vast majority of Americans. The goal of political finance reform is ultimately to win public confidence by creating a more responsive and effective electoral and governmental system.

The successful resolution of all these issues raises an eighth problem: the cost of maintaining a democratic electoral system. Obviously, an absolute dollar figure is only a starting point. Other perspectives are also relevant. How much does politics cost in relation to our ability to pay, that is, to our national wealth—or perhaps more specifically, to our national personal income, since that is the source of campaign funds? How much does it cost compared to political finance expenditures in other democratic nations? How strong is the claim of a democratic electoral system on resources that might otherwise go for food, housing, education, health care, defense, recreation, and a host of other personal and governmental budget items?

The American people are already paying direct costs of election administration that may be reasonably estimated at almost $250 million in each election year. The cost of all nomination and election contests was about $300 million in 1968 and probably $425 million in 1972. Reform may cost double or triple that amount.

But reform may also reduce the indirect costs imposed by the present system. If the present system benefits those who want something from government, then the rest of us must pay for that something. For example, if $600,000 spent on politics by maritime unions helps influence Congress to maintain a $500 million subsidy for a shrinking national merchant marine, the present system increases the taxpayers' burden by that amount....

Finally, political finance policy should be as straightforward as possible in its results and its administrative arrangements. Nothing in our politics arouses such suspicion as campaign funds. Nowhere is there so much conviction that laws are broken, regulations bent, and ethics trammeled. Long years of wholly ineffectual laws and freebooting finance practices have confirmed the public's suspicion. Any new policy must, therefore, be simple enough to gain public understanding, at least for its basic rules and perhaps even for its specific operations.

Citizens of each party must be able to see clearly when their own champions are in violation of the regulations and to realize that the whistle is not being blown by a partisan referee. And if a political finance policy requires public participation and support and if it entails expenditures of tax money, citizens must be able to assess it easily. Their assessment will bear heavily both on their own willingness to participate and on their reaction to the community's collective participation through the tax system....

Why Costs Rise

Most citizens believe that the staggering increases in campaign costs are a sinister consequence of the self-serving greed of ruthless politicians. But careful students of political finance find other factors at work, many wholly beyond the control of politicians and some within their control but not dishonorable.

Part of the cost increase results from the increasing number of people who are eligible to vote. Campaigners must increase their spending as the electorate expands; sending a first class letter to every elector would have cost more in 1972, with 136 million eligibles, than in 1968, with 120 million eligibles (even if postage

costs had remained constant, which they did not).[d] Media costs vary with the size of the audience. Demands for bumper stickers, brochures, and other essential campaign materials also depend on the size of the constituency. The growth of the electorate in recent years is due in part to the baby boom of the 1940s and 1950s. In addition, the Voting Rights Act of 1965 brought additional millions of blacks into the electorate and the Twenty-Sixth Amendment enfranchised millions of eighteen-, nineteen-, and twenty-year-olds.

The cost increase is also due to general inflation. The Consumer Price Index was 5 percent higher in 1964 than in 1960, 18 percent higher in 1968, and 41 percent higher in 1972.[e] And such goods and services as the salaries of skilled and experienced staff workers, postage stamps, mass media advertising, and air fares have gone up faster than the...average annual increase in the Consumer Price Index....Just doing the same thing, at much higher prices, accounts for a substantial share of the increase in campaign spending.

Changes in technology also are responsible for higher costs. The advent of radio and then of television sent costs soaring. And the use of special production teams and skilled film makers has drastically increased preparation costs for television....Public opinion polling is another increasingly expensive campaign practice. In presidential races polling outlays run to hundreds of thousands of dollars. Even in a Senate race in a medium-sized state, a three-phase polling operation in the year prior to election day will cost a minimum of $25,000. In the old days, of course, politicians relied on inexpensive but unscientific straw polls at supermarkets or in schools.

"Personalized" letters to voters are the newest style in campaigning. The preparation of these letters requires the installation of elaborate phone banks, manned by paid operators, months before the election. Information solicited about and from voters is then transferred, at high cost, to computer cards or tapes. The computer then summons up names of certain categories of voters—Roman Catholics, union workers, conservatives—and types a letter geared to the category and personally addressed to each voter.[f] Postage adds to the price of this electronic version of the personal contact vote solicitation that was once the work of now virtually extinct precinct captains.

Before voters object to the cost of these technologies, they should remember that in the United States politics must compete with a host of other diversions for the attention of an electorate accustomed to sophisticated, amusing, or subtle media advertising, news, and programming. The decline of party organizations has eliminated the reliable system of precinct workers who both took the public

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d. The estimated voting age population as of July 1, 1992, was nearly 189 million.

e. The CPI was more than three times higher in 1992 than in 1972.

f. In the two decades since Adamany and Agree wrote their book, technology for producing computerized mail has improved enormously and the necessary equipment has become much less expensive. However, the lower cost has simply stimulated greater use by campaigns, so that more is probably spent now on computerized mail than when Adamany and Agree wrote. Greater use of mail has also been stimulated by the rise of cable television, VCR's, and the like, so that conventional television advertising is less effective than previously in reaching the electorate. Finally, the spread of the use of computerized mail has driven many campaigns to rely on "glossier," more elaborate, and costlier mailings than were previously used, so that their mailers will be differentiated from the large number of political mailers received by voters just before an election.

pulse and tried to regulate it. Politicians resort to polls and personalized letters in an effort to fill the vacuum. The old-time mass rallies—hundreds of thousands in Cadillac Square to kick off the Democratic presidential campaign—are virtually gone. Americans sit stubbornly at home before their television sets, and the politicians must woo them electronically.

The geographical size of constituencies adds further costs. Nationwide campaigning by jet plane—especially since Hawaii and Alaska have become states—is far more expensive than the front porch campaigns or even the systematic city-by-city whistle stops of an earlier day. The one-man one-vote rules laid down by the Supreme Court have shifted House representation to cities and suburbs, leaving fewer representatives to cover sparsely settled regions. Maintaining headquarters and staff in many parts of a large geographical district adds to high costs.

The decline of traditional party organizations has also increased campaign costs. The reliable, year-in year-out ward organization got voters registered, tallied their pre-election preferences, and took them to the polls. Now candidates must painstakingly and expensively build citizen organizations for each new campaign, or they must pay workers to get these tasks done. Often several candidate organizations and political committees (such as union political action groups) work the same area, at greater expense and with less effectiveness than Frank Skeffington's precinct minions.

Competition, too, sends costs soaring. Candidates and their friends, as well as interest groups, big contributors, and party leaders, have always spent more money in districts and circumstances where the race is likely to be close than in opposition-dominated districts where the purpose of running a candidate is primarily to aid the ticket and give heart to the party faithful.

But competition has spread in the past twenty-five years. Republicans have broken open the once solidly Democratic South; outlays in Senate and House races in the region have accordingly shot upward. Democrats, in turn, have become equal competitors in the Midwest and Plains, staunchly Republican since the Civil War, and more recently, in the once impenetrable white collar suburbs. The decay of the Roosevelt New Deal coalition has also made presidential contests much more competitive.

"Reform" of nominating procedures also raises the cost to a candidate. When nominations were made by party caucuses or conventions, he had to appeal to only a relatively small number of persons. Speeches at party meetings, hospitality at delegate receptions, and front porch or parlor visits sufficed. But the convention system has been abandoned in most states, and the selection of national convention delegates occurs more and more frequently in primaries. Candidates must therefore wage not one but two full-scale appeals to the electorate: first for nomination in the primary and second for office in the general election. If the trend toward going to the public in nominating procedures continues, expenses for primary campaigns will continue to grow.

The availability of money is, of course, crucial to the level of expenditures. In recent years a substantial number of personally wealthy individuals financed by their own resources, families, business associates, and friends have competed for high office. Such candidates spend freely and virtually force their opponents to do likewise.... Money is also available because a larger, better educated, and better informed electorate includes more givers. While 12 percent of the eligible electorate contributed to campaigns in both 1960 and 1972, the electorate had

increased 30 million during those years and the number of contributors rose with it from roughly 13.1 million to 16.8 million.[g]

Finally, the large number of offices contested in the United States multiplies the overall campaign bill. No other nation has our Jacksonian, long-ballot tradition; and we pay a price for selecting 524,000 local, state, and national officials at the polls....

Few Americans contribute to politics, and those who do are disproportionately from upper socio-economic classes. A handful of Americans are truly big givers, making contributions ranging from $10,000 to more than $2 million. Established interest groups—business, health, agriculture, and labor—loom large in financing candidates, and some spend additional money for direct political action. Occasionally an ideological candidate, especially for the presidency, wins an outpouring of small contributions by appealing to a narrow segment of the population which is highly polarized on deeply felt issues.

The pattern of giving distorts American elections: candidates win access to the electorate only if they can mobilize money from the upper classes, established interest groups, big givers, or ideological zealots. Other alternatives have difficulty getting heard. And the voters' choice is thereby limited. The pattern of giving also threatens the governmental process: the contributions of big givers and interest groups award them access to officeholders, so they can better plead their causes. In some cases, contributions directly corrupt government by purchasing decisions. In others, governmental power is brought to bear, directly or implicitly, to squeeze contributions from those subject to governmental regulation or retaliation.

The private financing system does not supply enough money for politics, and the funds it does provide distort both elections and decision making. The equality of citizens on election day is diluted by their inequality in campaign financing. The electorate shares its control of officials with the financial constituency. Campaign financing policy should assure sufficient money for vigorous campaigns in a way that allows all citizens a roughly equal opportunity to participate in financing as well as voting and that eliminates the disproportionate influence of outright corruption that marks existing contributing practices.

Notes and Questions

1. Do you agree with the eight "problems" or "objectives" of campaign finance reform set forth by Adamany and Agree? If so, which are the most important? The least important? Is it clear that campaign finance reform is the most appropriate vehicle for attaining all their objectives? Are there additional objectives you think should be added to the list?

2. Adamany and Agree cover a broad range of issues pertinent to the campaign finance question. Although all are important and many have been contentious, probably two issues have attracted the most attention. First is the influence—corrupt influence, some would say—that contributors may gain over the official actions of the politicians that they support. The remaining writings in this

g. The percentage of the American population that makes monetary campaign contributions has remained remarkably steady. Over a 34-year period this percentage has remained between 10 and 15 percent. See Ruth S. Jones, *Contributing as Participation*, in MONEY, ELECTIONS, AND DEMOCRACY 27, 29 (M. Nugent & J. Johannes, eds., 1990).

chapter present three different viewpoints on this issue. Second is the effect that any actual or proposed regulation of campaign finance will have on electoral competition. In later chapters, we shall consider commentary on this and some of the other issues raised by Adamany and Agree.

Frank J. Sorauf, Money in American Elections 307–17 (1988)

The fear that contributors to campaigns, especially the contributors of large sums, will "purchase" leverage over public policy pervades Americans' views of their campaign finance. The issue centers very much on PAC contributions and on recipients who are legislative candidates—hence the cliche about "the best Congress money can buy." There is, however, no logical reason to limit the issue that way. Contributors other than PACs, individuals especially, may want to affect specific public policies.... Nor are legislatures the only elected policy-makers; voters in the states select a wide range of executive, administrative, and judicial officials after campaigns of varying extensiveness. Yet whatever the scope of the issue, central to it is the link between campaign money and policy outcomes.

Common Cause and the mass media have popularized the issue in a predictable form: the case study of a link between PAC contributions and a congressional decision. Examples abound. Over the years the best publicized have involved the contributions of doctors, dairy farmers, realtors, used car dealers, bankers, and gun owners. For the limited space of this book, the events surrounding the 1986 success of the National Rifle Association (NRA) in loosening the federal control of interstate gun transactions will have to suffice.

In March and April of 1986, the House of Representatives voted to weaken the Gun Control Act of 1968 to permit interstate sales of rifles and shotguns and to ease the record-keeping in commercial gun transactions. (The Senate had earlier passed similar but not identical legislation.) It was a major legislative victory for the National Rifle Association, an association of about 3 million gun owners. In the defeated opposition were law enforcement officials, and their much smaller and less well-funded organizations. The NRA, of course, was a major spender in congressional campaigns in 1984 ($700,324 in contributions and $785,516 in independent expenditures.)

NRA campaign spending did not go unnoticed in the press, and at the time of a crucial petition to force the bill out of committee, the *Washington Post* wrote that at least 129 of 156 (84 percent) of the signers of the discharge petition had received NRA money in 1984 or 1986. The next day a *Post* editorial proclaimed that the NRA "has done a bang-up job of buying support in Congress." But while some of the press assumed the PAC-policy connection, there were intimations in some of the nation's newspapers that the connection was not that simple. Sources of influence beyond the PAC and campaign finance seemed to be at work (see box).

Case studies such as this one raise all manner of questions. To begin, the direction of the cause is easily inferred, but less easily proven. Do the votes follow the money, or does the money follow the votes? While the votes in Congress may be influenced by the contributed money, it is more likely that the contributions result from the contributors' approval of the values and/or voting record of the candidate. PACs do give the greatest share of their money to incumbent candidates with well-

The Search for the Smoking Gun

In various ways the nation's press provided a number of hints that the National Rifle Association's success in weakening the Gun Control Act of 1968 had roots of influence other than money. From Minneapolis, New York, and Washington:

- The *Minneapolis Star-Tribune* quoted an anonymous Western Democrat as saying "It's the kind of an issue that could defeat me when nothing else could. In a typical year, this is an issue in a Rocky Mountain district that could move 4 to 5 percent of the people to vote the other way...."
- The *New York Times*'s Linda Greenhouse attributed the outcome to "the power of the National Rifle Association, one of the best organized and most feared lobbies in Washington," noting in conclusion that the NRA had "dedicated $1.6 million of its $5 million annual legislative budget to the bill."
- Somewhat later the *Washington Post* printed a four-paragraph opinion piece by Rep. David S. Monson, a Republican from Utah, challenging its interpretation of the vote on the bill. Wrote Representative Monson: "As a recipient of NRA contributions, I can unequivocally assure voters that my votes would have been the same without one dime of support from the NRA. That is because my constituents and I believe that the current enforcement of gun control legislation is a disgrace."

established voting records; for candidates without a record of legislative voting, they usually try to discover basic values in interviews or questionnaires. PACs do not contribute at random; just as individual contributors do, they support candidates whose ideas and values they like. The key question—and a very difficult one it is—is not whether legislators vote in ways that please their contributors, but whether they would have done so in the absence of a contribution.

It is, moreover, very hard to separate the effects of lobbying and of constituency pressures from the effects of a campaign contribution. The NRA has three million loyal members who respond with considerable intensity to the alarms of the organization, either in grass-roots pressure or in voting. Its Capitol Hill lobbyists are experienced and well financed. To speak of the NRA is to speak simultaneously of a powerful lobby, an affluent PAC, and a potent grass-roots organization. It is also to speak of a group of voters with such intense feelings about gun control that they are the prototypical "single issue" voters—voters for whom a single issue overrides all others.

Even if we can show that it was money that made the difference and that the votes did in fact follow the money, we have only explained a single case or instance. We have not even examined PAC activity on other sides of that issue. We have counted the winners, but not the losers. Nor do we know how typical our single case is of the whole business of a legislative session. To show the impact of campaign contributions on the legislative process, one would have to understand at least a good sample of roll calls and a map of PAC losses as well as

victories. In recent years, indeed, it has been clear that some of the heaviest spenders in the PAC movement have been among the biggest losers in the Congress. One need only mention the American Medical Association's losses on Medicare cost containment and the National Realtors Association loss of real estate tax shelters in the income tax revision of 1985–86.

Finally, most of the journalistic reports of PAC influence in legislatures suffer fatally from too simple a model of legislative decision-making. What of the role of constituency pressures; of legislative party; of the personal outlook and information of the legislator; of general public opinion; of the legislative peers and leaders; of groups and their lobbying; and, for at least some members, the programs and promptings of the president? One can hardly assume that the search for campaign contributions overrides all or even some of these imperatives. Any serious attempt to establish the independent effect of contributions must control for them, and many of the scholarly studies attempt to do so. Often, in fact, the argument shifts to the adequacy of the controls. Is a congressperson's previous record of liberal or conservative voting, for example, an adequate control for the aggregate effect of those external influences? That's a far tougher issue, of course, but at least all parties arguing it have rejected the simple correlation of PAC contributions and roll call votes.

Scholars working on the problem have begun to approach it with strategies more complex and sophisticated than the usual journalistic treatment. In some instances they have expanded the relationship to more PACs and a broader set of roll call votes. In some they have attempted to control for other factors such as party and constituency pressures. Yet others have extended the analysis over time, hoping to relate changes in contribution patterns with changes in votes. The results have been disappointingly mixed and ambiguous. Some studies find modest relationships and an independent effect of contributions, but others do not—an outcome probably the result of the different methodologies and the different groups and votes in the different projects.

From that diverse body of scholarship and its diverse conclusions, three conclusions seem warranted. First, and most important, there simply are no data in the systematic studies that would support the popular assertions about the "buying" of the Congress or about any other massive influence of money on the legislative process. Second, even taking the evidence selectively, there is at best a case for a modest influence of money, a degree of influence that puts it well behind the other major influences on congressional behavior. Third, in some of the studies with a time dimension, there is evidence that vote support for the PAC's legislative position leads to greater campaign contributions. They do not, however, answer the question whether the legislative votes changed in order to "earn" the reward of increased contributions.

Recent work has also begun to factor into the explanations the nature of PAC decision-making, the sources of PAC and group power, and the expectations of the contributors. They have, in other words, put the PACs into the equation! John Wright, for example, considers the way a group of large, often federated, PACs conduct their business:

> Because money must be raised at a local, grassroots level, local PAC officials, not Washington lobbyists, are primarily responsible for making allocation decisions. Consequently, congressmen who desire contributions

> must cultivate favorable relationships with local officials, and this arrangement tends to undercut the value of contributions as a bargaining tool for professional lobbyists.[27]

Janet Grenzke points to the effect of a different aspect of the PAC's basic organization and structure. Generally when one finds a positive causal relationship between contribution and pro-PAC change in a legislator's vote, she writes,

> The contribution is consistent with and may be considered a measure of the more important endorsement and campaign activities of the organization, which can influence member votes. Eliminating the contribution will not significantly change the organization's power because its power is based primarily on its ability to mobilize votes.[28]

In brief, PACs differ vastly in their organizations, goals, strategies, and decision-making; and those differences affect both their desire and their ability to use contributions to alter legislative votes.

When one considers PAC goals, one can of course take the PACs at their word; and the word has always been "access." Larry Sabato summarizes PAC expectations:

> While some legislators confess that PAC dollars affect their judgment of the issues before them, PAC officials are adamant that all they get for their investment is access to congressmen—a chance to "tell their story." Political analysts have long agreed that access is the principal goal of most interest groups, and lobbyists have always recognized that access is the key to influence...
>
> A congressman's time is often as valuable as his vote because, as the Public Affairs Council's Richard Armstrong declares, "except maybe for some guy from Idaho...they haven't time to see everybody. Some congressmen *say* they see everyone, but that's bullshit."[29]

In the broader world of American politics, "access" has always been a slippery word, sometimes serving in fact as a code word for palpable, demonstrated influence. As the PACs use it, however, it most often has a literal meaning: a chance to persuade, an opportunity to make a case or argue a point. If that argument seems self-serving, it is honestly made in the great number of instances. More important, mirabile dictu, it squares with what systematic evidence we have about the money-vote relationship. It fits with the complex variety of PAC organizations and with the diversity of their goals, especially with their disposition to contribute to candidates for all kinds of reasons that have little or only something to do with specific

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27. John R. Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective*, 79 AMERICAN POLITICAL SCIENCE REVIEW 400 (1985).

28. Janet M. Grenzke, *Shopping in the Congressional Supermarket: The Currency is Complex*, 33 AMERICAN JOURNAL OF POLITICAL SCIENCE 1 (1989).

29. Larry J. Sabato, PAC POWER 127 (1984). The ellipsis in the Armstrong quote is in the original. [As is the vulgarity.—ED.]

policy goals. The more generalized goals of access simply fit the realities of PACs better than do assumptions of a more purposeful, impact-on-policy strategy.

To be stubbornly skeptical about it, however, we have no systematic evidence that contributions do in fact produce access. The testimony of journalists, members of Congress, and PAC leadership suggests that PACs do enjoy it. The harder question remains unanswered: would that access have been granted in the absence of the contribution? If one concedes the access, it is easy to spin out a broader hypothesis. What appears to be a limited independent influence of PAC contributions is achieved largely through the persuasion afforded or facilitated by access. Access thus converts to an edge in influencing the decisions of members of Congress. Moreover, persuasion is easier when other players in the legislative process are less exigent. Thus the influence of the contributors varies with the nature of the policy at stake; it is greater in the narrower, less salient issues that escape party, presidential, or popular attention.

Alternatively, one can recast the problem of money's influence on legislation in terms of pluralism—the struggle of competing interests and their PACs for access or influence in a diverse and many-sided legislative contest. It is a view of intricately divided and opposing influence, one in which countervailing interests check and offset each other.[31] Such an argument about countervailing group power often stuns the ordinary citizen, for it leads to a conclusion that, all other things being equal, more PACs are "better" than fewer PACs. The view, moreover, is more than hypothetical; there are pieces of evidence that groups consciously attempt to offset the influence of their opponents. Certainly the success of conservative PACs in the late 1970s and nearly 1980s stimulated the formation of liberal PACs. And one scholarly study has found evidence of corporate PACs making contributions to members of the House Education and Labor Committee about two months after labor PACs had done so.[32] The resulting system of countervailing pressures thus liberates the legislator from the agonies of choice and gratitude. In the words of Rep. Barney Frank, a Democrat from Massachusetts,

> Business PACs invest in incumbents. It's the banks against the thrifts, the insurance companies against the banks, the Wall Street investment banks against the money center commercial banks. There's money any way you vote.

The recipient may therefore be in a stronger bargaining position than the contributor.

The other side of the pluralist argument is that as PACs proliferate, the contribution of any one accounts for fewer and fewer of the receipts of the average candidate and, therefore, the political influence or leverage attached to it dimin-

31. I hope it is clear that I am not suggesting that all interests are represented or represented fully in this pluralist struggle. The argument here is simply that for the purposes of limiting group power in this countervailing system that "more is better," that the more interests that are active, the more likely the system is to be self-limiting.

32. Dickinson McGaw & Richard McCleary, *PAC Spending, Electioneering & Lobbying: A Vector ARIMA Time Series Analysis*, 17 POLITY 574 (1985).

Table 1 Dispersal of PAC Contributions to Major Party Candidates for the House of Representatives, 1982–1984

	1982	1984
Number of PACs contributing to average candidate	46	54
Number of PACs contributing to average incumbent	140	160
Average PAC contribution to average candidate	$816	$960
Average PAC contribution to average incumbent	$741	$890
Average total receipts from PACs (all candidates)	$37,904	$52,230
Average total receipts from PACs (incumbents)	$128,795	$142,352
Average PAC contribution as % of average candidate receipts	0.63%	0.76%
Average PAC contributions as % of average incumbent receipts	0.27%	0.28%

ishes. The growing dispersal of PAC contributions and the diminishing dependence of a member of Congress on any one of them is apparent (Table 1). In fact, the dispersal is even greater than one might have expected because there are two trends at work: the number of PACs is increasing *and* the "average" PAC is spreading its contributions to more candidates rather than sharply increasing the sums of money it gives to each. The bottom line, then, is that the share of the total receipts that the average PAC contribution represents is well under one percent; for incumbents it is less than a third of one percent. If money is leverage, the leverage is not very substantial.

To summarize once again, the evidence simply does not support the more extravagant claims about the "buying" of the Congress. Systematic studies indicate at most a modest influence for PAC contributors, a degree of influence usually far less important than the voting constituency, the party, or the values [of] the legislator. Moreover, several other studies suggest that the goals and capacities of most PACs are not congruent with assumptions that they set out to change congressional votes. In fact, both the extent of their influence and the nature of their operations fit much better their own stated goal of access. Finally, the development of PAC pluralism—both in the increase of countervailing PACs and in the wide dispersion of their contributions in small sums—also leads one to a more modest assessment of PAC influence. Such conclusions may serve few demonologies, but they are the only ones that serve the facts as we know them.

One last matter remains on the money-policy agenda. Several journalists have proposed a different and more basic link between money and legislative votes, one involving not individual members of Congress but an entire legislative party. They argue that the Democrats in Congress, in order to compete with Republican fundraising, have moved the party's ideological weight closer to the political center. The claims always refer to Rep. Tony Coelho's chairmanship of the Democratic Congressional Campaign Committee and, more generally, the party's Washington money-raisers.[h] Among the latter, the "most corrosive of the party's identity" are said to be

> the rising Washington-based lawyers who can invest a few years laboring for the party, making contacts, and distributing funds—and then cash in

h. [For a detailed account of Coelho and his leadership of the DCCC, see Brooks Jackson, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS (1988).—ED.]

> handsomely in an enlarged law/lobby practice that serves mostly Republican-oriented business interests.[35]

It is not easy to assess the charge. The Democrats are certainly raising more corporate and business PAC money than they earlier did, and voices within the party urging a move to the ideological center are now louder than they were in the 1970s. But the argument rests on the proposition that individual members of Congress have altered their voting positions in order to facilitate collective party fund-raising. That proposition does not easily square with the weakness of party caucuses and steering committees in Congress, nor does it square with the fact that incumbent members of Congress raise their own reelection campaign funds—and raise them very well, too.

Notes and Questions

1. Sorauf devotes considerable space to the "case study" of the National Rifle Association. Is that a fair example to select, to test the hypothesis that interest groups can obtain significant political leverage from campaign contributions?

2. Most of the studies Sorauf relies on attempt to find systematic causal relationships between campaign contributions and congressional floor votes. As Sorauf reports, the results are mixed. Some commentators have suggested that influence derived from campaign contributions, to the extent that it exists, would be more likely to manifest itself in committees and in other legislative activities with less visibility than floor votes. Unfortunately, most other activities are much more difficult to measure than floor votes. One study, published after Sorauf's book, seems to find some evidence of influence from contributions over committee activity. See Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AMERICAN POLITICAL SCIENCE REVIEW 797 (1990).

3. As Sorauf suggests, the goals of different contributors may vary. Contributors who seek to attain their goals by helping candidates who support the same goals are sometimes said to follow an "electoral strategy." Those who contribute to candidates they believe are likely to win anyway in an attempt to influence their policies follow a "legislative strategy." See generally Kay Lehman Schlozman & John T. Tierney, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 206–08 (1986). Of course, a single contribution could be intended to serve both purposes. But a contributor following a predominantly electoral strategy would be likely to contribute primarily to candidates in competitive races, while a legislative strategy would point toward contributions to secure incumbents, particularly those in leadership positions or serving on committees of importance to the contributor.

That many interest group contributions are made in pursuit of a legislative strategy seems beyond doubt. Consider, for example, the 1982 Texas gubernatorial election. A Democrat unexpectedly defeated the Republican incumbent. Shortly after the election, the newly-elected Democrat received ninety contributions in amounts from $10,000 to $50,000 from sources that had contributed to his Republican opponent before the election.

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35. Robert Kuttner, "Ass Backward," in *The New Republic*, April 22, 1985.

Nevertheless, there are many contributions, including many interest group contributions, that are made in pursuit of an electoral strategy. Even when contributors follow a legislative strategy, Sorauf raises the question whether they succeed. As he reports, the empirical research on this question has produced mixed results. Furthermore, Sorauf appears to regard the question as crucial from a normative or policy perspective.

Do you agree? Suppose, in Sorauf's terminology, that instead of votes in Congress following campaign money, campaign money follows the votes and that the answer to what he calls the "key question" is that although "legislators vote in ways that please their contributors,...they would have done so in the absence of a contribution." If it is assumed that campaign spending has a significant influence on who wins an election—an assumption that will be examined in later chapters—the result would be that well-funded interests would be able to influence public policy by electing sympathetic candidates but not by using their money to induce unsympathetic candidates to change their positions. This might still give well-funded interests a big advantage over poorly-funded adversaries.

Under these suppositions, which of the problems for campaign finance reform identified by Adamany and Agree would be satisfied? Which would not? Would you be satisfied with the system? The essay by Bruce Cain, reprinted later in this chapter, may stimulate your thinking on these questions. The following excerpt looks at the relationship between contributions and legislative activity from a different angle.

Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*

18 HOFSTRA LAW REVIEW 301, 322–29 (1989)

What Is Meant By Influence?

Ironically, the inability of the econometric studies to answer whether campaign contributions have measurable effects on legislators' actions may result, in part, from the single-mindedness with which they have asked the question. Apparently believing that the extent of such measurable effects is of overriding importance, econometric analysts have attempted to tease out answers from data and mathematical tools ill-suited for the task. These analysts might make greater progress if they conducted a more open-ended inquiry into the dynamics of how campaign contributions enter into the legislative process and how they interact with other influences, rules and institutional factors to guide the conduct of individual legislators and the legislature as a whole. They would be well-advised to do so, not only to produce better social science, but because the degree of measurable aggregate influence of campaign contributions over legislative activity does not have the crucial normative significance that they have assumed.

It is commonly observed that any influence over legislative behavior generated by campaign contributions is intertwined with other influences. Michael Malbin, for example, points out that it is "difficult to separate the importance of PAC contributions from the lobbying efforts they are supposedly meant to enhance."[97]

97. See Michael Malbin, *Looking Back at the Future of Campaign Finance Reform*, in MONEY AND POLITICS IN THE UNITED STATES 232, 249 (Malbin ed., 1984); see also Sorauf,

Some writers conclude that because it is impossible to be confident that legislative actions favorable to contributors have been caused by contributions, concern over contributions may be minimized. Their premise of intertwining is correct and important, but the conclusion they draw from it is wrong by 180 degrees.

The conclusion is wrong because the question of campaign finance is a question of conflict of interest. [For present purposes, a] conflict of interest exists when the consequences of a decision made in the course of a relationship of trust are likely to have an effect, not implicit in the trust relationship, on...the decisionmaker's self-interest....

Often, and in various contexts, we take institutional steps to minimize the occurrence of conflicts of interest, or we disqualify a person from acting when a conflict of interest arises. Why do we do so? Part of the reason, and not necessarily the most important part, is our concern that the individual may deliberately set aside his or her obligations of trust in favor of self-interest. Even if we were sure we could identify all such cases of overt dishonesty, we would continue to regulate conflicts of interest because of the probability that even an honest person's judgment will be impaired when in a position of conflict. Centuries before terms such as "selective perception" were current, it was understood that an individual whose own self-interest is at stake finds it difficult to view a situation dispassionately and objectively. That is why we refer to a person without conflict as "disinterested."

Some people in a conflict situation may be able to act in the position of trust without being the slightest bit moved by the potential effects on self-interest. Others may find that considerations of self-interest are present in their minds but may be able, nonetheless, to struggle through to a conclusion based only on proper considerations. Still other people may be biased in their judgments in situations not conventionally regarded as conflicts of interest. The reason these situations can, and commonly do exist, is that conflict of interest is a concept based on the average person. Sometimes individuals are unusually resistant to being moved by self-interest, sometimes they are unusually susceptible, and sometimes their goals and preferences are sufficiently idiosyncratic that what constitutes self-interest is unusual. Therefore, conflict of interest regulation sometimes disqualifies an individual who is *not* biased, while at other times it fails to disqualify an individual who *is* biased. This does not mean that the regulation is faulty. It happens because there is no alternative to regulating on the basis of what we believe are typical human reactions.

What is the significance of the fact that the campaign finance question is a question of conflict of interest? First consider this statement from one of the econometric studies: "It is useful to imagine that the exogenous variables [such as party, ideology and constituency] determine an 'initial position' on the issue for a

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supra (stating that "[i]t is...very hard to separate the effects of lobbying and of constituency pressures from the effects of a campaign contribution.").

John Kingdon quoted a House member who stated: "A close friend of mine, who's been associated with me for years and is an important campaign contributor, is in the oil business. I had no idea how this bill would affect the oil people until I heard from him." John Kingdon, CONGRESSMEN'S VOTING DECISIONS 34 (3d ed. 1989). Would the friendship have been sufficient to make this legislator pay such heed without the contributions? If so, why did the member mention the fact that the friend is a contributor? Would the friendship be as close without the contributions? Could the legislator answer these questions with certainty?

candidate, and that contributions cause shifts away from that position."[104] As a heuristic device, this is often a useful procedure. As a description of reality it is woefully inadequate because of the intertwining of campaign contributions with other influencing factors. From the beginning of an issue's life, legislators know of past contributions and the possibility of future ones from the interest groups that are affected, just as the legislators know of relevant constituency effects, party positions, various aspects of the merits of the issue and so on. All of these combine in a manner no one fully understands to form an initial predisposition in the legislator. Thereafter, the legislator may receive new information on any or all of these factors. The new information may modify the legislator's initial position, but the information that is received and the manner in which it is processed will themselves be influenced by the initial position.

In reality, then, the influence of campaign contributions is present from the start, and it interacts in the human mind with other influences in an unfathomable but complex dynamic. It affects the "chemistry" or the "mix" of the legislator's deliberations. It may or may not affect the legislator's ultimate actions, but setting aside the most flagrant cases, no one can be sure, perhaps not even the legislator in question. For this reason, to say that campaign contributions "taint" the legislative process is to use the language with precision. It is not that the entire legislative process or even a great deal of it is corrupt; rather, it is that the corrupt element is intermingled with the entire process, in a way that cannot be isolated.

The conflicts of interest caused by campaign contributions are illustrated routinely in nearly every daily newspaper. For instance, the following example appeared in the *Los Angeles Times* while these paragraphs were being written. It is from an article about six Democrats, mostly from the south, on the House Ways and Means Committee.[109] At the time of the article, it was believed that these six members of Congress might swing the committee to report out a reduction in the tax on capital gains, supported by President Bush and the Republicans but opposed by a majority of the Democrats:

> Whatever the outcome, Bush has laid bare a deep split between Democrats' traditional ideology of opposing special treatment for the wealthy and the party's growing dependence on contributions from a host of business special interest groups, particularly real estate developers, that would benefit from the tax cut.
>
> "We've got wealthy Democrats in this country too," said a longtime supporter of a capital gains cut, Beryl Anthony Jr. (D-Ark.), who is a key party fund-raiser as head of the Democratic Congressional Campaign Committee.

A common way of describing this type of situation is to say that there is an "appearance of impropriety." While not exactly wrong, discussion of the campaign finance question in terms of appearances is misleading. It suggests that there is an underlying reality that is either proper or not proper, and if we could only look behind the locked door or, perhaps, into the legislator's head, we would

104. Chappell, *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 64 REVIEW OF ECONOMICS & STATISTICS 77, 78 (1982).

109. Redburn, "Six Democrats Backing Capital Gains Tax Cut," L.A. Times, July 25, 1989, pt. 1, at 1.

know. Used as a rationale for reform measures, the argument is that the appearance of impropriety is a sufficient justification for reform, because it undermines popular confidence in government. Depending on who is speaking and who is listening, there may be an implied wink to the effect that impropriety is really very unlikely but that some sop must be thrown to the ignorantly suspicious public. Alternatively, the implied wink may suggest that of course there is impropriety, but it would be impolitic to say so directly.

Rather than saying there is an *appearance of impropriety* in the Democrats' dependence on contributions from interests demanding a capital gains reduction or in similar situations, it is more precise to say that there is a *reality of conflict of interest*. There was no meeting, behind closed doors or otherwise, not even a moment in a single legislator's mind, in which a decision was made either to succumb to the contributors or not to succumb. The pressure from the contributors is simply part of the mix of considerations out of which a position evolves. At best, one can exercise a judgment as to whether the outcome would have been different if there had been no contributions and no possibility of contributions. Even if the hypothetical outcome would have been the same, however, it does not change the fact that the real outcome results from an actual, tainted process. That is why the question of how much contributions affect legislative outcomes, while surely important, is not normatively crucial.

It may be objected that the conflict of interest argument applies equally to many of the major influences on the legislative process other than campaign contributions. Legislators who are highly responsive to their constituents, for example, most likely act in that manner because they believe it will help them get reelected—a self-interested reason. Legislators who adhere to the party position or the wishes of influential colleagues may do so because they hope for reciprocity in the future, or for advancement within the legislative chamber. They also act out of self-interest.

The fallacy in this objection is its assumption that all considerations of self-interest are equal. No one ever claimed that systems are corrupt simply because they contain incentives. If this were the case, there would be a conflict of interest any time an employer paid an employee a salary, since the employee who did a good job in hopes of keeping the job or being promoted would be acting corruptly. Such incentives are not conflicts of interest because they are implicit in the relationship of trust, in this case between the employer and employee.

A variety of pressures characterize political life in America. Sorting out which pressures are proper and which are not is difficult. There are, however, some easy cases. Constituency influence is an example. One side of the Burkean debate maintains that while legislators should regard constituent opinions as relevant data for public policy, they should be guided only by their own best judgments. There is no consensus in favor of that position. Accordingly, some degree of responsiveness to constituents' views is at least permissible in legislative positions of trust in this country.

The paradigm case of improper influence is the payment of money to the official for the official's benefit. That is what a campaign contribution is. Indeed, the distinction between a campaign contribution and a payment for the recipient's personal use can be blurred or nonexistent. Nevertheless, there are some differences. Campaign contributions, under current conditions, are more likely to be indispensable to an elected official than personal payments. This makes campaign

contributions the more dangerous, though not the more unethical practice. A second difference is that the contributor may be motivated not to influence the recipient but to promote a cause that the recipient represents. In other words, contributors may follow an electoral rather than a legislative strategy.... [T]he fact that many contributions are ideological may affect the way people think about all contributions.

Despite differences, it is clear that our culture regards it as inappropriate for public officials to be influenced by campaign contributions. We need not look to Common Cause, Elizabeth Drew, and Brooks Jackson to establish this point. Stronger evidence comes from the scholars with whom I have joined issue in this part. Frank Sorauf, Michael Malbin, and others with similar views would not be at such great pains to characterize the influence of campaign contributions as minimal if they did not believe that it would be wrong if the contributions were influential, or at least that the overwhelming majority of their fellow citizens believe that it would be wrong.

Further confirmation can be found in the fact that a campaign contribution made with the intent to influence official conduct constitutes bribery, as that crime is defined in most American jurisdictions. It is true that the typical special interest bribe in the form of a campaign contribution is very rarely prosecuted. I doubt that this reflects approval of the practice as much as recognition of its pervasiveness, which in turn results from the fact that the receipt of special interest contributions is more or less a practical necessity for most legislators. This necessity may constitute an excellent reason for not prosecuting such routine transactions as bribes, but it does not justify preservation of the system that creates the necessity.

It is a fact of our political culture that although a great variety of the pressures brought to bear on politicians embody forces that are regarded as more or less democratic and therefore legitimate, this is not true of pressure imposed by payments of money to politicians, either for their personal benefit or for campaign use. At best, the existence of such pressures is tolerated as a necessary evil. The evil is necessary within the existing campaign finance system, but the existence of the evil provides a compelling reason for reforming that system.

Notes and Questions

1. The symposium in which this article appeared included several commentaries, pertinent excerpts of which will be set forth in these notes. First, Gary C. Jacobson, *Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers*, 18 HOFSTRA LAW REVIEW 369, 377–78 (1989):

> Reelection depends on many other things besides money, and actions that promote reelection do not always serve constituents or conscience. Elected officials routinely confront choices between doing what helps them stay in office and doing what they think is best for their constituents, their party or their country. To give some familiar examples, the prevalence in Congress [of] wasteful pork barrel politics, of vacuous position taking, and of endless self-promotion, suggests that money is by no means the only electoral necessity that promotes shirking. Lowenstein falls short of demonstrating that the current campaign finance system,

which, after all, limits the amount of money supplied by any particular individual or political action committee (PAC), is an especially egregious source of shirking and, therefore, requires the sweeping reforms he proposes.

2. Martin Shapiro, *Corruption, Freedom and Equality in Campaign Financing*, 18 HOFSTRA LAW REVIEW 385, 387 (1989):

> Lowenstein... operates as a cultural anthropologist and discovers that there is an anti-corruption norm in American society and that campaign financing legislation is an expression of that norm. The norm is legitimated by its existence and the statutes are legitimated by the norm. This approach is not entirely satisfactory from the standpoint of constitutional law. There is a cultural norm of racism in our society. Does the existence of such a norm give constitutional legitimacy to racist statutes? Such an argument would not appear terribly attractive or constitutional. Moreover, there is that old bromide of cultural anthropology. Is the best evidence of a norm profession or behavior? If there is an anti-corruption norm in American society, surely there is also a pro-corruption norm in the widespread proclivity of Americans to seek to influence the behavior of legislators by any means short of assassination.

3. Sanford Levinson, *Electoral Regulation: Some Comments*, 18 HOFSTRA LAW REVIEW 411, 412–13 (1989):

> I remain unpersuaded by any analysis that expresses justified worry about the impact of money on the behavior of public officials and, at the same time, wholly ignores the power of the media to influence these same public officials in part through the media's ability to structure public consciousness. Almost a decade ago my colleague, L.A. Powe, queried why Congress should be able to limit the ability to influence the outcomes of elections of everyone, except those fortunate enough to be owners of mass media.... The potential for conflicts of interests at the heart of Lowenstein's analysis is also present when a candidate confronts the owners and editors of major newspapers on issues and when such a candidate beseeches the same owners and editors to support... his or her campaign.

Bruce Cain, *Can Campaign Finance Reform Create a More Ethical Political Process?*

31 Public Affairs Report, No. 1, at 1 (Institute of Governmental Studies, UC Berkeley, Jan. 1990)

Hardly a week goes by without a reference in the media to either national or local campaign finance problems. The litany of complaints is by now familiar—elections cost too much, political contributors are too influential, legislators spend excessive time raising money instead of minding the business of government, the will of the majority is frustrated by well-funded minorities. The familiarity of these concerns stems from their long history. Despite the best efforts of successive waves of well-intentioned and not so well-intentioned reformers since the nine-

teenth century, Americans continue to grapple with the corrupting effects of money upon their political system.

Has the U.S. made progress in this area? In some ways, yes, and others, no. Like the fabled boy with a finger in the dike, reformers plug up one hole in the political system only to find that another has sprung elsewhere. Now, reformers are proposing to stick additional digits in the electoral dike, but, understandably, the American public is beginning to run short on optimism. The U.S. has more regulations, wider disclosure, stiffer enforcement, and better compliance than at any other time in its history. But when all is said and done, the influence of money upon elections is as great as ever, the sums spent on campaigns are at an all time high, and special interests are certainly no less powerful. To borrow from Lenin, one step forward, two steps back.

Reformers often speak as though Americans agree about what they want from campaign finance regulation even though this is rarely, if ever, spelled out. One obvious way to discover the goals of political reform is to look for clear moral guidelines that might underlie campaign finance regulation. Can we agree that certain practices are unethical, and therefore rightly prohibited, or are the ends of campaign finance reform really "political" and "ideological" values over which we are condemned to fight forever?

My own view is that while there are ethical components to reform, there are severe limits to a purely ethical approach. Most critical campaign finance issues hinge on other kinds of values, and in particular on differing conceptions of equality. The language and concepts of ethics may be invoked to discuss campaign finance reform, but they must be embedded in an explicit political theory about both the proper processes and outcomes of a democratic government. There will be no consensus about campaign finance reform until there is a consensus about these other political and ideological values.

One commonly mentioned but infrequently defined ethical principle relevant to the debate over campaign finance reform is "noncorruption." The most blatant form of corruption is bribery; i.e. performing a public function in exchange for private benefit, and in particular, for money. Accepting a bribe, it is widely thought, perverts and distorts the choice of the decision maker, placing his or her material interests above those of the public. However, bribery is ethical in some contexts. A parent who "bribes" a child into good behavior during a car trip by promising an ice cream cone is not acting unethically. A businessman who induces his employees to work overtime is also acting appropriately in the context of a capitalist system.

Why is bribery thought to be unethical in the case of the public official, but not in the cases of the parent or the businessman? There are several reasons, I think, and they are all related to the theory of modern government. First, acting on a bribe is said to violate a public trust. A public official assumes a position with certain responsibilities and normative expectations. In the terminology of Pitkin, a representative "acts for" the represented, not for his or her own interests alone (although the two may coincide). Taking money in return for performing a public duty is to act for oneself rather than for the public.

There are several problems with this. First, it is not clear what acting for the public always means since the U.S. is not a purely populistic democracy. In various ways, the American version of a democracy balances off the interests of minorities against the will of the majority. Thus, if the meaning of acting for the

public is always representing the interests of the majority then the U.S. system frequently violates this norm. Second, if violating the public trust merely means acting in a manner that is not expected of an official, then the problem with this line of argument is that it does not provide good reasons why bribery is bad. It only says that bribery is bad because there is a consensus that such behavior should not be condoned. It is factually accurate to say that actions are banned when there is a consensus against those actions, but surely there are good reasons why we prohibit some political behaviors but not others. A moral explanation for rules refers to their utilitarian consequences or their relationship to basic moral principles, not merely to the fact of consensus.

A second critical aspect of bribery is its "quid pro quo" nature. A person acts corruptly, it is thought, when he or she performs a public function in exchange for private gain. But is the quid pro quo by itself really the unethical aspect of the act? I think not. Unless one holds that public acts should be performed for non-self-interested motives only, then we must allow that "quid pro quo" relationships are common, and maybe even central, to democratic government. Representatives are controlled by voters precisely because they are motivated by the need to get votes. I am aware of theories that regard exchange relationships as lower forms of moral reasoning, but of no theory that rules out exchange relationships as unethical per se.

A Rousseauvian might believe that a political system operates best when officials contemplate the public good, but the roots of the American political system are far more practical and realistic in their assumptions about human behavior. In the Madisonian tradition, we assume that good decisions can come from the interplay of selfish motives just as in the market self-interest can be the fuel for productive and creative action (which is not to say that a political system totally predicated on selfish behavior and without some measure of other-regarding thought can work either). A political world without exchange may be some philosopher's utopian ideal, but it is not widely accepted in the U.S. tradition. As Robert Dahl reminds us in his influential book, *A Preface to Democratic Theory*, "In a rough sense, the essence of all competitive politics is bribery of the electorate by politicians."

For most Americans, it is okay for a politician to exchange public actions for votes, but it is not okay to exchange public action for money. Why? Some... believe that money is a particularly pernicious motive, but we certainly do not think that is true in the private sector, so the question is why do we believe that it is true in the public sector? A commonly given reason is that money perverts the decision making process. There are two senses in which we might think that this is true. First, money might pervert the utilitarian calculation of aggregate good, causing the decision maker to weigh his or her private gain over the aggregate interests of others in the political system. But in some conceptions of democratic government at least (e.g., the Downsian or Madisonian), the system works precisely because the representatives are looking out for their private gain (i.e., holding office).

The perversion of aggregate utility comes not from the fact of private gain per se, but from the undue weight given to monied interests over others. In other words, the critical consideration is not the "rightness" of some motives over others, but rather inequalities in the underlying distribution of wealth and the protection of private property from extortion by public officials. Imagine the follow-

ing mind experiment. What if we elected people by the amount of contributions they raised from their constituents. This would resolve the dilemma in democratic theory of differing intensities of preference, which Dahl has posed in the following way: why should an indifferent majority prevail over an intense minority, or to put it another way, do we need to know the cardinal values of utilities in order to calculate aggregate utility? If people were allowed to express their sentiments by the size of their campaign contributions, perhaps they would be better able to signal their true preferences.

The advantages gained by this procedure with respect to the issue of preference intensities are more than offset by two problems. First, governments deal in goods that by definition do not have desirable market properties (i.e., so-called public goods). It is therefore likely that the same market failures that disrupt the proper functioning of a market in public goods would also cause failures in a market for the representatives who promise to deliver those goods. But second, and just as important, unless constituents have equal endowments of money, this system of choosing representatives amounts to giving people with wealth a disproportionate voice in the government affairs. Given that the thrust of democratic reform in the twentieth century has been to make individuals more, not less, equal, with respect to their voice in government—e.g., inequities in the franchise and vote weighing have been largely, though not completely, eliminated in U.S. politics[—] limiting the power of money is a natural extension of the impulse towards equity.

Bribery thus violates political equity. There are of course other kinds of resources aside from money that are also unequally distributed (e.g., time, willingness to work, cleverness), but they cannot be converted to private uses by the candidate as easily or effectively as money (or gifts). This accounts for why there is a consensus in most western democracies against pure bribery. Things that can be used by the candidate for private purposes introduce motives other than reelection into the calculus of the representative. A person who works on a campaign because he or she has a lot of spare time is constrained to apply his or her resource advantage to the electoral arena. A person with money and the right to give bribes can influence the candidate with something other (and perhaps more powerful) than holding office.

But can the logic of bribery be applied to campaign contributions that are given for the purpose of influencing policymaking? I think not. If, as I said before, campaign contributions are bribery, then so are open pledges of electoral support in exchange for policy promises. "Rightness of motive" arguments do not get us very far. Doing something for a vote is no more or less wrong than doing something for a campaign contribution. The vote and the campaign contribution are means towards the end of reelection, and the exchange of a vote/contribution for policy is what ties the representative to the represented.

As with pure bribery, the fundamental objection is political—should wealthy people have more voice in government than others. Thus, conservatives will think that inequalities of wealth are justifiable and that the right to use it to promote their policy viewpoints is merely the exercise of free speech. But surely, one might say, the same could be said of pure bribes, and aren't large campaign contributions equivalent to pure bribes? I do not think so. The difference is that unlike the pure bribe, both the vote and the campaign contribution lead to the same private benefit for the candidate—i.e., holding office. Our objection to the pure bribe

was that the private consumption of money was such a powerful motive that it had to be regulated in the interests of equality. Money used strictly to get elected is on a more even footing with votes, volunteering time, and other forms of political resources. To develop a political consensus for eliminating quid pro quo campaign contributions, it is necessary (1) to argue that money in the service of reelection only has big advantages over other kinds of resources and (2) to persuade people that further political equity is needed. Reasonable people can disagree about both the empirical assertion and the political goal.

Thus, it only confuses matters to say that we should eliminate quid pro quo campaign contributions because they are bribery. All forms of political exchange are bribery of a sort. We need to decide which forms of bribery are permissible and which are not. What I called pure bribery was the exchange of private goods for public action. There are undoubtedly forms of pure bribery remaining (e.g., accepting honoraria from interest groups), and these should be labelled as such. However, limiting campaign contributions goes beyond the logic behind eliminating pure bribes, and we should honestly admit that. We may want to limit campaign contributions, but the reason for doing so is to redistribute political power. If we could actually limit contributions effectively (which we cannot do constitutionally at the present time because of the Supreme Court's views on expenditure limits), we in fact would be redistributing power from those with money to those with other unregulated resource advantages (e.g., senior citizens with time on their hands, frequent voters, volunteers). While some might favor such a redistribution, it is understandable that others might not.

We have eliminated most of the practices about which there is moral consensus. Ethics can help us identify residual forms of true bribery, but to go further in political reform, there must be consensus about how to redistribute political power in America. I am not optimistic about such a consensus and would advise reformers to choose their shots judiciously.

Notes and Questions

1. Cain says that moral explanations for rules refer "to their utilitarian consequences or their relationship to basic moral principles, not merely to the fact of consensus." Are there utilitarian reasons for a rule against campaign contributions made and received with the understanding that they will influence the recipient's decisions in public office? Do such contributions contravene a basic moral principle? If your answer to either of these questions is affirmative, how do you distinguish the campaign contribution from Cain's examples of "bribes" by the parent and the businessperson?

2. David Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUMBIA LAW REVIEW 1369 (1994), shares Cain's view that concerns for corruption cannot stand independently of concerns for equality and, like Cain, Strauss is skeptical of campaign finance reforms. Strauss uses a different "mind experiment" from Cain's to show that corruption concerns are subsumed by equality concerns:

> The best way to understand the relationship between corruption and equality is to consider what the corruption problem, so-called, would look like if the inequality problem were solved. Since the inequality prob-

lem will never by solved to everyone's satisfaction, this requires a suspension of disbelief. But one might suppose, for example, a scheme that equalizes people's ability to make contributions (and expenditures; for these hypothetical purposes there is no difference) by multiplying contributions by a factor inversely related to the contributor's income. The idea would be that a contribution of, say, one percent of any individual's income would be either supplemented or taxed by the government so that, no matter what the person's income, the same amount would be made available to the candidate. Assume, for the sake of argument, that such a scheme would implement an acceptable notion of equality and that it would be constitutional. (Both assumptions may be incorrect, of course.)

Suppose that in such a world, contributions made to politicians' campaigns were overtly "corrupt" in the sense in which that term is used in discussions of campaign finance reform. That is, individuals (and PACs) promised contributions explicitly contingent on a legislator's voting in a certain way; explicitly rewarded legislators for past votes; punished legislators by reducing contributions for legislative actions that the contributors opposed; made contributions during campaigns with the intention of reminding the candidate to whom they contributed of their support and redeeming their "IOU"; and so on. This is the anti-corruption nightmare scenario.

Strauss argues that under such an equalization system, so long as contributions could be used only for campaign purposes and not for the personal benefit of the candidate, the use of contributions to influence or even overtly to "buy" legislative favors would be ethically acceptable, because

these "bribes" have only a certain kind of value to the recipient. In a sense they are like vouchers, redeemable only for a certain purpose. To obtain a bribe, a legislator might deliberately cast a vote that she knew would ruin her chances of reelection. But it would be irrational for a legislator to cast such a vote in return for a campaign contribution—since the most the contribution can do is to improve her chances of reelection.

Do you agree? Whether or not you do, do you think the sort of equalization system that Strauss hypothesizes would be a sound reform in the real world?

3. Masochists and insomniacs will welcome the news that the debate over whether campaign contributions can be corrupt is resumed in essays by Cain, Strauss, and Lowenstein in the forthcoming 1995 volume of the UNIVERSITY OF CHICAGO LEGAL FORUM.

Chapter 11

Contribution and Expenditure Limits

The modern era of campaign finance regulation began, at the federal level, with the Federal Election Campaign Act Amendments of 1974 (FECA), codified at 2 U.S.C. § 431 *et seq.*[a] There were four basic forms of regulation contained in FECA, and with some variations, these have remained the basic elements of most debate on campaign finance regulation ever since: disclosure; limits on the size of campaign contributions; limits on campaign expenditures; and public financing of campaigns. In addition, FECA retained older forms of federal election regulation, especially a ban on contributions by corporations and labor unions.

FECA applies to congressional and presidential elections, only a small fraction of the elections held in the United States. However, around the same period, most of the states adopted roughly comparable laws that included some or all of the same forms of regulation.

Congress was aware when it enacted FECA that there would be serious challenges to the law's constitutionality. FECA includes a provision, 2 U.S.C. § 437h, allowing such challenges to receive expedited consideration in the federal courts. Almost before the ink of the statute had dried, a comprehensive challenge to most of its provisions was filed by an ideologically diverse group of plaintiffs.[b] The Court of Appeals upheld the law in its entirety with one very minor exception, 519 F.2d 821 (D.C.Cir. 1975), and the case came to the Supreme Court under the name *Buckley v. Valeo*.

On three previous occasions, the Court had taken pains to avoid deciding constitutional controversies over congressional attempts to regulate campaign finances.[c] In *Buckley*, the Court showed no such restraint. The Court adjudicated

a. The public financing provisions of FECA are codified separately, in the Internal Revenue Code. The entire text of the statute as it stood following the 1974 amendments is set forth as an appendix to *Buckley v. Valeo*, 424 U.S. 1, 144–235 (1976).

The Federal Election Campaign Act was originally enacted in 1971, but before most of its provisions were scheduled to go into effect, the 1971 system of regulation was replaced by the 1974 amendments.

b. The disclosure requirements were alleged to be overbroad. All the other major provisions were alleged to be unconstitutional in their entirety.

c. See United States v. CIO, 335 U.S. 106 (1948); United States v. UAW-CIO, 352 U.S. 567 (1957); Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972).

the validity of a large number of different provisions, and attempted to write a virtual treatise setting forth both general principles and considerable doctrinal detail, delineating the limits of regulation in this contentious field. The result was a *per curiam* decision (a decision "by the Court," i.e., not signed by any one justice) extending over 138 pages of the United States Reports, almost certainly the longest *per curiam* opinion in the history of the Supreme Court. In addition, five of the eight justices who participated in the case added separate views, disagreeing with one aspect or another of the majority decision. These separate statements fill an additional 83 pages of the official reports.

Buckley's major rulings were as follows:

1. The campaign disclosure requirements, the least controversial portion of FECA, were upheld. However, the Court stated that it would be unconstitutional to impose the disclosure requirements on parties or candidates who could show that disclosure might subject themselves, their contributors, or their vendors to governmental or private harassment. In *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), the Court ruled that a party was entitled to an exemption from disclosure requirements on this ground.

2. In the portion of the opinion that is reprinted in this chapter, the Court upheld the limits on the size of contributions but struck down the expenditure limits. There were three different expenditure limits in FECA: limits on independent spending in behalf of a candidate; limits on how much of his or her own money the candidate could spend; and limits on the total spending of a candidate's campaign. Prior to *Buckley*, most supporters of the legislation probably would have characterized the first two as corollaries of FECA's contribution limits. The limit on independent expenditures prevented evasion of the contribution limits and the limits on use of the candidate's own money prevented unfairness to a wealthy candidate's less wealthy opponents, for whom raising money might be made more difficult as a result of the contribution limits. As will be seen, the *Buckley* Court regarded all the expenditure limits as comprising a separate category, sharply distinct from the contribution limits.

3. FECA enacted public financing in presidential but not congressional campaigns. In presidential primaries, candidates can receive public funds on a matching basis for private contributions up to $250. In general elections, the presidential campaigns are entirely publicly financed, and the major party candidates receive no private contributions.[d] These public financing provisions were upheld in *Buckley*. Footnote 65, appended to the section on expenditure limits and reprinted below, stated that despite the unconstitutionality of such limits if they are mandatory, it is permissible to attach spending limits as a condition of acceptance of public financing, on the theory that the limits then become voluntary.

4. FECA created a new agency, the Federal Election Commission, for the purpose of administering and enforcing the new legislation. In *Buckley*, the Court ruled that the manner in which the FEC was constituted—two members each were appointed by the President, the Senate, and the House—violated the system of separation of powers established by the Constitution.

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d. However, the parties can receive private contributions, some of which may be used in ways that affect presidential elections, such as for voter registration and get out the vote activities. Such money is known as "soft money" and has been a subject of considerable controversy in recent years. Soft money and other issues related to public financing are considered in Chapter 16.

The last point required that the Act be amended in 1976, to reconstitute the FEC with all members appointed by the President. The Act was amended again in 1979, in response to a perception that the spending limits in the 1976 presidential election had discouraged "grass roots" campaign activity, as the candidates hoarded their funds for advertising and skimped on campaign buttons, bumper stickers, and the like. The 1979 amendments were designed to permit parties to spend funds on such activities, outside the campaign spending limits that accompany public financing of presidential campaigns.

Almost since FECA was enacted, various groups have mounted efforts to revise it. Nevertheless, except for the relatively minor amendments passed in 1976 and 1979, the FECA that emerged from *Buckley* continues to govern federal elections. That FECA is considerably different from the one passed by Congress, since it does not include expenditure limits in congressional elections. Indeed, Chief Justice Burger, in a separate opinion in *Buckley*, declared that he would have struck down the entire law rather than leave standing such a modified version of what Congress wrote:

> [T]he Court's result does violence to the intent of Congress in this comprehensive scheme of campaign finance. By dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts. Congress intended to regulate all aspects of federal campaign finances, but what remains after today's holding leaves no more than a shadow of what Congress contemplated. I question whether the residue leaves a workable program.

424 U.S. at 235–36 (Burger, C.J., concurring in part and dissenting in part).

Buckley is therefore a crucially important case for its direct effect on federal campaign law. There are several additional reasons why the decision, and especially the portion that is reprinted in this chapter, must be mastered by the student of election law. First, as mentioned above, the Court's opinion attempts to define in general outline and in considerable detail the constitutional limits on campaign finance reform in the United States. To be sure, critics have questioned *Buckley*'s internal consistency and its consistency with subsequent campaign finance decisions. Nevertheless, *Buckley* is still the most basic text against which any existing or proposed federal, state, or local campaign finance regulation must be tested. Second, because the case covers so much conceptual, doctrinal, polemical and even empirical ground, it provides a useful starting point for discussion of legal and policy aspects of the campaign finance problem. Finally, because of its breadth, and the contrast between its interventionism and the Court's earlier restraint in campaign finance cases, *Buckley* is an important case study for consideration of the judiciary's role in coping with the campaign finance problem and, more broadly, the Court's exercise of its function of judicial review in general.

Buckley v. Valeo

424 U.S. 1, 12–59 (1976)

I. CONTRIBUTION AND EXPENDITURE LIMITATIONS

The intricate statutory scheme adopted by Congress to regulate federal election campaigns includes restrictions on political contributions and expenditures

that apply broadly to all phases of and all participants in the election process. The major contribution and expenditure limitations in the Act prohibit individuals from contributing more than $25,000 in a single year or more than $1,000 to any single candidate for an election campaign[12] and from spending more than $1,000 a year "relative to a clearly identified candidate." Other provisions restrict a candidate's use of personal and family resources in his campaign and limit the overall amount that can be spent by a candidate in campaigning for federal office.

The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case.[16] Thus, the critical constitutional questions presented here go not to the basic power of Congress to legislate in this area, but to whether the specific legislation that Congress has enacted interferes with First Amendment freedoms or invidiously discriminates against nonincumbent candidates and minor parties in contravention of the Fifth Amendment.[e]

A. General Principles

The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters v. New York*, 333 U.S. 507, 510 (1948), "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs,...of course includ[ing] discussions of candidates...." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As

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12. An organization registered as a political committee for not less than six months which has received contributions from at least 50 persons and made contributions to at least five candidates may give up to $5,000 to any candidate for any election....[These are the organizations generally known as "political action committees," or "PACs."—ED.]

16. Article I, § 4, of the Constitution grants Congress the power to regulate elections of members of the Senate and House of Representatives. See *Smiley v. Holm*, 285 U.S. 355 (1932); *Ex parte Yarbrough*, 110 U.S. 651 (1884). Although the Court at one time indicated that party primary contests were not "elections" within the meaning of Art. I, § 4, *Newberry v. United States*, 256 U.S. 232 (1921), it later held that primary elections were within the Constitution's grant of authority to Congress. *United States v. Classic*, 313 U.S. 299 (1941). The Court has also recognized broad congressional power to legislate in connection with the elections of the President and Vice President. *Burroughs v. United States*, 290 U.S. 534 (1934).

e. References to the Fifth Amendment in this opinion are to what is sometimes referred to as the "equal protection component" of the Fifth Amendment. The Equal Protection Clause itself, in the 14th Amendment, restricts only the states. The Court has found, in the due process provisions of the Fifth Amendment, restrictions on the federal government that are virtually identical to those of the Equal Protection Clause.

the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that "(e)ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas," a freedom that encompasses "[t]he right to associate with the political party of one's choice." *Kusper v. Pontikes*, 414 U.S. 51, 56, 57 (1973), quoted in *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975).

It is with these principles in mind that we consider the primary contentions of the parties with respect to the Act's limitations upon the giving and spending of money in political campaigns. Those conflicting contentions could not more sharply define the basic issues before us. Appellees contend that what the Act regulates is conduct, and that its effect on speech and association is incidental at most. 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.

In upholding the constitutional validity of the Act's contribution and expenditure provisions on the ground that those provisions should be viewed as regulating conduct, not speech, the Court of Appeals relied upon *United States v. O'Brien*, 391 U.S. 367 (1968). The *O'Brien* case involved a defendant's claim that the First Amendment prohibited his prosecution for burning his draft card because his act was "symbolic speech" engaged in as a "demonstration against the war and against the draft." On the assumption that "the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment," the Court sustained the conviction because it found "a sufficiently important governmental interest in regulating the nonspeech element" that was "unrelated to the suppression of free expression" and that had an "incidental restriction on alleged First Amendment freedoms...no greater than [was] essential to the furtherance of that interest." The Court expressly emphasized that *O'Brien* was not a case "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."

We cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment[f]....

f. This passage is criticized by J. Skelly Wright, *Politics and the Constitution: Is Money*

Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the governmental interests advanced in support of the Act involve "suppressing communication." The interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns. Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups. Unlike *O'Brien*, where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."

Nor can the Act's contribution and expenditure limitations be sustained, as some of the parties suggest, by reference to the constitutional principles reflected in [decisions such as *Kovacs v. Cooper*, 336 U.S. 77 (1949), standing] for the proposition that the government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication. In contrast to *O'Brien*, where the method of expression was held to be subject to prohibition, [*Kovacs*, etc.] involved place or manner restrictions on legitimate modes of expression—picketing, parading, demonstrating, and using a soundtruck. The critical difference between this case and those time, place, and manner cases is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed.[17]

Speech?, 85 YALE LAW JOURNAL 1001, 1007–08 (1976): "I am bound to say that this passage performs a judicial sleight of hand. The real question in the case was: Can the use of *money* be regulated, by analogy to conduct such as draft-card burning, where there is an undoubted incidental effect on *speech*? However, what the Court asked was whether *pure speech* can be regulated where there is some incidental effect on *money*. Naturally the answer to the Court's question was 'No.' But this left untouched the real question in the case. The Court riveted its attention on what the money could buy—be it communication, or communication mixed with conduct. Yet the campaign reform law did not dictate what could be bought. It focused exclusively on the giving and spending itself. In short, the Court turned the congressional telescope around and looked through the wrong end."

17. The nongovernmental appellees argue that just as the decibels emitted by a sound truck can be regulated consistently with the First Amendment, *Kovacs*, the Act may restrict the volume of dollars in political campaigns without impermissibly restricting freedom of speech. This comparison underscores a fundamental misconception. The decibel restriction upheld in *Kovacs* limited the manner of operating a soundtruck but not the extent of its proper use. By contrast, the Act's dollar ceilings restrict the extent of the reasonable use of virtually every means of communicating information. As the *Kovacs* Court emphasized, the nuisance ordinance only barred sound trucks from broadcasting "in a loud and raucous manner on the streets," and imposed "no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers," or by soundtrucks operating at a reasonable volume.

[The Court's argument has been criticized by a number of commentators who analogize controlling the volume of a soundtruck to controlling the "volume" of monetary expenditures.

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.[18] This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate," 18 U.S.C. § 608(e)(1), would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.[20] Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns[21] and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling.

By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not commu-

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Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIFORNIA LAW REVIEW 1045, 1060 n.72 (1985), argues that this analogy "is flawed because the evil created by too much sound is noise in a strictly physical sense, whereas that thought to be created by too many dollars is noise only in a normative sense—namely that, in the view of the person drawing the analogy, too many dollars permit certain messages to be heard too much."—ED.]

18. Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.

20. The record indicates that, as of January 1, 1975, one full-page advertisement in a daily edition of a certain metropolitan newspaper cost $6,971.04—almost seven times the annual limit on expenditures "relative to" a particular candidate imposed on the vast majority of individual citizens and associations by § 608(e)(1).

21. The statistical findings of fact agreed to by the parties in the District Court indicate that 17 of 65 major-party senatorial candidates in 1974 spent more than the combined primary-election, general-election, and fundraising limitations imposed by the Act. The 1972 senatorial figures showed that 18 of 66 major-party candidates exceeded the Act's limitations. This figure may substantially underestimate the number of candidates who exceeded the limits provided in the Act, since the Act imposes separate ceilings for the primary election, the general election, and fundraising, and does not permit the limits to be aggregated. The data for House of Representatives elections are also skewed, since statistics reflect a combined $168,000 limit instead of separate $70,000 ceilings for primary and general elections with up to an additional 20% permitted for fundraising. Only 22 of the 810 major-party House candidates in 1974 and 20 of the 816 major-party candidates in 1972 exceeded the $168,000 figure. Both Presidential candidates in 1972 spent in excess of the combined Presidential expenditure ceilings.

nicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.[g] At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations.[23] The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The

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g. One critic argues that the Court omitted "any discussion of the contributor who wished to delegate his speech to a more effective communicator, as he freely could under the Court's invalidation of spending limitations if he picked an ad agency rather than a candidate." L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUPREME COURT REVIEW 243, 253.

23. Statistical findings agreed to by the parties reveal that approximately 5.1% of the $73,483,613 raised by the 1,161 candidates for Congress in 1974 was obtained in amounts in excess of $1,000. In 1974, two major-party senatorial candidates, Ramsey Clark and Senator Charles Mathias, Jr., operated large-scale campaigns on contributions raised under a voluntarily imposed $100 contribution limitation.

[Compare this footnote with footnote 21, *supra*, in which the Court documents the proposition that campaign spending limits *would* have a substantial repressive effect on campaign speech. In footnote 21 the Court considers the ratio of campaigns that would have exceeded the limits to those that spent within the limits. In footnote 23, the Court considers the ratio of money contributed in excess of the limits to that of money contributed within the limits. Why consider apples (the number of campaigns over the limit) in one case and oranges (the amount of money contributed over the limit) in the other?

Whatever the ratio that may be selected, how large must the ratio be for the Court to regard it as indicating that the limits in question will have a "dramatic adverse effect on the funding of campaigns and political associations"? According to the figures the Court gives in footnote 21, a total of 4.38% of House and Senate campaigns in 1972 and 1974 spent amounts that would have exceeded the campaign spending limits. Why does this indicate a "dramatic adverse effect" while the 5.1% figure the Court gives in footnote 23 shows the absence of such an effect?—ED.]

Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy. By contrast, the Act's $1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. See *NAACP v. Alabama*. The Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression "is simultaneously an interference with the freedom of (their) adherents," *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion).

In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.

B. Contribution Limitations

1. The $1,000 Limitation on Contributions by Individuals and Groups to Candidates and Authorized Campaign Committees

Section 608(b) provides, with certain limited exceptions, that "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000." The statute defines "person" broadly to include "an individual, partnership, committee, association, corporation, or any other organization or group of persons." § 591(g). The limitation reaches a gift, subscription, loan, advance, deposit of anything of value, or promise to give a contribution, made for the purpose of influencing a primary election, a Presidential preference primary, or a general election for any federal office.[24] §§ 591(e)(1), (2).... The restriction applies to aggregate amounts contributed to the candidate for each election with primaries, run-off elections, and general elections counted separately, and all Presidential primaries held in any calendar year treated together as a single election campaign. § 608(b)(5).

Appellants contend that the $1,000 contribution ceiling unjustifiably burdens First Amendment freedoms, employs overbroad dollar limits, and discriminates against candidates opposing incumbent officeholders and against minor-party candidates in violation of the Fifth Amendment. We address each of these claims of invalidity in turn.

(a)

As the general discussion in Part I-A, *supra*, indicated, the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association. The Court's decisions involving associational freedoms establish that the right of asso-

24. The Act exempts from the contribution ceiling the value of all volunteer services provided by individuals to a candidate or a political committee and excludes the first $500 spent by volunteers on certain categories of campaign-related activities. §§ 591(e)(5)(A)-(D)....

ciation is a "basic constitutional freedom," *Kusper*, that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama*. Yet, it is clear that "(n)either the right to associate nor the right to participate in political activities is absolute." *CSC v. Letter Carriers*, 413 U.S. 548, 567 (1973). Even a "'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. *Cousins*.

Appellees argue that the Act's restrictions on large campaign contributions are justified by three governmental interests. According to the parties and *amici*, the primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office. Two "ancillary" interests underlying the Act are also allegedly furthered by the $1,000 limits on contributions. First, the limits serve to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections. Second, it is argued, the ceilings may to some extent act as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money.

It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. In *CSC v. Letter Carriers*, *supra*, the Court found that the danger to "fair and effective government" posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees' right of partisan political association. Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical... if confidence in the system of representative Government is not to be eroded to a disastrous extent."

Appellants contend that the contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with "proven and suspected *quid pro quo* arrangements." But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action.[h] And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

The Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.[31] Significantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.

We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling.

(b)

Appellants' first overbreadth challenge to the contribution ceilings rests on the proposition that most large contributors do not seek improper influence over a candidate's position or an officeholder's action. Although the truth of that proposition may be assumed, it does not undercut the validity of the $1,000 contribu-

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h. Is this an accurate statement of the scope of the law of bribery under federal and state laws? See Chapter 9, *supra*.

31. While providing significant limitations on the ability of all individuals and groups to contribute large amounts of money to candidates, the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents or the proliferation of political funds each authorized under the Act to contribute to candidates. As a prime example, § 610 permits corporations and labor unions to establish segregated funds to solicit voluntary contributions to be utilized for political purposes. Corporate and union resources without limitation may be employed to administer these funds and to solicit contributions from employees, stockholders, and union members. Each separate fund may contribute up to $5,000 per candidate per election so long as the fund qualifies as a political committee under §608(b)(2).

The Act places no limit on the number of funds that may be formed through the use of subsidiaries or divisions of corporations, or of local and regional units of a national labor union....

The Act allows the maximum contribution to be made by each unit's fund provided the decision or judgment to contribute to particular candidates is made by the fund independently of control or direction by the parent corporation or the national or regional union.

tion limitation. Not only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.

A second, related overbreadth claim is that the $1,000 restriction is unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder, especially in campaigns for statewide or national office. While the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for congressional and Presidential campaigns, Congress' failure to engage in such fine tuning does not invalidate the legislation. As the Court of Appeals observed, "(i)f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." Such distinctions in degree become significant only when they can be said to amount to differences in kind.

(c)

Apart from these First Amendment concerns, appellants argue that the contribution limitations work such an invidious discrimination between incumbents and challengers that the statutory provisions must be declared unconstitutional on their face. In considering this contention, it is important at the outset to note that the Act applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations. Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions.

There is no such evidence to support the claim that the contribution limitations in themselves discriminate against major-party challengers to incumbents. Challengers can and often do defeat incumbents in federal elections. Major-party challengers in federal elections are usually men and women who are well known and influential in their community or State. Often such challengers are themselves incumbents in important local, state, or federal offices. Statistics in the record indicate that major-party challengers as well as incumbents are capable of raising large sums for campaigning. Indeed, a small but nonetheless significant number of challengers have in recent elections outspent their incumbent rivals. And, to the extent that incumbents generally are more likely than challengers to attract very large contributions, the Act's $1,000 ceiling has the practical effect of benefiting challengers as a class. Contrary to the broad generalization drawn by the appellants, the practical impact of the contribution ceilings in any given election will clearly depend upon the amounts in excess of the ceilings that, for various reasons, the candidates in that election would otherwise have received and the utility of these additional amounts to the candidates. To be sure, the limitations may have a significant effect on particular challengers or incumbents, but the record provides no basis for predicting that such adventitious factors will invariably and invidiously benefit incumbents as a class. Since the danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents, Congress had ample justification for imposing the same fundraising constraints upon both.

The charge of discrimination against minor-party and independent candidates is more troubling, but the record provides no basis for concluding that the Act invidiously disadvantages such candidates. As noted above, the Act on its face treats all candidates equally with regard to contribution limitations. And the restriction would appear to benefit minor-party and independent candidates relative to their major-party opponents because major-party candidates receive far more money in large contributions. Although there is some force to appellants' response that minor-party candidates are primarily concerned with their ability to amass the resources necessary to reach the electorate rather than with their funding position relative to their major-party opponents, the record is virtually devoid of support for the claim that the $1,000 contribution limitation will have a serious effect on the initiation and scope of minor-party and independent candidacies. Moreover, any attempt to exclude minor parties and independents en masse from the Act's contribution limitations overlooks the fact that minor-party candidates may win elective office or have a substantial impact on the outcome of an election.

In view of these considerations, we conclude that the impact of the Act's $1,000 contribution limitation on major-party challengers and on minor-party candidates does not render the provision unconstitutional on its face.

2. The $5,000 Limitation on Contributions by Political Committees

Section 608(b)(2) permits certain committees, designated as "political committees" [and popularly known as political action committees, or PACs—ED.], to contribute up to $5,000 to any candidate with respect to any election for federal office. In order to qualify for the higher contribution ceiling, a group must have been registered with the Commission as a political committee under 2 U.S.C. § 433 for not less than six months, have received contributions from more than 50 persons, and, except for state political party organizations, have contributed to five or more candidates for federal office. Appellants argue that these qualifications unconstitutionally discriminate against *ad hoc* organizations in favor of established interest groups and impermissibly burden free association. The argument is without merit. Rather than undermining freedom of association, the basic provision enhances the opportunity of bona fide groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees....

4. The $25,000 Limitation on Total Contributions During any Calendar Year

In addition to the $1,000 limitation on the nonexempt contributions that an individual may make to a particular candidate for any single election, the Act contains an overall $25,000 limitation on total contributions by an individual during any calendar year. § 608(b)(3). A contribution made in connection with an election is considered, for purposes of this subsection, to be made in the year the election is held. Although the constitutionality of this provision was drawn into question by appellants, it has not been separately addressed at length by the parties. The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to

a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

C. Expenditure Limitations

The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. The most drastic of the limitations restricts individuals and groups, including political parties that fail to place a candidate on the ballot, to an expenditure of $1,000 "relative to a clearly identified candidate during a calendar year." Other expenditure ceilings limit spending by candidates, their campaigns, and political parties in connection with election campaigns. It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes.*

1. The $1,000 Limitation on Expenditures "Relative to a Clearly Identified Candidate"

Section 608(e)(1) provides that "[no] person may make any expenditure... relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." The plain effect of § 608(e)(1) is to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views "relative to a clearly identified candidate" through means that entail aggregate expenditures of more than $1,000 during a calendar year. The provision, for example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement "relative to a clearly identified candidate" in a major metropolitan newspaper.[i]

Before examining the interests advanced in support of § 608(e)(1)'s expenditure ceiling, consideration must be given to appellants' contention that the provision is unconstitutionally vague. Close examination of the specificity of the statu-

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i. Consider Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUPREME COURT REVIEW 1, 6: "Under the FECA amendments, a person who, independently and on his own initiative, placed a full-page advertisement in the *Washington Post* urging the defeat of an incumbent president... could be fined and sent to prison. Even granting the seriousness of the problem, solutions so rigorous give off a whiff of brimstone."

But a different concern is expressed by John S. Shockley, *Money in Politics: Judicial Roadblocks to Campaign Finance Reform*, 10 HASTINGS CONSTITUTIONAL LAW QUARTERLY 679, 695–96 (1983): "In thus striking down limits on expenditures the Court freed the wealthy to engage in significant use of the most effective modes of communication. But what are the Justices saying about the great majority of the American people who cannot spend more than $1,000 on candidates they support? By the Court's own words, a majority of the American people are excluded from effective communication."

tory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests....

The key operative language of the provision limits "any expenditure... relative to a clearly identified candidate." Although "expenditure," "clearly identified," and "candidate" are defined in the Act, there is no definition clarifying what expenditures are "relative to" a candidate. The use of so indefinite a phrase as "relative to" a candidate fails to clearly mark the boundary between permissible and impermissible speech, unless other portions of § 608(e)(1) make sufficiently explicit the range of expenditures covered by the limitation. The section prohibits "any expenditure... relative to a clearly identified candidate during a calendar year which, *when added to all other expenditures... advocating the election or defeat of such candidate*, exceeds, $1,000." (Emphasis added.) This context clearly permits, if indeed it does not require, the phrase "relative to" a candidate to be read to mean "advocating the election or defeat of" a candidate.

But while such a construction of § 608(e)(1) refocuses the vagueness question, the Court of Appeals was mistaken in thinking that this construction eliminates the problem of unconstitutional vagueness altogether. For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest....

[These] constitutional deficiencies... can be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of "clearly identified" in § 608(e)(2) requires that an explicit and unambiguous reference to the candidate appear as part of the communication.[51] This is the reading of the provision suggested by the non-governmental appellees in arguing that "[f]unds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat are thus not covered." We agree that in order to preserve the provision against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.[52]

We turn then to the basic First Amendment question whether § 608(e)(1), even as thus narrowly and explicitly construed, impermissibly burdens the constitutional right of free expression. The Court of Appeals summarily held the provision constitutionally valid on the ground that "section 608(e) is a loophole-closing

51. Section 608(e)(2) defines "clearly identified" to require that the candidate's name, photograph or drawing, or other unambiguous reference to his identity appear as part of the communication. Such other unambiguous reference would include use of the candidate's initials (*e.g.*, FDR), the candidate's nickname (*e.g.*, Ike), his office (*e.g.*, the President or the Governor of Iowa), or his status as a candidate (*e.g.*, the Democratic Presidential nominee, the senatorial candidate of the Republican Party of Georgia).

52. This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

provision only" that is necessary to prevent circumvention of the contribution limitations. We cannot agree.

The discussion in Part I-A, *supra*, explains why the Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations. The markedly greater burden on basic freedoms caused by § 608(e)(1) thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of § 608(e)(1) turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.

We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify § 608(e)(1)'s ceiling on independent expenditures. First, assuming, *arguendo*, that large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions, § 608(e)(1) does not provide an answer that sufficiently relates to the elimination of those dangers. Unlike the contribution limitations' total ban on the giving of large amounts of money to candidates, § 608(e)(1) prevents only some large expenditures. So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office.[j]

Second, quite apart from the shortcomings of § 608(e)(1) in preventing any abuses generated by large independent expenditures, the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contribu-

j. Is the Court playing fast and loose in this paragraph? Very little contemporary election advertising is known for its subtlety, presumably because campaign advertisers believe most voters are paying little attention. It is thus questionable whether independent spending that fails to expressly urge support for the candidate in question is likely to have enough effect to induce a sense of obligation on the part of the candidate, once he or she is elected to office. However, if it is assumed that this "loophole" would undermine the statute's effectiveness, should not the Court have considered whether a different interpretation of § 608(e)(1) existed that would both alleviate vagueness concerns and better prevent evasion? For an argument that the Court should have and could have done so, see Marlene Arnold Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WISCONSIN LAW REVIEW 323, 342–44. Finally, consider the Court's footnote 31, in which it acknowledged that the anti-corruption effect of the contribution limits could be evaded by major special interests. Why does the possibility of evasion undermine the constitutionality of expenditure limits but not of contribution limits?

tions. The parties defending § 608(e)(1) contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act.[53] Section 608(b)'s contribution ceilings rather than § 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, § 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.[k]

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53. Section 608(e)(1) does not apply to expenditures "on behalf of a candidate" within the meaning of § 608(c)(2)(B). The latter subsection provides that expenditures "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate" are to be treated as expenditures of the candidate and contributions by the person or group making the expenditure. The House and Senate Reports provide guidance in differentiating individual expenditures that are contributions and candidate expenditures under § 608(c)(2)(B) from those treated as independent expenditures subject to the § 608(e)(1) ceiling. The House Report speaks of independent expenditures as costs "incurred without the request or consent of a candidate or his agent." The Senate report addresses the issue in greater detail. It provides an example illustrating the distinction between "authorized or requested" expenditures excluded from § 608(e)(1) and independent expenditures governed by § 608(e)(1):

"[A] person might purchase billboard advertisements endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agent's [*sic*] that would constitute an 'independent expenditure on behalf of a candidate' under section 614(c) of the bill. The person making the expenditure would have to report it as such.

"However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate just as if there had been a direct contribution enabling the candidate to place the advertisement himself. It would be so reported by both."

The Conference substitute adopted the provision of the Senate bill dealing with expenditures by any person "authorized or requested" to make an expenditure by the candidate or his agents. In view of this legislative history and the purposes of the Act, we find that the "authorized or requested" standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions subject to the limitations set forth in § 608(b).

k. In Part I.B.4 of its opinion, the Court upheld the $25,000 limitation on total contributions by an individual on the ground that the individual could evade the $1,000 limit on contributions to candidates by making "massive" contributions to PACs likely to support such candidates or "huge" contributions to the candidates' political parties. Was the "potential for abuse" less diminished in the case of the $25,000 limit than in the case of the limit on independent expenditures?

While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression. For the First Amendment right to "speak one's mind...on all public institutions" includes the right to engage in "'vigorous advocacy' no less than 'abstract discussion.'" *New York Times Co. v. Sullivan*, 376 U.S., at 269. Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.

It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times Co.* The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. Cf. *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 139 (1961).[55]...

For the reasons stated, we conclude that § 608(e)(1)'s independent expenditure limitation is unconstitutional under the First Amendment.

2. Limitation on Expenditures by Candidates from Personal or Family Resources

The Act also sets limits on expenditures by a candidate "from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year." § 608(a)(1). These ceilings vary from $50,000 for Presidential or Vice Presidential candidates to $35,000 for senatorial candidates, and $25,000 for most candidates for the House of Representatives.

The ceiling on personal expenditures by candidates on their own behalf, like the limitations on independent expenditures contained in § 608(e)(1), imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression.[1] The candidate, no less than any other person, has a First

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55. Neither the voting rights cases nor the Court's decision upholding the Federal Communications Commission's fairness doctrine lends support to appellees' position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society. Cases invalidating governmentally imposed wealth restrictions on the right to vote or file as a candidate for public office rest on the conclusion that wealth "is not germane to one's ability to participate intelligently in the electoral process" and is therefore an insufficient basis on which to restrict a citizen's fundamental right to vote. *Harper*. These voting cases and the reapportionment decisions serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography. But the principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression. Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues....

1. Shockley, *supra*, 10 HASTINGS CONSTITUTIONAL LAW QUARTERLY at 694–95, asks: "If one agrees with the Court that being able to spend only $25,000 to $50,000 annually on cam-

Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty," *Whitney v. California*, 274 U.S. 357, 375 (1927) (concurring opinion), applies with special force to candidates for public office. Section 608(a)'s ceiling on personal expenditures by a candidate in furtherance of his own candidacy thus clearly and directly interferes with constitutionally protected freedoms.

The primary governmental interest served by the Act—the prevention of actual and apparent corruption of the political process—does not support the limitation on the candidate's expenditure of his own personal funds. As the Court of Appeals concluded: "Manifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family." Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed.

The ancillary interest in equalizing the relative financial resources of candidates competing for elective office, therefore, provides the sole relevant rationale for § 608(a)'s expenditure ceiling. That interest is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights. First, the limitation may fail to promote financial equality among candidates. A candidate who spends less of his personal resources on his campaign may nonetheless outspend his rival as a result of more successful fundraising efforts. Indeed, a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign. Second, and more fundamentally, the First Amendment simply cannot tolerate § 608(a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that § 608(a)'s restriction on a candidate's personal expenditures is unconstitutional.

3. Limitations on Campaign Expenditures

Section 608(c) places limitations on overall campaign expenditures by candidates seeking nomination for election and election to federal office. Presidential candidates may spend $10,000,000 in seeking nomination for office and an additional $20,000,000 in the general election campaign. §§ 608(c)(1)(A), (B). The ceiling on senatorial campaigns is pegged to the size of the voting-age population of the State with minimum dollar amounts applicable to campaigns in States with small populations. In senatorial primary elections, the limit is the greater of eight cents multiplied by the voting-age population or $100,000, and in the general election the limit is increased to 12 cents multiplied by the voting-age population or

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paigning is in fact a substantial restraint upon constitutional expression, what does this say about the rights of the ninety-nine percent of the American electorate who cannot expend even this 'substantially restrained' amount? Since their ability to speak is presumably restrained even more, where are they to look for the protection of their First Amendment rights?"

$150,000. §§ 608(c)(1)(C), (D). The Act imposes blanket $70,000 limitations on both primary campaigns and general election campaigns for the House of Representatives with the exception that the senatorial ceiling applies to campaigns in States entitled to only one Representative. §§ 608(c)(1)(C)-(E). These ceilings are to be adjusted upwards at the beginning of each calendar year by the average percentage rise in the consumer price index for the 12 preceding months. § 608(d).

No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by § 608(c)'s campaign expenditure limitations. The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions. The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by § 608(c)'s campaign expenditure ceilings. The Court of Appeals' assertion that the expenditure restrictions are necessary to reduce the incentive to circumvent direct contribution limits is not persuasive. There is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions. Extensive reporting, auditing, and disclosure requirements applicable to both contributions and expenditures by political campaigns are designed to facilitate the detection of illegal contributions. Moreover, as the Court of Appeals noted, the Act permits an officeholder or successful candidate to retain contributions in excess of the expenditure ceiling and to use these funds for "any other lawful purpose." This provision undercuts whatever marginal role the expenditure limitations might otherwise play in enforcing the contribution ceilings.

The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns. Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support.[63] There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.[64] Moreover, the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.

The campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns. Appellees and the Court of Appeals stressed statistics indicating that spending for federal election campaigns increased almost 300% between 1952 and 1972 in comparison with a 57.6% rise in the consumer price index during the same period. Appellants respond that during these years the rise in campaign spending lagged behind the percentage increase in total expenditures for commercial advertising and the size of the gross national product. In any event, the mere

63. This normal relationship may not apply where the candidate devotes a large amount of his personal resources to his campaign.

64. As [Judge Tamm's] opinion dissenting in part from the decision below noted: "If a senatorial candidate can raise $1 voter from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication? I know of none."

growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.[65]

For these reasons we hold that § 608(c) is constitutionally invalid.

In sum, the provisions of the Act that impose a $1,000 limitation on contributions to a single candidate, § 608(b)(1), a $5,000 limitation on contributions by a political committee to a single candidate, § 608(b)(2), and a $25,000 limitation on total contributions by an individual during any calendar year, § 608(b)(3), are constitutionally valid. These limitations, along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions. The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion. By contrast, the First Amendment requires the invalidation of the Act's independent expenditure ceiling, § 608(e)(1), its limitation on a candidate's expenditures from his own personal funds, § 608(a), and its ceilings on overall campaign expenditures, § 608(c). These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.

Notes and Questions

1. *General principles—Are there First Amendment considerations on both sides?* Few are likely to quarrel with the majority's opening assertion that the con-

65. For the reasons discussed in Part III, *infra*, Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

[This footnote, number 65, is cryptic but extremely important, as the tying of permissible campaign spending limits to public funding has profoundly shaped the politics of campaign finance regulation. In Part III of its opinion the Court does give reasons for the permissibility of public financing, but contrary to the statement in footnote 65, there is no explanation in Part III or elsewhere in *Buckley* why Congress may "condition acceptance of public funds on an agreement by the candidate to abide by... expenditure limitations."

The text in the opinion immediately prior to footnote 65 should not be overshadowed by the footnote itself. If, collectively, the people favor a lower level of campaign expenditures, is it realistic for the Court to suggest that they may control the "quantity and range of debate" by reducing the contributions they make (as individuals or through associations) or receive (as candidates or political committees)? Consider Harold Leventhal, *Courts and Political Thickets*, 77 COLUMBIA LAW REVIEW 345, 368 (1977): "This answer ignores the possibility that the dynamics of some campaign problems are such that they cannot be solved by individual decisions; the race for campaign funds—like an arms race—requires global regulation."—ED.]

tribution and spending limits "operate in an area of the most fundamental First Amendment activities." Yet most commentators agree that *Buckley* is characterized by "fluctuating deference to congressional determinations." Marlene Arnold Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WISCONSIN LAW REVIEW 323, 325. One reason, no doubt, is that if the restrictions operate within the core of the First Amendment, the governmental interests at stake lie within the core of the democratic process. Supporters of campaign finance regulation often claim that the governmental interests furthered are not only important, but are themselves intended to further First Amendment values, by making the opportunity to participate effectively in political debate more widespread. Whether this is the case and the implications for constitutional doctrine if it is have been questions of continuing controversy.

Those who believe there were First Amendment values on both sides accuse the *Buckley* majority of excess formalism or mechanical jurisprudence. Such views were expressed by a member of the Court of Appeals panel whose ruling in *Buckley* upholding virtually all of the FECA Amendments was partially overruled by the Supreme Court:

> By ritual incantation of the notion of absolute protection, by applying it to the quantity as well as the content of political expression, and by making the unexamined and unprecedented assertion that money is speech, the Court elevated dry formalism over substantive constitutional reasoning. Political discussion is indeed at the core of the first amendment's guarantees, but the very centrality of political speech calls for a thorough rather than a conclusory analysis.

J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUMBIA LAW REVIEW 611, 633 (1982). Another member of the Court of Appeals panel in *Buckley* argued that the presence of First Amendment considerations on both sides required a more pragmatic approach than the Supreme Court had displayed:

> The first amendment works to promote an open market in ideas. But we restrict the freedom of monopolists controlling a market to enhance the freedom of others in the market. At a time when the liberty of contract had the constitutional preeminence today assigned to freedom of expression, Justice Holmes declared that principles of freedom cannot preclude government limits on the power of wealth in order to create a fair competition.... These examples... are suggestive of a pragmatic mode of thinking, which avoids focusing on the initial impact of a law, as a restriction, and looks at its overall effect.

Harold Leventhal, *Courts and Political Thickets*, 77 COLUMBIA LAW REVIEW 345, 373 (1977).

These critics have themselves drawn criticism from those who believe it is dangerous to give greater weight to "First Amendment values" than to what they regard as the First Amendment's direct command that the government not regulate political speech:

> The most important aspect of *Buckley v. Valeo* is what it did not do—specifically, the Supreme Court's refusal to follow the lead of the Court of Appeals and announce a radical new departure in the meaning of constitutional free speech. Although the revelations that accompanied Watergate undoubtedly pose hazards to the idea of self-government fully as great as the Court of Appeals apparently assumed, speech is not "free" in any very important sense if it is protected only when and to the extent that such protection is consistent with a congressionally defined notion of political equality....
>
> If we set any store by what Mr. Justice White in his dissenting opinion called "the word of those who know," the strong consensus is that, considering the state of American politics, very substantial sacrifices of the individual speech interest are warranted, indeed are necessary for the preservation of democratic values in government. The Court of Appeals capped its opinion with a disturbing metaphor—that of the dog in Aesop's fable who, lunging for the illusive bone reflected in the water, loses the real one that he had in his mouth. That real bone is the speech interest that is compatible with what [Alexander] Meiklejohn called "the common cause in which we all share." The bone in the water, the idea of free speech as an individual liberty—something that belongs to a person by inherent right regardless of what Congress may desire—may have, as the Court of Appeals suggests, a tincture of unreality. But the other bone is all too familiar. It is, at present, lodged in the throat of almost everyone in the world. Almost every country in the world, including those behind the iron curtain, can display a constitution that guarantees freedom of expression to the people—to the extent, of course, that the people's representatives may deem proper. With *Buckley v. Valeo* in hand, we can boast that our Constitution protects something far scarcer in history than that sort of freedom. And with the knowledge of the caliber of people who sometimes get their hands on our government, it is well that this is so.

Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUPREME COURT REVIEW 1, 42–43.

Following are two more extended statements of the competing sides of this debate. The first is from L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUPREME COURT REVIEW 243, 245–46, 268–69, 280–84:

> [T]he possibility [exists] that even if differing viewpoints are present there may be so overwhelming a predominance of communication in support of some of them that other viewpoints simply do not have a chance to be considered on the merits. For those who believe this occurs there is the not unnatural conclusion that the prevailing viewpoint has done so in an unfair way. Had the issue been joined between equals, a differing viewpoint would (or might) have prevailed. Most typically such concerns are expressed in the context of elections, and over the past decade there have been a variety of attempts to even up the potential clash of ideas through either contribution or expenditure limitations on candidates and their supporters.
>
> ...The structure of argument in the campaign finance cases is fairly simple. Because any contribution or expenditure will be translated into media advertising, a legislative restriction will necessarily limit speech. This is valid only if the gov-

ernment offers very important reasons. Typically, the government has two reasons, both going to the perceived purity of the electoral process. The first is that citizens may view large contributions to candidates as akin to bribery. But this rationale has not been sufficient to sustain all of the legislation. Thus the second justification: an election ought to have the elements of a fair fight, and when one side grossly outspends the other for advertising, a fair fight is impossible. Accordingly the marketplace of ideas is better served, and freedom of speech is enhanced, when one side of an issue is prevented from being repeated so often that it overwhelms rational thought about the merits of the election. This second justification for limiting contributions and expenditures is what I call the enhancement theory of freedom of speech. The theory has developed over the years on foundations that are foreign to the First Amendment; the theory has no place in any sensible treatment of the First Amendment and should, in the future, be summarily rejected....

To surrender the interests of individual autonomy and to attempt to tone down a debate (or one side of it) in the interests of enhancing the marketplace is to give up something that is directly traceable to the First Amendment in order to achieve a speculative gain. It is attempted on the speculative basis that a legislature knows at what points the problem of market failure is likely to surface and that enhancement is an effective means of avoiding them.... Furthermore, it rests on an assumption that less speech may well be better than more, an assumption that appears wildly at odds with the normal First Amendment belief that more speech is better....

The fundamental tenet of enhancement theory that less speech is better at some points seems to rest on two assumptions: first, additional speech on the other side either will not be forthcoming or is not worth the effort, and second, the "reach" of modern mass communications is of such a new order that it needs a different theory to make it function "consistently with the ends and purposes of the First Amendment." Yet just as there is a problem with determining how much is too much, there is also a gap in the explanation of why there will be no further speech on the other side to counter the speech that is being repeated too often. And how "new" is the problem? But for the "mass" communications of newspapers, specifically Pulitzer's and Hearst's, there would not have been a Spanish American War in 1898 to make Theodore Roosevelt next in line to the Presidency in 1900.

Enhancement has been articulated as a rationale only for dealing with the mass media. The soapbox orator, that classic and heroic lone dissenter of so much of the First Amendment case law, seems exempt. He does not fit within enhancement, because he cannot, from his soapbox, create the necessary imbalance. In his case we cannot shut him off because we dislike him, dislike his message, are sick and tired of being bothered, are angry that someone could be so wrongheaded, or feel that he creates such an imbalance in the marketplace that it would be unfair to let him continue. We are stuck with walking away from him or maybe even countering what he says with our own position.

The traditional solution, more rather than less speech, is both possible and desirable in the mass speech area as well. [A]s Brandeis recognized over fifty years ago, speech is a part of political liberty. Public discussion is a citizen's duty. As a society we have more to fear from an inert than an active citizenry. Fear and repression menace stable government; speech does not.... It is not so much that

we retain a naive belief that truth is knowable or that the electorate will rationally choose it, as that the simple recognition that no theory requiring people to stop speaking (or stop listening) better fits with our traditions than the one we have adopted. The theory that a speaker has the right to choose his message and the intensity and frequency of its delivery reflects the recognition that a free-for-all on public issues serves both the ideals [of] self-government and those of maximizing individual choices.

...It is hard to dispute that the wealthy seem to enjoy tremendous influence—and not only in this country. But if this is the concern, I would suspect that the best way of dealing with the power of wealth would be to attack its source rather than its consequences. In other words, if the wealthy are too powerful, change the tax and inheritance laws to prevent accumulations of wealth. If that is too extreme, then significant additional public funding can be made available for electoral campaigns, so that the advantages of wealth can either be eliminated or minimized. These are neither easy nor cost-free choices, but by not seeking to operate directly on speech in one case and by adding more speech without limiting anyone in the other, both are consistent with the traditions of the First Amendment.

I think it not unlikely that at least part of the impetus to do something toward limiting mass speech flows from a disdain for those that would use this type of speech and the message that they offer as well as the not inconceivable fear that people might listen. The nice thing about Abrams dropping pamphlets out of an upper floor window to the street below, or Gitlow distributing that horribly turgid and dull "Left Wing Manifesto," or Dennis and his handful of colleagues reading Marx and Lenin and plotting to find the proletariat for a revolution, or Brandenburg spouting his racism and anti-Semitism to the cattle of Hamilton County, was that we know that even if someone listens, nothing happens.[m] The speech reaches few people and affects even fewer. But the mass speech cases involve speech that everyone has seen, and the New Right mass mailing distortion squads appear to have done what the lone dissenter never managed to do, convince people to vote the wrong way. It is easy to defend speech we hate so long as it is ineffective, but it is much harder to do so when people actually respond positively....The sloganeering of mass speech does not require thought or invite dialogue. It preys on the basest instincts and, unfortunately, may well convince the masses to make our society a less enjoyable place to live.

This is, of course, true of a lot of speech....But [freedom of speech has come down] to us with but a single tradition: that the "State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech" and if there is concern, more, not less, speech is the best remedy. Thus far the Court's results in the mass speech cases have been reasonably consistent with this tradition. What remains is to strengthen them by recognizing that the mass speech cases present but the modern version of a much older problem to which we have long since known the appropriate remedy.

The second excerpt is from Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA LAW REVIEW 1405, 1407–16 (1986).

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m. In this sentence, Powe refers to a series of classic twentieth-century First Amendment decisions of the Supreme Court.

Democracy promises collective self-determination—a freedom to the people to decide their own fate—and presupposes a debate on public issues that is (to use Justice Brennan's now classic formula) "uninhibited, robust, and wide-open." [*Buckley* and other] free speech decisions of the seventies, however, seemed to impoverish, rather than enrich public debate and thus threatened one of the essential preconditions for an effective democracy. And they seemed to do so in a rather systematic way.

[A]t issue was not simply a conflict between equality and liberty, but also and more importantly, a conflict between two conceptions of liberty. The battle being fought was not just Liberty v. Equality, but Liberty v. Liberty, or to put the point another way, not just between the first amendment and the equal protection clause, but a battle *within* the first amendment itself. [T]he Court was not advancing an idiosyncratic or perverted conception of liberty, but was in fact working well within the Free Speech Tradition. The Court was not crudely substituting entrepreneurial liberty (or property) for political liberty; the rich or owners of capital in fact won, but only because they had advanced claims of political liberty that easily fit within the received Tradition. Money is speech—just as much as picketing is.

[T]he difficulties the Court encountered in the free speech cases of the seventies could ultimately be traced to inadequacies in the Free Speech Tradition itself. The problem was the Tradition not the Court. [O]n balance, it seemed that the Tradition oriented the Justices in the wrong direction and provided ample basis for those who formed the majority to claim, quite genuinely, that they were protecting free speech when, in fact, they were doing something of a different, far more ambiguous, character. This meant that criticism would have to be directed not simply at the Burger Court but at something larger: at a powerfully entrenched, but finally inadequate body of doctrine.

[T]he key to fulfilling the ultimate purposes of the first amendment is not autonomy, which has a most uncertain or double-edged relationship to public debate, but rather the actual effect of a broadcast: On the whole does it enrich public debate? Speech is protected when (and only when) it does, and precisely because it does, not because it is an exercise of autonomy. In fact, autonomy adds nothing and if need be, might have to be sacrificed, to make certain that public debate is sufficiently rich to permit true collective self-determination. What the phrase 'the freedom of speech' in the first amendment refers to is a social state of affairs, not the action of an individual or institution.

The risk posed to freedom of speech by autonomy... occurs whenever speech takes place under conditions of scarcity, that is, whenever the opportunity for communication is limited. In such situations one utterance will necessarily displace another. With the street corner, the element of scarcity tends to be masked; when we think of the street corner we ordinarily assume that every speaker will have his or her turn, and that the attention of the audience is virtually unlimited. Indeed, that is why it is such an appealing story. But in politics, scarcity is the rule rather than the exception. The opportunities for speech tend to be limited, either by the time or space available for communicating or by our capacity to digest or process information. This is clear and obvious in the case of the mass media, which play a decisive role in determining which issues are debated, and how, but it is true in other contexts as well. In a referendum or election, for example, there is every reason to be concerned with the advertising campaign mounted by the

rich and powerful, because the resources at their disposal enable them to fill all the available space for public discourse with their message....

Classical liberalism presupposes a sharp dichotomy between state and citizen. It teaches us to be wary of the state and equates liberty with limited government. The Free Speech Tradition builds on this view of the world when it reduces free speech to autonomy and defines autonomy to mean the absence of government interference. Liberalism's distrust of the state is represented by the antagonism between the policeman and soapbox orator and by the assumption that the policeman is the enemy of speech.

[W]e can no longer assume that the state is all censorship. [I]n the modern world the state can enrich as much as it constricts public debate: The state can do this, in part, through the provision of subsidies and other benefits....

We can also look beyond the provision of subsidies, and consider whether the state might enrich public debate by regulating in a manner similar to the policeman....The power of the media to decide what it broadcasts must be regulated because, as we saw through an understanding of the dynamic of displacement, this power always has a double edge: It subtracts from public debate at the very moment that it adds to it. Similarly expenditures of political actors might have to be curbed to make certain all views are heard. To date we have ambivalently recognized the value of state regulation of this character on behalf of speech—we have a fairness doctrine for the broadcast media and limited campaign financing laws. But these regulatory measures are today embattled, and in any event, more, not less, is needed....A commitment to rich public debate will allow, and sometimes even require the state to act in these ways, however elemental and repressive they might at first seem. Autonomy will be sacrificed, and content regulation sometimes allowed, but only on the assumption that public debate might be enriched and our capacity for collective self-determination enhanced. The risks of this approach cannot be ignored, and at moments they seem alarming, but we can only begin to evaluate them when we weigh in the balance the hidden costs of an unrestricted regime of autonomy.

At the core of my approach is a belief that contemporary social structure is as much an enemy of free speech as is the policeman....We should learn to recognize the state not only as an enemy, but also as a friend of speech; like any social actor, it has the potential to act in both capacities, and, using the enrichment of public debate as the touchstone, we must begin to discriminate between them. When the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment.[n]

On what points, if any, are Polsby, Powe, and Fiss in agreement? What is the fundamental disagreement between Fiss on the one hand, and Polsby and Powe on the other? Does the pragmatic approach recommended by Judges Wright and Leventhal necessarily entail Fiss' outlook?

Is the campaign finance debate a specific instance of the competing outlooks—pluralism and progressivism—described in Chapter 1? See J. Skelly

n. For a relation of views similar to those of Fiss to the ideals of civic republicanism, see Frank Michelman, *Political Truth and the Rule of Law*, 8 TEL AVIV UNIVERSITY STUDIES IN LAW 281 (1988).

Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE LAW JOURNAL 1001, 1013–21 (1976).

2. *Neutrality.* In the past quarter-century, "content neutrality" has emerged as a major component of the Supreme Court's doctrine in applying the First Amendment. "The Court applies 'the most exacting scrutiny' to regulations that discriminate among instances of speech based on its content." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 798 (2d ed., 1988) (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

In *Buckley*, the majority conceded that the FECA did not "focus on the ideas expressed by persons or groups subject to its regulations," while noting that the Act was "aimed in part at equalizing the relative ability of all voters to affect electoral outcomes." Defenders of regulation assert that "the equal money limits are concededly neutral as to the content of ideas expressed—a crucial point." Leventhal, *supra*, 77 COLUMBIA LAW REVIEW at 359. However, critics of regulation do not invariably concede this point.

> In no case will the effects upon individuals, interest groups, and other political actors be precisely evenhanded. Indeed, it is ironic that the most forceful argument supporting campaign finance legislation praises the FECA for depriving the wealthy of the advantage of their position. The argument implies that the chief *virtue* of reform measures is their lack of neutrality of impact. Statutes that are supported precisely because they deprive a particular group of its ability to engage relatively effectively in politics, therefore, may not be as 'entirely content neutral' as they seem.

Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIFORNIA LAW REVIEW 1045, 1062 (1985). See also Sanford Levinson, *Book Review: Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICHIGAN LAW REVIEW 939, 945 (1985) ("[I]t is worth considering to what extent we in fact support such restrictions because of tacit assumptions about the contents of the views held by the rich, who would obviously feel most of the burden of the restrictions."). Indeed, according to two of the attorneys who litigated *Buckley*, plaintiffs considered but rejected the idea of arguing that the regulations were not neutral:

> An argument plaintiffs decided against making in *Buckley*, in part on the ground that it sounded too political, is that restrictions on campaign financing generally favor Democrats over Republicans because the latter needed to exploit their generally greater access to substantial contributors or larger total contributions to overcome the Democrats' much larger registered membership. Moreover, it can be argued persuasively that so long as our social system is based on the premise that inequalities of wealth serve valid and useful purposes, the wealthy need means to exercise their financial power to defend themselves politically against the greater numbers who may believe that their economic interests militate toward leveling.

Brice M. Clagett & John R. Bolton, Buckley v. Valeo, *Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VANDERBILT LAW REVIEW 1327, 1335 (1976).

As a matter of tactics, do you believe the plaintiffs were correct to withhold this argument in the *Buckley* case? Do you believe contribution and expenditure limits are neutral?

3. *Is money speech?* The *Buckley* majority said that limiting campaign expenditures was tantamount to limiting speech, because such a limit "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." As a practical matter, a limit on spending by a major campaign may limit the *repetition* of the same message to the same audience. Is a reduction of repetition the same as a reduction of the size of the audience? What if the reason for the repetition is that many or most people are inclined to "tune out" the message (if it is broadcast) or throw it away unopened (if it is mailed)?

Though the question was hotly debated in the period leading up to *Buckley*, most defenders of reform have accepted the Court's conclusion that spending limits need to be treated as speech limitations though, as we have seen, they often contend that the limits also serve First Amendment goals. One writer who refused to concede the point was J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE LAW JOURNAL 1001, 1012 (1976):

> [T]he effectiveness of political speakers is not necessarily diminished by reasonable contribution and expenditure ceilings. The giving and spending restrictions may cause candidates and other individuals to rely more on less expensive means of communication. But there is no reason to believe that such a shift in means reduces the number of issues discussed in a campaign. And, by forcing candidates to put more emphasis on local organizing or leafletting or door-to-door canvassing and less on full-page ads and television spot commercials, the restrictions may well generate deeper exploration of the issues raised. Finally, even to the extent that smaller audiences result from diminished use of the most expensive and pervasive media—and the campaigning so far gives no substantial indication that this happens—the effectiveness of a given speaker does not decline in relation to that of his opponents. All similarly situated competitors face the same constraints. Within those limits effectiveness still depends on the creativity of the speaker—and on the soundness of his ideas.

How persuasive is Judge Wright's argument? When candidates are limited in the amount they can spend in their campaigns—either because of the limits in their fund-raising capabilities or because of legally imposed spending limits—they are likely to use their scarce economic resources in the manner they regard as most cost-effective. If mass media—especially television and direct mail—are perceived as the most cost-effective media, then the imposition of spending limits may cause campaigns to cut back on "grass roots" expenditures and thereby increase their overall dependence on mass media. Spending in the 1976 presidential campaign was limited, because the major candidates accepted public financing. The perception that the campaigns sharply cut back on grass roots expenditures, such as bumper stickers and campaign buttons, led to the adoption of amendments in 1979 that made it possible for parties to spend sums outside the regular spending limits for grass roots activities.

Even if spending limits did have the effect of diverting campaigns from reliance on mass media to reliance on volunteers, as Wright supposes, would this necessari-

ly be desirable? Political spot advertising on television is widely reviled, but the message is one that is controlled by the candidate. Volunteers might engage in more extended dialogue with voters, though anyone who has ever "walked precincts" in campaigns is likely to have mastered a brief, "canned" statement and been acutely aware of the need not to spend more than a few moments at any one residence. But the volunteer may not be accurately reflecting the views of the candidate, especially in presidential or statewide elections in which few volunteers are likely to have any significant acquaintance with the candidate.

4. *Contribution and expenditure limits.* The *Buckley* majority distinguished sharply between contribution limits and expenditure limits, treating the latter as more offensive to the First Amendment than the former. Chief Justice Burger, in his separate opinion concurring in part and dissenting in part, criticized this distinction, asserting that "contributions and expenditures are two sides of the same First Amendment coin." He explained:

> The Court's attempt to distinguish the communication inherent in political *contributions* from the speech aspects of political *expenditures* simply "will not wash." We do little but engage in word games unless we recognize that people—candidates and contributors—spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words.
>
> The Court attempts to make the Act seem less restrictive by casting the problem as one that goes to freedom of association rather than freedom of speech. I have long thought freedom of association and freedom of expression were two peas from the same pod. The contribution limitations of the Act impose a restriction on certain forms of associational activity that are for the most part, as the Court recognizes, harmless in fact. And the restrictions are hardly incidental in their effect upon particular campaigns. Judges are ill-equipped to gauge the precise impact of legislation, but a law that impinges upon First Amendment rights requires us to make the attempt. It is not simply speculation to think that the limitations on contributions will foreclose some candidacies. The limitations will also alter the nature of some electoral contests drastically.

Justice Blackmun, concurring in part and dissenting in part, also said he was "not persuaded that the Court makes, or indeed is able to make, a principled constitutional distinction between the contribution limitations, on the one hand, and the expenditure limitations, on the other, that are involved here." In later cases, individual justices have occasionally rejected *Buckley*'s decisive distinction between contribution and expenditure limits, see *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 518, 519 (1985) (Marshall, J., dissenting) ("Although I joined the portion of the *Buckley per curiam* that distinguished contributions from independent expenditures for First Amendment purposes, I now believe that the distinction has no constitutional significance."), or sought to limit the scope of the distinction. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring) ("In my opinion the distinction between individual expenditures and individual contributions that the Court identified in *Buckley* should have little, if any, weight in reviewing corporate participation in candidate elections.")

The distinction has also come in for heavy criticism from commentators outside the Supreme Court. The viability of the distinction has been doubted both by those who favor more stringent review of campaign finance regulations, e.g., BeVier, *supra*, 73 CALIFORNIA LAW REVIEW at 1063; Clagett & Bolton, *supra*, 29 VANDERBILT LAW REVIEW at 1332, and by those who favor greater constitutional tolerance for such regulations. For example, Judge Leventhal, *supra*, 77 COLUMBIA LAW REVIEW at 358–59, wrote:

> With a limitation of contributions, political freedom is rendered less than absolute. The conclusion that the limitations on these freedoms were supported by an overriding public interest was sound, in my view, but certainly debatable. What strikes a careful reader of the opinion, however, is the Court's acceptance for the present of the legislative judgment that the public interest in reform is overriding, while reserving for the future the possibility of reconsidering whether the provision operates in the real world not merely as a limitation but as an effective exclusion from the political process.
>
> Strikingly different from the pragmatic tone, experimental outlook, and fact-and-record oriented discussion of the passages upholding the foregoing provisions, are the virtually adjoining passages that invalidate ceilings on overall campaign expenditures in a campaign for federal office, on a candidate's expenditures from his own funds, and on amounts that can be expended by a supporter directly on behalf of a candidate rather than by contribution.
>
> A close look at these passages discloses that the Court rested its conclusions on undemonstrated, and possibly undemonstrable, assertions about the way the statute would affect political life.

One commentator, Nicholson, *supra*, 1977 WISCONSIN LAW REVIEW at 327, suggested that to explain the distinction, one must view *Buckley* in the "context of its time." The Watergate scandals

> produced a political climate in which wholesale invalidation of the 1974 reforms could have brought about widespread distrust of the Court as an institution. Indeed, the scandals probably convinced the Court that stringent measures were necessary to prevent illegal campaign activities from weakening our political system. However, the Court was clearly not convinced that the political power balance between the rich and the nonrich need be upset. Indeed, it was in dealing with the policy goal of equalizing the relative political influence of various economic classes that the Court accorded the least deference to Congress. The Court rejected the equalization of political influence as a rationale for restrictions upon the use of money for political expression. Although the rationale of preventing the appearance and reality of corruption was accepted as a compelling interest to restrict contributions, it refused to defer to Congress' determination that restrictions upon expenditures were necessary to prevent corruption.

Despite the distinction's possible origin in the political climate of its time, and despite the criticism it has received on and off the Court, the Court has continued to treat the distinction between contributions and expenditures as the cornerstone

of First Amendment doctrine affecting campaign finance regulation.[o] Attempting to benefit from hindsight, the editor of this volume recently reviewed experience since 1976 and concluded:

> [T]here is *some* basis for the Court's preference of contribution limits over expenditure limits. Contribution limits address the conflict of interest problem more directly, though not necessarily more effectively, than campaign spending limits, whereas spending limits restrict speech more directly than contribution limits. Indirect effects can be equally or more serious than direct effects, but in a world of great empirical uncertainty, one may have a higher degree of confidence in judgments of causation when the causal chain is direct.... Although the jury of social scientists is still out, there is reason to believe that to the extent spending limits reduce spending more than contribution limits, this will tend to make spending limits more detrimental to electoral competition....
>
> These advantages of contribution limits over spending limits are modest, at best, and very much subject to changing circumstances. They do not support a general principle that expenditure limits are nearly always unconstitutional while contribution limits are nearly always valid.

Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After* Austin, 21 CAPITAL UNIVERSITY LAW REVIEW 381, 401–02 (1992).

5. *The validity of contribution limits.* The Court upheld the FECA contribution limits as an effort "to limit the actuality and appearance of corruption resulting from large individual financial contributions." Although the Court was willing to assume "that most large contributors do not seek improper influence over a candidate's position or an officeholder's action," the Court quoted approvingly the Court of Appeals' statement that "a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." Does this approach provide adequate protection to First Amendment rights? BeVier, *supra*, 73 CALIFORNIA LAW REVIEW at 1086–88, believes it does not:

> Campaign contributions are valuable first amendment activities which, in *most* instances, involve little genuine risk of corrupting public decision-making. Contribution limitations thus systematically restrict protected, *non*dangerous activities....
>
> In contrast to its customary strategy of overprotecting speech in order to protect speech that matters, the Court's willingness to defer to corruption-prevention measures represents an apparent strategy of underprotecting speech in order to protect a governmental interest that matters. The Court, in effect, has permitted Congress to outlaw entirely political activity that presents no genuine danger of corruption—the substantive evil that Congress has the right to prevent....
>
> The question that must be faced, then, is whether "where corruption is the evil feared," the Court should underprotect speech. Genuine corruption, of course, undermines the integrity of any government. More-

o. However, as we shall see in later chapters, the distinction has had less force in cases involving ballot measure elections or the regulation of corporate political activity.

over, it is difficult to detect and difficult to define precisely in a statute. Therefore it arguably is impossible to prevent with narrowly drawn prohibitions. Thus, the argument would go, the Court can reasonably permit the legislature to treat the problem with broad prophylactic rules and need not impose any requirement that the government demonstrate either the rules' necessity or their efficacy.

This argument is troublesome because it treats the nature of the government interest as the only variable that determines how the Court should deal with plainly overbroad legislative rules. There is, of course, another variable to be considered, namely the fact that rules deter and punish legitimate political behavior. Strict scrutiny of legislative means is the first amendment norm, and overprotection of speech rights is a substantively and procedurally defensible judicial practice. The fact that corruption is the evil to be feared does not render political activity itself intrinsically less valuable. Moreover, no one has ever tried to explain why legislatures should in principle have more leeway to infringe upon first amendment rights to prevent corruption than they have, for example, to prevent subversion.

Despite such criticism, the Court has continued to regard restrictions on contributions permissively. A strong reaffirmation of this permissiveness occurred in *California Medical Association (CMA) v. Federal Election Commission*, 453 U.S. 182 (1981), a case that arose because of the intricate provisions in FECA regulating the financial activities of political action committees. When a corporation or union organizes a PAC, the corporation or union is permitted to pay the PAC's administrative expenses without limit. These can be quite high, often exceeding the amounts of campaign funds that the PAC raises and distributes. On the other hand, corporations and unions are not permitted to contribute campaign funds to their PACs or directly to federal candidates. Individuals and unincorporated associations are permitted to contribute campaign funds, but these are subject to the general limits. In particular, they can give a PAC no more than $5,000. CMA, an unincorporated association, gave more than $5,000 to CALPAC, a PAC established as the vehicle for campaign money raised from California doctors. CMA argued that for First Amendment purposes, its payments to CALPAC should be treated as similar to expenditures rather than contributions, because such payments constituted the only way CMA could engage in political activity through a political committee. Furthermore, since CMA's payments went only to CALPAC, not directly to candidates, and since CALPAC's contributions to candidates were subject to the normal limits, the CMA payments posed no danger of corruption. Finally, CMA argued that it was denied equal protection as compared to corporations and unions that were permitted to pay the administrative expenses of their PACs without limit.

Speaking for a plurality of four, Justice Marshall wrote this often-quoted passage:

> We would naturally be hesitant to conclude that CMA's determination to fund CALPAC rather than to engage directly in political advocacy is entirely unprotected by the First Amendment. Nonetheless, the "speech by proxy" that CMA seeks to achieve through its contributions to CAL-

> PAC is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.

There were four justices who dissented on jurisdictional grounds without reaching the merits. Therefore, the fifth vote required for the decision against CMA was cast by Justice Blackmun, who repeated his opinion, stated in *Buckley*, that restrictions on contributions and expenditures were subject to the same "rigorous standard of review." Perhaps more significant than Marshall's and Blackmun's contrasting rhetoric was the fact that a majority was willing to uphold a contribution restriction whose efficacy as an instrument against corruption or conflict of interest seems tenuous at best. Blackmun joined with the other four justices to make a majority in rejecting CMA's equal protection argument on the ground that when the whole pattern of restrictions on corporations and unions was considered, there was no discrimination against an unincorporated association such as CMA.

6. *The invalidity of expenditure limits.* If the purpose of preventing contributors from gaining improper influence over elected officials justifies contribution limits, why is the same purpose not also a justification of overall limits on how much a candidate's campaign may spend? One reason in *Buckley* was that spending limits are subject to more stringent review under the First Amendment. In addition, the *Buckley* majority regarded contribution limits as the primary weapon against undue influence, and spending limits as a redundancy. "The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by...campaign expenditure restrictions."

This conclusion, like so many others in *Buckley*, has come in for criticism:

> Sixteen years after *Buckley*, few would argue that the FECA contribution limits have prevented conflicts of interest arising from campaign contributions. The Court seems to have assumed that the contribution limits set by Congress were fixed solely for the purpose of preventing contributions that could exert improper pressure. If so, the Court's assumption was erroneous. Although limits could prevent the most flagrant and dangerous contributions, to set the limits low enough to remove the likelihood of pressure would have been to preclude the possibility of raising funds for an adequate campaign. Congress recognized that in the absence of public financing, realistic contribution limits without expenditure limits could not effectively prevent the campaign finance system from being a system of institutionalized conflict of interest.

Lowenstein, *supra*, 21 CAPITAL UNIVERSITY LAW REVIEW at 398–99. Even if this argument that campaign spending limits are not redundant as an anti-corruption device is accepted, a spending limit itself would not prevent receipt of a contribution large enough for potential improper influence to exist. On what theory could a campaign spending limit prevent "a system of institutionalized conflict of interest"?

The other major argument in favor of expenditure limits that was rejected by the *Buckley* majority is that such limits would equalize the opportunity to participate in electoral politics and to influence outcomes. In Note 1, *supra*, we considered some contrasting views on equality as a general goal of campaign finance

regulation. The "equalization rationale" has been explained in these terms by one of its prominent proponents:

> Arguably, whether sizeable political contributions come from an organization or a wealthy individual, the use of concentrated wealth in the electoral process is unfair because it gives some a special advantage in influencing the outcome of elections. Affluent voters can back up their votes with substantial contributions that are used to persuade other voters. Dr. David Adamany calls this the 'multiple vote' effect. Furthermore, the need for huge sums of money to compete with well financed candidates deters those without ties to wealthy interests from even entering the political fray. Concentrated wealth thus not only makes the electoral system less democratic, it also reduces variety in the marketplace of ideas.

Marlene Arnold Nicholson, *Basic Principles or Theoretical Tangles: Analyzing the Constitutionality of Government Regulation of Campaign Finance*, 38 CASE WESTERN RESERVE LAW REVIEW 589, 597–98 (1988).

Was this equalization rationale rejected in *Buckley* because it was insufficient or because it was not even a permissible objective under the Constitution? Probably the most frequently quoted statement in *Buckley* is that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." This strong statement, written in the context of rejecting the FECA limits on independent expenditures, prompted Professor Nicholson, writing shortly after the *Buckley* decision was issued, to find "that the Court viewed the purpose to equalize as the impropriety." 1977 WISCONSIN LAW REVIEW at 330. As will be seen, later campaign finance decisions have seemed to show fluctuating attitudes on the Court toward equalizing regulations. Even in *Buckley* itself, the Court's hostility was not uniform in intensity. The strong language quoted above occurred in the context of a drastically restrictive provision, the $1,000 limit on individual expenditures in a federal election campaign. In the context of limits on a candidate's overall campaign spending, which, as the Court noted, provided "substantially greater room for discussion and debate," the Court appeared to treat the equalization rationale with less animosity, rejecting it because there was nothing invidious about permitting the candidate who could raise more to spend more, *so long as only modest contributions were permitted.*

A frequent theme in recent debate over campaign finance is that aside from concerns for conflict of interest and equality, candidates and incumbent officeholders devote too much time and attention to fundraising, impairing their ability to carry out the responsibilities of candidacy and public office. The obsession with fundraising is said to arise out of the perceived need for ever-increasing amounts that must be raised through contributions whose size is legally limited. Campaign spending limits, presumably, would mitigate this problem. For an argument that spending limits therefore are necessary to further a compelling governmental interest that was not considered in *Buckley* and that they should be upheld, see Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUMBIA LAW REVIEW 1281 (1994).

7. *The standard of review.* As students of constitutional law are well aware, for at least the last three decades the Supreme Court has devoted considerable

time to elaborating the "standard of review" that will be employed to test the constitutionality of various government measures. To simplify, it is ordinarily assumed that regulation that impinges on First Amendment rights—especially when it is political speech and association that are at stake—will be reviewed under the most rigorous standard, often described as "strict scrutiny." The *Buckley* majority having concluded that both contribution limits and spending limits impinge on the freedom of political speech or association, it would seem to follow that they should be subjected to strict scrutiny. But did the *Buckley* majority test all the limits against the strictest standard? This question has seemed to some to have at least some tactical significance, because if strict scrutiny was applied, future limits are likely to be struck down, even though certain limits (those on the size of contributions) were upheld in *Buckley*. On the other hand, if a more lenient standard of review was applied, then it may be easier to defend various campaign regulations. The doctrinal debate is summarized by Marlene Arnold Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine*, 10 HASTINGS CONSTITUTIONAL LAW QUARTERLY 601, 607–08 (1983):

> It is difficult to determine the standard of review employed by the Court to evaluate the various restrictions in *Buckley*. Although the per curiam opinion relied upon cases in which strict scrutiny was explicitly applied, it was less than explicit in describing the standard it was actually employing. The decision in *Buckley* may be viewed as a case in which the strictest First Amendment review was applied to all of the limitations. The fact that contribution limitations were upheld may simply mean that those restrictions alone were found to be necessary to further a compelling government interest. The Court's initial rejection of the argument that a lesser standard of review than strict scrutiny should apply because the limitations applied to "speech plus" rather than "pure speech," supports this view. On the other hand, the Court seemed to scrutinize some of the limitations more closely than others, giving credence to the interpretation that the level of scrutiny was subject to a sliding scale, depending upon the Court's view of the burden upon First Amendment interests. [L]imitations upon overall campaign expenditures seemed to fall somewhere in the middle. Unlike its treatment of independent expenditures and the use of a candidate's personal wealth, the Court did not greatly stress the seriousness of the burden, and did not speak in absolutist terms. Rather, the primary emphasis was upon the inadequacy of the proffered rationales.

8. *Footnote 65.* Footnote 65 of the *Buckley* majority opinion stated that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." Footnote 65 is an important and controversial qualification of the otherwise comprehensive condemnation of spending limits. Critics of public financing conditioned on the acceptance of spending limits point out that the simultaneous enactment of contribution limits may put considerable pressure on candidates to accept the public financing/spending limits package. The argument is made cogently by Clagett & Bolton, *supra*, 29 VANDERBILT LAW REVIEW at 1336–37:

> [T]he candidate is presented with a particularly invidious form of the twentieth century 'Catch 22' which threatens to reduce the private sector to adjuncts and servants of the state: government imposes restrictions upon, and by taxation or otherwise dries up funds formerly available to, a private activity; government then offers public funds to subsidize the activity it itself has crippled; the courts then hold that by virtue of the regulation and the subsidies the formerly private activity has become 'state action' and thus subject to even greater governmental control. When this process involves a virtually coerced surrender of first amendment rights in an area going to the heart of the political process, it is difficult to see how the Court's unexplained result can be sustained if the issue is brought before it and fully analyzed.

Judge Leventhal, *supra*, 77 COLUMBIA LAW REVIEW at 361, was friendlier to FECA and therefore found Footnote 65 not anomalous but evidence that despite its rhetoric, the Court regarded spending limits as "substantially and significantly less restrictive than content prohibitions." Professor Polsby, *supra*, 1976 SUPREME COURT REVIEW at 30–31, took a similar but less approving view:

> [T]he Court made a mistake in allowing expenditure ceilings to ride in on the coattails of public financing. There is no good reason for the Court to allow this restraint, especially when it takes the strong position on expenditure ceilings that it does. The Court's failure even to allude to this issue has the flavor of a tacit agreement among the Justices that expenditures of private money in elections is a bad thing for which there exists no obviously constitutional remedy. Hence, expenditure limits are to be cursed with the tongue but blessed with the hand, an understandable political compromise, not dismissible out-of-hand as bad policy, but unconvincing as law and contrary to the fundamental logic of the bulk of the decision.

If, as Polsby is willing to concede, spending limits tied to public financing may be good policy, then why is a ruling that the policy is constitutionally permissible "unconvincing as law"? There are some campaign finance reformers who are less than enthusiastic about spending limits but who strongly favor public financing of campaigns and either favor or are willing to tolerate spending limits so long as they are accompanied by public financing. Is it possible that the *Buckley* majority (or some members of it) were of this mind and that they hoped or expected that the result of the *Buckley* decision would be to induce Congress to extend public financing to congressional elections? If so, would such considerations be proper influences on a Supreme Court decision? Whether or not they were proper, any such hopes or expectations on the part of the Justices have failed to come to fruition. Continuous efforts to extend public financing to congressional campaigns have consistently failed over a period of two decades.

Whatever the merits of Clagett and Bolton's criticism of Footnote 65, their prediction that the footnote would fail to withstand further scrutiny has turned out to be incorrect. The issue was presented more concretely in *Republican National Committee v. Federal Election Commission*, 487 F.Supp. 280 (S.D.N.Y.) *aff'd*, 445 U.S. 955 (1980). That case was a challenge to 26 U.S.C. § 9003(b), which requires major party presidential candidates to certify, as a condition of receiving public funding, that they will not "incur qualified campaign expenses in excess of

the aggregate payments to which they will be entitled," and that no private contributions will be accepted unless necessary to make up the difference in the event that the amount available in the government's "Presidential Election Campaign Fund" should fall short of the amount candidates are entitled to receive.

Plaintiffs in *RNC* contended that as a practical matter, candidates had no choice but to accept the public funding and that in any event, the conditioning of public funding on the waiver of First Amendment rights constituted an unconstitutional condition. The District Court regarded the contention that candidates had no choice but to accept public funding as unproved. Relying on *Buckley*'s Footnote 65 and on other decisions applying the "unconstitutional condition" doctrine, the District Court held that "the fact that a statute requires an individual to choose between two methods of exercising the same constitutional right does not render the law invalid, provided the statute does not diminish a protected right or, where there is such a diminution, the burden is justified by a compelling state interest." The District Court did not think the conditions attached to presidential public funding infringed on First Amendment rights, and in any event, it found a compelling state interest in assuring that candidates who receive public funding should be "relieved of the burdens of soliciting private contributions and of avoiding unhealthy obligations to private contributors."

The Supreme Court's summary affirmance (i.e., without issuing its own opinion) is an authoritative reaffirmation that expenditure limits may be imposed as a condition on public funding, but it is no indication whether the Supreme Court relied on any or all of the reasons given by the District Court. The question of the rationale for Footnote 65, which remains open, is of more than theoretical interest. As will be seen in later chapters, Congress and state legislatures have often been more receptive to spending limits than to public financing. If you were a staff assistant to a legislator seeking a means of obtaining spending limits without public funding, how would you answer these questions?

(a) Is it permissible under Footnote 65 and *RNC* to impose a $1,000 contribution limit on candidates, but to increase that limit to $5,000 for candidates who agree not to exceed a specified spending limit?

(b) If not, would it be permissible to impose a $1,000 contribution limit, but to increase that limit to $5,000 for a candidate whose opponent declines to agree to a specified spending limit?

For related problems, see *Day v. Holahan* in Chapter 16, and the notes following.

9. These notes have considered "substantive" constitutional questions raised by *Buckley*. A related but distinct question is the extent to which the judiciary should be resolving such issues, rather than leaving them to be resolved through political institutions. For an excellent theoretical discussion of this issue, see Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUMBIA LAW REVIEW 1326 (1994). For a less theoretical (and less excellent) discussion, see Lowenstein, *supra*, 21 *Capital University Law Review* at 424–27.

Chapter 12

Money and Ballot Propositions

The Federal Election Campaign Act, whose constitutionality was at issue in *Buckley v. Valeo*, regulated federal elections only. *Buckley* therefore had no occasion to consider regulations of money in campaigns for and against ballot propositions. At the state level, especially in states with the initiative process, ballot propositions are a significant part of politics.

Often, the issues decided in ballot measure elections are of great importance to well-financed economic interests. For example, in 1994 alone, in one state, California, the ballot included a proposal to replace private medical insurance with a "single payer" plan and a proposal underwritten by Philip Morris to weaken protection against second-hand smoke, as well as emotionally-charged proposals to impose severe restrictions on the access of "illegal" immigrants to public services and to place a "three strikes and you're out" sentencing requirement in the state constitution. Proposals in the previous few years had included five different measures to regulate auto insurance, a large increase in the tax on tobacco products, and a large-scale school voucher plan. Propositions with similarly high economic and political stakes have appeared on the ballot in many other states.

It should come as no surprise that well-financed interests have been willing to spend large sums to qualify initiatives for the ballot and to pass or defeat them at elections, nor that states have sometimes attempted to regulate what they regard as harmful uses of money. This chapter considers some of these regulations and the Supreme Court's review of them under the First Amendment.

The first case we shall consider, *First National Bank of Boston v. Bellotti*, involves a state statute directed at the use of corporate funds in ballot measure campaigns. The *Bellotti* case thus introduces two major questions: first, how does the framework established in *Buckley* apply to ballot measure elections and, second, are the constitutional principles announced in *Buckley* equally applicable to regulations targeted solely at corporations? The first question is explored in this chapter. The second has been given additional attention by the Court in more recent cases that will be considered in later chapters.

The next case, *Citizens Against Rent Control v. City of Berkeley*, was a challenge to a limit on the size of contributions in ballot measure campaigns. Should such limits be upheld on the authority of *Buckley* and *California Medical Association v. FEC*?

Finally, we consider *Meyer v. Grant*, which tested the constitutionality of restrictions on certain expenditures during the effort to qualify an initiative for the ballot.

I. Financing Ballot Measure Campaigns

First National Bank of Boston v. Bellotti

435 U.S. 765 (1978)

Mr. Justice POWELL delivered the opinion of the Court.

In sustaining a state criminal statute that forbids certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals, the Massachusetts Supreme Judicial Court held that the First Amendment rights of a corporation are limited to issues that materially affect is business, property, or assets....

I

The statute at issue, Mass. Gen. Laws Ann., ch. 55, § 8, prohibits appellants, two national banking associations and three business corporations, from making contributions or expenditures "for the purpose of... influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." The statute further specifies that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation."...

Appellants wanted to spend money to publicize their views on a proposed constitutional amendment that was to be submitted to the voters as a ballot question at a general election on November 2, 1976. The amendment would have permitted the legislature to impose a graduated tax on the income of individuals. [Appellants] brought this action seeking to have the statute declared unconstitutional. [The state court upheld the statute.][3]...

3. This was not the first challenge to § 8. The statute's legislative and judicial history has been a troubled one. Its successive re-enactments have been linked to the legislature's repeated submissions to the voters of a constitutional amendment that would allow the enactment of a graduated tax.

The predecessor of § 8, § 7..., did not dictate that questions concerning the taxation of individuals could not satisfy the "materially affecting" requirement. The Supreme Judicial Court construed § 7 not to prohibit a corporate expenditure urging the voters to reject a proposed constitutional amendment authorizing the legislature to impose a graduated tax on corporate as well as individual income.

[T]he legislature amended § 7 by adding the sentence: "No question submitted to the voters concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." The statute was challenged in 1972 by four of the present appellants; they wanted to oppose a referendum proposal similar to the one submitted to and rejected by the voters in 1962. Again the expenditure was held to be lawful.

The most recent amendment was enacted on April 28, 1975, when the legislature further refined the second sentence of § 8 to apply only to ballot questions "solely" concerning the taxation of individuals. Following this amendment, the legislature on May 7, 1975, voted to submit to the voters on November 2, 1976, the proposed constitutional amendment authorizing the imposition of a graduated personal income tax. It was this proposal that led to the case now before us.

III

The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect. We hold that it does.

A

The speech proposed by appellants is at the heart of the First Amendment's protection....

As the Court said in *Mills v. Alabama*, 384 U.S. 214 (1966), "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

The court below nevertheless held that corporate speech is protected by the First Amendment only when it pertains directly to the corporation's business interests. In deciding whether this novel and restrictive gloss on the First Amendment comports with the Constitution and the precedents of this Court, we need not survey the outer boundaries of the Amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment.[13] The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection. We turn now to that question.

B

The court below found confirmation of the legislature's definition of the scope of a corporation's First Amendment rights in the language of the Fourteenth Amendment. Noting that the First Amendment is applicable to the States through the Fourteenth, and seizing upon the observation that corporations "cannot claim for themselves the liberty which the Fourteenth Amendment guarantees." *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the court concluded that a corporation's First Amendment rights must derive from its property rights under the Fourteenth.

13. Nor is there any occasion to consider in this case whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities.

This is an artificial mode of analysis, untenable under decisions of this Court.... Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, and the Court has not identified a separate source for the right when it has been asserted by corporations. In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court rejected the very reasoning adopted by the Supreme Judicial Court and did not rely on the corporation's property rights under the Fourteenth Amendment in sustaining its freedom of speech.

Yet appellee suggests that First Amendment rights generally have been afforded only to corporations engaged in the communications business or through which individuals express themselves, and the court below apparently accepted the "materially affecting" theory as the conceptual common denominator between appellee's position and the precedents of this Court. It is true that the "materially affecting" requirement would have been satisfied in the Court's decisions affording protection to the speech of media corporations and corporations otherwise in the business of communication or entertainment, and to the commercial speech of business corporations. In such cases, the speech would be connected to the corporation's business almost by definition. But the effect on the business of the corporation was not the governing rationale in any of these decisions. None of them mentions, let alone attributes significance to, the fact that the subject of the challenged communication materially affected the corporation's business.

The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. But the press does not have a monopoly on either the First Amendment or the ability to enlighten. Similarly, the Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas. Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification....

C

We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. The "materially affecting" requirement is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

Section 8 permits a corporation to communicate to the public its views on certain referendum subjects—those materially affecting its business—but not others. It also singles out one kind of ballot question—individual taxation—as a subject about which corporations may never make their ideas public. The legislature

has drawn the line between permissible and impermissible speech according to whether there is a sufficient nexus, as defined by the legislature, between the issue presented to the voters and the business interests of the speaker.

In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. Yet the State contends that its action is necessitated by governmental interests of the highest order. We next consider these asserted interests.

IV...

The Supreme Judicial Court did not subject § 8 to "the critical scrutiny demanded under accepted First Amendment and equal protection principles," *Buckley*, because of its view that the First Amendment does not apply to appellants' proposed speech. For this reason the court did not even discuss the State's interests in considering appellants' First Amendment argument. The court adverted to the conceivable interests served by § 8 only in rejecting appellants' equal protection claim. Appellee nevertheless advances two principal justifications for the prohibition of corporate speech. The first is the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government. The second is the interest in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation. However weighty these interests may be in the context of partisan candidate elections,[26] they either are not implicated in this case or are not served at all, or in other than a random manner, by the prohibition in § 8.

26. In addition to prohibiting corporate contributions and expenditures for the purpose of influencing the vote on a ballot question submitted to the voters, § 8 also proscribes corporate contributions or expenditures "for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting, or antagonizing the interests of any political party." In this respect, the statute is not unlike many other state and federal laws regulating corporate participation in partisan candidate elections. Appellants do not challenge the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections. About half of these laws, including the federal law, 2 U.S.C. § 441b (originally enacted as the Federal Corrupt Practices Act), by their terms do not apply to referendum votes. Several of the others proscribe or limit spending for "political" purposes, which may or may not cover referenda. The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections..

A

Preserving the integrity of the electoral process, preventing corruption, and "sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" are interests of the highest importance. *Buckley*; *United States v. United Automobile Workers*, 352 U.S. 567 (1957). Preservation of the individual citizen's confidence in government is equally important. *Buckley*.

Appellee advances a number of arguments in support of his view that these interests are endangered by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts,[28] or that there has been any threat to the confidence of the citizenry in government.

Nor are appellee's arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing." *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959). We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment...." *Buckley*. Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the rel-

28. In his dissenting opinion, Mr. Justice WHITE relies on incomplete facts with respect to expenditures in the 1972 referendum election, in support of his perception as to the "domination of the electoral process by corporate wealth." The record shows only the extent of corporate and individual contributions to the two committees that were organized to support and oppose, respectively, the constitutional amendment. It does show that three of the appellants each contributed $3,000 to the "opposition" committee. The dissenting opinion makes no reference to the fact that amounts of money expended independently of organized committees need not be reported under Massachusetts law, and therefore remain unknown.

Even if viewed as material, any inference that corporate contributions "dominated" the electoral process on this issue is refuted by the 1976 election. There the voters again rejected the proposed constitutional amendment even in the absence of any corporate spending, which had been forbidden by the decision below.

[Although corporate spending was prohibited, opponents of the 1976 proposal outspent supporters by about $115,000 to $10,000. See John S. Shockley, *Money in Politics: Judicial Roadblocks to Campaign Finance Reform*, 10 HASTINGS CONSTITUTIONAL LAW QUARTERLY 679, 703 n.117 (1983). Does this fact support or detract from Justice Powell's position?—ED.]

ative merits of conflicting arguments.[31] They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. In sum, "[a] restriction so destructive of the right of public discussion [as § 8], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U.S. 516 (1945).

B

Finally, appellee argues that § 8 protects corporate shareholders, an interest that is both legitimate and traditionally within the province of state law. *Cort v. Ash*, 422 U.S. 66 (1975). The statute is said to serve this interest by preventing the use of corporate resources in furtherance of views with which some shareholders may disagree. This purpose is belied, however, by the provisions of the statute, which are both underinclusive and overinclusive.

The underinclusiveness of the statute is self-evident. Corporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted, even though corporations may engage in lobbying more often than they take positions on ballot questions submitted to the voters. Nor does § 8 prohibit a corporation from expressing its views, by the expenditure of corporate funds, on any public issue until it becomes the subject of a referendum, though the displeasure of disapproving shareholders is unlikely to be any less.

The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject. Indeed, appellee has conceded that "the legislative and judicial history of the statute indicates... that the second crime was 'tailor-made' to prohibit corporate campaign contributions to oppose a graduated income tax amendment."

Nor is the fact that § 8 is limited to banks and business corporations without relevance. Excluded from its provisions and criminal sanctions are entities or organized groups in which numbers of persons may hold an interest or membership, and which often have resources comparable to those of large corporations. Minorities in such groups or entities may have interests with respect to institutional speech quite comparable to those of minority shareholders in a corporation. Thus the exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and other associations undermines the plausibility of the State's pur-

31. The State's paternalism evidenced by this statute is illustrated by the fact that Massachusetts does not prohibit lobbying by corporations, which are free to exert as much influence on the people's representatives as their resources and inclinations permit. Presumably the legislature thought its members competent to resist the pressures and blandishments of lobbying, but had markedly less confidence in the electorate. If the First Amendment protects the right of corporations to petition legislative and administrative bodies, see *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity.

ported concern for the persons who happen to be shareholders in the banks and corporations covered by § 8.

The overinclusiveness of the statute is demonstrated by the fact that § 8 would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure. Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues.[34] Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.

Assuming, *arguendo*, that protection of shareholders is a "compelling" interest under the circumstances of this case, we find "no substantially relevant correlation between the governmental interest asserted and the State's effort" to prohibit appellants from speaking. *Shelton v. Tucker*, 364 U.S. 479 (1960).

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34. Appellee does not explain why the dissenting shareholder's wishes are entitled to such greater solicitude in this context than in many others where equally important and controversial corporate decisions are made by management or by a predetermined percentage of the shareholders. Mr. Justice WHITE's repeatedly expressed concern for corporate shareholders who may be "coerced" into supporting "causes with which they disagree" apparently is not shared by appellants' shareholders. Not a single shareholder has joined appellee in defending the Massachusetts statute or, so far as the record shows, has interposed any objection to the right asserted by the corporations to make the proscribed expenditures.

The dissent of Mr. Justice WHITE relies heavily on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *International Assn. of Machinists v. Street*, 367 U.S. 740 (1961). These decisions involved the First Amendment rights of employees in closed or agency shops not to be compelled, as a condition of employment, to support with financial contributions the political activities of other union members with which the dissenters disagreed.

Street and *Abood* are irrelevant to the question presented in this case. In those cases employees were required, either by state law or by agreement between the employer and the union, to pay dues or a "service fee" to the exclusive bargaining representative. To the extent that these funds were used by the union in furtherance of political goals, unrelated to collective bargaining, they were held to be unconstitutional because they compelled the dissenting union member "'to furnish contributions of money for the propagation of opinions which he disbelieves....'" *Abood*.

The critical distinction here is that no shareholder has been "compelled" to contribute anything. Apart from the fact, noted by the dissent, that compulsion by the State is wholly absent, the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason. A more relevant analogy, therefore, is to the situation where an employee voluntarily joins a union, or an individual voluntarily joins an association, and later finds himself in disagreement with its stance on a political issue. The *Street* and *Abood* Courts did not address the question whether, in such a situation, the union or association must refund a portion of the dissenter's dues or, more drastically, refrain from expressing the majority's views. In addition, even apart from the substantive differences between compelled membership in a union and voluntary investment in a corporation or voluntary participation in any collective organization, it is by no means an automatic step from the remedy in *Abood*, which honored the interests of the minority without infringing the majority's rights, to the position adopted by the dissent which would completely silence the majority because a hypothetical minority might object.

V

Because that portion of § 8 challenged by appellants prohibits protected speech in a manner unjustified by a compelling state interest, it must be invalidated. The judgment of the Supreme Judicial Court is

Reversed.[a]

Mr. Justice WHITE, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting....

I

There is now little doubt that corporate communications come within the scope of the First Amendment. This, however, is merely the starting point of analysis, because an examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not. Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations are not "an integral part of the development of ideas, of mental exploration and of the affirmation of self."[4] They do not represent a manifestation of individual freedom or choice. Undoubtedly, as this Court has recognized, see *NAACP v. Button*, 371 U.S. 415 (1963), there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits. Shareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion. In fact, as discussed *infra*, the government has a strong interest in assuring that investment decisions are not predicated upon agreement or disagreement with the activities of corporations in the political arena.

Of course, it may be assumed that corporate investors are united by a desire to make money, for the value of their investment to increase. Since even communications which have no purpose other than that of enriching the communicator have some First Amendment protection, activities such as advertising and other communications integrally related to the operation of the corporation's business may be viewed as a means of furthering the desires of individual shareholders. This unanimity of purpose breaks down, however, when corporations make expenditures or undertake activities designed to influence the opinion or votes of the general public on political and social issues that have no material connection

a. A concurring opinion by Chief Justice Burger is omitted.

4. T. Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1966).

with or effect upon their business, property, or assets. Although it is arguable that corporations make such expenditures because their managers believe that it is in the corporations' economic interest to do so, there is no basis whatsoever for concluding that these views are expressive of the heterogeneous beliefs of their shareholders whose convictions on many political issues are undoubtedly shaped by considerations other than a desire to endorse any electoral or ideological cause which would tend to increase the value of a particular corporate investment. This is particularly true where, as in this case, whatever the belief of the corporate managers may be, they have not been able to demonstrate that the issue involved has any material connection with the corporate business. Thus when a profitmaking corporation contributes to a political candidate this does not further the self-expression or self-fulfillment of its shareholders in the way that expenditures from them as individuals would.

The self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas. Any communication of ideas, and consequently any expenditure of funds which makes the communication of ideas possible, it can be argued, furthers the purposes of the First Amendment. This proposition does not establish, however, that the right of the general public to receive communications financed by means of corporate expenditures is of the same dimension as that to hear other forms of expression. In the first place, as discussed *supra*, corporate expenditures designed to further political causes lack the connection with individual self-expression which is one of the principal justifications for the constitutional protection of speech provided by the First Amendment. Ideas which are not a product of individual choice are entitled to less First Amendment protection. Secondly, the restriction of corporate speech concerned with political matters impinges much less severely upon the availability of ideas to the general public than do restrictions upon individual speech. Even the complete curtailment of corporate communications concerning political or ideological questions not integral to day-to-day business functions would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts. Moreover, it is unlikely that any significant communication would be lost by such a prohibition. These individuals would remain perfectly free to communicate any ideas which could be conveyed by means of the corporate form. Indeed, such individuals could even form associations for the very purpose of promoting political or ideological causes....

It bears emphasis here that the Massachusetts statute forbids the expenditure of corporate funds in connection with referenda but in no way forbids the board of directors of a corporation from formulating and making public what it represents as the views of the corporation even though the subject addressed has no material effect whatsoever on the business of the corporation. These views could be publicized at the individual expense of the officers, directors, stockholders, or anyone else interested in circulating the corporate view on matters irrelevant to its business.

The governmental interest in regulating corporate political communications, especially those relating to electoral matters, also raises considerations which differ significantly from those governing the regulation of individual speech. Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules

relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process. Although *Buckley* provides support for the position that the desire to equalize the financial resources available to candidates does not justify the limitation upon the expression of support which a restriction upon individual contributions entails, the interest of Massachusetts and the many other States which have restricted corporate political activity is quite different. It is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process, especially where, as here, the issue involved has no material connection with the business of the corporation. The State need not permit its own creation to consume it. Massachusetts could permissibly conclude that not to impose limits upon the political activities of corporations would have placed it in a position of departing from neutrality and indirectly assisting the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities. Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas. Ordinarily, the expenditure of funds to promote political causes may be assumed to bear some relation to the fervency with which they are held. Corporate political expression, however, is not only divorced from the convictions of individual corporate shareholders, but also, because of the ease with which corporations are permitted to accumulate capital, bears no relation to the conviction with which the ideas expressed are held by the communicator.

The Court's opinion appears to recognize at least the possibility that fear of corporate domination of the electoral process would justify restrictions upon corporate expenditures and contributions in connection with referenda but brushes this interest aside by asserting that "there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts," and by suggesting that the statute in issue represents an attempt to give an unfair advantage to those who hold views in opposition to positions which would otherwise be financed by corporations. It fails even to allude to the fact, however, that Massachusetts' most recent experience with unrestrained corporate expenditures in connection with ballot questions establishes precisely the contrary. In 1972, a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax on both individuals and corporations was put to the voters. The Committee for Jobs and Government Economy, an organized political committee, raised and expended approximately $120,000 to oppose the proposed amendment, the bulk of it raised through large corporate contributions. Three of the present appellant corporations each contributed $3,000 to this committee. In contrast, the Coalition for Tax Reform, Inc., the only political committee organized to support the 1972 amendment, was able to raise and expend only approximately $7,000. Per-

haps these figures reflect the Court's view of the appropriate role which corporations should play in the Massachusetts electoral process, but it nowhere explains why it is entitled to substitute its judgment for that of Massachusetts and other States, as well as the United States, which have acted to correct or prevent similar domination of the electoral process by corporate wealth.

This Nation has for many years recognized the need for measures designed to prevent corporate domination of the political process. The Corrupt Practices Act, first enacted in 1907, has consistently barred corporate contributions in connection with federal elections. This Court has repeatedly recognized that one of the principal purposes of this prohibition is "to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." *United States v. Automobile Workers*, 352 U.S. 567 (1957). Although this Court has never adjudicated the constitutionality of the Act, there is no suggestion in its cases construing it...that this purpose is in any sense illegitimate or deserving of other than the utmost respect; indeed, the thrust of its opinions, until today, has been to the contrary.

II

There is an additional overriding interest related to the prevention of corporate domination which is substantially advanced by Massachusetts' restrictions upon corporate contributions: assuring that shareholders are not compelled to support and financially further beliefs with which they disagree where, as is the case here, the issue involved does not materially affect the business, property, or other affairs of the corporation....

Mr. Justice REHNQUIST, dissenting.

This Court decided at an early date, with neither argument nor discussion, that a business corporation is a "person" entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment. Likewise, it soon became accepted that the property of a corporation was protected under the Due Process Clause of that same Amendment. Nevertheless, we concluded soon thereafter that the liberty protected by that Amendment "is the liberty of natural, not artificial persons." *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906). Before today, our only considered and explicit departures from that holding have been that a corporation engaged in the business of publishing or broadcasting enjoys the same liberty of the press as is enjoyed by natural persons, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and that a nonprofit membership corporation organized for the purpose of "achieving...equality of treatment by all government, federal, state and local, for the members of the Negro community" enjoys certain liberties of political expression. *NAACP v. Button*, 371 U.S. 415 (1963).

The question presented today, whether business corporations have a constitutionally protected liberty to engage in political activities, has never been squarely addressed by any previous decision of this Court. However, the General Court of the Commonwealth of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic have considered the matter, and have concluded that restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible. The judgment

of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court. I think it quite probable that their judgment may properly be reconciled with our controlling precedents, but I am certain that under my views of the limited application of the First Amendment to the States, which I share with the two immediately preceding occupants of my seat on the Court, but not with my present colleagues, the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

Early in our history, Mr. Chief Justice Marshall described the status of a corporation in the eyes of federal law:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.

Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819). The appellants herein either were created by the Commonwealth or were admitted into the Commonwealth only for the limited purposes described in their charters and regulated by state law. Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, our inquiry must seek to determine which constitutional protections are "incidental to its very existence." *Dartmouth College*.

There can be little doubt that when a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law. Likewise, when a State charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to the liberty of the press essential to the conduct of its business. *Grosjean* so held, and our subsequent cases have so assumed. Until recently, it was not thought that any persons, natural or artificial, had any protected right to engage in commercial speech. Although the Court has never explicitly recognized a corporation's right of commercial speech, such a right might be considered necessarily incidental to the business of a commercial corporation.

It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes. A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. So long as the Judicial Branches of the State and Federal Governments remain open to protect the corporation's interest in its property, it has no need, though it may have the desire, to petition the political branches for similar protection. Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed.[6] I would

6. The question of whether [restrictions such as § 8] are politically desirable is exclusively for decision by the political branches of the Federal Government and by the States, and may

think that any particular form of organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation.

One need not adopt such a restrictive view of the political liberties of business corporations to affirm the judgment of the Supreme Judicial Court in this case. That court reasoned that this Court's decisions entitling the property of a corporation to constitutional protection should be construed as recognizing the liberty of a corporation to express itself on political matters concerning that property. Thus, the Court construed the statute in question not to forbid political expression by a corporation "when a general political issue materially affects a corporation's business, property or assets."

I can see no basis for concluding that the liberty of a corporation to engage in political activity with regard to matters having no material effect on its business is necessarily incidental to the purposes for which the Commonwealth permitted these corporations to be organized or admitted within its boundaries. Nor can I disagree with the Supreme Judicial Court's factual finding that no such effect has been shown by these appellants. Because the statute as construed provides at least as much protection as the Fourteenth Amendment requires, I believe it is constitutionally valid.

It is true, as the Court points out, that recent decisions of this Court have emphasized the interest of the public in receiving the information offered by the speaker seeking protection. The free flow of information is in no way diminished by the Commonwealth's decision to permit the operation of business corporations with limited rights of political expression. All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity.

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not be reviewed here. My Brother WHITE, in his dissenting opinion, puts the legislative determination in its most appealing light when he says:

"[T]he interest of Massachusetts and the many other States which have restricted corporate political activity... is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process...."

As I indicate in the text, I agree that this is a rational basis for sustaining the legislation here in question. But I cannot agree with my Brother WHITE's intimation that this is in fact the reason that the Massachusetts General Court enacted this legislation. If inquiry into legislative motives were to determine the outcome of cases such as this, I think a very persuasive argument could be made that the General Court, desiring to impose a personal income tax but more than once defeated in that desire by the combination of the Commonwealth's referendum provision and corporate expenditures in opposition to such a tax, simply decided to muzzle corporations on this sort of issue so that it could succeed in its desire.

If one believes, as my Brother WHITE apparently does, that a function of the First Amendment is to protect the interchange of ideas, he cannot readily subscribe to the idea that, if the desire to muzzle corporations played a part in the enactment of this legislation, the General Court was simply engaged in deciding which First Amendment values to promote....

But I think the Supreme Judicial Court was correct in concluding that, whatever may have been the motive of the General Court, the law thus challenged did not violate the United States Constitution.

I would affirm the judgment of the Supreme Judicial Court.

Notes and Questions

1. Justice Powell wrote in *Bellotti*, "The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' [Citation]." Is eloquence in campaign speech equivalent to persuasiveness, as Justice Powell seems to assume? Consider the following anecdote, described by Arthur Samish, who was widely regarded as the most powerful lobbyist in California in the 1930's and 40's.

Samish placed an initiative proposal on the ballot to give a tax break to the bus and truck industry, which he represented. He tried to "educate the voting public on the need for standard taxation for buses, pointing out that 1,700 small communities had no other public transportation besides buses." But railroad companies succeeded in defeating the initiative with a large advertising campaign.

The next election, Samish tried again. He hired "a well-known cartoonist named Johnny Argens to draw a picture of a big, fat, ugly pig." The pig was placed on billboards throughout California with the slogan:

DRIVE THE HOG FROM THE ROAD!
VOTE YES ON PROPOSITION NUMBER 2

Samish also distributed millions of handbills containing the pig and the same slogan. He points out that he always spelled out the word "Number." If he used the abbreviation "No. 2," "the voter might get confused and think he should vote 'No.'" Samish reports that his plan worked.

> Boy, did it work! Nobody likes a roadhog, and the voters flocked to the polls and passed the constitutional amendment by 700,000!
>
> All because the voters thought they were voting against roadhogs. That had nothing to do with it.

See Arthur H. Samish & Bob Thomas, THE SECRET BOSS OF CALIFORNIA 37–38 (1971).

Was Samish's campaign literature in favor of "Proposition Number 2" eloquent? Was it persuasive? Was it the kind of speech that merits the full protection of the First Amendment?

2. Justice Powell's opinion contains the statement that if "appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration." Is it possible, then, that in a different case a ban on corporate financial resources being used in ballot measure campaigns would be upheld? What kind of record evidence or legislative findings, if any, would lead to such a result? Would Samish's anecdote in the previous note be relevant? Would evidence that corporations often achieved electoral success by such tactics be sufficient? See generally John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence and Declining Voter Confidence be Found?*, 39 UNIVERSITY OF MIAMI LAW REVIEW 377 (1985). Shockley writes, at 389–90:

> The Court's distinction between domination and legitimate persuasion probably hinges on *perception*. In other words, only if voters perceive big money as dominating the process, thereby alienating citizens, reducing voter turnout, and undermining the democratic process, should campaign finance reform curb such influence. Requiring a public perception of domination adds a second stage to the process, complicating the matter considerably. If the public were to recognize the overwhelming impact of campaign funds on direct democracy, would money simultaneously become less influential, as in a self-negating prophecy? What if the public does not perceive money as being dominant, but it is? Or, less likely, what if the public perceives money as being dominant, but the public is wrong? On this question of perception, is it not relevant that so many states and municipalities—often through direct voter approval of the specific laws—have tried to limit money in ballot proposition campaigns? Is this an indication that the public already perceives and understands the power of money to dominate the electoral process? For what other purposes would these states enact such laws? Unfortunately, the Court has chosen not to answer these questions.

3. Suppose Ann is an elderly individual who purchased shares of XYZ Corporation at the depths of the Depression in the 1930's. Since then the value of the stock has increased greatly, and for Ann to sell her XYZ stock would have disastrous tax consequences for Ann and her children.

Suppose Bill is a state employee. The state withholds a portion of Bill's salary each month and deposits it in his behalf into the state retirement system, the investments of which include stock in XYZ Corporation. The salary withholding is mandatory and Bill has no control over the retirement system's investments.

Suppose Carol last year purchased "letter stock" in XYZ Corporation. Carol purchased this stock from XYZ in a private placement, and Carol entered into a binding agreement not to sell the stock for a two-year period.

Now suppose XYZ Corporation proposes to contribute $500,000 to the chief committee opposing Proposition W, a ballot measure that is strongly supported by Ann, Bill, and Carol. Can Ann, Bill, or Carol enjoin XYZ from making the contribution, or obtain any other relief against XYZ? See footnote 34 of the Court's opinion in *Bellotti*.

4. Does the Court's opinion leave open the possibility of a statute that would require advance stockholder approval of a corporation's political contributions? See generally Francis H. Fox, *Corporate Political Speech: The Effect of First National Bank of Boston v. Bellotti Upon Statutory Limitations on Corporate Referendum Spending*, 67 KENTUCKY LAW JOURNAL 75, 96–101 (1978–79); Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE LAW JOURNAL 235 (1981).

If so, and if State *A* wanted to enact such a statute, could the state make the statute applicable to participation in elections conducted in State *A* by foreign corporations (i.e., by corporations that are incorporated in another state)? For example, according to a footnote (not reprinted above) in Justice Rehnquist's opinion, one of the appellants, Digital Equipment Corporation (DEC), was incorporated in Massachusetts, but another, Gillette, was incorporated in Delaware. Would it satisfy Massachusetts' purposes if an advance stockholder approval requirement

effectively prevented contributions by DEC, but was inapplicable to Gillette? What would be the effect of such applicability in litigation challenging the constitutionality of the statute? See generally Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WILLIAM & MARY LAW REVIEW 587, 599 n.69 (1991).

Such questions prompted the following comments by Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAPITAL UNIVERSITY LAW REVIEW 381, 408–9 (1992):

> In reality, the concern for dissenting shareholders is ancillary to concerns regarding the electoral process, and the consequences of inserting such regulations into corporation laws would be untenable....
>
> This is not to say that the problem of the dissenting shareholder is completely irrelevant. The fact that corporate management is speaking with other people's money, whether or not the "owners" agree with the speech, care about it, or even are aware of it, is a relevant consideration that reduces to some degree the force behind claims for First Amendment protection for corporate participation in election campaigns. Corporations have a weak claim, if any, to protection, to the extent freedom of speech is based on principles such as autonomy or self-realization. Justice Powell's majority opinion in *Bellotti* utterly fails to recognize the relevance of these considerations, and that failure helps to account for the perception of many that his opinion is one-sided and unsatisfactory. But if *Bellotti* is unbalanced, it is not wrong in noticing that there are instrumental values that underlie the First Amendment. The fact that when corporations speak, their managers speak with other people's money, like the fact that corporations are creatures of the state favored by certain legal advantages, is a relevant background fact, but it is no more than that.

5. There is some controversy over the effects of campaign spending on ballot propositions. Some scholars have asserted that even when one side greatly outspends its adversaries its chances for success do not increase materially. *E.g.*, Ronald J. Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEBRASKA LAW REVIEW 965, 1028–38 (1979). Others have found one-sided spending to have a dominant effect. *E.g.*, John S. Shockley, THE INITIATIVE PROCESS IN COLORADO POLITICS: AN ASSESSMENT (1980). Research relative to California ballot propositions held between 1968 and 1980 suggests that one-sided spending has generally been very effective, to the point of "dominance," when it has been on the negative side, but surprisingly ineffective when it has been on the affirmative side. See Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA LAW REVIEW 505 (1982). Lowenstein's study is deservedly criticized for its statistical crudeness by John R. Owens & Larry L. Wade, *Campaign Spending on California Ballot Propositions, 1924–1984: Trends and Voting Effects*, 39 WESTERN POLITICAL QUARTERLY 675, 682–87 (1986). Owens and Wade considered vote percentages rather than passage or defeat of ballot propositions, and the effects of campaign spending that they found were relatively weak. Nevertheless, a study of California initiative campaigns for the period 1976–88 generally found the same effects on outcomes as had appeared in Lowenstein's study, i.e., dominance of big negative spending and ineffectiveness

of big affirmative spending. See California Commission on Campaign Financing, DEMOCRACY BY INITIATIVE 290–91 (1992).

If you were persuaded that this conclusion (that one-sided spending usually prevails if it is on the negative side but not on the affirmative side) holds generally in ballot proposition campaigns, would it lead you to regard some control as desirable or as unnecessary? Would your answer be affected by whether you regard the institutions of direct democracy as desirable?

6. In *Bellotti*, Justice Powell avoided direct consideration of whether corporations have first amendment rights by stating that the significant issue was the right of the public to hear the speech that issues from corporations. Justice Powell's analysis is criticized in Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 SOUTHERN CALIFORNIA LAW REVIEW 1227, 1235 (1986):

> On its face, this approach to the first amendment is a little incongruous. By its terms, the amendment protects "freedom of speech," not freedom to hear. The Court, of course, reasoned that the latter freedom is necessarily implied by the former. But in the *Bellotti* situation that reasoning seems circular: whether the corporation has a right to speak depends on the listener's right to receive; but a listener presumably has a right to receive only what the speaker has a right to say. Moreover, the incongruity of *Bellotti*'s theory is intensified by its distance from the general public's understanding of law and rights: in everyday language, rights protect people, not corporations; in everyday thought, the first amendment is needed for the unpopular few, not the powerful many.
>
> The incongruity also may be understood in a somewhat different way. "The people," acting through their government, have prohibited certain entities from speaking about certain questions. Does the first amendment prevent the people from doing so? Ordinarily, the answer would be simple, because all people have a right to speak, either as part of their right to govern or as part of their right of self-expression. But here the would-be speaker is not a person and cannot benefit from the right to speak because it has no right to govern and needs no right of self-expression. The Court's argument is that a right resides in the people to have the information they need to govern. Yet in the statute at issue "the people" expressly decided not only that this information is not needed to govern, but that allowing the corporation to speak corrupts the electoral process and thus interferes with the people's effective exercise of their right to govern.

7. May a state regulate the financing of ballot measure campaigns in general, aside from participation by corporations? Limiting the total amount that may be spent for or against a ballot proposition seems to be ruled out by *Buckley v. Valeo*. For a decision so holding, see *Citizens for Jobs and Energy v. Fair Political Practices Commission*, 16 Cal.3d 671, 29 Cal.Rptr. 106, 547 P.2d 1386 (1976). In *Bellotti*, the appellants had alleged a desire to spend money, not contribute, in the Massachusetts election. Limits on the size of contributions to candidates were upheld in *Buckley*. Would similar limits on contributions to ballot measure campaigns be upheld? This question was presented in the following case.

Citizens Against Rent Control v. City of Berkeley
454 U.S. 290 (1981)

Chief Justice BURGER delivered the opinion of the Court.

The issue on appeal is whether a limitation of $250 on contributions to committees formed to support or oppose ballot measures violates the First Amendment.

I

[Berkeley, California, adopted an electoral reform ordinance through the initiative process, containing the following Section 602]:

> No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250).

Appellant Citizens Against Rent Control is an unincorporated association formed to oppose a ballot measure at issue in the April 19, 1977, election. The ballot measure would have imposed rent control on many of Berkeley's rental units. To make its views on the ballot measure known, Citizens Against Rent Control raised more than $108,000 from approximately 1,300 contributors. It accepted nine contributions over the $250 limit. Those nine contributions totaled $20,850, or $18,600 more than if none of the contributions exceeded $250....

Two weeks before the election, Citizens Against Rent Control sought and obtained a temporary restraining order prohibiting enforcement of [§ 602]. The ballot measure relating to rent control was defeated. [The trial court later declared § 602 unconstitutional, but the California Supreme Court reversed on the ground that large contributions by special interests would "corrupt" the initiative process.]

II

...We begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena [*sic*] and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted. The voters of the city of Berkeley adopted the challenged ordinance which places restrictions on that marketplace. It is irrelevant that the voters rather than a legislative body enacted § 602, because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.

III

A

The Court has acknowledged the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues....

Buckley also made clear that contributors cannot be protected from the possibility that others will make larger contributions....

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

The Court went on to note that the freedom of association "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'"[5] Under the Berkeley ordinance an affluent person can, acting alone, spend without limit to advocate individual views on a ballot measure. It is only when contributions are made in concert with one or more others in the exercise of the right of association that they are restricted by § 602.

There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them. To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association. Section 602 does not seek to mute the voice of one individual, and it cannot be allowed to hobble the collective expressions of a group.

Buckley identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*:

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined....
>
> ...Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical...if confidence in the system of representative Government is not to be eroded to a disastrous extent.'

Buckley thus sustained limits on contributions to candidates and their committees....

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5. The value of the right to associate is illustrated by the cost of reaching the public. Appellants represent that the cost of a single mailing to each of the 71,088 persons registered to vote in Berkeley in 1977 was $12,800. The cost of a full-page advertisement in a Berkeley area newspaper, the Independent Gazette, was $1,620.

In *Bellotti*, we held that a state could not prohibit corporations any more than it could preclude individuals from making contributions or expenditures advocating views on ballot measures. The *Bellotti* Court relied on *Buckley* to strike down state legislative limits on advocacy relating to ballot measures:

> Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'

Notwithstanding *Buckley* and *Bellotti*, the city of Berkeley argues that § 602 is necessary as a prophylactic measure to make known the identity of supporters and opponents of ballot measures. It is true that when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source. Here, there is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under § 112 of the ordinance, which requires publication of lists of contributors in advance of the voting.

Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression. As we have noted, regulation of First Amendment rights is always subject to exacting judicial scrutiny. The public interest allegedly advanced by § 602—identifying the sources of support for and opposition to ballot measures—is insubstantial because voters may identify those sources under the provisions of § 112. In addition, the record in this case does not support the California Supreme Court's conclusion that § 602 is needed to preserve voters' confidence in the ballot measure process. Cf. *Bellotti*. It is clear, therefore, that § 602 does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights.

B

Apart from the impermissible restraint on freedom of association, but virtually inseparable from it in this context, § 602 imposes a significant restraint on the freedom of expression of groups and those individuals who wish to express their views through committees. As we have noted, an individual may make expenditures without limit under §602 on a ballot measure but may not contribute beyond the $250 limit when joining with others to advocate common views. The contribution limit thus automatically affects expenditures,[b] and limits on expenditures operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue concerning a ballot measure.

Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's commit-

b. Is this statement consistent with the analysis in *Buckley* supporting the constitutionality of the FECA contribution limits? If not, which analysis is more sound, the *per curiam* opinion's in *Buckley* or Chief Justice Burger's here?—ED.

tees there is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression. The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions.

IV

A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression. The restraint imposed by the Berkeley ordinance on rights of association and in turn on individual and collective rights of expression plainly contravenes both the right of association and the speech guarantees of the First Amendment. Accordingly, the judgment of the California Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Justice REHNQUIST, concurring.

...Unlike the factual situation in *Bellotti*, the Berkeley ordinance was not aimed only at corporations, but sought to impose an across-the-board limitation on the size of contributions to committees formed to support or oppose ballot measure referenda....Therefore, my dissenting opinion in *Bellotti*...does not come into play....

Justice MARSHALL, concurring in the judgment.

[T]he Court fails to indicate whether or not it attaches any constitutional significance to the fact that the Berkeley ordinance seeks to limit contributions as opposed to direct expenditures. As Justice WHITE correctly notes in dissent, beginning with our decision in *Buckley*, this Court has always drawn a distinction between restrictions on contributions, and direct limitations on the amount an individual can expend for his own speech....

Because the Court's opinion is silent on the standard of review it is applying to this contributions limitation, I must assume that the Court is following our consistent position that this type of governmental action is subjected to less rigorous scrutiny than a direct restriction on expenditures. The city of Berkeley seeks to justify its ordinance on the ground that it is necessary to maintain voter confidence in government. If I found that the record before the California Supreme Court disclosed sufficient evidence to justify the conclusion that large contributions to ballot measure committees undermined the "confidence of the citizenry in government," *Bellotti*, I would join Justice WHITE in dissent on the ground that the State had demonstrated a sufficient governmental interest to sustain the indirect infringement on First Amendment interests resulting from the operation of the Berkeley ordinance. Like Justices BLACKMUN and O'CONNOR, however, I find no such evidentiary support in this record. I therefore concur in the judgment.

Justice BLACKMUN and Justice O'CONNOR, concurring in the judgment.

The contribution limitations at issue here encroach directly on political expression and association. Thus, Berkeley's ordinance cannot survive constitutional challenge unless it withstands "exacting scrutiny." *Bellotti*....

We would hold that Berkeley has neither demonstrated a genuine threat to its important governmental interests nor employed means closely drawn to avoid unnecessary abridgment of protected activity. In *Buckley*, this Court upheld limitations on contributions to candidates as necessary to prevent contributors from corrupting the representatives to whom the people have delegated political decisions. But curtailment of speech and association in a ballot measure campaign, where the people themselves render the ultimate political decision, cannot be justified on this basis.

Nor has Berkeley proved a genuine threat to its interest in maintaining voter confidence in government. We would not deny the legitimacy of that interest.... We did not find those interests threatened in *Bellotti*, however, in part because the State failed to show "by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes" or "the confidence of the citizenry in government." The city's evidentiary support in this case is equally sparse.

Finally, Berkeley does not justify its contribution limit as necessary to encourage disclosure. We cannot accept the Court's conclusion that that interest is "insubstantial," given the Court's concession that "when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source." Yet Berkeley need not impose a $250 ceiling on contributions to encourage disclosure so long as it vigorously enforces its already stringent disclosure laws.

We need say no more in order to reverse. Accordingly, we concur in the judgment.

Justice WHITE, dissenting.

...This case poses a less encompassing regulation on campaign activity [than in *Buckley* and *Bellotti*], one tailored to [their] odd measurements....Precisely because it reflects these decisions, the ordinance regulates contributions but not expenditures and does not prohibit corporate spending. It is for that very reason perhaps that the effectiveness of the ordinance in preserving the integrity of the referendum process is debatable. Even so, the result here illustrates that the *Buckley* framework is most problematical and strengthens my belief that there is a proper role for carefully drafted limitations on expenditures.

Even under *Buckley*, however, the Berkeley ordinance represents such a negligible intrusion on expression and association that the measure should be upheld. The ordinance certainly does not go beyond what I understand the First Amendment to permit. For both these reasons, I dissent.

I

The Berkeley ordinance does not control the quantity or content of speech. Unlike the statute in *Bellotti*, it does not completely prohibit contributions and expenditures. Any person or company may contribute up to $250. If greater spending is desired, it must be made as an expenditure, and expenditures are not limited

or otherwise controlled. Individuals also remain completely unfettered in their ability to join interested groups or otherwise directly participate in the campaign.

The Court reaches the conclusion that the ordinance is unconstitutional only by giving *Buckley* the most extreme reading and by essentially giving the Berkeley ordinance no reading at all. It holds that the contributions involved here are "beyond question a very significant form of political expression." Yet in *Buckley* the Court found that contribution limitations "entai[l] only a marginal restriction upon the contributor's ability to engage in free communication." As with contributions to candidates, ballot measure contributions "involv[e] speech by someone other than the contributor" and a limitation on such donations "does not in any way infringe the contributor's freedom to discuss candidates and issues." Indeed what today has become "a very significant form of political expression" was held just last Term to involve only "some limited element of protected speech." *California Medical Assn.*...

The Court also finds that the freedom of association is impermissibly compromised by not allowing persons to contribute unlimited funds to committees organized to support or oppose a ballot measure. However, in *Buckley*, the Court observed that contribution ceilings "leav[e] persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." Associational rights, it was thought, were seriously impinged only by expenditure ceilings—there by virtue of precluding associations from effectively amplifying the voice of their adherents.... The Court's concern that this ordinance will "hobble the collective expressions of a group" is belied by the fact that appellants, having already met their campaign budget, ended all fundraising almost a month before the election.

It is bad enough that the Court overstates the extent to which First Amendment interests are implicated. But the Court goes on to assert that the ordinance furthers no legitimate public interest and cannot survive "any degree of scrutiny." Apparently the Court assumes this to be so because the ordinance is not directed at *quid pro quos* between large contributors and candidates for office, "the single narrow exception" for regulation that it viewed *Buckley* as endorsing. The *Buckley* Court, however, found it "unnecessary to look beyond the Act's primary purpose," the prevention of corruption, to uphold the contribution limits, and thus did not consider other possible interests for upholding the restriction. Indeed, at least since *United States v. Automobile Workers*, 352 U.S. 567 (1957), the Court has recognized that "sustaining the active alert responsibility of the individual citizen in a democracy for the wise conduct of government" is a valid state interest. The *Bellotti* Court took care to note that this objective, along with "[p]reserving the integrity of the electoral process [and] the individual citizen's confidence in government" "are interests of the highest importance."

In *Bellotti*, the Court found inadequate evidence in the record to support these interests, but it suggested that some regulation of corporate spending might be justified if "corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests." The Court suggested that such a situation would arise if it could be shown that "the relative voice of corporations ha[d] been overwhelming [and]... significant in influencing referenda." It is quite possible that such a test is fairly met in this case. Large contributions, mainly from corporate sources, have skyrocketed as the role

of individuals has declined.[2] Staggering disparities have developed between spending for and against various ballot measures.[3] While it is not possible to prove that heavy spending "bought" a victory on any particular ballot proposition, there is increasing evidence that large contributors are at least able to block the adoption of measures through the initiative process. Recognition that enormous contributions from a few institutional sources can overshadow the efforts of individuals may have discouraged participation in ballot measure campaigns and undermined public confidence in the referendum process.

By restricting the size of contributions, the Berkeley ordinance requires major contributors to communicate directly with the voters. If the ordinance has an ultimate impact on speech, it will be to assure that a diversity of views will be presented to the voters.... Of course, entities remain free to make major direct expenditures. But because political communications must state the source of funds, voters will be able to identify the source of such messages and recognize that the communication reflects, for example, the opinion of a single powerful corporate interest rather than the views of a large number of individuals. As the existence of disclosure laws in many states suggests, information concerning who supports or opposes a ballot measure significantly affects voter evaluation of the proposal. The Court asserts, without elaboration, that existing disclosure requirements suffice to inform voters of the identity of contributors. Yet, the inadequacy of disclosure laws was a major reason for the adoption of the Berkeley ordinance. Section 101(d) of the ordinance constitutes a finding by the people of Berkeley that "the influence of large campaign contributors is increased because existing laws for disclosure of campaign receipts and expenditures have proved to be inadequate."

Admittedly, Berkeley cannot present conclusive evidence of a causal relationship between major undisclosed expenditures and the demise of the referendum as a tool of direct democracy. But the information available suffices to demonstrate that the voters had valid reasons for adopting contribution ceilings. It was on a similar foundation that the Court upheld contribution limits in *Buckley* and *California Medical Assn.* In my view, the ordinance survives scrutiny under the *Buckley* and *Bellotti* cases.

II

There are other grounds for sustaining the ordinance. I continue to believe that because the limitations are content-neutral, and because many regulatory actions will indirectly affect speech in the same manner as regulations in the sphere of campaign finance, "the argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely

2. The California Fair Political Practices Commission has reported that campaign contributions from private individuals in the November 1980 general election totaled only one-half of the individual contributions given during the 1978 general election and represented only 5% of all the contributions made.

3. [In this and subsequent footnotes that are omitted here, Justice White points to examples from California ballot measure elections to document his points. Some similar information is contained in the notes following this decision.—ED.]

too much." *Buckley* (WHITE, J., concurring in part and dissenting in part). Every form of regulation—from taxes to compulsory bargaining—has some effect on the ability of individuals and corporations to engage in expressive activity. We must therefore focus on the extent to which expressive and associational activity is restricted by the Berkeley ordinance. That First Amendment interests are implicated should begin, not end, our inquiry. When the infringement is as slight and ephemeral as it is here, the requisite state interest to justify the regulation need not be so high.

The interests which justify the Berkeley ordinance can properly be understood only in the context of the historic role of the initiative in California. "California's entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy." *James v. Valtierra*, 402 U.S. 137 (1971). From its earliest days, it was designed to circumvent the undue influence of large corporate interests on government decisionmaking. It served, as President Wilson put it, as a "gun behind the door" to keep political bosses and legislators honest. In more recent years, concerned that the heavy financial participation by corporations in referendum contests has undermined this tool of direct democracy, the voters of California enacted by initiative in 1974 the Political Reform Act, which limited expenditures in statewide ballot measure campaigns, and Berkeley voters adopted the ordinance at issue in this case. The role of the initiative in California cannot be separated from its purpose of preventing the dominance of special interests. That is the very history and purpose of the initiative in California, and similarly it is the purpose of ancillary regulations designed to protect it. Both serve to maximize the exchange of political discourse. As in *Bellotti*, "[t]he Court's fundamental error is its failure to realize that the state regulatory interests...are themselves derived from the First Amendment." (WHITE, J., dissenting).

Perhaps, as I have said, neither the city of Berkeley nor the State of California can "prove" that elections have been or can be unfairly won by special interest groups spending large sums of money, but there is a widespread conviction in legislative halls, as well as among citizens, that the danger is real. I regret that the Court continues to disregard that hazard.

Notes and Questions

1. For commentary on *Citizens Against Rent Control (CARC)* and the issue it addresses, see Marlene Nicholson, *The Constitutionality of Contribution Limitations in Ballot Measure Elections*, 9 ECOLOGY LAW QUARTERLY 683 (1981); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA LAW REVIEW 505, 583–602 (1982).

2. *Buckley*, *California Medical Association*, and *CARC* all involved the validity of limits on the size of contributions. Did the Court measure the proffered justifications for the limits against the same standard of review in each case? Should it have?

3. The City argued the limit should be upheld as necessary to make known the identity of supporters and opponents of ballot measures. How could a contribution limit possibly serve this purpose? Was the Court right to reject this argument?

4. The Court rejected the California Supreme Court's view that a contribution limit could be justified as "needed to preserve voters' confidence in the ballot measure process" because it was not supported by the record. What evidence would be sufficient to sustain this argument? Note that the research described in Note 5 following *Bellotti* on the effects of campaign spending in ballot measure elections had not been published prior to the trial in *CARC* and therefore could not have been made part of the record. If another jurisdiction adopted a contribution limit, would introduction of that research be sufficient to sustain the limit?

5. Suppose that in a ballot proposition campaign side A can raise $1,000,000 in relatively small contributions, and side B can raise only $100,000 in such contributions. Suppose further that XYZ Corporation would like to contribute $900,000 to side B. Is it fair to permit the large contribution under these circumstances? Is it fair to prohibit it? From whose point of view are you applying a standard of fairness? Consider Lowenstein, *supra* at 515–17:

> There are two conceptions of fairness that may inform our evaluation. First, the campaign may be regarded as fair when both sides have a roughly equal opportunity to present their arguments to the voters. We shall call this the *equality* standard of fairness. Second, the campaign may be regarded as fair when the ability of either side to present its arguments more or less reflects the number of people who actively support that side and the strength of their feelings. We shall call this the *intensity* standard of fairness.
>
> The equality standard is based on the voter's interest in receiving a balanced presentation of the arguments. If the equality standard is met, the voter is least likely to be deceived and most likely to be apprised of considerations relevant to his assessment of the proposition. The intensity standard is based on the interest of activists on each side who wish to translate their own strong feelings into an advantage for their side. The intensity standard minimizes the likelihood that an apathetic majority will impose severe harm on an intense minority. In addition, it incorporates the idea that widespread political participation is desirable and therefore should be encouraged by assuring that participation will be effective.
>
> While both the equality and intensity standards have intuitive appeal, they can be incompatible. If large numbers of people feel strongly and are prepared to contribute money, speak out and otherwise assist one side of the issue while most of their opponents remain apathetic, under the intensity standard the result is regarded as fair although voters are exposed to a relatively one-sided debate. On the other hand, if measures are taken to assure a relatively even-handed debate, the intense feelings on one side will not significantly enhance that side's chances of success.

In the above problem, is permitting the contribution by the XYZ Corporation to Side B fair under either or both of the equality or the intensity standards of fairness? Suppose the XYZ Corporation instead wants to contribute $900,000 to side A. Is permitting this contribution fair under either or both of the equality or the intensity standards of fairness?

Now consider a variation that is often more realistic in ballot measure campaigns. Side A has sufficiently widespread and intense support that it can raise

$500,000 in small contributions, and it receives no large contributions. Side B receives virtually no small contributions, but four corporations contribute $5 million each. Because of the large size of the state and the high prices for advertising in media of all types, political experts agree that a $500,000 campaign will have almost no success in communicating its message to voters, whereas $20 million is just about what is needed to get a message heard often enough to make an impression. Furthermore, because of other, more newsworthy matters that will be on the ballot at the same time, newspapers and broadcasters are giving little attention to the proposition in question. The proposition is sufficiently complex and its likely consequences sufficiently debatable that the electorate would unquestionably benefit from debate and information. Under these circumstances, if the choice is between a one-sided campaign favoring side B and virtually no campaign at all, which is more in the public interest?

6. The effects of large contributions can be dramatic. Consider the case of Proposition 5 in the California 1978 general election, an initiative proposal to require separate smoking and no-smoking sections in public places. In contributions *under* $1,000, the supporters raised $541,621 compared with the opponents' $48,236. In contributions *over* $1,000, the supporters raised $111,960, while the opponents raised $6,302,252. Almost all of this last figure came from five major tobacco companies and the Tobacco Institute. One company alone, R.J. Reynolds Tobacco Company, put up $2,403,600. See Fair Political Practices Commission, CAMPAIGN CONTRIBUTIONS AND SPENDING REPORT, November 7, 1978 General Election. These large contributions were not made in vain. Although early polls showed Proposition 5 leading by 20 percentage points, the proposition was defeated. See Lowenstein, *supra* at 537–40.

The absence of any limit on the size of contributions to ballot measure campaigns, combined with the high cost of advertising media in large states, can render small contributions by ordinary citizens insignificant. To a large extent, this has occurred in California.

> With large contributions coming from all sides, ballot measure campaigns become battles between fewer and fewer major interests. A majority of the funding for some 1990 initiative contests came from fewer than 10 contributors. In the campaign for forest protection Proposition 130, for example, the proponents were funded almost entirely by two contributors—Harold Arbit and Frank Wells—who gave contributions of $1 million or more. The opposition campaign was almost entirely supported by 16 lumber companies giving in amounts of $100,000 or more.
>
> ...In 1990, two-thirds (67%) of the total dollars raised by all campaigns were received in amounts of $100,000 or more.... Over one-third (37%) of all 1990 contributions came in amounts of $1 million or more....
>
> Contributions from small donors were least significant. Though contributors of less than $1,000 accounted for 78% of the total *number* of contributions to 1990 campaigns, they totaled just 6% of the total dollars contributed.

California Commission on Campaign Financing, DEMOCRACY BY INITIATIVE 279–80 (1992) (some emphasis deleted).

7. Would public financing of ballot measure campaigns be desirable? What would be the objective of public financing? Would money be provided in all ballot proposition campaigns? Bear in mind that many ballot propositions involve relatively obscure amendments to state constitutions that generate little interest. If money is not to be provided in all campaigns, how would it be decided which propositions would be eligible? Would funds go to both sides of the campaign or to one side only? If it were decided that a given side in a given campaign were entitled to funds, what would happen if more than one committee on that side applied for the funds? Would public financing be joined with a limit on the size of contributions or would it be an alternative to such limits? For discussion of these issues, see Lowenstein, *supra* at 578–83.

II. Financing Qualification Drives

Meyer v. Grant
486 U.S. 414 (1988)

Justice STEVENS delivered the opinion of the Court.

In Colorado [o]ne section of the state law regulating the initiative process makes it a felony to pay petition circulators. The question in this case is whether that provision is unconstitutional....

I...

Under Colorado law,...the proponents of [a measure] have six months to obtain the necessary signatures, which must be in an amount equal to at least five percent of the total number of voters who cast votes for all candidates for the Office of Secretary of State at the last preceding general election. If the signature requirements are met, the petitions may be filed with the Secretary of State, and the measure will appear on the ballot at the next general election.

State law requires that the persons who circulate the approved drafts of the petitions for signature be registered voters. Before the signed petitions are filed with the Secretary of State, the circulators must sign affidavits attesting that each signature is the signature of the person whose name it purports to be and that, to the best of their knowledge and belief, each person signing the petition is a registered voter. The payment of petition circulators is punished as a felony.

Appellees are proponents of an amendment to the Colorado Constitution that would remove motor carriers from the jurisdiction of the Colorado Public Utilities Commission. In early 1984 they obtained approval of a title, submission clause, and summary for a measure proposing the amendment and began the process of obtaining the 46,737 signatures necessary to have the proposal appear on the November 1984 ballot. Based on their own experience as petition circulators, as well as that of other unpaid circulators, appellees concluded that they would need the assistance of paid personnel to obtain the required number of signatures within the allotted time. They then brought this action...against the Secretary of State and the Attorney General of Colorado seeking a declaration that the statutory prohibition against the use of paid circulators violates their rights under the First Amendment.

[The trial court upheld the law, but was reversed by the Tenth Circuit Court of Appeals.][3]

II

We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny. *Buckley*....

The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it.[4] Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech."

The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will gar-

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3. In support of its conclusion that the prohibition against the use of paid circulators did not inhibit the placement of initiative measures on the general ballot, the District Court compared Colorado's experience with that of 20 States which have an initiative process but do not prohibit paid circulators. It noted that since 1910, Colorado has ranked fourth in the total number of initiatives placed on the ballot. This statistic, however, does not reject the possibility that even more petitions would have been successful if paid circulators had been available, or, more narrowly, that these appellees would have had greater success if they had been able to hire extra help. As the District Court itself noted, "the evidence indicates [appellees'] purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers."

4. The record in this case demonstrates that the circulation of appellees' petition involved political speech. Paul Grant, one of the appellees, testified about the nature of his conversations with voters in an effort to get them to sign the petition:

"[T]he way we go about soliciting signatures is that you ask the person—first of all, you interrupt the person in their walk or whatever they are doing. You intrude upon them and ask them, "Are you a registered voter?...

"If you get a yes, then you tell the person your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, 'Please let me know a little bit more.' Typically, that takes maybe a minute or two, the process of explaining to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from [State Public Utilities Commission] regulations.

"Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign....

"[We try] to explain the not just deregulation in this industry, that it would free up to industry from being cartelized, allowing freedom from moral choices, price competition for the first time, lowering price costs, which we estimate prices in Colorado to be $150 million a year in monopoly benefits. We have tried to convey the unfairness and injustice of the existing system, where some businesses are denied to go into business simply to protect the profits of existing companies.

"We tried to convey the unfairness of the existing system, which has denied individuals the right to start their own businesses. In many cases, individuals have asked for an authority and been turned down because huge corporate organizations have opposed them."

This testimony provides an example of advocacy of political reform that falls squarely within the protections of the First Amendment.

ner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion....

Appellants argue that even if the statute imposes some limitation on First Amendment expression, the burden is permissible because other avenues of expression remain open to appellees and because the State has the authority to impose limitations on the scope of the state-created right to legislate by initiative. Neither of these arguments persuades us that the burden imposed on appellees' First Amendment rights is acceptable.

That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.

Relying on *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), Colorado contends that because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right. That reliance is misplaced. In *Posadas* the Court concluded that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." The Court of Appeals quite properly pointed out the logical flaw in Colorado's attempt to draw an analogy between the present case and *Posadas*. The decision in *Posadas* does not suggest that "the power to ban casino gambling entirely would include the power to ban public discussion of legislative proposals regarding the legalization and advertising of casino gambling." Thus it does not support the position that the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions. And, as the Court of Appeals further observed:

> *Posadas* is inapplicable to the present case for a more fundamental reason—the speech restricted in *Posadas* was merely "commercial speech which does 'no more than propose a commercial transaction....'" Here, by contrast, the speech at issue is "at the core of our electoral process and of the First Amendment freedoms," *Buckley*—an area of public policy where protection of robust discussion is at its zenith.

We agree with the Court of Appeals' conclusion that the statute trenches upon an area in which the importance of First Amendment protections is "at its zenith." For that reason the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable.

III

We are not persuaded by the State's arguments that the prohibition is justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process. As the Court of Appeals correctly held, the former interest is adequately protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained.

The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns. The Attorney General has argued that the petition circulator has the duty to verify the authenticity of signatures on the petition and that compensation might provide the circulator with a temptation to disregard that duty. No evidence has been offered to support that speculation, however, and we are not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

Other provisions of the Colorado statute deal expressly with the potential danger that circulators might be tempted to pad their petitions with false signatures. It is a crime to forge a signature on a petition, to make false or misleading statements relating to a petition, or to pay someone to sign a petition. Further, the top of each page of the petition must bear a statement printed in red ink warning potential signatories that it is a felony to forge a signature on a petition or to sign the petition when not qualified to vote and admonishing signatories not to sign the petition unless they have read and understand the proposed initiative. These provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.

"[L]egislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley*. That principle applies equally to "the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Id*. The Colorado statute prohibiting the payment of petition circulators imposes a burden on political expression that the State has failed to justify. The Court of Appeals correctly held that the statute violates the First and Fourteenth Amendments. Its judgment is therefore affirmed.

Notes and Questions

1. This was a unanimous decision. Why did not Justice White dissent?

2. Is the Colorado ban on paid petition circulators properly viewed as a restriction on speech or as a method of self-regulation by the state to determine which measures will be placed on the ballot? Consider a hypothetical statute that permits proponents of initiatives to employ paid circulators but requires the circulators to indicate on the face of the petitions that they have been paid. When the petitions are filed, the signatures acquired by paid circulators are ignored for purposes of determining whether the measure has qualified for the ballot. Paid circulators are required to disclose this fact to signers, who remain free to sign a petition circulated by a volunteer.

Would the hypothetical statute violate the First Amendment? Does it prohibit anyone from engaging in any speech activity or from paying others to engage in speech activity? As a practical matter, are its effects any different from the statute struck down in *Meyer v. Grant*? See Daniel Hays Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View*

and a Proposal, 17 HASTINGS CONSTITUTIONAL LAW QUARTERLY 175, 184–87 (1989).

3. In footnote 4, Justice Stevens presents one version of the typical signature solicitation process. Here is another, given by the late Ed Koupal, who was head of an organization that had considerable success using volunteer circulators to qualify measures for the ballot in California in the early 1970's, quoted in Carla Lazzareschi Duscha, *The Koupals' Petition Factory*, 6 CALIFORNIA JOURNAL 83, 83 (1975):

> "Generally the people who are out getting signatures are too god-damned interested in their ideology to get the required number in the required time," Koupal said. "We use the hoopla process. First, you set up a table with six petitions taped to it and a sign in front that says, SIGN HERE. One person sits at the table. Another person stands in front. That's all you need—two people.
>
> "While one person sits at the table, the other walks up to people and asks two questions. (We operate on the old selling maxim that two yesses make a sale.) First, we ask if they are a registered voter. If they say yes, we ask them if they are registered in that county. If they say yes to that, we immediately push them up to the table where the person sitting points to a petition and says, 'Sign this.' By this time the person feels, 'Oh, goodie, I get to play,' and signs it. If a table doesn't get 80 signatures an hour using this method, it's moved the next day."
>
> Koupal said that about 75 percent of the people sign when they're told to. "Hell no, people don't ask to read the petition and we certainly don't offer,' he added. "Why try to educate the world when you're trying to get signatures?"

From the standpoint of the First Amendment, does it matter whether this process described by Ed Koupal, or the process described by Paul Grant in footnote 4 of the Stevens opinion, is more typical?

4. After reviewing social science studies and a variety of anecdotal information regarding the petition circulation process, Lowenstein & Stern, *supra* at 199–200, drew the following conclusions:

> The degree to which potential signers agree with the merits of a petition is a significant but not crucial factor in their willingness to sign. Many other considerations go into the decision. These considerations undoubtedly are more important for some people, such as those particularly susceptible to casual social pressure, than for others. Petition circulators, whether professional or volunteer, can succeed, if they are willing to put in the effort, by relying on two general principles. First, they can use their experience and training to attempt to create a situation in which the social pressure to sign is relatively high. Second, they can adapt to the need for large numbers of signatures by ignoring potential signers for whom persuasion requires more than a few seconds....
>
> As to the signers, if the question is whether as a group they are more likely to support the substance of the petition than a comparable group of nonsigners, the answer is yes. If the question is whether the ability to obtain signatures is a reasonably accurate measure of public support for

> the substance of the petition, the answer is no. The latter point is vividly demonstrated by this statistic: One petition management firm was retained in a total of fifty-three petition drives through 1988, and fifty-two of these qualified for the ballot. The statement that under present conditions, anyone willing to put up the funds can buy a place on the ballot, is no hyperbole.

If these conclusions are valid empirically, what affect do they have, if any, on the constitutional analysis in *Meyer v. Grant*? See *id.* at 200–205.

5. Is Justice Stevens correct in arguing that because the Colorado statute "makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion," it follows that the statute restricts political expression? Does it restrict political expression if a state does not have an initiative process at all? If Colorado wished to raise the number of required signatures to qualify an initiative for the ballot, would it have to justify its action under the First Amendment?

6. In California (though probably not yet to the same degree in other states that use the initiative process) the reliance on professional circulators to qualify initiatives has become immense. Consider the following from a report issued by a non-profit research organization:

> Professional signature-gathering firms now boast that they can qualify *any* measure for the ballot (one "guarantees" qualification) if paid enough money for cadres of individual signature gatherers, and their statement is probably true. Any individual, corporation or organization with approximately $1 million to spend can now place any issue on the ballot and at least have a chance of enacting a state law. Qualifying an initiative for the statewide ballot is thus no longer so much a measure of general citizen interest as it is a test of fundraising ability. Instead of waging volunteer petition campaigns for broadbased grassroots support, initiative proponents now engage in intense searches for large contributors willing to fund increasingly expensive paid circulation drives....
>
> In recent elections, *one* business organization or individual has singlehandedly qualified an initiative for the ballot. In 1984, for example, Scientific Games of Atlanta, a manufacturer of lottery tickets, contributed 99.6% ($1.1 million) of the total qualification funding raised ($1.11 million) to qualify Proposition 37 (the successful lottery initiative) for the ballot. In 1988, San Francisco Bay Area attorney Jim Rogers, with approximately $300,000 (93% of the total $324,000 raised) qualified his advertising disclosure Proposition 105 for the ballot. In 1990, Harold Arbit contributed nearly $1 million to qualify Proposition 130 ("Forests Forever") for the ballot and in 1991 Frank Wells contributed over $500,000 to re-qualify the forest protection initiative.

California Commission on Campaign Financing, DEMOCRACY BY INITIATIVE 265 (1992).

7. Asserting that "it can be both too hard and too easy to qualify an initiative," Lowenstein & Stern, *supra*, propose a two-tier system, in which signatures obtained by volunteer circulators would weigh more heavily toward qualification

than signatures obtained by professionals.[c] *Id.* at 220–23. A state could then lower the required number of signatures, making it easier for all-volunteer groups to qualify their measures, while making it substantially more difficult for groups relying solely on professionals. What values would be served and disserved by this proposal? Is the proposal constitutional?

The Lowenstein-Stern proposal is criticized by Philip L. Dubois & Floyd F. Feeney, IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE 84 (1992):

> It could be cumbersome to administer in practice, susceptible to fraud and deception by those seeking the bonus, difficult to enforce, and possibly unconstitutional on equal-protection grounds by valuing some signatures more than others....
>
> Even assuming that the Lowenstein/Stern proposal could be administered, enforced, survive constitutional challenge, and be effective, it suffers from a more fundamental flaw: it fails to come to grips with the fact that signatures, whether gathered by volunteers or paid solicitors, are simply not meaningful gauges of public discontent or even interest.

Dubois and Feeney suggest a different means of assuring that signatures are a "meaningful gauge," which they believe requires separating the solicitation of signatures from the collection of signatures:

> Solicitors could be limited to discussing ballot measures with prospective signators and to distributing the official ballot title and summary along with appropriate campaign literature urging voters to support placing the matter on the ballot. Petitions for signatures could then be made available for voters to sign in a number of prominent public locations, such as state and local government offices, public libraries, and fire stations. Alternatively, solicitors might provide voters with a stamped or unstamped postcard bearing the official title and summary with a space for voters to provide their names and addresses as required by law, preaddressed to the county registrar of voters where it would be sent for verification.

Id. at 86. Is the Dubois-Feeney proposal an improvement on the Lowenstein-Stern proposal? Is the Dubois-Feeney proposal more enforceable? Can the Dubois-Feeney proposal be improved?

8. Another method of circulating initiative petitions is by direct mail. Of course, this method is very expensive, but if the proposal has sufficiently intense support, it sometimes is possible to raise sufficient funds through the mailings to pay for the circulation drive as it goes along. Some measures were qualified in this manner in California in the period around 1980, and many thought this would be the wave of the future. However, it has proved difficult to raise adequate funds for most proposals, so that in most cases direct mail has been at most a supplemental means of obtaining signatures. From a public interest standpoint, is the use of direct mail better or worse than the use of volunteer circulators? Professional cir-

c. Under this proposal, a person who signed a professionally circulated petition would be permitted later to sign a petition circulated by a volunteer, in order to receive the benefit of the higher weighting.

culators? See Thomas E. Cronin, DIRECT DEMOCRACY 216–17 (1989); Lowenstein & Stern, *supra*, at 205–9.

9. States place other restrictions on the circulation of initiatives besides restricting payment to circulators. One common requirement is that the circulator reside in the county in which he or she circulates the petition. Is such a requirement unconstitutional under *Meyer v. Grant*? Cf. *State ex rel. Stenberg v. Beermann*, 485 N.W.2d 151 (Neb. 1992).

10. For a survey of the qualification requirements in states that use the initiative and referendum processes, see David B. Magleby, *Ballot Access for Initiatives and Popular Referendums: The Importance of Petition Circulation and Signature Validation Procedures*, 2 JOURNAL OF LAW & POLITICS 287 (1985).

Chapter 13

Targeted Regulations: Corporations, Unions, PACs, Lobbyists

To this point, most of the campaign finance regulations we have considered have been general in their application. The major exception is *Bellotti*, in which the Massachusetts law in question applied only to banks and corporations. In this chapter, we shall consider prohibitions and restrictions that are targeted against certain types of contributors. Many such regulations exist. For example, federal law prohibits contributions in *any* election—federal, state or local—by national banks and corporations specially chartered by acts of Congress (2 U.S.C. § 441b, *infra*) and by foreign nationals (2 U.S.C. §441e). Our attention will be limited to regulations targeted against four types of contributors: corporations, labor unions, political action committees (PACs), and lobbyists.

I. Corporations and Labor Unions

At the federal level, the earliest campaign finance restriction targeted contributions by corporations. Such contributions were prohibited, and during the World War II period the prohibition was extended to labor unions. The sequence of legislation is set forth in the *NRWC* decision, which follows. For a detailed historical account, see Robert E. Mutch, CAMPAIGNS, CONGRESS, AND COURTS (1988). In the 1970s, the Federal Corrupt Practices Act, which contained these prohibitions, was merged into the Federal Election Campaign Act, and is now located at 2 U.S.C. § 441b.

Prior to the adoption of the FECA, the Corrupt Practices Act was rarely enforced. Most of the few cases that were prosecuted were brought against labor unions. Three of these cases reached the Supreme Court, and in each instance the union in question challenged the constitutionality of a ban on union contributions. In each case, the Court either interpreted the law so as not to apply to the alleged conduct or otherwise avoided deciding the constitutional issue. See *United States v. CIO*, 335 U.S. 106 (1948); *United States v. United Automobile Workers*, 352 U.S. 567 (1957); *Pipefitters Local Union No. 562 v. United States*, 407 U.S.

385 (1972). In *UAW*, in particular, the Court seemed to stretch very hard to avoid adjudicating the constitutional question.[a]

When the ban on corporate and labor contributions was reenacted as part of the original FECA, adopted in 1971, it was qualified by express provisions authorizing corporations and unions to use their funds to pay administrative expenses of "separate segregated funds"—now almost universally referred to as PACs[b]—which in turn could contribute to federal candidates out of voluntary contributions they received from individuals. Many unions and some corporations had been using PACs, but their legality had been questionable. In *Pipefitters*, *supra*, the Supreme Court finally ruled that under the prior law PACs were permissible, but by that time Congress, in the FECA, had already adopted rules legalizing and governing PACs. The present version of the statute follows:

2 U.S.C. § 441b

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which [federal offices] are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section....

(b)(1) [Defines "labor organization."]

(2) For purposes of this section..., the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stock-

a. *UAW*, written by Justice Frankfurter, is also noteworthy for its account of the history of federal campaign finance regulation.

b. "PAC," or "political action committee," is not a term that appears in the FECA. Most PACs are "multicandidate political committees," which the Act defines as "a political committee which has been registered... for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any state political party organization, has made contributions to 5 or more candidates for Federal office." 2 U.S.C. § 441a(a)(4). A committee must qualify as a multicandidate political committee in order to be eligible for the $5,000 limit on contributions to federal candidates, as opposed to the $1,000 limit that is applicable to individuals and other entities. A "separate segregated fund" of a corporation or union will ordinarily qualify as a multicandidate political committee—or, in popular language, as a PAC.

holders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of

such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

Notes and Questions

1. Labor union PACs commonly collect contributions by a "check-off" procedure, whereby members sign an authorization to have a small amount deducted from each paycheck. Suppose a union PAC uses a "reverse check-off," whereby the contribution is withheld from each member's paycheck unless the member submits a request that the contribution *not* be withheld? See *FEC v. National Education Association*, 457 F.Supp. 1102 (D.D.C. 1978).

2. The provisions in Section 441b(b)(4), specifying the individuals who may be solicited by corporate and labor PACs, were added to the FECA in 1976. In a controversial opinion the previous year, the Federal Election Commission had ruled by a 4–2 vote that corporations could solicit stockholders and employees. F.E.C. Advisory Opinion 1975-23 (Sun Oil Co.)(1975). Many Democrats and union leaders had urged that corporations be limited to soliciting stockholders. Corporate leaders and many Republicans, recognizing that employees were much more likely than stockholders to contribute to corporate PACs, strenuously argued the contrary. The 1976 statutory amendments limited corporate PACs to soliciting "executive or administrative personnel."[c] Although on the face of it this represented a compromise, as a practical matter it was a smashing victory for corporate PACs, whose expenditures increased rapidly and dramatically. In 1976, corporate PACs spent a total of $5.8 million. By 1982, this figure had risen to $43.8 million.[d]

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c. Under Section 441b(b)(4)(B), the corporate PAC may solicit lower level employees by mail at their residences. It is doubtful whether this provision has any practical significance.

d. See Larry J. Sabato, PAC POWER 14 (1985). For the background of the Sun Oil advisory opinion and an account of the events that followed, see Mutch, *supra*, at 166–70.

3. Should corporate and labor PACs be subject to restrictions on whom they may solicit for contributions? 2 U.S.C. § 441b(b)(4)(D) permits incorporated trade associations to solicit stockholders and executive and administrative personnel of corporations that are members of the trade association. However, they must receive approval of the member corporation, which may not give such approval to more than one trade association in a calendar year. The constitutionality of this restriction was upheld in *Bread Political Action Committee v. FEC*, 635 F.2d 621 (7th Cir. 1980), reversed on procedural grounds, 455 U.S. 577 (1982). The Court of Appeals observed that the restrictions on solicitation apply only to PACs whose administrative expenses are paid by corporations or unions:

> The same individuals who organize these political committees are free to establish a political committee independent of, rather than merely segregated from, the corporate treasury and corporate funds and thereby be free to solicit "the world." The reason Congress chose to allow trade associations to solicit the stockholders and executive or administrative employees (and their families) of member corporations (with their approval) is undoubtedly because the member corporations themselves cannot make political contributions *per se* to the trade association's political committee. At the same time, the restrictions placed on this potential pool of solicitees serves, as we have said earlier, to prevent the exception from swallowing the whole.

4. In contrast to the Court's earlier resistance to adjudicating the constitutionality of the ban on corporate and union contributions, in the post-*Buckley* era the Court was more than willing to reach the issue in the following case, whose primary focus was a much narrower question of interpreting section 441b to determine which potential contributors may be solicited by a PAC affiliated with a non-stock, non-profit corporation.

Federal Election Commission v. National Right to Work Committee

459 U.S. 197 (1982)

Justice REHNQUIST delivered the opinion of the Court.

The question in the case ultimately comes down to whether respondent National Right to Work Committee ("NRWC") limited its solicitation of funds to "members" within the meaning of 2 U.S.C. § 441b(b)(4)(C)....

Respondent NRWC is a nonprofit corporation without capital stock organized under the laws of the Commonwealth of Virginia. Given the central role of the congressional use of the word "member" in this litigation, it is useful to set forth respondent's organizational history in some detail. In 1975, respondent's predecessor and another corporation merged; the articles of merger filed in the District of Columbia by the successor corporation stated that NRWC "shall not have members."... Likewise, respondent's bylaws make no reference to members or to membership in the corporation. The stated purpose of NRWC... is "[t]o help make the public aware of the fact that American citizens are being required, against their will, to join and pay dues to labor organizations in order to earn a living...." In pursuance of this objective, NRWC regularly mails messages to mil-

lions of individuals and businesses whose names have found their way onto commercially available mailing lists that the organization has purchased or rented. The letters do not mention membership in NRWC, but seek donations to help NRWC publicize its opposition to compulsory unionism and frequently contain a questionnaire that the recipient is requested to answer and return.

In late 1975, in order to comply with § 441b of the Act, NRWC established a separate segregated fund, see 2 U.S.C. § 441b(b)(4)(C),[4] "to receive and make contributions on behalf of federal candidates." The fund was denominated the "Employees Rights Campaign Committee" ("ERCC"); its operation was completely subsidized from the NRWC treasury, which paid all the expenses of establishing and administering the fund, and of soliciting contributions. During part of 1976, NRWC sent letters to some 267,000 individuals, who had at one time contributed to it, soliciting contributions to ERCC. As a result of these solicitations, the fund received some $77,000 in contributions.

In October, 1976, another lobbying group, the Committee for an Effective Congress, filed a complaint against ERCC with the Commission, alleging violation of 2 U.S.C. § 441b(b)(4). The complaint asserted that NRWC had violated this section of the Act by using corporate funds to solicit contributions to ERCC from persons who were not NRWC's stockholders, executive or administrative personnel, or their families. NRWC did not deny these assertions, but took the position that the recipients of its solicitation letters were "members" of NRWC within the proviso set forth in § 441b(b)(4)(C). The Commission found probable cause to believe that a violation had occurred, and [this] litigation followed.

Essential to the proper resolution of the case is the interpretation of § 441b(b)(4)(C)'s statement that the prohibition against corporate solicitation contained in § 441b(b)(4)(A) shall not prevent "a...corporation without capital stock...from soliciting contributions to [a separate segregated fund established by a...corporation without capital stock] *from members of such... corporation....*" (Emphasis added.)...

The statutory purpose of § 441b, as outlined above, is to prohibit contributions or expenditures by corporations or labor organizations in connection with federal elections. 2 U.S.C. § 441b(a). The section, however, permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of "separate segregated funds," which may be "utilized for political purposes." 2 U.S.C. § 441b(b)(2)(C). The Act restricts the operations of such segregated funds, however, by making it unlawful for a corporation to solicit contributions to a fund established by it from persons other than its "stockholders and their families and its executive or administrative personnel and their families." 2 U.S.C. § 441b(b)(4)(A). Finally, and of most relevance here, the section just quoted has its own proviso, which states in pertinent part that "[t]his paragraph shall not prevent...a corporation without capital stock, or a separate segregated fund established by...a corporation without capital stock, from soliciting contributions to such a fund from

4. The separate segregated fund may be completely controlled by the sponsoring corporation or union, whose officers may decide which political candidates contributions to the fund will be spent to assist. The "fund must be separate from the sponsoring union [or corporation] only in the sense that there must be a strict segregation of its monies" from the corporation's other assets. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 414–417 (1972).

members" of the sponsoring corporation. 2 U.S.C. s 441b(b)(4)(C). The effect of this proviso is to limit solicitation by nonprofit corporations to those persons attached in some way to it by its corporate structure.

...While we do not feel sufficiently informed at this time to attempt an exegesis of the statutory meaning of the word "members" beyond that necessary to decide this case, we find it relatively easy to dispose of [respondent's argument that its] solicitation was limited to its "members," since in our view this would virtually excise from the statute the restriction of solicitation to "members."

Section 441b(b)(4)(C) was one of several amendments to the Act enacted in 1976. The entire legislative history of the subsection appears to be the floor statement of Senator Allen who introduced the provision in the Senate and explained the purpose of his amendment in this language:

> Mr. President, all this amendment does is to cure an omission in the bill. It would allow corporations that do not have stock but have a membership organization, such as a cooperative or other corporation without capital stock and, hence, without stockholders, to set up separate segregated political funds as to which it can solicit contributions from its membership; since it does not have any stockholders to solicit, it should be allowed to solicit its members....

This statement suggests that "members" of nonstock corporations were to be defined, at least in part, by analogy to stockholders of business corporations and members of labor unions. The analogy to stockholders and union members suggests that some relatively enduring and independently significant financial or organizational attachment is required to be a "member" under § 441b(b)(4)(C). The Court of Appeals' determination that NRWC's "members" include anyone who has responded to one of the corporation's essentially random mass mailings would, we think, open the door to all but unlimited corporate solicitation and thereby render meaningless the statutory limitation to "members."

We also assume, since there is no body of federal law of corporations, that Congress intended at least some reference to the laws of the various states dealing with nonprofit corporations....

Most states apparently permit nonprofit corporations to have "members" similar to shareholders in a business corporation, although state statutes generally do not seem to require this form of organization; in many states the Board of Directors of a nonprofit corporation may be an autonomous, self-perpetuating body. Given the wide variety of treatment of the subject of membership in state incorporation laws, and the focus of the Commission's regulation on the corporation's own standards, we think it was entirely permissible for the Commission in this case to look to NRWC's corporate charter...and the bylaws adopted in accordance with that charter.

Applying the statutory language as we interpret it to the facts of this case, we think Congress did not intend to allow the 267,000 individuals solicited by NRWC during 1976 to come within the exclusion for "members" in 2 U.S.C. § 441b(b)(4)(C). Although membership cards are ultimately sent to those who either contribute or respond in some other way to respondents' mailings, the solicitation letters themselves make no reference to members. Members play no part in the operation or administration of the corporation; they elect no corporate officials, and indeed there are apparently no membership meetings. There is no

indication that NRWC's asserted members exercise any control over the expenditure of their contributions. Moreover, as previously noted, NRWC's own articles of incorporation and other publicly filed documents explicitly disclaimed the existence of members. We think that under these circumstances, those solicited were insufficiently attached to the corporate structure of NRWC to qualify as "members" under the statutory proviso.

Unlike the Court of Appeals, we do not think this construction of the statute raises any insurmountable constitutional difficulties. The Court of Appeals expressed the view that the sort of solicitations involved here would neither corrupt officials nor coerce members of the corporation holding minority political views, the two goals which it believed Congress had in mind in enacting the statutory provisions at issue. That being so, the Court of Appeals apparently thought, and respondent argues here, that the term "members" must be given an elastic definition in order to prevent impermissible interference with [constitutional rights. Respondent] places considerable reliance on our statement in *Buckley*:

> The Court's decisions involving associational freedoms establish that the right of association is a "basic constitutional freedom," that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

Under this standard, respondent asserts, the Act's restriction of its solicitation cannot be upheld.

While we fully subscribe to the views stated in *Buckley*, in the very next sentence to the passage quoted by the respondent, the Court went on to say:

> Yet, it is clear that "[n]either the right to associate nor the right to participate in political activities is absolute."

In this case, we conclude that the associational rights asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting § 441b.

...The first purpose of § 441b, the government states, is to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions. See *United States v. United Automobile Workers*, 352 U.S. 567, 579 (1957). The second purpose of the provisions, the government argues, is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. See *United States v. CIO*, 335 U.S. 106, 113 (1948).

We agree with petitioners that these purposes are sufficient to justify the regulation at issue. Speaking of corporate involvement in electoral politics, we recently said:

> The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of

> the governmental interest in preventing this occurrence has never been doubted. *Bellotti*, fn. 26.

Likewise, in *Buckley*, we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption. These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process." *UAW*.

We are also convinced that the statutory prohibitions and exceptions we have considered are sufficiently tailored to these purposes to avoid undue restriction on the associational interests asserted by respondent. The history of the movement to regulate the political contributions and expenditures of corporations and labor unions is set forth in great detail in *UAW*. Seventy-five years ago Congress first made financial contributions to federal candidates by corporations illegal by enacting the Tillman Act (1907). Within the next few years Congress went further and required financial disclosure by federal candidates following election, Act of July 25, 1910, and the following year required pre-election disclosure as well. The Federal Corrupt Practices Act, passed in 1925, extended the prohibition against corporate contributions to include "anything of value," and made acceptance of a corporate contribution as well as the giving of such a contribution a crime.

The first restrictions on union contributions were contained in the second Hatch Act(1940), and later, in the War Labor Disputes Act of 1943, union contributions in connection with federal elections were prohibited altogether. These prohibitions on union political activity were extended and strengthened in the Taft-Hartley Act (1947), which broadened the earlier prohibition against contributions to "expenditures" as well. Congress codified most of these provisions in the Federal Election Campaign Act of 1971 and enacted later amendments in 1974 and in 1976. Section 441b(b)(4)(C) is, as its legislative history indicates, merely a refinement of this gradual development of the federal election statute.

This careful legislative adjustment of the federal electoral laws, in a "cautious advance, step by step," to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference. As we discuss below, it also reflects a permissible assessment of the dangers posed by those entities to the electoral process.

In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations. The statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared....[7]

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7. Our decision in *Bellotti* is entirely consistent with our conclusion here. Bellotti struck down a prohibition against corporate expenditures and contributions in connection with state referenda. The Court explicitly stated that its decision did not involve "the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or

To accept the view that a solicitation limited only to those who have in the past proved "philosophically compatible" to the views of the corporation *must* be permitted under the statute in order for the prohibition to be constitutional would ignore the teachings of our earlier decisions. The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, *Bellotti*, and there is no reason why it may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals....

The judgment of the Court of Appeals is reversed.

Notes and Questions

1. Was the Court right to uphold a ban on contributions by corporations? Later decisions on the susceptibility of corporations to regulation of their political activities are reprinted in Chapter 14, and you may wish to reserve judgment on this question until you have read them. The notes in Chapter 14 include debate on various theories that some people contend justify special regulations controlling corporate contributions and expenditures.

For a careful analysis, published before *NRWC*, of the constitutional question as it applies to both corporations and labor unions, see Marlene Arnold Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL LAW REVIEW 945 (1980).

2. Is the ban on contributions to federal candidates by labor unions constitutional? Consider Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAPITAL UNIVERSITY LAW REVIEW 381, 385–86 n.21 (1992):

> In *NRWC*, the Court gave two reasons for upholding the federal ban on contributions by corporations. The first, to ensure that the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators," is not easily applied to unions, which do not receive the same kind of "special advantages" that are conferred on corporations. The second reason, mentioned only briefly in *NRWC*, to protect dissenting individuals whose money is paid to the organization, is stated by the Court as applying to a "corporation or union." However, this concern cannot justify regulation of union activity, since the less restrictive (and legally mandated) alternative of barring political use of dissenting members' dues or other payments to the union provides adequate protection. See, e.g., *Communication Workers of America v. Beck*, 487 U.S. 735 (1988). Nevertheless, the Court's reference in *NRWC* to "the particular legal and economic attributes of corporations and labor organizations" that may war-

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other means of influencing candidate elections. " *Id.*, at n. 26. In addition,...the Court specifically pointed out that in elections of candidates to public office, unlike in referenda on issues of general public interest, there may well be a threat of real or apparent corruption. As discussed in text, Congress has relied on just this threat in enacting § 441b.

rant "considerable deference," suggests the likelihood that the Court will uphold restrictions on contributions by unions.

II. Political Action Committees

The total number of federal political action committees grew rapidly in the first decade following the 1974 amendments to the FECA, and then leveled off. At the end of 1974, 608 PACs were registered with the FEC. By the middle of 1991, the number was 4,123.[e]

The restrictions on solicitation of contributions by PACs in 2 U.S.C. § 441b apply to corporate and labor union PACs, which have the offsetting advantage of being able to use treasury funds of the sponsoring corporations and unions to pay their administrative expenses. This is no trivial advantage, as the administrative expenses often exceed the money received from contributors and donated to candidates. About half the registered PACs are sponsored by corporations or unions, with corporate PACs about five times as numerous as union PACs. A little less than a quarter are sponsored by other types of organizations, primarily membership groups such as professional organizations. A little over a quarter are "nonconnected."[f] However, only about half the nonconnected PACs are active, compared to about 80 percent of the sponsored PACs.[g] Following are amounts (in millions of dollars) contributed to congressional campaigns by PACs of different types in 1988, and the percentages of the total for each type.[h]

Type of PAC	*Amount*	*Percentage*
Corporate	$50.4	34%
Labor	33.9	23%
Other	44.0	30%
Nonconnected	19.1	13%
Total	147.4	100%

Nonconnected PACs typically raise their funds in small contributions solicited by direct mail that makes its appeal on general ideological grounds or on the basis of a particular cause or issue. Even those who criticize sponsored PACs as vehicles of special interest influence often regard nonconnected PACs as a healthy source of money for candidates. However, nonconnected PACs have sometimes been criticized to the extent they engage in independent spending. In 1980 and 1984, nonconnected PACs made independent expenditures in federal campaigns amounting, respectively, to $18.8 million and $21.7 million. This was the overwhelming majority of independent spending by PACs in federal campaigns during those years. In the next presidential election year, the figure for nonconnected PACs dropped to $3.7 million, still more than half of the total for all PACs.[i]

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e. See Frank Sorauf, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 100 (1992).

f. See David B. Magleby & Candice J. Nelson, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 74 (1990). The figures on breakdown of PACs by type are as of 1988.

g. See Sorauf, *supra*, at 105.

h. Derived from Magleby & Nelson, *supra*, at 84, Table 5-4.

i. See *id.* at 91, Table 5-8.

Many people feared that independent spending would throw the system of public funding of presidential campaigns out of balance or would lead to irresponsible advertising, since the candidate it supported could not be held responsible. There were also partisan concerns, because independent spending by conservative groups seemed to have helped the Republicans win control of the Senate in the 1980 elections. Accordingly, independent spending by nonconnected PACs became a focal point for reformers during its peak period of the early and mid-1980s. Could such spending be specially regulated because of special dangers resulting from the structure of PACs, by analogy to *NRWC*'s recognition of special dangers by virtue of the special characteristics of corporations?

Scholars who thought this question should be answered affirmatively argued that in the case of large, nonconnected PACs that raised money for independent expenditures through direct mail, pressure could be exerted, not by the individual contributors but by the managers of the PACs.

> The real or effective financial constituency in these circumstances is the PAC and its leadership, not the small givers to PAC campaign warchests. The candidate knows the programs and objectives of the PAC, and it is to the PAC officers that preferred access is given. These nationally centralized institutions thus compete with local constituents, including those who supply political resources, for the attention of public officials.

David Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZONA LAW REVIEW 569, 596 (1980). Archibald Cox, *Constitutional Issues in the Regulation of the Financing of Election Campaigns*, 31 CLEVELAND STATE LAW REVIEW 395, 411 (1982), provided what he called a "particularly unsubtle" example.

> The National Conservative Political Action Committee (NCPAC) is an "independent" political committee that spent over $2 million in the 1980 presidential campaign. In 1981, NCPAC's National Chairman wrote to Congressman Neal:
>
> > If you will make a public statement in support of the President's tax cut package and state that you intend to vote for it, we will withdraw all [independent, hostile] radio and newspaper ads planned in your district. In addition, we will be glad to run radio and newspaper ads applauding you for your vote to lower taxes.
>
> Cox went on:
>
> > In *Buckley*, the Supreme Court opined that independent expenditures create little risk of corrupting government because the absence of prearrangement and coordination will make such expenditures of little value to the candidate; indeed, may render them counterproductive. That might well be true of any expenditures by individuals to publicize their own ideas and words. The assumption made by the Court is much less plausible as applied to individuals who simply buy advertising services and time or space in the media. The assumption seems utterly implausible as applied to expenditures by political committees, organizations whose primary purpose is to promote the election of a candidate or candidates and

whose managers either are, or rely upon the services of, practicing politicians or professional campaign managers. Political committees, whose primary purpose is, by definition, to further the election of a candidate, do not need to be told by the candidate that straightforward, massive media advertising will help. They will have little difficulty in identifying the themes of the candidate's advertising. Nor do they need to be told how to follow those themes (particularly when they hire the same consultants and media experts used by the official campaign).

The Supreme Court addressed these contentions in the following decision.

Federal Election Commission v. National Conservative Political Action Committee (NCPAC)

470 U.S. 480 (1985)

Justice REHNQUIST delivered the opinion of the Court.

The Presidential Election Campaign Fund Act (Fund Act), 26 U.S.C. § 9001 *et seq.*, offers the Presidential candidates of major political parties the option of receiving public financing for their general election campaigns. If a Presidential candidate elects public financing, § 9012(f) makes it a criminal offense for independent "political committees," such as appellees National Conservative Political Action Committee (NCPAC) and Fund For A Conservative Majority (FCM), to expend more than $1,000 to further that candidate's election.

[The Democratic Party and the Federal Election Commission brought separate actions alleging that the two conservative PACs, NCPAC and FCM, had spend large sums in support of Ronald Reagan's candidacy in 1980 and that they had announced plans to do the same in 1984. They alleged that these past and threatened expenditures violated Section 9012(f). In this case, the Supreme Court affirms the District Court's ruling that Section 9012(f) was unconstitutional.[j]]

II

NCPAC is a nonprofit, nonmembership corporation... registered with the FEC as a political committee. Its primary purpose is to attempt to influence directly or indirectly the election or defeat of candidates for federal, state, and local offices by making contributions and by making its own expenditures. It is governed by a three-member board of directors which is elected annually by the existing board. The board's chairman and the other two members make all decisions concerning which candidates to support or oppose, the strategy and methods to employ, and the amounts of money to spend. Its contributors have no role in these decisions. It raises money by general and specific direct mail solicitations.

j. In a portion of the decision that is not reprinted here, the Court also ruled, over the dissent of four justices, that the Democratic Party had no standing to raise the issue. Because the FEC unquestionably had standing, the Court addressed the constitutional question.

It does not maintain separate accounts for the receipts from its general and specific solicitations, nor is it required by law to do so.

FCM is... registered with the FEC as a multicandidate political committee. In all material respects it is identical to NCPAC.

Both NCPAC and FCM are self-described ideological organizations with a conservative political philosophy. They solicited funds in support of President Reagan's 1980 campaign, and they spent money on such means as radio and television advertisements to encourage voters to elect him President. On the record before us, these expenditures were "independent" in that they were not made at the request of or in coordination with the official Reagan election campaign committee or any of its agents. Indeed, there are indications that the efforts of these organizations were at times viewed with disfavor by the official campaign as counterproductive to its chosen strategy. NCPAC and FCM expressed their intention to conduct similar activities in support of President Reagan's reelection in 1984, and we may assume that they did so.

[B]oth the Fund Act and FECA play a part in regulating Presidential campaigns. The Fund Act comes into play only if a candidate chooses to accept public funding of his general election campaign, and it covers only the period between the nominating convention and 30 days after the general election. In contrast, FECA applies to all Presidential campaigns, as well as other federal elections, regardless of whether publicly or privately funded. [In *Buckley*] we upheld as constitutional the limitations on *contributions to candidates* and struck down as unconstitutional *limitations on independent expenditures.*

In these cases we consider provisions of the Fund Act that make it a criminal offense for political committees such as NCPAC and FCM to make independent expenditures in support of a candidate who has elected to accept public financing. Specifically, § 9012(f) provides:

> (1)... it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

...There is no question that NCPAC and FCM are political committees and that President Reagan was a qualified candidate, and it seems plain enough that the PACs' expenditures fall within the term "qualified campaign expense."... We conclude that the PACs' independent expenditures at issue in this case are squarely prohibited by § 9012(f), and we proceed to consider whether that prohibition violates the First Amendment.

There can be no doubt that the expenditures at issue in this case produce speech at the core of the First Amendment....

The PACs in this case, of course, are not lone pamphleteers or street corner orators in the Tom Paine mold; they spend substantial amounts of money in order to communicate their political ideas through sophisticated media advertisements. And of course the criminal sanction in question is applied to the expenditure of money to propagate political views, rather than to the propagation of those views unaccompanied by the expenditure of money. But for purposes of presenting

political views in connection with a nationwide Presidential election, allowing the presentation of views while forbidding the expenditure of more than $1,000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system. [*Buckley*.]

We also reject the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First Amendment protection. The First Amendment freedom of association is squarely implicated in these cases. NCPAC and FCM are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to "amplif[y] the voice of their adherents." *Buckley*; *CARC*. It is significant that in 1979–1980 approximately 101,000 people contributed an average of $75 each to NCPAC and in 1980 approximately 100,000 people contributed an average of $25 each to FCM.

The FEC urges that these contributions do not constitute individual speech, but merely "speech by proxy," see *California Medical Assn. v. FEC* (MARSHALL, J.) (plurality opinion), because the contributors do not control or decide upon the use of the funds by the PACs or the specific content of the PACs' advertisements and other speech. The plurality emphasized in that case, however, that nothing in the statutory provision in question "limits the amount [an unincorporated association] or any of its members may independently expend in order to advocate political views," but only the amount it may contribute to a multicandidate political committee. Unlike *California Medical Assn.*, the present cases involve limitations on expenditures by PACs, not on the contributions they receive; and in any event these contributions are predominantly small and thus do not raise the same concerns as the sizable contributions involved in *California Medical Assn.*

Another reason the "proxy speech" approach is not useful in this case is that the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

Our decision in *NRWC* is not to the contrary. That case turned on the special treatment historically accorded corporations. In return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals. We held in *NRWC* that a rather intricate provision of the FECA dealing with the prohibition of corporate campaign contributions to political candidates did not violate the First Amendment. The prohibition excepted corporate solicitation of contributions to a segregated fund established for the purpose of contributing to candidates, but in turn limited such solicitations to stockholders or members of a corporation without capital stock. We upheld this limitation on solicitation of contributions as applied to the National Right to Work Committee, a corporation without capital stock, in view of the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office. *NRWC* is consistent with this Court's earlier holding that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates. *Bellotti*. In *Bellotti*, of course, we did not reach, nor do we need to reach in these cases, the question whether a

corporation can constitutionally be restricted in making independent expenditures to influence elections for public office.[k]

Like the National Right to Work Committee, NCPAC and FCM are also formally incorporated; however, these are not "corporations" cases because § 9012(f) applies not just to corporations but to any "committee, association, or organization (whether or not incorporated)" that accepts contributions or makes expenditures in connection with electoral campaigns. The terms of § 9012(f)'s prohibition apply equally to an informal neighborhood group that solicits contributions and spends money on a Presidential election as to the wealthy and professionally managed PACs involved in these cases.

Having concluded that the PAC's expenditures are entitled to full First Amendment protection, we now look to see if there is a sufficiently strong governmental interest served by § 9012(f)'s restriction on them and whether the section is narrowly tailored to the evil that may legitimately be regulated....

We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances. In *Buckley* we struck down the FECA's limitation on individuals' independent expenditures because we found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption. For similar reasons, we also find § 9012(f)'s limitation on independent expenditures by political committees to be constitutionally infirm.

Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political favors. But here the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate. The amounts given to the PACs are overwhelmingly small contributions, well under the $1,000 limit on contributions upheld in Buckley; and the contributions are by definition not coordinated with the campaign of the candidate. The Court concluded in *Buckley* that there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign. We said there:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

We think the same conclusion must follow here. It is contended that, because the PACs may by the breadth of their organizations spend larger amounts than the individuals in *Buckley*, the potential for corruption is greater. But precisely what the "corruption" may consist of we are never told with assurance. The fact

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k. [This issue was decided by the Court in two later cases, which are reprinted in Chapter 14.]

that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view. It is of course hypothetically possible here, as in the case of the independent expenditures forbidden in *Buckley*, that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.

Even were we to determine that the large pooling of financial resources by NCPAC and FCM did pose a potential for corruption or the appearance of corruption, § 9012(f) is a fatally overbroad response to that evil. It is not limited to multimillion dollar war chests; its terms apply equally to informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate.

Several reasons suggest that we are not free to adopt a limiting construction that might isolate wealthy PACs, even if such a construction might save the statute. First, Congress plainly intended to prohibit just what § 9012(f) prohibits—independent expenditures over $1,000 by all political committees, large and small. Even if it did not intend to cover small neighborhood groups, there is also no evidence in the statute or the legislative history that it would have looked favorably upon a construction of the statute limiting § 9012(f) only to very successful PACs. Secondly, we cannot distinguish in principle between a PAC that has solicited 1,000 $25 contributions and one that has solicited 100,000 $25 contributions. Finally, it has been suggested that § 9012(f) could be narrowed by limiting its prohibition to political committees in which the contributors have no voice in the use to which the contributions are put. Again, there is no indication in the statute or the legislative history that Congress would be content with such a construction. More importantly, as observed by the District Court, such a construction is intolerably vague. At what point, for example, does a neighborhood group that solicits some outside contributions fall within § 9012(f)? How active do the group members have to be in setting policy to satisfy the control test? Moreover, it is doubtful that the members of a large association in which each have a vote on policy have substantially more control in practice than the contributors to NCPAC and FCM: the latter will surely cease contributing when the message those organizations deliver ceases to please them.

In the District Court, the FEC attempted to show actual corruption or the appearance of corruption by offering evidence of high-level appointments in the Reagan administration of persons connected with the PACs and newspaper articles and polls purportedly showing a public perception of corruption. The District Court excluded most of the proffered evidence as irrelevant to the critical elements to be proved: corruption of candidates or public perception of corruption of candidates. A tendency to demonstrate distrust of PACs is not sufficient. We think the District Court's finding that "the evidence supporting an adjudicative finding of corruption or its appearance is evanescent" was clearly within its discretion, and we will not disturb it here. If the matter offered by the FEC in the District

Court be treated as addressed to what the District Court referred to as "legislative facts," we nonetheless agree with the District Court that the evidence falls far short of being adequate for this purpose.

Finally, the FEC urges us to uphold § 9012(f) as a prophylactic measure deemed necessary by Congress, which has far more expertise than the Judiciary in campaign finance and corrupting influences. [*NRWC*].

Here, however, the groups and associations in question, designed expressly to participate in political debate, are quite different from the traditional corporations organized for economic gain. In *NRWC* we rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit. But this proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized does not suffice to establish the validity of § 9012(f), which indiscriminately lumps with corporations any "committee, association or organization."...

While in *NRWC* we held that the compelling governmental interest in preventing corruption supported the restriction of the influence of political war chests funneled through the corporate form, in the present cases we do not believe that a similar finding is supportable: when the First Amendment is involved, our standard of review is "rigorous," *Buckley*, and the effort to link either corruption or the appearance of corruption to independent expenditures by PACs, whether large or small, simply does not pass this standard of review. Even assuming that Congress could fairly conclude that large-scale PACs have a sufficient tendency to corrupt, the overbreadth of § 9012(f) in these cases is so great that the section may not be upheld. We are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct.

The judgment of the District Court is affirmed as to the constitutionality of § 9012(f)....

It is so ordered.

Justice WHITE, dissenting....

My disagreements with [the majority's] analysis, which continues this Court's dismemberment of congressional efforts to regulate campaign financing, are many. First, I continue to believe that *Buckley* was wrongly decided. Congressional regulation of the amassing and spending of money in political campaigns without doubt involves First Amendment concerns, but restrictions such as the one at issue here are supported by governmental interests—including, but not limited to, the need to avoid real or apparent corruption—sufficiently compelling to withstand scrutiny....

Even if I accepted *Buckley* as binding precedent, I nonetheless would uphold §9012(f). *Buckley* distinguished "direct political expression," which could not be curtailed, from financial contributions, which could. Limitations on expenditures were considered direct restraints on the right to speak one's mind on public issues and to engage in advocacy protected by the First Amendment. The majority views the challenged provision as being in that category. I disagree.

The majority never explicitly identifies whose First Amendment interests it believes it is protecting. However, its concern for rights of association and the effective political speech of those of modest means, indicates that it is concerned with the interests of the PACs' contributors. But the "contributors" are exactly that—contributors, rather than speakers. Every reason the majority gives for treating § 9012(f) as a restraint on speech relates to the effectiveness with which the donors can make their voices heard. In other words, what the majority purports to protect is the right of the contributors to make contributions.

But the contributors are not engaging in speech; at least, they are not engaging in speech to any greater extent than are those who contribute directly to political campaigns. *Buckley* explicitly distinguished between, on the one hand, using one's own money to express one's views, and, on the other, giving money to someone else in the expectation that that person will use the money to express views with which one is in agreement. This case falls within the latter category. As the *Buckley* Court stated with regard to contributions to campaigns, "the transformation of contributions into political debate involves speech by someone other than the contributor." The majority does not explain the metamorphosis of donated dollars from money into speech by virtue of the identity of the donee.

It is true that regulating PACs may not advance the Government's interest in combating corruption as directly as limiting contributions to a candidate's campaign. But this concern relates to the governmental interest supporting the regulation, not to the nature of the conduct regulated. Even if spending money is to be considered speech, I fail to see how giving money to an independent organization to use as it wishes is also speech. I had thought the holding in *Buckley* was exactly the opposite. Certainly later cases would so indicate. See *NRWC*; *CMA*.

The Court strikes down § 9012(f) because it prevents PAC donors from effectively speaking by proxy. But appellees are not simply mouthpieces for their individual contributors. The PAC operates independently of its contributors. Donations go into the committee's general accounts. It can safely be assumed that each contributor does not fully support every one of the variety of activities undertaken and candidates supported by the PAC to which he contributes. It is true, as the majority points out, that in general the contributors presumably like what they hear. However, "this sympathy of interests alone does not convert" the PAC's speech into that of its contributors. *CMA*.

Finally, the burden imposed by § 9012(f) is slight. Exactly like the contributions limits upheld in *Buckley*, § 9012(f) "does not in any way infringe the contributor's freedom to discuss candidates and issues." And because it does not limit personal expenditures, it does not "reduce the total amount of money potentially available to promote political expression." Accordingly, *Buckley* indicates that the decision below should be reversed....

These cases are in any event different enough from *Buckley* that that decision is not dispositive. The challenged provision is not part of the FECA, whose expenditure limitations were struck down in *Buckley*. Rather, it is part of the Fund Act, which was, to the extent it was before the Court, upheld.

The Fund Act provides major party candidates the option of accepting public financing, drawn from a fund composed of voluntary checkoffs from federal income tax payments, and forgoing all private contributions. In upholding this system in *Buckley*, we accepted Congress' judgment that it would go far "to reduce the deleterious influence of large contributions on our political process, to

facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising."...

It is quite clear from the statutory scheme and the legislative history that the public financing alternative was to be comprehensive and exclusive—a total substitution for private financing. If the public funding merely supplements rather than supplants the private, its benefits are nil. Indeed, early proposals for public financing came to grief on exactly this problem....

Because it is an indispensable component of the public funding scheme, § 9012(f) is supported by governmental interests absent in *Buckley*. Rather than forcing Congress to abandon public financing because it is unworkable without constitutionally prohibited restrictions on independent spending, I would hold that § 9012(f) is permissible precisely because it is a necessary, narrowly drawn means to a constitutional end. The need to make public financing, with its attendant benefits, workable is a constitutionally sufficient additional justification for the burden on First Amendment rights.

The existence of the public financing scheme changes the picture in other ways as well. First, it heightens the danger of corruption discounted by the majority. If a candidate accepts public financing, private contributions are limited to zero. Where there are no contributions being made directly to the candidate or his committee, and no expenditures of private funds subject to his direct control, "independent" expenditures are thrown into much starker relief. If those are the only private expenditures, their independence is little assurance that they will not be noticed, appreciated, and, perhaps, repaid.

The majority argues that there is no danger here of direct political favors—the paradigmatic ambassadorship in exchange for a large contribution. Accepting, arguendo, this assertion, I still do not share the majority's equanimity about the infusion of massive PAC expenditures into the political process. The candidate may be forced to please the spenders rather than the voters, and the two groups are not identical. The majority concedes that aggregations of wealth influence the candidate for political office. It is exactly this influence that Congress sought to escape in providing for public financing of Presidential elections, and that supports the limitations it imposed.

The provision for exclusive public funding not only enhances the danger of real or perceived corruption posed by independent expenditures, it also gives more weight to the interest in holding down the overall cost of political campaigns. In *Buckley*, this concern was partly ignored and partly rejected as not achieved by the means chosen. Neither course is possible here. The Fund Act was a response not merely to "the influence of excessive private political contributions," but also to the "dangers of spiraling campaign expenditures." I am unwilling to discount the latter concern, particularly in the context of a scheme where public financing is supposed to replace private financing and cap total expenditures. Certainly there can be no concern that communication will suffer for want of money spent on the campaigns. Finally, in the context of the public financing scheme, the apparent congressional desire that elections should be between equally well financed candidates and not turn on the amount of money spent for one or the other is all the more compelling, and the danger of funding disparities more serious....

By striking down one portion of an integrated and comprehensive statute, the Court has once again transformed a coherent regulatory scheme into a nonsensi-

cal, loophole-ridden patchwork. As THE CHIEF JUSTICE pointed out with regard to the similar outcome in *Buckley*, "[b]y dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts." Without § 9012(f), Presidential candidates enjoy extensive public financing while those who would otherwise have worked for or contributed to a campaign had there been no such funding will pursue the same ends through "independent" expenditures. The result is that the old system remains essentially intact, but that much more money is being spent. In overzealous protection of attenuated First Amendment values, the Court has once again managed to assure us the worst of both worlds. I respectfully dissent.

Justice MARSHALL, dissenting....

Although I joined the portion of the *Buckley per curiam* that distinguished contributions from independent expenditures for First Amendment purposes, I now believe that the distinction has no constitutional significance....

Undoubtedly, when an individual interested in obtaining the proverbial ambassadorship had the option of either contributing directly to a candidate's campaign or doing so indirectly through independent expenditures, he gave money directly. It does not take great imagination, however, to see that, when the possibility for direct financial assistance is severely limited, as it is in light of *Buckley's* decision to uphold the contribution limitation, such an individual will find other ways to financially benefit the candidate's campaign. It simply belies reality to say that a campaign will not reward massive financial assistance provided in the only way that is legally available. And the possibility of such a reward provides a powerful incentive to channel an independent expenditure into an area that a candidate will appreciate. Surely an eager supporter will be able to discern a candidate's needs and desires; similarly, a willing candidate will notice the supporter's efforts. To the extent that individuals are able to make independent expenditures as part of a *quid pro quo*, they succeed in undermining completely the first rationale for the distinction made in *Buckley*.

The second factor supporting the distinction between contributions and expenditures was the relative magnitude of the First Amendment interest at stake....

I disagree that the limitations on contributions and expenditures have significantly different impacts on First Amendment freedoms. First, the underlying rights at issue—freedom of speech and freedom of association—are both core First Amendment rights. Second, in both cases the regulation is of the same form: It concerns the amount of money that can be spent for political activity. Thus, I do not see how one interest can be deemed more compelling than the other.

In summary, I am now unpersuaded by the distinction established in *Buckley*. I have come to believe that the limitations on independent expenditures challenged in that case and here are justified by the congressional interests in promoting "the reality and appearance of equal access to the political arena," *id.* (opinion of MARSHALL, J.), and in eliminating political corruption and the appearance of such corruption. Therefore, I dissent, substantially for the reasons expressed in [portions] of Justice WHITE's dissent, from the Court's decision today to strike down § 9012(f)'s limitation on independent expenditures by "political committees."...

Notes and Questions

1. The constitutionality of Section 9012(f) had been tendered to the Supreme Court previously in *Common Cause v. Schmitt*, 455 U.S. 129 (1982). The District Court had found unconstitutional the $1,000 limit on independent expenditures in support of presidential candidates who accepted public funding. Perhaps surprisingly, the Supreme Court divided 4–4 and thereby affirmed the District Court's ruling, but without opinion and without precedential effect. Justice O'Connor was the additional justice who participated in *NCPAC* but not in *Schmitt*. Apparently two other justices changed their minds.

2. Does *NCPAC* rule out all limitations on independent expenditures under all circumstances?

3. Marlene Arnold Nicholson, *The Supreme Court's Meandering Path in Campaign Finance Regulation and What it Portends for Future Reform*, 3 JOURNAL OF LAW & POLITICS 509, 529–32 (1987), comments on the "strikingly different" tone in *NCPAC*, compared with *NRWC*. In *NRWC*, "a unanimous Court had given broad discretion to Congress; here seven justices signed on to an opinion which gave virtually no deference to Congress." She finds the Court's attempt to distinguish *NRWC* to be the least persuasive aspect of *NCPAC*:

> The distinction was based on two grounds: first, the restriction in *NRWC* applied to contributions, while that in *NCPAC* applied to independent expenditures; second, the restrictions in *NRWC* applied only to corporations while that in *NCPAC* applied to all political committees, incorporated or not.
>
> There seems little question that direct contributions are more corrupting than independent expenditures, at least if the comparison is between a contribution and an expenditure of the same size. There is, however, a serious debate on the question whether very large independent expenditures can have a sufficient corrupting effect to warrant limitation. This seems to be a question upon which reasonable persons can differ. Despite the comment in Justice Rehnquist's unanimous opinion in *NRWC* to the effect that they would not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared," the Court proceeded to do just that in *NCPAC*.
>
> The Court's contribution/expenditure distinction seems to have become code words which substitute for a careful analysis of whether the restrictions actually serve the purported goal of preventing the appearance or reality of undue influence. Although this approach has the virtue of making it easy to decide cases, it is overly simplistic and does not really focus on the interests supposedly served by the restrictions. Seemingly any limitation described as applying to independent expenditures will be subjected to the most rigorous and perhaps even an insurmountable level of scrutiny, whereas the Court will defer almost totally to Congress in dealing with a limitation described as applying to contributions....
>
> *NRWC* was... a contribution case.... However, unlike *Buckley*, it did not involve limitations upon contributions to candidates. Rather, it involved limitations upon those persons who can be solicited for contributions to a corporate PAC. [T]he corporation may well have used the

contributions received from solicitation for independent expenditures.... Justice Rehnquist nevertheless deferred to Congress without even discussing the connection between preventing corruption and the limitations in question.

Indeed, the only connection appears to be that by limiting solicitation the PACs are prevented from accumulating enough money to make contributions which could result in undue influence. Such an argument would seem to support a limitation upon solicitation by any group. However, because first amendment interests are involved, presumably Congress would need a very important reason for placing such burdens on some groups and not on others. One can only assume that the Court views a decision to organize as a corporation as a sufficient reason.

In *NCPAC*, Justice Rehnquist attempted to explain away *NRWC* as a "corporations" case. Using language suspiciously similar to his and to Justice White's dissents in *Bellotti*..., he asserted in *NCPAC* that in return for the special advantages of the corporate form, the corporation must forgo some rights. He also referred to the "well established constitutional validity of legislative regulation of corporate contributions to candidates to public office."...

The Court's attempt to distinguish *NRWC* from *NCPAC* because the former is a "corporations" case presents problems because NRWC, as an organization, had much more in common with NCPAC than it had with the ordinary commercial corporation. The "evil of potential corruption" which has "long been recognized" presumably has been associated with business corporations, not ideological groups which choose to take the corporate form.

4. Frank Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONSTITUTIONAL COMMENTARY 97, 106 (1986), criticizes *NCPAC* for, among other reasons, its single-minded focus on *quid pro quo* corruption as a goal for campaign finance regulation. He suggests an alternate goal that should guide First Amendment interpretation:

> Of all the potentially legitimate interests spurned or ignored by the Supreme Court, in *Buckley* and thereafter, none is more appealing than the legislative interest in preserving the integrity of the electoral process. It has an estimable history in constitutional jurisprudence, and it relates easily to regulating political money. It shifts judicial attention from the nexus between campaign finance and governmental decision to that between campaign finance and the outcome of the election, from whether money "buys" influence in legislative and executive offices to whether it determines who sits in those offices in the first place.

III. Lobbyists

Lobbyists are individuals who are employed to influence governmental decisions in the executive and, especially, the legislative branch. Not surprisingly, lobbyists often desire to or are pressured to make campaign contributions. Some states have attempted to place special restrictions on contributions by lobbyists. In

one sense, such restrictions are more precisely targeted than restrictions on corporations, unions, or PACs, because, by definition, lobbyists are employed to influence public officials. But lobbyists are individuals, not organizations, and as individuals they enjoy the same constitutional rights as anyone else. Are restrictions directed at lobbyists' contributions constitutional?

Barker v. Wisconsin Ethics Board

841 F.Supp. 255 (W.D.Wis. 1993)

CRABB, Chief Judge.

Six lobbyists have brought this civil action to contest the constitutionality of a provision in Wisconsin's lobby law, specifically Wis.Stat. § 13.625(1)(b), to the extent that it interferes with their First Amendment right to volunteer unpaid personal services to candidates for elected office.... Defendants contend that any statutory interference with plaintiffs' First Amendment rights is justified by the state's interest in preventing corruption and the appearance of corruption in government....

Now before the court are the parties' cross-motions for summary judgment on the question whether the prohibition in Wis.Stat. § 13.625(1)(b) is constitutional as directed to voluntary campaign services. That statute provides:

13.625 Prohibited practices.

(1) No lobbyist may:

(b) Furnish to any agency official or legislative employe of the state or to any elective state official or candidate for an elective state office, or to the official's, employe's or candidate's personal campaign committee:

1. Lodging.

2. Transportation.

3. Food, meals, beverages, money or any other thing of pecuniary value, except that a lobbyist may make a campaign contribution to a partisan elective state official or candidate's personal campaign committee; but a lobbyist may make a contribution to which par. (c) applies only as authorized in par. (c).

Paragraph (c) permits a lobbyist to make a monetary contribution to an elective official or candidate for an elective office during a limited period of time and under specified conditions.

...I conclude that Wis.Stat. § 13.625 is unconstitutional insofar as it prohibits lobbyists from volunteering personal services to political campaigns, because it is not closely drawn to avoid unnecessary abridgment of associational freedoms.

FACTS

Plaintiffs in this action are licensed lobbyists as defined in Wis.Stat. § 13.62(11), that is, each of them is:

> an individual who is employed by a principal, or contracts for or receives economic consideration, other than reimbursement for actual expenses, from a principal and whose duties include lobbying on behalf of the principal. If an individual's duties on behalf of a principal are not limited exclusively to lobbying, the individual is a lobbyist only if he or she

> makes lobbying communications on each of at least 5 days within a reporting period.

...A "reporting period" is any six month period beginning with January 1 or July 1. Wis.Stat. § 13.62(12r). Plaintiffs Leigh S. Barker, Katherine S. Stout and Bruce J. Oradei work as consultants for the Wisconsin Educational Association Council. Plaintiff Ronald Parys is employed by the Wisconsin Grocers Association, Inc. Plaintiffs Thomas H. Coenen and Janet R. Swandby are members of Coenen/Swandby Associates, a government relations management firm....

On January 27, 1993, the Ethics Board issued formal opinion OEB 93-3, interpreting Wis.Stat. § 13.625(1)(b) to prohibit a lobbyist from volunteering personal services to a partisan campaign. The Ethics Board opinion states in relevant part:

> In essence, [§ 13.625(1)(b)] prohibits a lobbyist from furnishing any thing of pecuniary value to an individual campaigning for partisan elective state office or to a partisan elected office holder except for campaign contributions during particular time periods. A campaign contribution is defined in section 11.01(6), Wisconsin Statutes, to exclude services provided by an individual for a political purpose on behalf of a candidate when the individual is not compensated specifically for such purposes.... Services having pecuniary value would include labor such as delivering campaign literature door to door, stuffing envelopes, constructing yard signs, telephoning citizens on a candidate's behalf, and similar campaign tasks that would require the use of paid labor if individuals did not volunteer....
>
> The Ethics Board advises that a lobbyist may not furnish personal services to the campaign of an individual running for partisan elective state office if those services are not reportable as a campaign contribution under the campaign finance law and if such services consist of labor for which a campaign would have to pay individuals if they did not volunteer.

...Each of the plaintiffs volunteered personal services to one or more [candidates' campaigns] in the April 6, 1993 elections. In addition, each plaintiff wishes to have the opportunity in future elections to volunteer services such as putting up yard signs, delivering brochures, stuffing envelopes and making telephone calls on behalf of candidates.

OPINION

[T]he ethics board's opinion does not conflict with or diverge from the statute because the statute as written includes personal volunteer services; these services can be said to have some pecuniary value, whether they consist of managing an entire campaign or simply handing out campaign literature.

Plaintiffs contend that the statute imposes an unconstitutional burden on their First Amendment rights of association and expression because it is overbroad, that is, not narrowly drawn to advance a compelling state interest. Defendants do not dispute that the statute burdens plaintiffs' First Amendment rights. They contend, however, that the statute should be upheld because it is narrowly drawn to prevent corruption while interfering only marginally with rights under

the First Amendment. Before addressing whether the statute is sufficiently narrowly drawn, I must determine the appropriate standard of review.

Standard of Review

There is no question but that § 13.625(1)(b) implicates a fundamental right....

Invoking the United States Supreme Court's opinion in *Buckley*, plaintiffs assert that the narrowly tailored standard requires this court to employ strict scrutiny to determine whether the state has demonstrated a compelling state interest and employed "means closely drawn to avoid unnecessary abridgment of associational freedoms."...

Defendants...propose that the contested provision warrants a lesser degree of scrutiny, corresponding to that accorded unions, corporations or similar kinds of organizations, because it regulates lobbyists, who threaten the integrity of the political process in a way that ordinary citizens do not. Citing *National Right to Work Committee*, defendants assert that the court need not "second guess" the legislature's judgment, because the statute is merely a content-neutral prophylactic rule deserving of the court's deference. In *NRWC*, the Supreme Court accorded "considerable deference" to Congress "to account for the particular legal and economic attributes of corporations and labor organizations." This case is not about rights of separate legal and economic entities, but rather about rights of individuals, whose legal and economic attributes as citizens and voters do not change by virtue of their trade. Livelihood is not a sufficient factor to warrant less than strict scrutiny to statutes burdening the First Amendment rights of individuals.

...Similar to the provisions in *Buckley*, Wisconsin's prohibition against lobbyists' contributing personal services to campaigns has a direct quantitative effect on political communication and association. The Wisconsin provision is even more restrictive than the provisions at issue in *Buckley*. It imposes a total prohibition on a protected activity and not just a partial restriction. Therefore, Wisconsin's prohibition requires a standard of review that is no less exacting than the one required in *Buckley*. This conclusion is compelled by the fact that Wisconsin's lobby law provides criminal sanctions for violations of its provisions.

Narrowly Tailored Analysis

The state's interest

Defendants assert that the state has a compelling interest in avoiding the specter of corruption that would arise from the sight of lobbyists participating in political campaigns. Although the United States Supreme Court has recognized few state interests important enough to justify an infringement of First Amendment rights, one of these is the state interest in preventing government corruption. *NCPAC*. Preventing the appearance of corruption is equal to the interest in preventing actual corruption; both tend to undermine representative democracy. *Buckley*. The Supreme Court has also recognized a legitimate government interest in regulating lobbyists. *See United States v. Harriss*, 347 U.S. 612 (1954) (upholding disclosure law directed at lobbyists for reason that legislators must know whose interests they were being asked to promote).

In general, Wisconsin's lobby law reflects the legislature's judgment that, as a class, lobbyists have greater potential to corrupt the political process than do ordi-

nary citizens. The question is whether the state has identified and evaluated the precise interests at stake sufficiently to justify the burdens it has imposed on lobbyists' First Amendment rights....

Ordinarily, the state does not regulate individuals who perform volunteer work in political campaigns. To justify the prohibition at issue, defendants suggest it stems from a heightened concern in the legislature that lobbyists are more motivated than ordinary citizens to gain greater access to candidates or, at least, to gain the appearance of greater access and that lobbyists are also motivated to volunteer personal services as a way of avoiding the limitations on financial contributions. Defendants suggest that public confidence in participatory democracy will be undermined by "legislative campaigns being managed by lobbyists, candidates being driven around by lobbyists, and candidates being given advertising and political advice by lobbyists...."

In *Meyer*, the United States Supreme Court addressed similar arguments by the state of Colorado, which was defending a statutory prohibition against using paid circulators to obtain signatures on petitions supporting citizen ballot initiatives. Finding no evidence of actual carelessness or fraud, the Court rejected the state's argument that an interest in compensation might motivate circulators to disregard their duty to verify the authenticity of signatures on the petition any more than a volunteer with an interest in having the proposition placed on the ballot might be so motivated. Defendants' arguments are equally unpersuasive in this case. Without a showing of actual improprieties, allegations of improper motives are not a sufficient justification for a statutory prohibition of a First Amendment right. Defendants have shown no basis for finding that volunteering by lobbyists threatens the integrity of the political process any more than volunteering by other citizens, such as environmental activists, insurance executives, or lawyers, whose volunteering is altogether unregulated because neither Congress nor the state of Wisconsin has seen any need for regulation under ordinary circumstances. These individuals may be just as much in the public eye, may have as much at stake in the legislative process, and may be equally motivated to associate closely with elected public officials, but there is no question that the state cannot interfere with their right to do volunteer work in political campaigns without violating their constitutional rights. I am not prepared to assume that lobbyists are more inclined to interfere with the integrity of the political process than other individuals who are motivated by their various concerns to volunteer to work in political campaigns.

In addition, defendants have failed to demonstrate that the prohibition against lobbyists' volunteering furthers the state's interest in preventing the spectacle of lobbyists associating with political candidates. As defendants note, the statute does not prevent lobbyists from expressing their political views independently of a campaign. For example, lobbyists may allow their names to be used in a candidate's ad, including, conceivably, a billboard or television ad, or they may create their own ads independently, giving the illusion of close association with a candidate. Moreover, defendants have failed to show that the spectacle of a candidate in close association with a lobbyist would injure the integrity of the political process; if the voters do not like the spectacle, the appearance of close association might as easily injure the candidate's chances for success at the polls.

The Supreme Court has found sufficient justification for a prohibition on volunteering to political campaigns in the case of government workers. *United States*

Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973). Upholding the Hatch Act's provisions prohibiting government employees from participating in political campaigns, the Court identified specific government interests that the statute protected, among them, maintaining the integrity of government employment and promotion procedures, assuring "impartial execution of the laws" according to the will of Congress and not politics, and preventing the government work force from building itself into a "powerful, invincible, and perhaps corrupt political machine." Because lobbyists operate outside government structures, they do not present the same risk of mixing governmental and political processes that civil servants present. Lobbyists do not execute the laws, and they do not pass laws. They may influence legislation, but they do so as outsiders to the legislative process. In *Letter Carriers*, the government had extensively documented the dangers of mixing politics and civil service employment over the course of centuries of experience, providing a compelling rationale for a ban on political volunteering in the civil service context. Defendants have presented no such compelling rationale in this case. I agree with the observations of the Supreme Court of California in *Fair Political Practices Comm'n v. Superior Court of Los Angeles County*, 25 Cal.3d 33, 599 P.2d 46, 157 Cal.Rptr. 855 (1979), cert. denied, 444 U.S. 1049 (1980): "The governmental interests held to warrant substantial restrictions on political rights in *Letter Carriers* have no greater application to lobbyists than to other private campaign contributors."

The Provision

Besides falling short in their attempts to identify and evaluate the precise interests justifying the burden on lobbyists' First Amendment rights imposed by the prohibition, defendants fail to show that the provision is "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*. As an initial concern, the definition of lobbyist is a broad one. The statute does not limit its reach to lobbyists whose activities are more likely to threaten the integrity of the political process. Under Wisconsin law, a "lobbyist" is any person "employed by a principal...who makes lobbying communications on each of at least 5 days within a reporting period" of 6 months. Plaintiffs contend that the targeted population is overly broad because it takes fewer than one lobbying communication a month to transform an ordinary citizen into a "lobbyist" under Wisconsin law. Plaintiffs also contend that the provision does not discriminate between lobbyists who represent a single principal part-time and those who represent numerous principals full-time or between lobbyists who will never have occasion to lobby the elected official and those who will have many occasions to do so. Defendants do not respond to these arguments. An independent review of the statute suggests that plaintiffs' portrayal of the prohibition's extensive reach is accurate.

As a second concern, defendants have failed to show that the challenged provision avoids unnecessary abridgment of associational freedoms. They argue that the statute prohibits only a small range of possible contributions by lobbyists to political campaigns: activities conducted at the request or authorization of a partisan candidate or the candidate's committee, such as telephoning potential voters from a candidate's telephone bank or going door-to-door on the candidate's behalf. They emphasize that the statute neither prohibits lobbyists from con-

tributing financially to campaigns nor restricts lobbyists from expressing political views independently either privately or publicly. In response, plaintiffs contend that the ability to contribute money to a campaign cannot compensate for a blanket prohibition against volunteering their time and energy as private citizens to campaigns of their choice. They also contend that the ability to express political views independently of campaigns cannot compensate for deprivation of the right to associate with others in pursuit of the same political causes.

Under limited circumstances, some abridgment of lobbyists' associational rights has survived close scrutiny. In *Harriss*, the Supreme Court upheld provisions in the Federal Regulation of Lobbying Act that required the disclosure of lobbying activities. The Court allowed this limited abridgment of lobbyists' rights to help prevent the evil caused by special interest groups "masquerading" before Congress "as proponents of the public weal" where the burden on lobbyists' First Amendment rights was "at most an indirect one resulting from self-censorship...."

This is not such a limited circumstance. The legislative interests at stake are not comparable: there is no concern in this case that lobbyists will masquerade as the embodiments of the public good. Licensing, registration and reporting requirements in Wisconsin's lobby law discourage lobbyists from operating in secret. More significant, the act upheld in *Harriss* did not entail a prohibition, or even a limitation, on lobbyists' associational activities. In the federal lobbying act, Congress had "merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose."

Defendants argue that any abridgment on lobbyists' associational rights is compensated for by the fact that lobbyists remain free to express political views independently of a campaign. By definition, however, independent activities are not associational. What the statute forecloses to lobbyists is their ability to associate with candidates and their supporters in furtherance of common political goals. *See Citizens Against Rent Control.*

Defendants' argument raises the additional question whether the ability to contribute money to campaigns can be a sufficient surrogate for the right to associate in person with campaigns. Although neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has ever addressed this precise question, the underlying premise of *Buckley* is that financial contributions cannot substitute for associational rights. In *Buckley*, [the] Court placed great weight on the importance of the fact that volunteer services were exempted from the Federal Election Act's contribution limitations. The Court found the election act's contribution ceilings to be constitutional in part because Congress did not attempt to limit citizens' volunteering their labor to political campaigns. As the Court emphasized in Buckley, First Amendment rights "cannot properly be made to depend on a person's financial ability...."

Under Wisconsin's law, lobbyists face the same financial contribution ceilings as do other citizens; in addition, they face restrictions on when and under what circumstances they may make financial contributions to campaigns; and they are required to report their lobbying activities. In addition, they are prevented from volunteering personal services to political associations. This prohibition far surpasses the contribution limitations that the Court found constitutional in *Buckley*. Whereas *Buckley* endorsed limits on financial contributions in the context of

unregulated volunteering, the Wisconsin statute prohibits all contributions of volunteer services in the context of financial contribution limits....

[D]efendants' motion for summary judgment is DENIED; plaintiffs' motion for summary judgment is GRANTED....

Notes and Questions

1. This case results from a strikingly foolish interpretation of the Wisconsin statutes by the state Ethics Board. Volunteer services are universally excluded from statutory definitions of "contribution," because they are not perceived as giving rise to the problems associated with campaign contributions and because the legislature wishes not to impede them by entangling them in disclosure and other requirements. Wisconsin has banned gifts from lobbyists to candidates for partisan office, but makes an exception for campaign contributions. This exception to the ban on gifts certainly is not intended to incorporate the exclusion of volunteer services from the definition of "contribution," whose purpose is to insulate such services from regulatory burdens. The reasons to permit lobbyists to engage in voluntary campaign services are stronger than the reasons to permit them to make monetary contributions. The Ethics Board's mindlessly literal putting of these two statutes together to result in a ban on voluntary campaign services by lobbyists is perverse.[1]

2. Is an outright ban on contributions by lobbyists unconstitutional? In *Fair Political Practices Commission v. Superior Court*, 599 P.2d 46 (Cal. 1979), cert. denied 444 U.S. 1049 (1980), the California Supreme Court struck down California Government Code § 86202, which made it unlawful:

> for a lobbyist to make a contribution, or to act as an agent or intermediary in the making of any contribution, or to arrange for the making of any contribution by himself or by another person.

The court reasoned as follows:

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1. Unfortunately, strikingly foolish interpretations of campaign finance statutes by state and federal administrators are not unusual. For another example, consider *Weld for Governor v. Director of the Office of Campaign and Political Finance*, 556 N.E.2d 21 (Mass. 1990). Two Republican candidates, running respectively for Governor and Lieutenant Governor, wanted to run as a team in the primary, urging voters to vote for both of them and sharing expenses for joint advertising on items such as buttons, bumper stickers and signs. However, the agency responsible for Massachusetts' campaign finance laws issued a bulletin stating:

> It is the opinion of this office that a joint expenditure by two or more committees which permits each participating committee to obtain the benefit of the full value of the goods or services for which the joint expenditure is made would result in one committee transferring something of value to each other committee. This transfer would occur even if each committee pays a pro rata share of the costs and directly controls the use of only a pro rata share of such goods or services. Such expenditure would therefore be subject to the contribution limitations....

The practical effect of this interpretation was to prohibit the two candidates from promoting themselves jointly. The agency did not bother to explain how such an interference with candidates' ability to present themselves as a team or ticket could conceivably be thought to advance any of the purposes of the campaign finance law. The candidates had to go all the way to the Supreme Judicial Court of Massachusetts to get this stupid ruling overturned.

> Obviously, the prohibition against lobbyist contributions...is a substantial restriction on the lobbyists' freedom of association, and the restriction may be upheld only if the "State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*. The statute fails to meet the test.
>
> The claimed state interest is to rid the political system of both apparent and actual corruption and improper influence. Under *Buckley* such a purpose justifies closely drawn restrictions. However, it does not appear that total prohibition of contributions by any lobbyist is a closely drawn restriction.
>
> First, the prohibition applies to contributions to any and all candidates even though the lobbyist may never have occasion to lobby the candidate. Secondly, the definition of lobbyist is extremely broad, to include persons who appear regularly before administrative agencies seeking to influence administrative determinations in favor of their clients. Thirdly, the statute does not discriminate between small and large but prohibits all contribution. Thus, it is not narrowly directed to the aspects of political association where potential corruption might be identified.
>
> While either apparent or actual political corruption might warrant some restriction of lobbyist associational freedom, it does not warrant total prohibition of all contributions by all lobbyists to all candidates.

How significant is the first of the court's objections, that the ban applies to all candidates for state office, even those the lobbyist may never try to influence? As of 1979, there were 127 state elective offices. 120 of these were seats in the legislature. Of the remaining seven, the Governor had the power to sign or veto bills and the Lieutenant Governor had that power when the Governor was absent from the state. At most, then, there would be five elective offices that a legislative lobbyist might be unconcerned with.

The court's second objection to the statute was that the ban applied to some lobbyists who lobbied only executive agencies. In a comment to one of its regulations, 2 Cal. Code of Regulations § 18600, the FPPC makes these points:

> The influence of legislative officials and elected state officers extends throughout state government, there being no precise limits of their jurisdiction. Administrative agency officials know that members of the Legislature and the constitutional officers chosen directly by the people play a role in (1) defining the agency's powers; (2) adopting legislation bearing on the work of the agency; (3) determining the budget of the agency; (4) making or confirming appointments to the agency; and (5) considering future appointments to other governmental posts for the incumbent agency officials. In addition to these factors is the prestige of these elected officials which may give their communications with and urgings upon administrative agency officials special weight.

Whatever their merits, the court's first two objections could be satisfied fairly easily by a slightly more narrowly drawn statute. The third objection is that the statute bans contributions by lobbyists rather than limiting their size. Is this objection undermined by *NRWC*?

3. Some targeted prohibitions of contributions have been upheld by state courts, including a ban on contributions by officers and "key employees" of casinos in *Petition of Soto*, 565 A.2d 1088 (N.J.Super. 1989), cert denied, 110 S.Ct. 3216 (1990), and by liquor licensees in *Schiller Park Colonial Inn v. Berz*, 349 N.E.2d 61 (Ill. 1976).

Chapter 14

Corporations and the "New Corruption"

The two most recent Supreme Court decisions dealing with campaign finance both involved independent expenditures by corporations. The decisions touch on a number of points that are of interest, but the point that has provoked the most discussion revolves around the Court's use of the term "corruption" in these cases as a state interest justifying restrictions on expenditures. As you read these decisions and the related materials, consider whether you believe their reasoning represents a major departure from earlier decisions such as *Buckley v. Valeo*, *First National Bank of Boston v. Bellotti*, *Citizens Against Rent Control v. Berkeley*, and *FEC v. National Conservative Political Action Committee*. To the extent the recent decisions reflect a new approach, will they have any effect on regulations applicable to individuals or groups other than corporations? Will they have any effect on regulation of spending, even by corporations, in ballot measure campaigns?

Federal Election Commission v. Massachusetts Citizens for Life

479 U.S. 238 (1986)

Justice BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III-B, and III-C, and an opinion with respect to Part III-A, in which Justice MARSHALL, Justice POWELL, and Justice SCALIA join.

The questions for decision here arise under § 316 of the Federal Election Campaign Act (FECA or Act), 2 U.S.C. § 441b. The first question is whether appellee Massachusetts Citizens for Life, Inc. (MCFL), a nonprofit, nonstock corporation, by financing certain activity with its treasury funds, has violated the restriction on independent spending contained in § 441b. That section prohibits corporations from using treasury funds to make an expenditure "in connection with" any federal election, and requires that any expenditure for such purpose be financed by voluntary contributions to a separate segregated fund. If appellee has violated § 441b, the next question is whether application of that section to MCFL's conduct is constitutional. We hold that the appellee's use of its treasury funds is prohibited by § 441b, but that § 441b is unconstitutional as applied to

the activity of which the Federal Election Commission (FEC or Commission) complains.

I

A

MCFL was incorporated in January 1973 as a nonprofit, nonstock corporation under Massachusetts law. Its corporate purpose as stated in its articles of incorporation is:

> To foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities and in addition to engage in any other lawful act or activity for which corporations may be organized....

MCFL does not accept contributions from business corporations or unions. Its resources come from voluntary donations from "members," and from various fund-raising activities such as garage sales, bake sales, dances, raffles, and picnics. The corporation considers its "members" those persons who have either contributed to the organization in the past or indicated support for its activities.[1]

Appellee has engaged in diverse educational and legislative activities designed to further its agenda. It has organized an ecumenical prayer service for the unborn in front of the Massachusetts Statehouse; sponsored a regional conference to discuss the issues of abortion and euthanasia; provided speakers for discussion groups, debates, lectures, and media programs; and sponsored an annual March for Life. In addition, it has drafted and submitted legislation, some of which has become law in Massachusetts; sponsored testimony on proposed legislation; and has urged its members to contact their elected representatives to express their opinion on legislative proposals.

MCFL began publishing a newsletter in January 1973. It was distributed as a matter of course to contributors, and, when funds permitted, to noncontributors who had expressed support for the organization. The total distribution of any one issue has never exceeded 6,000. The newsletter was published irregularly from 1973 through 1978: three times in 1973, five times in 1974, eight times in 1975, eight times in 1976, five times in 1977, and four times in 1978. Each of the newsletters bore a masthead identifying it as the "Massachusetts Citizens for Life Newsletter," as well as a volume and issue number. The publication typically contained appeals for volunteers and contributions and information on MCFL activities, as well as on matters such as the results of hearings on bills and constitutional amendments, the status of particular legislation, and the outcome of referenda, court decisions, and administrative hearings. Newsletter recipients were usually urged to contact the relevant decisionmakers and express their opinion.

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1. MCFL concedes that under this Court's decision in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), such a definition does not permit it to solicit contributions from such persons for use by a separate segregated fund established under the Act. That case held that in order to be considered a "member" of a nonstock corporation under the Act, one must have "some relatively enduring and independently significant financial or organizational attachment" to the corporation.

B

In September 1978, MCFL prepared and distributed a "Special Edition" prior to the September 1978 primary elections. While the May 1978 newsletter had been mailed to 2,109 people and the October 1978 newsletter to 3,119 people, more than 100,000 copies of the "Special Edition" were printed for distribution. The front page of the publication was headlined "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and readers were admonished that "[n]o pro-life candidate can win in November without your vote in September." "VOTE PRO-LIFE" was printed in large bold-faced letters on the back page, and a coupon was provided to be clipped and taken to the polls to remind voters of the name of the "pro-life" candidates. Next to the exhortation to vote "pro-life" was a disclaimer: "This special election edition does not represent an endorsement of any particular candidate."

To aid the reader in selecting candidates, the flyer listed the candidates for each state and federal office in every voting district in Massachusetts, and identified each one as either supporting or opposing what MCFL regarded as the correct position on three issues. A "y" indicated that a candidate supported the MCFL view on a particular issue and an "n" indicated that the candidate opposed it. An asterisk was placed next to the names of those incumbents who had made a "special contribution to the unborn in maintaining a 100% pro-life voting record in the state house by actively supporting MCFL legislation." While some 400 candidates were running for office in the primary, the "Special Edition" featured the photographs of only 13. These 13 had received a triple "y" rating, or were identified either as having a 100% favorable voting record or as having stated a position consistent with that of MCFL. No candidate whose photograph was featured had received even one "n" rating.

The "Special Edition" was edited by an officer of MCFL who was not part of the staff that prepared the MCFL newsletters. The "Special Edition" was mailed free of charge and without request to 5,986 contributors, and to 50,674 others whom MCFL regarded as sympathetic to the organization's purposes. The Commission asserts that the remainder of the 100,000 issues were placed in public areas for general distribution, but MCFL insists that no copies were made available to the general public.[2] The "Special Edition" was not identified on its masthead as a special edition of the regular newsletter, although the MCFL logotype did appear at its top. The words "Volume 5, No. 3, 1978" were apparently handwritten on the Edition submitted to the FEC, but the record indicates that the actual Volume 5, No. 3, was distributed in May and June 1977. The corporation spent $9,812.76 to publish and circulate the "Special Edition," all of which was taken from its general treasury funds.

A complaint was filed with the Commission alleging that the "Special Edition" was a violation of § 441b. The complaint maintained that the Edition repre-

2. The FEC submitted an affidavit from a person who stated that she obtained a copy of the "Special Edition" at a statewide conference of the National Organization for Women, where a stack of about 200 copies were available to the general public. [If you were a candidate featured for having a perfect "pro-life" voting record, how pleased would you be to learn that the "Special Edition" was being distributed at a conference of the National Organization for Women?—ED.]

sented an expenditure of funds from a corporate treasury to distribute to the general public a campaign flyer on behalf of certain political candidates. The FEC found reason to believe that such a violation had occurred, initiated an investigation, and determined that probable cause existed to believe that MCFL had violated the Act. After conciliation efforts failed, the Commission filed a complaint in the District Court under § 437g(a)(6)(A), seeking a civil penalty and other appropriate relief....

II

[Appellee] argues that the definition of an expenditure under § 441b necessarily incorporates the requirement that a communication "expressly advocate" the election of candidates, and that its "Special Edition" does not constitute express advocacy. The argument relies on the portion of *Buckley* that upheld the disclosure requirement for expenditures by individuals other than candidates and by groups other than political committees. There, in order to avoid problems of overbreadth, the Court held that the term "expenditure" encompassed "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."...

We agree with appellee that [the rationale for the *Buckley* ruling] requires a similar construction of the more intrusive provision that directly regulates independent spending. We therefore hold that an expenditure must constitute "express advocacy" in order to be subject to the prohibition of § 441b. We also hold, however, that the publication of the "Special Edition" constitutes "express advocacy."

Buckley adopted the "express advocacy" requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in that case that a finding of "express advocacy" depended upon the use of language such as "vote for," "elect," "support," etc. Just such an exhortation appears in the "Special Edition." The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact. The "Special Edition" thus falls squarely within § 441b, for it represents express advocacy of the election of particular candidates distributed to members of the general public.

Finally, MCFL argues that it is entitled to the press exemption under 2 U.S.C. §431(9)(B)(i) reserved for "any news story, commentary, or editorial distributed through the facilities of any...newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."

MCFL maintains that its regular newsletter is a "periodical publication" within this definition, and that the "Special Edition" should be regarded as just another issue in the continuing newsletter series. The legislative history on the press exemption is sparse; the House of Representatives' Report on this section states merely that the exemption was designed to

> make it plain that it is not the intent of Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.

We need not decide whether the regular MCFL newsletter is exempt under this provision, because, even assuming that it is, the "Special Edition" cannot be considered comparable to any single issue of the newsletter. It was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletters. It was not distributed to the newsletter's regular audience, but to a group 20 times the size of that audience, most of whom were members of the public who had never received the newsletter. No characteristic of the Edition associated it in any way with the normal MCFL publication. The MCFL masthead did not appear on the flyer, and, despite an apparent belated attempt to make it appear otherwise, the Edition contained no volume and issue number identifying it as one in a continuing series of issues.

MCFL protests that determining the scope of the press exemption by reference to such factors inappropriately focuses on superficial considerations of form. However, it is precisely such factors that in combination permit the distinction of campaign flyers from regular publications. We regard such an inquiry as essential, since we cannot accept the notion that the distribution of such flyers by entities that happen to publish newsletters automatically entitles such organizations to the press exemption. A contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, thereby eviscerating § 441b's prohibition.[5]

In sum, we hold that MCFL's publication and distribution of the "Special Edition" is in violation of § 441b. We therefore turn to the constitutionality of that provision as applied to appellee.

III

A[a]

Independent expenditures constitute expression "at the core of our electoral process and of the First Amendment freedoms." *Buckley*. We must therefore determine whether the prohibition of § 441b burdens political speech, and, if so, whether such a burden is justified by a compelling state interest.

The FEC minimizes the impact of the legislation upon MCFL's First Amendment rights by emphasizing that the corporation remains free to establish a separate segregated fund, composed of contributions earmarked for that purpose by the donors, that may be used for unlimited campaign spending. However, the corporation is *not* free to use its general funds for campaign advocacy purposes.

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5. Nor do we find the "Special Edition" akin to the normal business activity of a press entity deemed by some lower courts to fall within the exemption, such as the distribution of a letter soliciting subscriptions, see *FEC v. Phillips Publishing Co.*, 517 F.Supp. 1308, 1313 (DC 1981), or the dissemination of publicity, see *Reader's Digest Assn. v. FEC*, 509 F.Supp. 1210 (SDNY 1981).

a. Recall that in Part III-A Justice Brennan is writing for a plurality consisting of himself and Justices Marshall, Powell, and Scalia.

While that is not an absolute restriction on speech, it is a substantial one. Moreover, even to speak through a segregated fund, MCFL must make very significant efforts.

If it were not incorporated, MCFL's obligations under the Act would be those specified by § 434(c), the section that prescribes the duties of "[e]very person (other than a political committee)." Section 434(c) provides that any such person that during a year makes independent expenditures exceeding $250 must: (1) identify all contributors who contribute in a given year over $200 in the aggregate in funds to influence elections; (2) disclose the name and address of recipients of independent expenditures exceeding $200 in the aggregate, along with an indication of whether the money was used to support or oppose a particular candidate; and (3) identify any persons who make contributions over $200 that are earmarked for the purpose of furthering independent expenditures. All unincorporated organizations whose major purpose is not campaign advocacy, but who occasionally make independent expenditures on behalf of candidates, are subject only to these regulations.

Because it is incorporated, however, MCFL must establish a "separate segregated fund" if it wishes to engage in any independent spending whatsoever. §§ 441b(a), (b)(2)(C). Since such a fund is considered a "political committee" under the Act, all MCFL independent expenditure activity is, as a result, regulated as though the organization's major purpose is to further the election of candidates. This means that MCFL must comply with several requirements in addition to those mentioned. Under § 432, it must appoint a treasurer; ensure that contributions are forwarded to the treasurer within 10 or 30 days of receipt, depending on the amount of contribution; see that its treasurer keeps an account of every contribution regardless of amount, the name and address of any person who makes a contribution in excess of $50, all contributions received from political committees, and the name and address of any person to whom a disbursement is made regardless of amount; and preserve receipts for all disbursements over $200 and all records for three years. Under § 433, MCFL must file a statement of organization containing its name, address, the name of its custodian of records, and its banks, safety deposit boxes, or other depositories; must report any change in the above information within 10 days; and may dissolve only upon filing a written statement that it will no longer receive any contributions nor make disbursements, and that it has no outstanding debts or obligations.

Under § 434, MCFL must file either monthly reports with the FEC or reports on the following schedule: quarterly reports during election years, a pre-election report no later than the 12th day before an election, a postelection report within 30 days after an election, and reports every 6 months during nonelection years. These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed by 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the

retirement of any debt or obligation. In addition, MCFL may solicit contributions for its separate segregated fund only from its "members," §§ 441b(b)(4)(A), (C), which does not include those persons who have merely contributed to or indicated support for the organization in the past. See *National Right to Work Committee*, 459 U.S. 197, 204 (1982).

It is evident from this survey that MCFL is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated. These additional regulations may create a disincentive for such organizations to engage in political speech. Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage. Restriction of solicitation of contributions to "members" vastly reduces the sources of funding for organizations with either few or no formal members, directly limiting the ability of such organizations to engage in core political speech. It is not unreasonable to suppose that, as in this case, an incorporated group of like-minded persons might seek donations to support the dissemination of their political ideas and their occasional endorsement of political candidates, by means of garage sales, bake sales, and raffles. Such persons might well be turned away by the prospect of complying with all the requirements imposed by the Act. Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales lest nonmembers take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.[8]

Thus, while § 441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize § 441b as an infringement on First Amendment activities....

B

When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest. The FEC first insists that justification for § 441b's expenditure restriction is provided by this Court's acknowledgment that "the special characteristics of the corporate structure require particularly careful regulation." *NRWC*. The Commission thus relies on the long history of regulation of corporate political activity as support for the application of § 441b to MCFL. Evaluation of the Commission's argument requires close examination of the underlying rationale for this longstanding regulation.

We have described that rationale in recent opinions as the need to restrict "the influence of political war chests funneled through the corporate form," *NCPAC*; to "eliminate the effect of aggregated wealth on federal elections," *Pip-*

8. The fact that MCFL established a political committee in 1980 does not change this conclusion, for the corporation's speech may well have been inhibited due to its inability to form such an entity before that date. Furthermore, other organizations comparable to MCFL may not find it feasible to establish such a committee, and may therefore decide to forgo engaging in independent political speech.

efitters; to curb the political influence of "those who exercise control over large aggregations of capital," *Automobile Workers*; and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization," *NRWC*.

This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas. It acknowledges the wisdom of Justice Holmes' observation that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market...." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. Political "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. See *NCPAC*; *Buckley*. Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

By requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to prevent this threat to the political marketplace. The resources available to *this* fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee.[11] The expenditure restrictions of § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas.

Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes.[12] Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace. While MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise. In short, MCFL is not the type of "traditional corporatio[n] organized

11. While business corporations may not represent the only organizations that pose this danger, they are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth. That Congress does not at present seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations. Rather, Congress' decision represents the "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,'" to which we have said we owe considerable deference. *NRWC*.

12. The regulation imposed as a result of this concern is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in *Bellotti*.

for economic gain," *NCPAC*, that has been the focus of regulation of corporate political activity.

NRWC does not support the inclusion of MCFL within § 441b's restriction on direct independent spending. That case upheld the application to a nonprofit corporation of a different provision of § 441b: the limitation on who can be solicited for contributions to a political committee. However, the political activity at issue in that case was contributions, as the committee had been established for the purpose of making direct contributions to political candidates. We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending. *NCPAC*; *CMA*; *Buckley*.

In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in *NRWC* to support a limitation on the ability of a committee to raise money for direct contributions to candidates. The limitation on solicitation in this case, however, means that nonmember corporations can hardly raise any funds at all to engage in political speech warranting the highest constitutional protection. Regulation that would produce such a result demands far more precision than § 441b provides. Therefore, the desirability of a broad prophylactic rule cannot justify treating alike business corporations and appellee in the regulation of independent spending.

The Commission next argues in support of § 441b that it prevents an organization from using an individual's money for purposes that the individual may not support. We acknowledged the legitimacy of this concern as to the dissenting stockholder and union member in *NRWC* and in *Pipefitters*. But such persons, as noted, contribute investment funds or union dues for economic gain, and do not necessarily authorize the use of their money for political ends. Furthermore, because such individuals depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union. It was thus wholly reasonable for Congress to require the establishment of a separate political fund to which persons can make voluntary contributions.

This rationale for regulation is not compelling with respect to independent expenditures by appellee. Individuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes. It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor. In addition, an individual desiring more direct control over the use of his or her money can simply earmark the contribution for a specific purpose.... Finally, a contributor dissatisfied with how funds are used can simply stop contributing.

The Commission maintains that, even if contributors may be aware that a contribution to appellee will be used for political purposes in general, they may not wish such money to be used for electoral campaigns in particular. That is, persons may desire that an organization use their contributions to further a cer-

tain cause, but may not want the organization to use their money to urge support for or opposition to political candidates solely on the basis of that cause. This concern can be met, however, by means far more narrowly tailored and less burdensome than § 441b's restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose.

It is true that *NRWC* held that the goal of protecting minority interests justified solicitation restrictions on a nonprofit corporation operating a political committee established to make direct contributions to candidates. As we have noted above, however, the Government enjoys greater latitude in limiting contributions than in regulating independent expenditures. Given a contributor's awareness of the political activity of appellee, as well as the readily available remedy of refusing further donations, the interest protecting contributors is simply insufficient to support § 441b's restriction on the independent spending of MCFL....

Thus, the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL. The dissent is surely correct in maintaining that we should not second-guess a decision to sweep within a broad prohibition activities that differ in degree, but not kind. It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all. Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form. Given this fact, the rationale for restricting core political speech in this case is simply the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom. While the burden on MCFL's speech is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification. In so holding, we do not assume a legislative role, but fulfill our judicial duty—to enforce the demands of the Constitution.

C

Our conclusion is that § 441b's restriction of independent spending is unconstitutional as applied to MCFL, for it infringes protected speech without a compelling justification for such infringement. We acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace.

Regardless of whether that concern is adequate to support application of § 441b to commercial enterprises, a question not before us, that justification does not extend uniformly to all corporations. Some corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status.

In particular, MCFL has three features essential to our holding that it may not constitutionally be bound by § 441b's restriction on independent spending. *First*, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. *Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no

economic disincentive for disassociating with it if they disagree with its political activity.[13] *Third*, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.

It may be that the class of organizations affected by our holding today will be small. That prospect, however, does not diminish the significance of the rights at stake. Freedom of speech plays a fundamental role in a democracy.... Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction. Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation. In enacting the provision at issue in this case, Congress has chosen too blunt an instrument for such a delicate task.

Affirmed.

Justice O'CONNOR, concurring in part and concurring in the judgment.

I join Parts I, II, III-B, and III-C, and I concur in the Court's judgment that 2 U.S.C. § 441b is unconstitutional as applied to the conduct of appellee MCFL, at issue in this case. I write separately, however, because I am concerned that the Court's discussion of the Act's disclosure requirements may be read as moving away from the teaching of *Buckley*. In *Buckley*, the Court was concerned not only with the chilling effect of reporting and disclosure requirements on an organization's contributors, but also with the potential burden of disclosure requirements on a group's own speech. The *Buckley* Court concluded that disclosure of a group's independent campaign expenditures serves the important governmental interest of "shed[ding] the light of publicity" on campaign financing, thereby helping voters to evaluate the constituencies of those who seek federal office. As a result, the burden of disclosing independent expenditures generally is "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.*

In my view, the significant burden on MCFL in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act. As the Court has described, engaging in campaign speech requires MCFL to assume a more formalized organizational form and significantly reduces or eliminates the sources of funding for groups such as MCFL with few or no "members." These additional requirements do not further the Government's informational interest in campaign disclosure, and, for

13. This restriction does not deprive such organizations of "members" that can be solicited for donations to a separate segregated fund that makes contributions to candidates, a fund that, under our decision in *NRWC*, must be established by all corporations wishing to make such candidate contributions. *NRWC* requires that "members" have either a "financial or organizational attachment" to the corporation. Our decision today merely states that a corporation that does not have persons affiliated *financially* must fall outside § 441b's prohibition on direct expenditures if it also has the other two characteristics possessed by MCFL that we discuss in text.

the reasons given by the Court, cannot be justified by any of the other interests identified by the Federal Election Commission. Although the organizational and solicitation restrictions are not invariably an insurmountable burden on speech, see, *e.g.*, *NRWC*, in this case the Government has failed to show that groups such as MCFL pose any danger that would justify infringement of its core political expression. On that basis, I join in the Court's judgment that § 441b is unconstitutional as applied to MCFL.

Chief Justice REHNQUIST, with whom Justice WHITE, Justice BLACKMUN, and Justice STEVENS join, concurring in part and dissenting in part.

In *NRWC*, the Court unanimously endorsed the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." I continue to believe that this judgment, as reflected in 2 U.S.C. § 441b, is constitutionally sound and entitled to substantial deference, and therefore dissent from the Court's decision to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* Though I agree that the expenditures in this case violated the terms of § 441b, and accordingly join Parts I and II of the Court's opinion, I cannot accept the conclusion that the statutory provisions are unconstitutional as applied to appellee MCFL....

I do not dispute that the threat from corporate political activity will vary depending on the particular characteristics of a given corporation; it is obvious that large and successful corporations with resources to fund a political war chest constitute a more potent threat to the political process than less successful business corporations or nonprofit corporations. It may also be that those supporting some nonbusiness corporations will identify with the corporations' political views more frequently than the average shareholder of General Motors would support the political activities of that corporation. These distinctions among corporations, however, are "distinctions in degree" that do not amount to "differences in kind." *Buckley*. As such, they are more properly drawn by the Legislature than by the Judiciary. Congress expressed its judgment in § 441b that the threat posed by corporate political activity warrants a prophylactic measure applicable to all groups that organize in the corporate form. Our previous cases have expressed a reluctance to fine-tune such judgments; I would adhere to that counsel here.

I would have thought the distinctions drawn by the Court today largely foreclosed by our decision in *NRWC*....

The Court explains the decisions in *NRWC* and *NCPAC* by reference to another distinction found in our decisions—that between contributions and independent expenditures. See *Buckley*. This is admittedly a distinction between the facts of *NRWC* and those of *NCPAC*, but it does not warrant a different result in view of our longstanding approval of limitations on corporate spending and of the type of regulation involved here. The distinction between contributions and independent expenditures is not a line separating black from white. The statute here—though involving independent expenditures—is not nearly so drastic as the "wholesale restriction of clearly protected conduct" at issue in *NCPAC*. It regulates instead the *form* of otherwise unregulated spending. A separate segregated fund formed by MCFL may use contributions it receives, without limit, on political expenditures. As the Court correctly notes, the regulation of § 441b is not without burdens, but it remains wholly different in character from that which we

condemned in *NCPAC*. In these circumstances, I would defer to the congressional judgment that corporations are a distinct category with respect to which this sort of regulation is constitutionally permissible.[4]

The basically legislative character of the Court's decision is dramatically illustrated by its effort to carve out a constitutional niche for "[g]roups such as MCFL." The three-part test gratuitously announced in today's dicta adds to a well-defined prohibition a vague and barely adumbrated exception certain to result in confusion and costly litigation. If we sat as a council of revision to modify legislative judgments, I would hesitate to join the Court's effort because of this fact alone. But we do not sit in that capacity; we are obliged to leave the drawing of lines in cases such as this to Congress if those lines are within constitutional bounds. Believing that the Act of Congress in question here passes this test, I dissent from the Court's contrary conclusion.

Justice WHITE, while joining THE CHIEF JUSTICE's opinion, adheres to his dissenting views expressed in *Buckley*, *Bellotti*, and *NCPAC*.

Notes and Questions

1. Does the Supreme Court's willingness to find "express advocacy" in the MCFL "Special Edition" represent a retreat from the indication in footnote 52 of *Buckley* that only explicit phrases such as "vote for Smith" would be sufficient, so as to avoid problems of vagueness? For an earlier ruling that under facts roughly comparable to those in *MCFL* there was no express advocacy, see *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980). A more expansive view of "express advocacy" was taken in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), cert. denied 484 U.S. 850 (1987).

2. In *NCPAC*, the Court stated:

> Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors.

In *NRWC* the Court upheld the ban on corporate contributions in part because the ban

> ensure[d] that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions.

In *MCFL* is the Court addressing the same state interest as in these passages from *NCPAC* and *NRWC*? Consider Marlene Arnold Nicholson, *Basic Principles or Theoretical Tangles: Analyzing the Constitutionality of Government Regulation of Campaign Finance*, 38 CASE WESTERN RESERVE LAW REVIEW 589, 599 (1988):

4. The statutory scheme at issue in this case does not require us to consider the validity of a direct and absolute limitation on independent expenditures by corporations.

> [In *MCFL*], the Court not only expanded its definition of corruption, beyond that articulated in *National Conservative Political Action Committee*, but in doing so it seemed to adopt a version of the much maligned equalization rationale as part of its new definition. In *Massachusetts Citizens for Life* the "corrosive effect of concentrated wealth" to which the Court referred is the effect on the electoral process, not the effect on office holders.

When Professor Nicholson refers to the "much maligned equalization rationale," she alludes to the celebrated statement in *Buckley* that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Is Nicholson correct in suggesting that Part III(B) of Justice Brennan's opinion would permit restricting the speech of business corporations to enhance the relative voice of others? If so, what sort of "equalization" and "fairness" is the Court saying may be promoted by restrictions on corporate speech? Consider note 5 following *Citizens Against Rent Control v. Berkeley*, discussing the "equality" and "intensity" standards of fairness.

3. The discussion in *MCFL* suggesting an expanded conception of "corruption" that could be used to justify restrictions on corporate spending was dictum. The statute as applied to MCFL itself was struck down, and in the second paragraph of Part III(C) of his opinion, Justice Brennan left open the question whether Section 441b would be upheld as applied to business corporations. Dictum was converted into holding in the following case.

Austin v. Michigan Chamber of Commerce

494 U.S. 652 (1990)

Justice MARSHALL delivered the opinion of the Court.

In this appeal, we must determine whether § 54(1) of the Michigan Campaign Finance Act violates either the First or the Fourteenth Amendment to the Constitution. Section 54(1) prohibits corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office. Mich.Comp. Laws § 169.254(1) (1979). Corporations are allowed, however, to make such expenditures from segregated funds used solely for political purposes. § 169.255(1). In response to a challenge brought by the Michigan State Chamber of Commerce (Chamber), the Sixth Circuit held that § 54(1) could not be applied to the Chamber, a Michigan nonprofit corporation, without violating the First Amendment. 856 F.2d 783 (1988). Although we agree that expressive rights are implicated in this case, we hold that application of § 54(1) to the Chamber is constitutional because the provision is narrowly tailored to serve a compelling state interest. Accordingly, we reverse the judgment of the Court of Appeals.

I

Section 54(1) of the Michigan Campaign Finance Act prohibits corporations from making contributions and independent expenditures in connection with

state candidate elections.[1] The issue before us is only the constitutionality of the State's ban on independent expenditures....The Act exempts from this general prohibition against corporate political spending any expenditure made from a segregated fund. § 169.255(1). A corporation may solicit contributions to its political fund only from an enumerated list of persons associated with the corporation. See §§ 169.255(2),(3).

The Chamber, a nonprofit Michigan corporation, challenges the constitutionality of this statutory scheme. The Chamber comprises more than 8,000 members, three-quarters of whom are for-profit corporations. The Chamber's general treasury is funded through annual dues required of all members. Its purposes, as set out in the bylaws, are to promote economic conditions favorable to private enterprise; to analyze, compile, and disseminate information about laws of interest to the business community and to publicize to the government the views of the business community on such matters; to train and educate its members; to foster ethical business practices; to collect data on, and investigate matters of, social, civic, and economic importance to the State; to receive contributions and to make expenditures for political purposes and to perform any other lawful political activity; and to coordinate activities with other similar organizations.

In June 1985 Michigan scheduled a special election to fill a vacancy in the Michigan House of Representatives. Although the Chamber had established and funded a separate political fund, it sought to use its general treasury funds to place in a local newspaper an advertisement supporting a specific candidate. As the Act made such an expenditure punishable as a felony, see § 169.254(5), the Chamber brought suit in District Court for injunctive relief against enforcement of the Act, arguing that the restriction on expenditures is unconstitutional under both the First and the Fourteenth Amendments....

II

To determine whether Michigan's restriction on corporate political expenditures may constitutionally be applied to the Chamber, we must ascertain whether it burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest....

A

This Court concluded in *MCFL* that a federal statute requiring corporations to make independent political expenditures only through special segregated funds burdens corporate freedom of expression....

Despite the Chamber's success in administering its separate political fund ([the] Chamber expected to have over $140,000 in its segregated fund available for use in the 1986 elections), Michigan's segregated fund requirement still burdens the Chamber's exercise of expression because "the corporation is not free to use its general funds for campaign advocacy purposes." *MCFL* (plurality opinion). The Act imposes requirements similar to those in the federal statute involved in *MCFL*: a segregated fund must have a treasurer, § 169.221; and its administrators must keep detailed accounts of contributions, § 169.224, and file with state

1. Section 54(1) is modeled on a provision of the Federal Election Campaign Act of 1971 that requires corporations and labor unions to use segregated funds to finance independent expenditures made in federal elections. 2 U.S.C. § 441b.

officials a statement of organization, *ibid.* In addition, a nonprofit corporation like the Chamber may solicit contributions to its political fund only from members, stockholders of members, officers or directors of members, and the spouses of any of these persons. § 169.255. Although these requirements do not stifle corporate speech entirely, they do burden expressive activity. See *MCFL*. Thus, they must be justified by a compelling state interest.

B

The State contends that the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption. See *NCPAC* ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances"). State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace." *MCFL*. As the Court explained in *MCFL*, the political advantage of corporations is unfair because

> [t]he resources in the treasury of a business corporation... are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

We therefore have recognized that "the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form." *NCPAC*.

The Chamber argues that this concern about corporate domination of the political process is insufficient to justify a restriction on independent expenditures. Although this Court has distinguished these expenditures from direct contributions in the context of federal laws regulating individual donors, *Buckley*, it has also recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections, *Bellotti*. Regardless of whether this danger of "financial *quid pro quo*" corruption, see *NCPAC*, may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas. The Act does not attempt "to equalize the relative influence of speakers on elections," *post* (KENNEDY, J., dissenting); rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations. We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for § 54; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries war-

rants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.

C

We next turn to the question whether the Act is sufficiently narrowly tailored to achieve its goal. We find that the Act is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views. Contrary to the dissents' critical assumptions, the Act does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds. Because persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views. See *MCFL*.

The Chamber argues that § 54(1) is substantially overinclusive, because it includes within its scope closely held corporations that do not possess vast reservoirs of capital. We rejected a similar argument in *NRWC*, in the context of federal restrictions on the persons from whom corporations could solicit contributions to their segregated funds.... Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process. This potential for distortion justifies § 54(1)'s general applicability to all corporations. The section therefore is not substantially overbroad.

III

The Chamber contends that even if the Campaign Finance Act is constitutional with respect to for-profit corporations, it nonetheless cannot be applied to a nonprofit ideological corporation like a chamber of commerce. In *MCFL*, we held that the nonprofit organization there had "features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of [its] incorporated status." In reaching that conclusion, we enumerated three characteristics of the corporation that were "essential" to our holding. Because the Chamber does not share these crucial features, the Constitution does not require that it be exempted from the generally applicable provisions of § 54(1).

The first characteristic of Massachusetts Citizens for Life, Inc., that distinguished it from ordinary business corporations was that the organization "was formed for the express purpose of promoting political ideas, and cannot engage in business activities."... MCFL's narrow political focus thus "ensure[d] that [its] political resources reflect[ed] political support."

In contrast, the Chamber's bylaws set forth more varied purposes, several of which are not inherently political. For instance, the Chamber compiles and disseminates information relating to social, civic, and economic conditions, trains and educates its members, and promotes ethical business practices. Unlike MCFL's, the Chamber's educational activities are not expressly tied to political

goals; many of its seminars, conventions, and publications are politically neutral and focus on business and economic issues. The Chamber's president and chief executive officer stated that one of the corporation's main purposes is to provide "service to [its] membership that includes everything from group insurance to educational seminars, and... litigation activities on behalf of the business community." Deposition of E. James Barrett. The Chamber's nonpolitical activities therefore suffice to distinguish it from MCFL in the context of this characteristic.

We described the second feature of MCFL as the absence of "shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." Although the Chamber also lacks shareholders, many of its members may be similarly reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs and to establish contacts with other members of the business community. The Chamber's political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with the former may continue to pay dues to participate in the latter. Justice KENNEDY ignores these disincentives for withdrawing as a member of the Chamber, stating only that "[o]ne need not become a member... to earn a living." Certainly, members would be disinclined to terminate their involvement with the organization on the basis of less extreme disincentives than the loss of employment. Thus, we are persuaded that the Chamber's members are more similar to shareholders of a business corporation than to the members of MCFL in this respect.

The final characteristic upon which we relied in *MCFL* was the organization's independence from the influence of business corporations. On this score, the Chamber differs most greatly from the Massachusetts organization. MCFL was not established by, and had a policy of not accepting contributions from, business corporations. Thus it could not "serv[e] as [a] condui[t] for the type of direct spending that creates a threat to the political marketplace." In striking contrast, more than three-quarters of the Chamber's members are business corporations, whose political contributions and expenditures can constitutionally be regulated by the State. As we read the Act, a corporation's payments into the Chamber's general treasury would not be considered payments to influence an election, so they would not be "contributions" or "expenditures," and would not be subject to the Act's limitations. Business corporations therefore could circumvent the Act's restriction by funneling money through the Chamber's general treasury. Because the Chamber accepts money from for-profit corporations, it could, absent application of § 54(1), serve as a conduit for corporate political spending. In sum, the Chamber does not possess the features that would compel the State to exempt it from restriction on independent political expenditures.

IV

The Chamber also attacks § 54(1) as underinclusive because it does not regulate the independent expenditures of unincorporated labor unions. Whereas unincorporated unions, and indeed individuals, may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure; corporations are "by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth." *MCFL*.

The desire to counterbalance those advantages unique to the corporate form is the State's compelling interest in this case; thus, excluding from the statute's coverage unincorporated entities that also have the capacity to accumulate wealth "does not undermine its justification for regulating corporations." *Ibid.*

Moreover, labor unions differ from corporations in that union members who disagree with a union's political activities need not give up full membership in the organization to avoid supporting its political activities. Although a union and an employer may require that all bargaining unit employees become union members, a union may not compel those employees to support financially "union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Communications Workers v. Beck*, 487 U.S. 735, 745 (1988). See also *Abood* (holding that compelling nonmember employees to contribute to union's political activities infringes employees' First Amendment rights). An employee who objects to a union's political activities thus can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its duties as the exclusive representative of the bargaining unit on labor-management issues. As a result, the funds available for a union's political activities more accurately reflect[] members' support for the organization's political views than does a corporation's general treasury. Michigan's decision to exclude unincorporated labor unions from the scope of § 54(1) is therefore justified by the crucial differences between unions and corporations.

V

Because we hold that § 54(1) does not violate the First Amendment, we must address the Chamber's contention that the provision infringes its rights under the Fourteenth Amendment. The Chamber argues that the statute treats similarly situated entities unequally. Specifically, it contends that the State should also restrict the independent expenditures of unincorporated associations with the ability to accumulate large treasuries and of corporations engaged in the media business.

Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101 (1972). We find that, even under such strict scrutiny, the statute's classifications pass muster under the Equal Protection Clause. As we explained in the context of our discussions of whether the statute was overinclusive or underinclusive, the State's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political "war chests" amassed with the aid of the legal advantages given to corporations.

Similarly, we find that the Act's exemption of media corporations from the expenditure restriction does not render the statute unconstitutional....

Although all corporations enjoy the same state-conferred benefits inherent in the corporate form, media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. We have consistently recognized the unique role that the press plays in "informing and educating the public, offering criticism, and providing a forum for discussion and debate." *Bellotti*. See also *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitu-

tionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve")....The media exception ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events. A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public. Although the press' unique societal role may not entitle the press to greater protection under the Constitution, *Bellotti*, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations. We therefore hold that the Act does not violate the Equal Protection Clause.

VI

Michigan identified as a serious danger the significant possibility that corporate political expenditures will undermine the integrity of the political process, and it has implemented a narrowly tailored solution to that problem. By requiring corporations to make all independent political expenditures through a separate fund made up of money solicited expressly for political purposes, the Michigan Campaign Finance Act reduces the threat that huge corporate treasuries amassed with the aid of favorable state laws will be used to influence unfairly the outcome of elections. The Michigan Chamber of Commerce does not exhibit the characteristics identified in *MCFL* that would require the State to exempt it from a generally applicable restriction on independent corporate expenditures. We therefore reverse the decision of the Court of Appeals.

It is so ordered.[b]

Justice STEVENS, concurring.

In my opinion the distinction between individual expenditures and individual contributions that the Court identified in *Buckley* should have little, if any, weight in reviewing corporate participation in candidate elections. In that context, I believe the danger of either the fact, or the appearance, of *quid pro quo* relationships provides an adequate justification for state regulation of both expenditures and contributions....Accordingly, I join the Court's opinion and judgment.

Justice SCALIA, dissenting.

"Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: _____." In permitting Michigan to make private corporations the first object of this Orwellian announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the "fairness" of political debate.

b. Justice Brennan's concurring opinion, consisting largely of a rebuttal to the dissents, is omitted.

I

A

The Court's opinion says that political speech of corporations can be regulated because "[s]tate law grants [them] special advantages" and because this "unique state-conferred corporate structure... facilitates the amassing of large treasuries." This analysis seeks to create one good argument by combining two bad ones. Those individuals who form that type of voluntary association known as a corporation are, to be sure, given special advantages—notably, the immunization of their personal fortunes from liability for the actions of the association—that the State is under no obligation to confer. But so are other associations and private individuals given all sorts of special advantages that the State need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies. It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights. See *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Speiser v. Randall*, 357 U.S. 513 (1958). The categorical suspension of the right of any person, or of any association of persons, to speak out on political matters must be justified by a compelling state need. See *Buckley*. That is why the Court puts forward its second bad argument, the fact that corporations "amas[s] large treasuries." But that alone is also not sufficient justification for the suppression of political speech, unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates. Neither of these two flawed arguments is improved by combining them and saying, as the Court in effect does, that "since the State gives special advantages to these voluntary associations, and since they thereby amass vast wealth, they may be required to abandon their right of political speech."[1]

The Court's extensive reliance upon the fact that the objects of this speech restriction, corporations, receive "special advantages" is in stark contrast to our opinion issued just six years ago in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). In that decision, striking down a congressionally imposed ban upon editorializing by noncommercial broadcasting stations that receive federal funds, the *only* respect in which we considered the receipt of that "special advantage" relevant was in determining whether the speech limitation could be justified under Congress' spending power, as a means of assuring that the subsidy was devoted only to the purposes Congress intended, which did not

1. The Court's assertion that the Michigan law "does not impose an *absolute* ban on all forms of corporate political spending," (emphasis added) is true only in a respect that is irrelevant for purposes of First Amendment analysis. A corporation is absolutely prohibited from spending its own funds on this form of political speech, and would be guilty of misrepresentation if it asserted that a particular candidate was supported or opposed by the corporation. This is to say that the corporation *as a corporation* is prohibited from speaking. What the Michigan law permits the corporation to do is to serve as the founder and treasurer of a different association of individuals that can endorse or oppose political candidates. The equivalent, where an individual rather than an association is concerned, would be to prohibit John D. Rockefeller from making political endorsements, but to permit him to form an association to which others (though not he himself) can contribute for the purpose of making political endorsements. Just as political speech by that association is not speech by John D. Rockefeller, so also speech by a corporate PAC that the Michigan law allows is not speech by the corporation itself.

include political editorializing. We held it could not be justified on that basis, since "a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing.... The station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity." Of course the same is true here, even assuming that tax exemptions and other benefits accorded to incorporated associations constitute an exercise of the spending power. It is not just that portion of the corporation's assets attributable to the gratuitously conferred "special advantages" that is prohibited from being used for political endorsements, but *all* of the corporation's assets. I am at a loss to explain the vast difference between the treatment of the present case and *League of Women Voters*. Commercial corporations may not have a public *persona* as sympathetic as that of public broadcasters, but they are no less entitled to this Court's concern.

As for the second part of the Court's argumentation, the fact that corporations (or at least some of them) possess "massive wealth": Certain uses of "massive wealth" in the electoral process—whether or not the wealth is the result of "special advantages" conferred by the State—pose a substantial risk of corruption which constitutes a compelling need for the regulation of speech. Such a risk plainly exists when the wealth is given directly to the political candidate, to be used under his direction and control. We held in *Buckley*, however, that independent expenditures to express the political views of individuals and associations do not raise a sufficient threat of corruption to justify prohibition. Neither the Court's opinion nor either of the concurrences makes any effort to distinguish that case—except, perhaps, by misdescribing the case as involving "federal laws regulating individual donors," or as involving "individual expenditures," (STEVENS, J., concurring). Section 608(e)(1) of the Federal Election Campaign Act of 1971, which we found unconstitutional in *Buckley*, was directed, like the Michigan law before us here, to expenditures made for the purpose of advocating the election or defeat of a particular candidate. It limited to $1,000 (a *lesser* restriction than the absolute prohibition at issue here) such expenditures not merely by "individuals," but by "persons," specifically defined to include corporations. The plaintiffs in the case included corporations, and we specifically discussed § 608(e)(1) as a restriction addressed not just to individuals but to "individuals and groups," "persons and groups," "persons and organizations," "person[s] [and] association[s]."... In support of our determination that the restriction was "wholly at odds with the guarantees of the First Amendment" we cited *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), which involved limitations upon a corporation. Of course, if § 608(e)(1) had been unconstitutional only as applied to individuals and not as applied to corporations, we might nonetheless have invalidated it *in toto* for substantial overbreadth, see *Broadrick v. Oklahoma*, 413 U.S. 601, 611–613 (1973), but there is not a hint of that doctrine in our opinion. Our First Amendment law is much less certain than I had thought it to be if we are free to recharacterize each clear holding as a disguised "overbreadth" determination.

Buckley should not be overruled, because it is entirely correct. The contention that prohibiting overt advocacy for or against a political candidate satisfies a "compelling need" to avoid "corruption" is easily dismissed. As we said in *Buckley*, "[i]t would naively underestimate the ingenuity and resourcefulness of per-

sons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." Independent advocacy, moreover, unlike contributions, "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive," thus reducing the danger that it will be exchanged "as a *quid pro quo* for improper commitments from the candidate." The latter point seems even more plainly true with respect to corporate advocates than it is with respect to individuals. I expect I could count on the fingers of one hand the candidates who would generally welcome, much less negotiate for, a formal endorsement by AT & T or General Motors. The advocacy of such entities that have "amassed great wealth" will be effective only to the extent that it brings to the people's attention *ideas* which—despite the invariably self-interested and probably uncongenial source—strike them as true.

The Court does not try to defend the proposition that independent advocacy poses a substantial risk of political "corruption," as English speakers understand that term. Rather, it asserts that that concept (which it defines as "'financial *quid pro quo*' corruption,") is really just a narrow subspecies of a hitherto unrecognized genus of political corruption. "Michigan's regulation," we are told, "aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporations's political ideas." Under this mode of analysis, virtually anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically "corrosive," which is close enough to "corruptive" to qualify. It is sad to think that the First Amendment will ultimately be brought down not by brute force but by poetic metaphor.

The Court's opinion ultimately rests upon that proposition whose violation constitutes the "New Corruption": Expenditures must "reflect actual public support for the political ideas espoused." This illiberal free-speech principle of "one man, one minute" was proposed and soundly rejected in *Buckley*:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

But it can be said that I have not accurately quoted today's decision. It does not endorse the proposition that government may ensure that expenditures "reflect actual public support for the political ideas espoused," but only the more limited proposition that government may ensure that expenditures "reflect actual public support for the political ideas espoused by corporations." The limitation is of course entirely irrational. Why is it perfectly all right if advocacy by an individual billionaire is out of proportion with "actual public support" for his positions?

There is no explanation, except the effort I described at the outset of this discussion to make one valid proposition out of two invalid ones: When the vessel labeled "corruption" begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship "special privilege"; and when that in turn begins to go down, it returns to "corruption." Thus hopping back and forth between the two, the argumentation may survive but makes no headway towards port, where its conclusion waits in vain....

C

[The Court finds § 54(1) narrowly tailored to serve a compelling state interest] for the following reason:

> As we explained in the context of our discussions of whether the statute was overinclusive or underinclusive, the State's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political "war chests" amassed with the aid of the legal advantages given to corporations.

That state interest (assuming it is compelling) does indeed explain why the State chose to silence "only corporations" rather than wealthy individuals as well. But it does not explain (what "narrow tailoring" pertains to) why the State chose to silence *all* corporations, rather than just those that possess great wealth. If narrow tailoring means anything, surely it must mean that action taken to counter the effect of amassed "war chests" must be targeted, if possible, at amassed "war chests." And surely such targeting is possible—either in the manner accomplished by the provision that we invalidated in *Buckley*, *i.e.*, by limiting the prohibition to independent expenditures above a certain amount, or in some other manner, *e.g.*, by limiting the expenditures of only those corporations with more than a certain amount of net worth or annual profit....

D

Finally, a few words are in order concerning the Court's approval of the Michigan law's exception for "media corporations." This is all right, we are told, because of "the unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'" But if one believes in the Court's rationale of "compelling state need" to prevent amassed corporate wealth from skewing the political debate, surely that "unique role" of the press does not give Michigan justification for *excluding* media corporations from coverage, but provides especially strong reason to include them.[c] Amassed corporate wealth that regularly sits astride the ordinary channels of information is much more likely to produce the New Corruption (too much of one point of view) than amassed corporate wealth that is generally busy making money elsewhere. Such media corporations not only have vastly greater power to

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c. For expression of similar views pointing to the power of the press as a reason for skepticism regarding limitations on non-media participants in campaigns, see L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUPREME COURT REVIEW 243, 268; Sanford Levinson, *Electoral Regulation: Some Comments*, 18 HOFSTRA LAW REVIEW 411, 412–13 (1989).

perpetrate the evil of overinforming, they also have vastly greater opportunity. General Motors, after all, will risk a stockholder suit if it makes a political endorsement that is not plausibly tied to its ability to make money for its shareholders. But media corporations make money *by* making political commentary, including endorsements. For them, unlike any other corporations, the whole world of politics and ideology is fair game. Yet the Court tells us that it is reasonable to *exclude* media corporations, rather than target them specially.

Members of the institutional press, despite the Court's approval of their illogical exemption from the Michigan law, will find little reason for comfort in today's decision. The theory of New Corruption it espouses is a dagger at their throats. The Court today holds merely that media corporations *may* be excluded from the Michigan law, not that they *must* be. We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers. See *Bellotti*. Thus, the Court's holding on this point must be put in the following unencouraging form: "Although the press' unique societal role may not entitle the press to greater protection under the Constitution, *Bellotti*, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." One must hope, I suppose, that Michigan will continue to provide this generous and voluntary exemption.

II

I would not do justice to the significance of today's decision to discuss only its lapses from case precedent and logic. Infinitely more important than that is its departure from long-accepted premises of our political system regarding the benevolence that can be expected of government in managing the arena of public debate, and the danger that is to be anticipated from powerful private institutions that compete with government, and with one another, within that arena.

Perhaps the Michigan law before us here has an unqualifiedly noble objective—to "equalize" the political debate by preventing disproportionate expression of corporations' points of view. But governmental abridgment of liberty is always undertaken with the very best of announced objectives (dictators promise to bring order, not tyranny), and often with the very best of genuinely intended objectives (zealous policemen conduct unlawful searches in order to put dangerous felons behind bars). The premise of our Bill of Rights, however, is that there are some things—even some seemingly *desirable* things—that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure "fair" political debate. The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition. Perhaps the Michigan Legislature was genuinely trying to assure a "balanced" presentation of political views; on the other hand, perhaps it was trying to give unincorporated unions (a not insubstantial force in Michigan) political advantage over major employers. Or perhaps it was trying to assure a "balanced" presentation because it knows that with evenly balanced speech incumbent officeholders generally win. The fundamental approach of the First Amendment, I had always thought, was to assume the worst, and to rule the regulation of political speech "for fairness' sake" simply out of bounds.

I doubt that those who framed and adopted the First Amendment would agree that avoiding the New Corruption, that is, calibrating political speech to

the degree of public opinion that supports it, is even a *desirable* objective, much less one that is important enough to qualify as a compelling state interest. Those Founders designed, of course, a system in which popular ideas would ultimately prevail; but also, through the First Amendment, a system in which true ideas could readily become popular. For the latter purpose, the calibration that the Court today endorses is precisely backwards: To the extent a valid proposition has scant public support, it should have wider rather than narrower public circulation. I am confident, in other words, that Jefferson and Madison would not have sat at these controls; but if they did, they would have turned them in the opposite direction.

Ah, but then there is the special element of corporate wealth: What would the Founders have thought of that? They would have endorsed, I think, what Tocqueville wrote in 1835:

> When the members of an aristocratic community adopt a new opinion or conceive a new sentiment, they give it a station, as it were, beside themselves, upon the lofty platform where they stand; and opinions or sentiments so conspicuous to the eyes of the multitude are easily introduced into the minds or hearts of all around. In democratic countries the governing power alone is naturally in a condition to act in this manner; but it is easy to see that its action is always inadequate, and often dangerous.... No sooner does a government attempt to go beyond its political sphere and to enter upon this new track than it exercises, even unintentionally, an insupportable tyranny.... Worse still will be the case if the government really believes itself interested in preventing all circulation of ideas; it will then stand motionless and oppressed by the heaviness of voluntary torpor. Governments, therefore, should not be the only active powers; associations ought, in democratic nations, to stand in lieu of those powerful private individuals whom the equality of conditions has swept away.

2 A. de Tocqueville, Democracy in America 109 (P. Bradley ed. 1948). While Tocqueville was discussing "circulation of ideas" in general, what he wrote is also true of candidate endorsements in particular. To eliminate voluntary associations—not only including powerful ones, but *especially* including powerful ones—from the public debate is either to augment the always dominant power of government or to impoverish the public debate. The case at hand is a good enough example. Why should the Michigan voters in the 93d House District be deprived of the information that private associations owning and operating a vast percentage of the industry of the State, and employing a large number of its citizens, believe that the election of a particular candidate is important to their prosperity? Contrary to the Court's suggestion, the same point cannot effectively be made through corporate PACs to which individuals may voluntarily contribute. It is important to the message that it represents the views of Michigan's leading corporations *as corporations*, occupying the "lofty platform" that they do within the economic life of the State—not just the views of some *other* voluntary associations to which some of the corporations' shareholders belong.

Despite all the talk about "corruption and the appearance of corruption"—evils that are not significantly implicated and that can be avoided in many other ways—it is entirely obvious that the object of the law we have approved today is

not to prevent wrongdoing but to prevent speech. Since those private associations known as corporations have so much money, they will speak so much more, and their views will be given inordinate prominence in election campaigns. This is not an argument that our democratic traditions allow—neither with respect to individuals associated in corporations nor with respect to other categories of individuals whose speech may be "unduly" extensive (because they are rich) or "unduly" persuasive (because they are movie stars) or "unduly" respected (because they are clergymen). The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff. As conceded in Lincoln's aphorism about fooling "all of the people some of the time," that premise will not invariably accord with reality; but it will assuredly do so much more frequently than the premise the Court today embraces: that a healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak, and who may not.

* * *

Because today's decision is inconsistent with unrepudiated legal judgments of our Court, but even more because it is incompatible with the unrepealable political wisdom of our First Amendment, I dissent.

Justice KENNEDY, with whom Justice O'CONNOR and Justice SCALIA join, dissenting.

...By using distinctions based upon both the speech and the speaker, the Act engages in the rawest form of censorship: the State censors what a particular segment of the political community might say with regard to candidates who stand for election. The Court's holding cannot be reconciled with the principle that "legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Meyer v. Grant.*

...The Court draws support for its discrimination among nonprofit corporate speakers from portions of our opinion in *MCFL*. It must be acknowledged that certain language in *MCFL*, in particular the discussion which pointed to the express purpose of the organization to promote political ideas, lends support to the majority's test. That language, however, contravenes fundamental principles of neutrality for all political speech. It should not stand in the way of giving full force to the essential and vital holding of *MCFL*, which is that a nonprofit corporation engaged in political discussion of candidates and elections has the full protection of the First Amendment.

...The majority almost admits that, in the case of independent expenditures, the danger of a political *quid pro quo* is insufficient to justify a restriction of this kind. Since the specter of corruption, which had been "the only legitimate and compelling government interest[s] thus far identified for restricting campaign finances," *NCPAC*, is missing in this case, the majority invents a new interest: combating the "corrosive and distorting effects of immense aggregations of wealth," accumulated in corporate form without shareholder or public support. The majority styles this novel interest as simply a different kind of corruption, but has no support for its assertion. While it is questionable whether such imprecision

would suffice to justify restricting political speech by for-profit corporations, it is certain that it does not apply to nonprofit entities.

The evil of political corruption has been defined in more precise terms. We have said: "Corruption is a subversion of the political process" whereby "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain...." *NCPAC*. In contrast, the interest touted by the majority is the impermissible one of altering political debate by muting the impact of certain speakers....

Notes and Questions

1. Can Justice Scalia's and Justice O'Connor's dissenting posture in *Austin* be reconciled with their joining in Part III(B) of the Court's opinion in *MCFL*?

2. Why does Justice Marshall emphasize the advantages given to corporations by state laws? Is it because of the pressure originating from Justice Scalia's argument that the fact that corporations may derive their wealth from sources unrelated to their political views does very little to differentiate corporations from many other organizations and from wealthy individuals? If so, does Justice Marshall's reliance on state-created advantages salvage his position? Is the fact that corporations receive certain advantages relevant to the extent to which they should be permitted to participate financially in electoral politics?

Bellotti was criticized by some for failing to give sufficient weight to the advantages conferred on corporations by the state. See William Patton & Randall Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WISCONSIN LAW REVIEW 494, 496. Writing after *Austin*, another commentator acknowledged Justice Scalia's argument that the receipt of legal advantages is not unique to the corporation, but responded that "there are differences of degree, and the Court might properly make distinctions based on them." Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUPREME COURT REVIEW 105, 115. A variant on this view is expressed in Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 *Capital Law Review* 381, 407–08 (1992):

> [T]he question should be whether the advantages given to the corporation by the state are related to the regulation in question in a way that lends justification to the regulation. In the present context, the only apparent relation between advantages provided to corporations and regulation of their financial participation in election campaigns is that the advantages facilitate the accumulation of large amounts of capital within the corporation. Accordingly, the legal advantages enjoyed by corporations may to a degree reinforce arguments based on their ability to accumulate capital, but the legal advantages do not provide an independent justification for regulation of corporate political activity.

3. When Justice Scalia asks why it is "perfectly all right if advocacy by an individual billionaire is out of proportion with 'actual public support' for his positions," might one response be that it is *not* all right, and that the inconsistency should be resolved by overruling *Buckley*'s strong protection of independent expenditures? Or is there necessarily an inconsistency? Consider Marlene Arnold

Nicholson, *Basic Principles or Theoretical Tangles: Analyzing the Constitutionality of Government Regulation of Campaign Finance*, 38 CASE WESTERN RESERVE LAW REVIEW 589, 606 (1988):

> Corporate expression does not reflect the self-realization of actual people. [She adds, in a footnote, "It probably reflects only someone's determination of what will be most profitable for the corporation, which may or may not correspond with anyone's view of good political policy."] Perhaps we must be willing to tolerate the possibility of a coercive influence of concentrated wealth when it represents someone's self-fulfillment, but we need not do so when that element is missing.

Nicholson adds that although this would be a "principled conclusion," she would reject it because the self-realization interest should be considered together with other pertinent values. All would be accommodated, she suggests, "if very generous limitations were applied to independent expenditures, the use of candidate wealth and contributions in ballot measure elections."

4. Justice Marshall attempts to rebut the dissenters' characterization of the Michigan statute as an absolute ban on corporate political spending on the ground that the statute "permits corporations to make independent political expenditures through separate segregated funds," i.e., PACs. If the use of corporate funds to pay the administrative expenses of a PAC were prohibited, would the law be constitutional? Are the dissenters correct that the corporation's ability to create and pay the expenses of a PAC is an inadequate substitute, because there is distinctive value in the speech originating from the corporation itself? For arguments supporting the dissenters on this issue, see David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONSTITUTIONAL LAW QUARTERLY 541, 569–73 (1991).

5. Is *Austin* consistent with *Bellotti*? In *Michigan State Chamber of Commerce v. Austin*, 832 F.2d 947 (6th Cir. 1987), a different case involving some of the same parties, the Court of Appeals struck down a Michigan statute that limited corporate contributions to committees supporting or opposing a ballot measure to $40,000. The court relied on the statement in *Bellotti* that "Referenda are held on issues, not candidates for political office. The risk of corruption perceived in cases involving candidate elections, simply is not present in a popular vote on a public issue." Is this statement in *Bellotti* valid given the conception of "corruption" accepted by the Supreme Court majority in *MCFL* and *Austin*? Given these two decisions, should a statute similar to the Michigan law struck down by the 6th Circuit be upheld?[d]

6. Given the distinction drawn in *MCFL* and *Austin* between two types of corporation, did the Court reach the right result regarding the Michigan Chamber of Commerce? If MCFL added to its political activities a program of educating pregnant women regarding pre-natal care, and if it entered into arrangements with a bank and an insurance company to provide attractive discounts on credit cards and life insurance to contributors to MCFL, would it then be constitutional to ban MCFL from making independent expenditures? If your answer is no, is it

d.. *MCFL* was decided nearly a year before the 6th Circuit decision in *Michigan State Chamber of Commerce*, but is not cited in the court's opinion, and may not have been known to the court.

because of Justice Marshall's third point, that MCFL still would not be receiving contributions or membership payments from business corporations?

In that case, suppose the Michigan Chamber of Commerce continued to receive payments from corporate members but abandoned all aspects of its program other than pursuing its political agenda. Would it be entitled to an exemption from the independent expenditure ban? If not, would it be fair to say that Justice Marshall really is applying a one-part rather than a three-part test?

7. Suppose the Michigan Chamber of Commerce adopts a procedure whereby any member can assure that no portion of its dues or other payments to the Chamber are used for political purposes. Could § 54(1) then constitutionally be enforced against the Chamber? If not, could not Michigan *require* "membership corporations" to adopt such procedures? In short, should § 54(1) have been upheld on the ground there was a less restrictive alternative?

The first two of the *MCFL* criteria would seem to be satisfied by a procedure whereby a member of or contributor to the Chamber could "earmark" its funds for non-political uses. Perhaps of more practical interest, the basis for distinguishing the situation of labor unions would be undermined, so this problem can be discussed in connection with Note 8. Still, the third criterion would support the statute. The "earmarking" option would not affect the corporations who *want* their payments used for political purposes and are using the Chamber as a conduit for that purpose.

8. In Part IV of his opinion, Justice Marshall holds that extending the ban on independent expenditures to corporations but not to labor unions does not result in unconstitutional discrimination. Federal law extends the ban to both unions and corporations. Is the federal ban on independent expenditures by unions constitutional under the reasoning of *MCFL* and *Austin*?

Chapter 15

Incumbency

One issue that comes up frequently in debates on campaign finance reform is the effect of any proposal (or of the status quo) on the relative strength of incumbents and challengers. As the following materials will demonstrate, incumbent legislators who seek reelection tend to have a high success rate, and there are various laws and practices that benefit incumbent officeholders in their quests for reelection or for election to higher office. We shall consider some of these and the legal questions that surround them. We shall also consider legislative term limits, a particularly strong anti-incumbent measure that has enjoyed strong popular support in recent years. As you read the following materials, keep the following questions in mind:

1. What are the pros and cons of an electoral system in which incumbents usually can count on reelection as opposed to one in which they usually face a difficult struggle each election year?

2. Most of the "perquisites" considered in this chapter involve at least some gain to the public as well as some political benefit to the incumbent officeholder. Would a change or curtailment of the practice be desirable on balance? If you believe political benefit should be minimized, are there alternative arrangements that would preserve the public benefit while reducing or eliminating the political effect?

3. Can the practices be justified as assurances to officeholders that their accomplishments in behalf of the public will become known and be rewarded politically, thus creating an incentive for high quality public service? To what extent does a given practice encourage substantive accomplishments? To what extent does it encourage creating a false or exaggerated appearance of accomplishment?

4. To what extent are the practices the inevitable result of the demands we make on our public officials? Officials are generally expected to act as ombudsmen able to perform a variety of individual services for constituents, and as party leaders with informed opinions on a broad range of issues, even those which are unrelated to the official's specific responsibilities. Would it be fair for society to demand that officials play these roles and then require that they pay for the necessary resources with private funds?

5. Many officials pay for some activities which have mixed governmental, constituent service, and political purposes with private funds, which may be either campaign contributions or contributions to separate accounts usually

known as "office accounts" or, less reverently, "slush funds." In the past the contributions to and expenditures from the accounts were often secret, but most modern campaign disclosure laws require that they be disclosed. Is private financing of these activities preferable to public financing? To what extent, if at all, are the arguments for public financing of election campaigns applicable here?

6. Granted the high success rate of incumbent candidates, how significant a cause are the perquisites considered in this chapter? How significant are patterns of campaign financing? Could the success rate be explained by the existence of gerrymandered election districts, or a tendency by some voters to vote for an incumbent who is doing an adequate job?

7. Perhaps most importantly, what is the relationship between performance in office and electoral practices that benefit incumbents? How does the desire of incumbents for reelection affect the ability of parties to function effectively in legislatures and elsewhere in government? In what ways is the accountability of elected officials for the performance of government either reinforced or obscured? Ask the same questions with respect to any proposed reform intended to minimize or eliminate the incumbency advantage.

I. The Incumbency Advantage

A. *The Permanent Campaign*

Hedrick Smith, THE POWER GAME 119–126 (1988)

The campaign is never over.

—Robert Squier, media consultant

Well before the five-hour hearing began one September morning in 1985, there were the telltale signs of a major media event. Unusually large crowds of young people lined the columned hallways of the old Russell Senate Office Building to wait for seats. Several television crews set up video monitors and sound equipment in the hallways. The hearing room quickly filled to overflowing.

Inside, it was almost impossible to move. The press tables were jammed. Capitol guards, in starched white shirts, manned the doors. The audience, which had come for a show, was in a boisterous mood at the prospect of the Senate Commerce Committee scrutinizing the seamy, sinful side of rock music. Senator Jack Danforth, the committee chairman, warned against applause and demonstrations. The hearing, he said, was not to consider legislation but merely "to provide a forum for airing the issue."

The opening shot was the protest of Susan Baker, the wife of Treasury Secretary James Baker, and Tipper Gore, wife of Senator Albert Gore, Jr., of Tennessee, among others, against "porn rock," an escalating trend of violent, brutal erotica in rock music (*heavy metal*, in the argot of its fans). Sexually explicit songs, Mrs. Baker told the committee, were "glorifying rape, sadomasochism, incest, the occult, and suicide" with palpable and pernicious effects on the young. Mrs. Gore, speaking for the Parents Music Resource Center, carefully stopped short of advocating censorship. But she urged record companies voluntarily to label record albums, the way cigarette packages are labeled, with warnings of "violent and sexually explicit lyrics."

Later, there was a rustle at the appearance of Dee Snider, a heavy-metal singer-composer who was a particular target of the mothers' criticism. Snider wriggled through the packed crowd in a faded-jeans outfit, a thick shower of stringy long blond curls tumbling well over his shoulder. At the witness table, he jauntily peeled off his jeans jacket to expose a tattoo on his left shoulder and a sleeveless black T-shirt promoting Twisted Sister, his rock group. Bare-armed, he faced the somber-suited senators.

"I don't know if it's morning or afternoon," he said, peering through dark glasses at the dais. "I'll say both: Good morning and good afternoon." He flashed a toothy grin at the nearest television camera.

Snider defensively declared himself a husband, a father, and a Christian. Then, he proceeded to accuse Mrs. Gore of "character assassination," of distorting his lyrics, and of spreading an "outright lie" by claiming that a T-shirt marketed by his group showed "a woman in handcuffs sort of spread-eagled." His song "Under the Blade," he contended, was not a parable of rape in bondage but a tale of fear on the operating table, an interpretation that met skepticism from Senator Gore.

Frank Zappa, a rock voice from an earlier, tamer rock era, arrived in jacket and tie, and with lawyer at his side warned against censorship. What the mothers wanted, he cautioned, would be like "treating dandruff by decapitation."

On the network news that night, the star was none of the above. It was Senator Paula Hawkins of Florida, a petite, politically canny and assertive grandmother, who made drug abuse, child abuse, missing children, and pornography her cornerstone issues in the Senate. Hawkins was not a member of the Senate Commerce Committee, but she has a nose for media events and a knack for attracting publicity that enabled her to upstage the committee. Through senatorial courtesy, Senator Hawkins arranged to be invited and appeared, eye-catching and camera-catching, in a fire-engine-red suit.

Several other senators made predictable statements of moral outrage, but Hawkins had a shrewder gambit. She had her statement, too, but knowing that words were no match for pictures, she came armed with some near-irresistible visuals crafted by the graphic-arts staff of the Senate Republican Conference. On her own television set, plopped on the dais, she played a couple of sizzling porn-rock videocassettes—one of them "Hot for Teacher" by Eddie van Halen—to demonstrate for one and all that the new raunchiness of rock made Elvis Presley seem as innocent as a choirboy. And she waved aloft the blowup of a lurid, blood-dripping male figure and crude four-letter slogans on the album cover of a heavy-metal group called W.A.S.P.

Hawkins's performance caught the play on two national networks. But she and her handlers were taking no chances; to be sure of solid coverage in her home state of Florida, where she was engaged in a tough battle for reelection, Senator Hawkins provided "video feeds"—electronic press releases, videotapes of her in action. They were fed to more than thirty Florida television stations on a satellite hookup arranged through the Senate Republican Conference.

Indeed, according to Susan Baker, Paula Hawkins had been the catalyst behind the hearing in the first place. "She contacted me before any talk of a hearing surfaced," Mrs. Baker recalled. "The idea came from her." Senator Hawkins's political instincts were sound. It was a hot topic with wide audience appeal, because one side of the argument was outraged and the other side was titillated.

The six and a half minutes of network news time given that evening to the Senate's porn-rock hearing was more coverage than the massive congressional efforts on the budget deficit crisis received in a full month. C-Span, the cable network that covers congressional proceedings, got more requests for copies of the porn-rock hearing than anything else it has covered since it began operating in 1979.

Making political hay out of a televised hearing on a newsy topic is hardly a revolutionary idea. Since Senator Estes Kefauver's investigations of organized crime in 1951 and the Watergate investigations of Richard Nixon more than two decades later, many leading politicians have used televised hearings to catapult themselves into national prominence. Kefauver made himself a presidential contender partly by his crime probe; the Watergate hearings made Howard Baker, a Tennesseean like Kefauver, a national political figure. Even tapping celebrity entertainers to excite more popular interest is not an original angle—it was one of the many techniques used by Senator Joseph McCarthy during his postwar Communist haunts.

The new wrinkle is that video politics has become a prime time vehicle for virtually every incumbent, even a relatively unnoticed freshman Republican such as Paula Hawkins. What used to be rare is now routine. What used to be the sporadic, often sensational province of a few political heavyweights dealing with major national concerns has now become the regular practice of the rank-and-file backbenchers to publicize their activities and specialized agendas.

Everyone is advertising, trying to establish a successful brand name with the voters. The new breed of television-oriented congressmen and senators use satellite feeds to send their own versions of hearings to home-state television stations. The porn-rock hearing was a juicy enough topic to hit the national networks. But for wider play, three Republicans (Hawkins, Danforth of Missouri and Paul Trible of Virginia) and one Democrat (Fritz Hollings of South Carolina) beamed home their own video feeds in time for the local nightly news. Indeed, the whole point of regular, daily satellite feeds is to bypass the networks and go directly to local stations, often hungry for a Washington angle.

The Five Pillars of Incumbency

Video feeds epitomize the technology of the constant campaign. Above all, what was driving Paula Hawkins at the porn-rock hearings was the politics of survival. Obviously, politicians come to Washington with more than one motive. Most have some particular programs or policy lines they want to push; others have policy peeves, injustices they want to correct. Some have ambition to become substantial policymakers and master legislators. Many more are driven by the pursuit of prestige and notoriety, by the chance to be seen on television back home or the hopes of winning celebrity status among a wider audience. But one universal and paramount motive is reelection. All but a few want to continue in office. Many make it a career, running almost constantly to keep themselves in office while they are there.

The campaign has become the perpetual-motion machine. More than ever in our history, elections are an unbroken succession, each following the last without interruption. The techniques, mentality, and mercenary consultants of the campaign follow the winners right into office.

The current power game has given incumbents, especially those in the House of Representatives, enormous advantages. Once they are in Congress, they have a

high-technology arsenal that insures that all but a tiny handful will survive any challenge. The five pillars of incumbency are: 1. video feeds; 2. high-tech computerized mail; 3. elaborately staffed casework, involving myriad little favors for incumbents; 4. personal presence back home, often ingeniously publicized; and 5. political money.

Some politicians, especially the new breed in the House, have become extremely skilled at modern survival techniques. The record shows that. Since the mid-1960s, ninety-one percent of the House incumbents who sought reelection were successful. That trend reached a peak of 97.7 percent in 1986. Turnover comes mainly when people retire or in rare years of shock upsets. The Senate has been less secure, with a seventy-eight percent reelection rate in the 1980s.[a] Overall, the congressional record of survival is far higher than in the 1940s and 1950s, let alone earlier in our history.

The built-in resources of congressional office are so great that they not only give incumbents a nearly unbeatable advantage, but they scare off potential challengers. The costs of campaigning have become so great that there is a declining number of serious challengers who can mount the necessary effort. The result is that the techniques of survival politics, mostly financed at *taxpayer expense*, allow many members in the House to insulate themselves from the swings of the political pendulum in presidential elections.

To a striking degree, recent congressional campaigns have been decoupled from presidential campaigns. Ronald Reagan, even with fifty-nine percent of the popular vote in his 1984 landslide, could not pull many new Republicans into office on his coattails. In the House, 192 Democrats held their seats in districts that went for Reagan. Something similar happened in the Nixon landslide of 1972, prompting one well-known academic specialist on Congress, David Mayhew of Yale University, to comment that the smart House member should ignore national trends and work his district like an old-fashioned ward boss, doing favors, making his presence felt, cutting a visible figure.

That political catechism has taken on new force in the past decade—and not accidentally. Ohio Congressman Wayne Hays deliberately liberalized the administrative rules of the House from 1971 to 1975 to favor incumbents. Hays served as both head of the Democratic Congressional Campaign Committee (DCCC)—concerned with reelection of House Democrats—and chairman of the House Administration Committee—which writes the housekeeping rules. Hays wanted to make it easier for incumbents to keep getting elected...; Hays wanted to protect the large Democratic class of '74, many of whom had won normally Republican seats and were especially vulnerable in 1976. So Hays granted House members larger allowances, enabling them to expand their staffs and do more case-

a. These figures leave out of account the fact that House members have to run for reelection every two years, while Senators have six-year terms. If, as Smith suggests, in an average year the average House member who seeks reelection has a ninety-one percent chance of succeeding, then that member's chances of being reelected for the three terms that make up a Senate term are .91 x .91 x .91, or a fraction over seventy-five percent. This is a slightly *lower* figure than the seventy-eight percent reelection rate for Senators that Smith reports. See Amihai Glazer & Bernard Grofman, *Two Plus Two Plus Two Equals Six: Tenure in Office of Senators and Representatives, 1953–1983*, 12 LEGISLATIVE STUDIES QUARTERLY 555 (1987), finding that the reelection chances of House members over three elections are about equal to those of Senators in one election. —ED.

work, and he liberalized accounting rules so that House members could spend more money on travel home and mail to constituents. These changes were a boon to the constant campaign and the Democratic House majority.

"What they've done, starting in '74," protested Newt Gingrich, an outspoken Georgia Republican, "is they built this huge wall of incumbency advantage which makes it very hard to beat the incumbent."

The traditional way that American politicians have kept in good favor with the home folks is to obtain slices of federal "pork" for their districts: money from the federal pork barrel for dams, sewage plants, mass transit, military bases, defense contracts. That works with local civic, business, and political leaders, but for many ordinary voters, "pork" is too impersonal. The fresh angle, which has mushroomed since the mid-1970s, is doing a huge volume of little personal favors for constituents. In Congress, they call it "casework." That means having your staff track down missing Social Security checks, inquire about sons and husbands in the armed services, help veterans get medical care, pursue applications for small-business loans. With this technique, some senators and House members become more valued by thousands of voters as ombudsmen than as legislators.

The constant campaign has other new twists. One is the modern adaptation of that old-fashioned congressional privilege: the postage frank, which permits officeholders to mail a letter or package by merely writing a signature where the rest of us put a stamp. The idea was to let members of Congress keep voters informed about the actions of government. But the frank has become a tool for modern mass merchandising at taxpayers expense. The cost soared over $111 million in 1984, reflecting not only rising volume, but new technology. In one decade, the technology of political mail has gone through several generations. Twenty years ago, congressional offices did not have copying machines or computers. Nowadays, a senator or House member uses high-speed laser printers, automated letter folders, and computerized mass-mailing systems. Technical sophistication enables incumbents to ferret out friendly or swing segments of voters for carefully targeted messages. They tell people what those people want to hear, without aggravating others who disagree.

The object is to use mass-marketing techniques and yet somehow provide a personalized touch.... [S]uccessful high tech must have a human message and create an intimate, personal feeling. Since television is the most powerful technological intrusion it must be balanced by more personal contacts. Hence the drive for casework and direct mail with a personal feel.

Even so, the real cutting edge of the constant campaign is the video feed. Not glitzy, big-buck advertising paid for by political donations, but the week-in-and-week-out generation of prepackaged electronic press releases: videotapes for television outlets and audiotapes, or actualities, for radio stations. They go on the air (sometimes edited but sometimes untouched by the local stations) as straight news reports, usually without any indication that congressional politicians originated them and that taxpayer dollars usually paid for them. Along with regular news reporting, these become part of what politicians call "free media": publicity and coverage which is not labeled for its political sponsorship, even though the cameraman worked for a political party, not a TV station.

For example, the camera crew that Paula Hawkins asked to cover the porn-rock hearing worked not for the networks or for independent Florida stations, but for the Senate Republican Conference. The conference is the official organ of all

the Republican senators; it is financed by a hefty annual taxpayer's subsidy of $565,000 a year. (Senate Democrats got a similar subsidy but ran a modest media operation, spending their funds on other activities.) These funds are part of the $1.6 billion in annual appropriations that Congress votes for its own operations. The Republican Conference staff includes two full camera crews, three graphic artists, and ten film editors, producers, and other media technicians. In four years, its operation went from nothing to sending out 4,032 satellite feeds for senators in 1986.

Tighter rules in the House of Representatives forbid taxpayer subsidies for video feeds. In the House, the cost of self-generated video is picked up mostly by the political parties or by the members themselves. But members of both houses and both parties can use two congressional recording studios to tape their own weekly cable network interview shows and radio broadcasts, with the help of a staff of forty producers, cameramen, sound engineers, and technicians all paid for by about $1.4 million a year in tax dollars. In addition, the Republican party is rich enough so that its congressional arm can send out forty thousand radio feeds a year for its House members on automated phone banks.

The constant campaign demands a relentlessly reassuring presence for the home folks: regular weekend trips for luncheon speeches to the Rotary Club or the chamber of commerce, endless drop-ins at homes for the elderly, defense plants, or new shopping malls, and campaign-style innovations such as the "walking town meetings" (ambulatory open houses) that Senator Bill Bradley conducts on New Jersey beaches. But no chore is more important than the grinding preoccupation of incumbents with raising enough money for the next campaign, sometimes four or five years ahead of time for senators, often to finance periodic pubic-opinion polling so that incumbents can keep tabs on the mood of their voters and their own vulnerabilities.

One symbol of the permanent campaign stands in a suburban district outside of Denver where Representative Tim Wirth has kept a campaign office open continuously for fourteen years, since his first election in 1974. His staff jokingly calls it the "campaign office that never closed down."

Notes and Questions

1. What, if anything, does the Paula Hawkins incident tell us about the American political process? Did she do anything wrong? Does her ability to garner publicity in the way she did suggest anything dysfunctional about the way that either the press or the Congress operates?

2. Paula Hawkins was defeated by Democrat Bob Graham in her quest for reelection in 1986.

3. Consider note "a", showing that the percentage of House incumbents who succeed in getting reelected over the six-year period that makes up a Senate term is about equal to the percentage of Senate incumbents who are successful when they run for reelection. Does this suggest that the "incumbency advantage," however great it may be, is equal in the Senate and the House, or is the percentage of successful incumbents in any given election the more relevant comparison? In any event, what could explain the higher House reelection rate in a given election?

4. Much theorizing and investigation have been devoted to the ways in which the desire for reelection affects official performance. In the simplest conception of

democracy, reelection provides the incentive to make officials accountable to the public. Concerns about incumbents' electoral advantages suggest that neither the general public nor students of government accept this simple conception as entirely adequate. Although the point cannot be explored in depth in this book, the following brief discussion may suggest some lines of thought and starting places for research.

A particularly influential work has been David R. Mayhew, CONGRESS: THE ELECTORAL CONNECTION (1974). Mayhew hypothesizes that members of Congress are motivated *solely* by the desire for reelection. Of course, Mayhew recognizes that this is at least an oversimplification and an exaggeration. Nevertheless, he concludes that a great deal of the behavior of individual legislators and of the structure and performance of the Congress as a whole are consistent with this simplified assumption. In particular, Mayhew argues that the reelection goal prompts legislators to engage primarily in three activities:

> One activity is *advertising*, defined here as any effort to disseminate one's name among constituents in such a fashion as to create a favorable image but in messages having little or no issue content. A successful congressman builds what amounts to a brand name.... The personal qualities to emphasize are experience, knowledge, responsiveness, concern, sincerity, independence, and the like. Just getting one's name across is difficult enough; only about half the electorate, if asked, can supply their House members' names. It helps a congressman to be known....
>
> A second activity may be called *credit claiming*, defined here as acting so as to generate a belief in a relevant political actor (or actors) that one is personally responsible for causing the government, or some unit thereof, to do something that the actor (or actors) considers desirable. The political logic of this, from the congressman's point of view, is that an actor who believes that a member can make pleasing things happen will no doubt wish to keep him in office so that he can make pleasing things happen in the future. The emphasis here is on individual accomplishment (rather than, say, party or governmental accomplishment) and on the congressman as doer (rather than as, say, expounder of constituency views). Credit claiming is highly important to congressmen, with the consequence that much of congressional life is a relentless search for opportunities to engage in it.
>
> [I]t becomes necessary for each congressman to try to peel off pieces of governmental accomplishment for which he can believably generate a sense of responsibility. For the average congressman the staple way of doing this is to traffic in what may be called "particularized benefits." Particularized governmental benefits... have two properties: (1) Each benefit is given out to a specific individual, group, or geographical constituency, the recipient unit being of a scale that allows a single congressman to be recognized (by relevant political actors and other congressmen) as the claimant for the benefit (other congressmen being perceived as indifferent or hostile). (2) Each benefit is given out in apparently ad hoc fashion (unlike, say, social security checks) with a congressman apparently having a hand in the allocation. A particularized benefit can normally be regarded as a member of a class. That is, a benefit given out to an

> individual, group, or constituency can normally be looked upon by congressmen as one of a class of similar benefits given out to sizable numbers of individuals, groups, or constituencies. Hence, the impression can arise that a congressman is getting "his share" of whatever it is the government is offering....
>
> In sheer volume the bulk of particularized benefits come under the heading of "casework"—the thousands of favors congressional offices perform for supplicants in ways that normally do not require legislative action....But many benefits require new legislation, or at least they require important allocative decisions on matters covered by existent legislation. Here the congressman fills the traditional role of supplier of goods to the home district. It is a believable role; when a member claims credit for a benefit on the order of a dam, he may well receive it. ["Sometimes without justification," Mayhew adds in a footnote.]...
>
> The third activity congressmen engage in may be called *position taking*, defined here as the public enunciation of a judgmental statement on anything likely to be of interest to political actors. The statement may take the form of a roll call vote. The most important classes of judgmental statements are those prescribing American governmental ends (a vote cast against the war; a statement that "the war should be ended immediately") or governmental means (a statement that "the way to end the war is to take it to the United Nations")....The congressman as position taker is a speaker rather than a doer. The electoral requirement is not that he make pleasing things happen but that he make pleasing judgmental statements. The position itself is the political commodity. Especially on matters where governmental responsibility is widely diffused it is not surprising that political actors should fall back on positions as tests of incumbent virtue.

Id. at 49–62.

Although Mayhew contends that a great deal of congressional activity is consistent with the hypothesis of reelection as the only goal, he acknowledges that the hypothesis cannot explain everything.

> Quite the contrary. It is not too much to say that if all members did nothing but pursue their electoral goals, Congress would decay or collapse. Some of the institutional maintenance problems are implicit in the earlier discussion, including a serious one arising from the difficulty of getting members to do grueling and unrewarding legislative work. (Sometimes in the Senate it is even hard to get them to appear and vote.)

Id. at 141. Thus, although many analysts have attempted to refine and elaborate Mayhew's single-motivation explanation of Congress, others have attempted to build on the presumably more realistic premise that most legislators have multiple goals—though concededly these almost always will prominently include reelection, which is a prerequisite to being able to continue to pursue other goals. Following the lead of Richard Fenno, many scholars assume that three motivations tend to be paramount, though in different balances for different legislators: "reelection, influence within the House, and good public policy." Richard F. Fenno, Jr., CONGRESSMEN IN COMMITTEES 1 (1973).

Some social scientists are uncomfortable with a multiple-goal assumption, on the ground that the assumption does not predict which goals will be paramount on which occasions, and thus cannot predict congressional performance. Furthermore, critics argue, the multiple-goal assumption is not "falsifiable," because after the fact, whatever Congress does can be explained by an assumption that is so protean that it could have as easily explained the opposite outcome. Nevertheless, the multiple-goal assumption can provide the foundation for rich and insightful accounts of congressional action on important matters, as in Daniel Shaviro's analysis of major tax changes in the 1980s. In 1981, Congress seemed to adhere closely to Mayhew's model, passing legislation that contained numerous particularized benefits for a variety of interest groups. But in 1986, it passed new legislation that was strongly opposed by many of the same groups. See Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1 (1990).

A recent study proposes an in-between position, assuming that reelection is always the paramount goal, but that often legislators can choose between different courses of action without risk to the goal of reelection, in which case they will pursue other goals such as influence within Congress and public policy. See R. Douglas Arnold, THE LOGIC OF CONGRESSIONAL ACTION 5 (1990). Arnold also adds certain elements to Mayhew's analysis. Arnold concedes that at the time legislators act on many issues, most constituents are unaware of their actions and may be unaware of the issue or of what is the best way for the government to deal with it. But Arnold argues that the legislators must nevertheless take into account how the issue will affect constituents, because the issue may become more salient by election time and the press, interest groups, and most of all an incumbent's challenger will take steps to inform voters of unpopular actions taken by the incumbent. (A striking example is the savings and loan debacle. In the 1980s, very few Americans were aware of the policies the government was following affecting the savings and loan industry. When that issue exploded, imposing enormous costs on an already troubled national fisc, many members of Congress suffered electoral costs because of past connections with savings and loans.) Within this framework, Arnold attempts to show that numerous factors, including the way an issue is framed in debate, may influence whether legislators work for particularized interests or behave in a more "public-regarding" way.

5. Hedrick Smith describes and David Mayhew theorizes about a Congress composed of professional politicians, sophisticated in the use of modern communications devices and other resources to maintain themselves in office. This environment is by no means unique to Congress. Indeed, one of the most striking phenomena in American politics in recent decades is the spread of such "professional" politics beyond Congress and the largest state and local governments to state legislatures in most states and to localities of only modest size. For an insightful account of this phenomenon (despite its rather lurid title), see Alan Ehrenhalt, THE UNITED STATES OF AMBITION (1991). As Ehrenhalt has noted more recently, the ascendency of career, professional politicians has been as complete in Britain as in the United States.

> [I]n the late twentieth century, both political systems have generated a similar cast of characters, people whose dedication to a political career is overwhelming and, in many cases, all but lifelong.

Alan Ehrenhalt, *Political pros*, THE PUBLIC INTEREST, Fall, 1994, at 131, 132.

B. Incumbency and Electoral Competition

It remains to be seen whether the 1992 and 1994 elections will diminish concern over the "incumbency advantage" and its effects on electoral competition. The 325 incumbents reelected to the House of Representatives in 1992 were the lowest number since 1948. This occurred in large part because 52 incumbents declined to run for reelection, a post-World War II record. But the 19 incumbents defeated in primaries also set a post-World War II record, and the percentage of incumbents seeking reelection and winning dipped below 90 percent for the first time since the Watergate election of 1974 and only the second time since 1964. Although a relatively high total of 49 House seats changed parties, the parties' gains partially canceled each other out, with the result that the Republicans gained a modest net of 10 seats.[1]

In 1994, voters showed that they could use a sharper partisan focus in defeating incumbents. The Republican Party won control of both houses of Congress and not a single Republican incumbent Governor, Senator, or House member was defeated. 1994 marked the first time since 1952 that the Republicans won control of the House, and only the third time since 1928.

Although the 1992 and 1994 elections may make the "incumbency advantage" a less salient political concern and will almost certainly affect the nature of that concern, serious consideration of incumbency and electoral competition is still worthwhile, for several reasons. First, it is possible that the relatively high turnover of 1992 and 1994 will prove temporary, and that future elections will return to earlier patterns. Second, even if the role of incumbency in elections is permanently changed, it will be impossible to understand the nature of that change without some understanding of prior conditions. Third, policy and legal issues that have originated in concern over the incumbency advantage, such as term limits and controls on legislative perquisites, or that have been profoundly affected by incumbency concerns, such as campaign finance, will not disappear.

Incumbency in legislative elections has received an enormous amount of study, nearly all of it in the last quarter century. Much is known, but much remains obscure. Little of what has been learned—and even less of the researchers' awareness of the limits of their knowledge—has found its way into popular debates about incumbency. This section will review research on the nature and extent of the incumbency advantage and on its causes and consequences. As we have seen, in any given election, the incumbency advantage is stronger in House races than in Senate contests. The incumbency advantage is a major factor in state legislative elections, sometimes as much as or more than in U.S. House races. However, most of the published research has focused on the U.S. House, and perforce, this section will do the same.

1. All figures in this paragraph are derived from VITAL STATISTICS ON AMERICAN POLITICS 125, 206, 208 (4th ed. 1994). The figure of 49 seats changing parties is complicated by the fact that House districts were reapportioned (between states) and redistricted (within states) between the 1990 and 1992 elections.

1. Extent of the incumbency advantage

It might seem that the extent of the incumbency advantage could be measured easily, by considering the percentage of incumbents who get elected or calculating the average vote percentage obtained by incumbents. Unfortunately, such simple approaches are insufficient. Consider, for example, a Democratic incumbent who runs for reelection in an inner-city Chicago district, and a Republican incumbent running in a rock-ribbed Republican district in downstate Illinois. Suppose each wins by margins of 70 percent or higher. Are their victory margins attributable to incumbency? Perhaps any Chicago Democrat or downstate Republican could have done equally well. Or consider a district with no strong partisan bias, in which there is no incumbent, and the Republican candidate, Roy, receives 60 percent of the vote. Perhaps this victory suggests that Roy was a stronger candidate than the Democrat, Doris. Suppose the same two candidates run two years later, and again Roy receives 60 percent of the vote. Is this victory the result of an incumbency advantage or of the same superior candidacy that was determinative in the first election?

Despite these and similar problems, political scientists trying to measure the incumbency advantage have sought answers to three distinct questions: First, how much is incumbency worth to the average legislator in terms of expected enhancement of his or her percentage of the two-party vote? Second, how does incumbency affect the number of "marginal" districts? Third, how much does incumbency improve a legislator's chance of being reelected?

Vote percentage. The first systematic estimate of the incumbency advantage was performed by Robert Erikson.[2] Erikson attempted to exclude the effects of district partisanship and candidate superiority by estimating the "sophomore surge" and the "retirement slump." In the above example, the sophomore surge would be the increase in Roy's vote percentage from his *initial* election to his first *reelection*, i.e., zero. If Roy had received 65 percent in the second election, his sophomore surge would have been 5 percentage points. Suppose that before Roy's election, the district was represented by another Republican, Ruby, who received 70 percent of the vote in her last reelection effort. The retirement slump would be the decrease from her 70 percent margin to Roy's initial victory margin of 60 percent, i.e., 10 percentage points.

Applying this procedure to the 1954–1960 period, Erikson estimated the incumbency advantage at two percentage points. He concluded that such a small benefit could have been decisive in only a small number of districts and that therefore the fact that a high percentage of incumbents won reelection should be attributed primarily to the fact that most districts were safe for their parties and not to the advantage deriving specifically from the fact of incumbency. However, when he applied the same procedures to later elections, Erikson found that although the two percent estimate remained accurate through 1964, in the 1966–70 elections the incumbency advantage jumped to about five percent.

Subsequent studies using the sophomore surge or retirement slump or both tended to confirm Erikson's finding of a sharp jump in the incumbency advantage

2. See Robert S. Erikson, *The Advantage of Incumbency in Congressional Elections*, 3 POLITY 395 (1971).

and since that time has been in the 5–10 percent range.[3] A similar jump appears to have occurred in state legislatures, but one to two decades later.

Vanishing marginals. The research of Erikson and those who followed him showed a surge in the incumbency advantage in the 1960s, but because their research dealt with averages across districts, it could do no more than suggest a possible adverse effect on electoral competition. The case for such an adverse effect was strengthened in an influential article by David Mayhew.[4]

Political scientists and political practitioners alike have long regarded a representative's margin of victory in one election as a useful indicator of his or her prospects in the next election. There is no single threshold of vulnerability, but political scientists have usually used either 55 or 60 percent as a convenient point for identification of "marginal" districts. Mayhew showed that in the early and mid-1960s, the number of House elections falling within the marginal range declined sharply. By 1972 there were only about half as many marginal elections as in 1956. The decline appeared to be connected to incumbency, because there was no decline when only "open seat" races (those in which no incumbent was running) were considered. Furthermore, when the presidential vote was broken down by House districts, there was no decline in the number of districts that were marginal.

Another drop in marginal districts occurred in the early 1980s. Using more elaborate statistical methods than Mayhew had used, Gary Jacobson estimated the proportion of incumbent races that were marginal (defined as less than a 60% vote total for the winner) as 39 percent for 1946–64, 27 percent for 1966–82, and 17 percent for 1984–88.[5]

Reelection Rates. The vanishing marginals seemed to indicate that incumbents' average advantage in winning votes was indeed paying off in terms of electoral security, with a resultant decline in competition. At least a portion of the extra votes incumbents were getting were boosting many of them from close victories indicating vulnerability to comfortable victories indicating safety. Indeed, the combination of enhanced average vote percentage and vanishing marginals seemed for over a decade to have completed the case for increased electoral safety. However, when scholars in the late 1980s began to look at the incumbency advantage from the seemingly simple perspective of actual rates of reelection, the picture became surprisingly murky.

Table 15-1 shows that from 1950–1990, incumbents who sought reelection enjoyed a high success rate. In only three years were more than 10 percent of incumbents running in general elections defeated, and the figure never reached as high as 12 percent. If incumbents defeated in primaries are included, there were four years in which over 10 percent of the incumbents seeking reelection lost, but the figure never reached 14 percent. The percentage of incumbents defeated in

3. Bear in mind that these are averages. They do not necessary apply to any given incumbent and may vary considerably from one election year to another.

4. See David R. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 POLITY 295 (1974).

5. See Gary C. Jacobson, THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT: COMPETITION IN U.S. HOUSE ELECTIONS, 1946–1988, at 26–29 (1990).

Table 15.1 Electoral Fortunes of U.S. House Incumbents, 1946–1994

Year(s)	Total Running	Lost Primary	Lost General	Total Lost	Total Won	% Won General	% Won Total
1946	398	18	52	70	328	86.3%	82.4%
1948	400	15	68	83	317	82.3%	79.3%
1950	400	6	32	38	362	91.9%	90.5%
1952	389	9	26	35	354	93.2%	91.0%
1954	407	6	22	28	379	94.5%	93.1%
1956	411	6	16	22	389	96.0%	94.6%
1958	396	3	37	40	356	90.6%	89.9%
1960	405	5	25	30	375	93.8%	92.6%
1962	402	12	22	34	368	94.4%	91.5%
1964	397	8	45	53	344	88.4%	86.6%
1966	411	8	41	49	362	89.8%	88.1%
1968	409	4	9	13	396	97.8%	96.8%
1970	401	10	12	22	379	96.9%	94.5%
1972	390	12	13	25	365	96.6%	93.6%
1974	391	8	40	48	343	89.6%	87.7%
1976	384	3	13	16	368	96.6%	95.8%
1978	382	5	19	24	358	95.0%	93.7%
1980	398	6	31	37	361	92.1%	90.7%
1982	393	10	29	39	354	92.4%	90.1%
1984	409	3	16	19	390	96.1%	95.4%
1986	393	2	6	8	385	98.5%	98.0%
1988	409	1	6	7	402	98.5%	98.3%
1990	407	1	15	16	391	96.3%	96.1%
1992	368	19	24	43	325	93.1%	88.3%
1994	386	4	35	39	347	90.8%	89.9%
1952–60	2008	29	126	155	1853	93.6%	92.3%
1962–70	2020	42	129	171	1849	93.5%	91.5%
1972–80	1945	34	116	150	1795	93.9%	92.3%
1982–90	2011	17	72	89	1922	96.4%	95.6%
1952–66	3218	57	234	291	2927	92.6%	91.0%
1968–90	4764	65	209	274	4490	95.6%	94.2%
1992–94	754	23	59	82	672	91.9%	89.1%

Source: 1946–1992, VITAL STATISTICS ON AMERICAN POLITICS 206 (4th ed. 1994); 1994, compiled by editor.

Column 7 shows the percentage of incumbents in the general election who were reelected. The denominator is the total seeking reelection (column 2) minus the number defeated in primaries (column 3).

Column 8 shows the percentage of incumbents seeking reelection who were reelected. The denominator is the total seeking reelection (column 2).

in the mid-1960s. Different studies have generated somewhat different results (as well as some methodological controversies) but there is a near-consensus that the incumbency advantage, measured by vote percentage, jumped in the mid-1960s,

1992 and 1994 was at the high end of the range that prevailed in the previous four decades, but 1992 and 1994 did not break out of that range.

As we have noted, incumbents may be reelected because of party dominance in their districts or because they are superior candidates, without any need for an electoral advantage inherent in incumbency. However, given the boost in incumbents' vote percentage and the sharp drop in marginal districts that occurred in the mid-1960s, an increase in the reelection rate for incumbents at the same time might have been expected and could have been attributed to a heightened incumbency advantage.

Gary Jacobson challenged conventional wisdom regarding the benefits of incumbency by pointing out that for the period 1952–1980, on a decade-by-decade basis, there had been no increase in incumbents' reelection rate.[6] In the 1950s and the 1970s they were reelected at identical rates, with a slight dip in the 1960s. General election reelection rates were nearly the same in all three decades.

How was it possible for incumbents' vote percentages to surge and for the marginals to vanish without a dramatic increase in the incumbency reelection rate? Jacobson's answer lay in another development: At the same time that the average incumbent's vote percentage was increasing, the variation about the mean was also surging.[7] What this meant was that the threshold of marginality needed to be raised. For example, an "incumbent elected in the 1970s with between 60 and 65 percent of the vote was just as likely to lose in the next election as was an incumbent in the 1950s who had been elected with 55 to 60 percent of the vote."[8] The reduced correlation between an incumbent's vote percentage in one election and the next made it possible for incumbents to increase their average vote percentages and to move out of the ranges that had been thought of as marginal while still losing elections as often as they had before.

Jacobson's studies created a new conventional wisdom that incumbents were *not* safer than they had been before the mid-1960s, but not one that lasted long. There was strong scholarly criticism,[9] but the biggest blows to Jacobson's assertions were leveled by the elections of the 1980s. Reelection rates went up noticeably, and more than 96 percent of incumbents running in general elections from 1982 to 1990 were reelected.

Jacobson was not cowed by a mere decade. He argued that the low number of incumbent defeats in the 1980s was a short-term phenomenon, occurring because "national conditions and issues [were not] conducive to change."[10] The 1992 and 1994 elections certainly tend to support Jacobson's position. To be sure,

6. See Gary C. Jacobson, THE POLITICS OF CONGRESSIONAL ELECTIONS (1987); Gary C. Jacobson, *The Marginals Never Vanished: Incumbency and Competition in Elections to the U.S. House of Representatives, 1952–1982*, 31 AMERICAN JOURNAL OF POLITICAL SCIENCE 126 (1987).

7. Much the same point had been documented earlier by Thomas E. Mann, UNSAFE AT ANY MARGIN: INTERPRETING CONGRESSIONAL ELECTIONS (1978).

8. Jacobson, *The Marginals Never Vanished*, at 130.

9. See Monica Bauer & John R. Hibbing, *Which Incumbents Lose in House Elections: A Response to Jacobson's "The Marginals Never Vanished,"* 33 AMERICAN JOURNAL OF POLITICAL SCIENCE 262 (1989).

10. Gary C. Jacobson, THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT: COMPETITION IN U.S. HOUSE ELECTIONS, 1946–1988 133 (1990).

if instead of dividing the 1952–1990 time period by decades, as Jacobson does, one instead separates 1952–1966 from 1968–1990, the picture is one of a noticeable decline in competition. But if 1968–1990 constituted an "era" of low competition, 1992 may have been the beginning of a period of higher turnover.

Before turning to possible causes of the incumbency advantage, we should note another implication of the increased variance in incumbents' vote percentages noted above. Even if the actual number of incumbents who will be defeated or face a close call in a given year is low, increased variance means that the number of incumbents who face *potential* jeopardy increases. Incumbents who contemplate a lengthy career in Congress need to be concerned not only with their jeopardy in the next election, but over a series of elections. Often it takes only one defeat to derail a congressional and perhaps a political career. Mayhew's finding that the marginal elections were declining in races with incumbents but remained high in open seat races might create an expectation that most representatives elected initially in close races will win thereafter by safe margins. However, even after the mid-1960s, only a third of the House members elected initially by close margins were able to follow with three consecutive "safe" victories.[11] Even representatives initially elected with a "safe" margin were found to have a one-out-of-four chance of going down to electoral defeat at some time in the future.[12]

It thus appears that fewer incumbents enjoy long-term security than would appear from looking at one of Mayhew's charts of vanishing marginals. This fact helps to explain the seeming paradox that despite widespread belief that incumbents are "entrenched," observers of Congressional behavior universally report that members usually "run scared" and engage in what Hedrick Smith called "the perpetual campaign."

2. Causes

The previous discussion shows that although the incumbency advantage is a more complex question than is sometimes supposed, it is no myth or popular delusion. Not surprisingly, very soon after it was detected, scholars began to search for causes and to speculate over consequences.

Gerrymandering. An early suspect was gerrymandering. This was natural, since the mid-1960s jump in the incumbency advantage coincided with *Wesberry*, which required that congressional districts within a state contain equal populations and thereby triggered a round of mid-decade congressional redistricting.

Despite its initial plausibility, several reasons exist for rejecting gerrymandering as an explanation of the incumbency advantage. If the marginals were vanishing because of redistricting and not because of the dynamics of House elections, then the results of national and statewide elections should have become more polarized when broken down by congressional districts. Yet, as Mayhew pointed out, there was no decline of marginal results in presidential elections broken down by congressional districts during the period that the marginals were declining in House races with incumbents. Similar results have been found more recently, in statewide as well as presidential elections.[13]

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11. See Melissa P. Collie, *Incumbency, Electoral Safety, and Turnover in the House of Representatives, 1952–76*, 75 AMERICAN POLITICAL SCIENCE REVIEW 119, 138 (1981).

12. See Robert S. Erikson, *Is There Such a Thing as a Safe Seat?*, 8 POLITY 623 (1976).

13. See Jacobson, ELECTORAL ORIGINS, at 96.

Furthermore, the temporal correlation between the incumbency surge and court-coerced redistricting turned out upon closer inspection to be illusory. For example, the percentage of marginal districts declined at least as much in the 1960s in states that did not redistrict as in states that did.[14]

Decline of partisanship. The decline of partisanship in voting provides a better, but only a partial explanation of the incumbency advantage. In the late 19th century

> there was no popular cultural support for the "independent" voter as the man who evaluated candidates and issues on the merits and arrived at an informed decision. On the contrary, such people tended to be scorned as "traitors," "turncoats," or corrupt sellers of their votes.[15]

Times have changed. In a 1986 survey, 92 percent agreed that "I always vote for the person I think is best, regardless of what party they belong to," while only 14 percent agreed that "I always support the candidates of just one party."[16]

In fact, people vote more consistently along party lines than the 1986 survey suggests, but decreased party loyalty is nevertheless a very important cause of the incumbency advantage.[17] By its nature, however, it is an incomplete explanation. Strong party voting helps incumbents who represent safe partisan districts or whose party is benefiting from shifts in voter sentiments in a given year. But by the same token, strong party voting prevents incumbents from protecting themselves against adverse partisan tides. Increased voter willingness to cross party lines and to split tickets creates the *opportunity* for incumbents to increase their vote shares and electoral security by winning votes from adherents of the opposing party. However, there is no logical necessity for votes that become less determined by party identification to favor incumbents. The decline in party voting made the enhanced incumbency advantage possible, but cannot by itself explain why that possibility came to fruition.

Incumbents' activities. Some popular rhetoric seems to treat the incumbency advantage as if it were an axiomatic phenomenon, without any particular cause and somehow immune to voter preferences. Although it is possible that some voters use incumbency as a positive voting cue, there is little evidence for this and it may be offset, especially in recent elections, by hostility toward incumbency. Incumbency is probably best thought of not as an intrinsic electoral advantage but as a resource that a candidate can use to enhance his or her chances.

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14. See John A. Ferejohn, *On the Decline of Competition in Congressional Elections*, 71 AMERICAN POLITICAL SCIENCE REVIEW 166 (1977). For additional indications that redistricting was not responsible for the incumbency surge of the 1960s, see Albert D. Cover, *One Good Term Deserves Another: The Advantage of Incumbency in Congressional Elections*, 21 AMERICAN JOURNAL OF POLITICAL SCIENCE 523 (1977); Albert D. Cover & David R. Mayhew, *Congressional Dynamics and the Decline of Competitive Congressional Elections*, in Lawrence C. Dodd & Bruce I. Oppenheimer, eds., CONGRESS RECONSIDERED (1st ed. 1977).

15. Walter Dean Burnham, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS 73 (1970).

16. Larry J. Sabato, THE PARTY'S JUST BEGUN: SHAPING POLITICAL PARTIES FOR AMERICA'S FUTURE 133 (1988) (Table 4.5).

17. See, e.g., Keith Krehbiel & John R. Wright, *The Incumbency Effect in Congressional Elections: A Test of Two Explanations*, 27 AMERICAN POLITICAL SCIENCE REVIEW 140 (1983).

As Hedrick Smith argued, incumbents do many things, aside from their actual reelection campaigns, to try to assure their reelection. Their legislative activities such as votes on bills are calculated to avoid grounds for attack and to build support from the interests they regard as important to their electoral coalitions. They seek favorable publicity in the news media, and they further publicize themselves through mail sent to constituents at public expense. They deploy their staffs to act in their names as ombudsmen, assisting constituents in matters ranging from simple provision of information to assistance in winning grants or other government funding for a variety of projects in their districts. They spend time attending meetings, functions, and other events to bring them into contact with constituents.[18]

Incumbents engage in these activities to assist in their reelection, and it seems reasonable to assume that the activities have this effect. Nevertheless, it has been very difficult to find solid empirical evidence of a correlation between the activities and the incumbent's vote share. To the contrary, almost all studies have found a lack of correlation.[19] In addition, researchers have been unable to find evidence that incumbent activities discourage strong challenges.[20]

Despite these studies several scholars have attempted to demonstrate that incumbent activities are effective, but none with as great perseverance and creativity as Morris Fiorina. Fiorina and his colleagues have focused on one incumbent activity, "casework," the assistance that House members provide to constituents in their dealings with agencies of the federal government. In what may be the most comprehensive study of casework, they were still unable to show the direct connection between casework and votes for incumbents, but they did show in various ways that casework is associated with favorable attitudes, and that persons who hold these favorable attitudes are more likely to vote for the incumbent.[21]

If such indirect evidence is less than compelling, it is not difficult to find reasons for difficulty in proving the electoral effectiveness of casework and other incumbent activities. First, "casework" is a somewhat vague term that includes a range of activities, and there is no very accurate way to measure it. Second, and perhaps most importantly, no members of the House have volunteered to suspend casework or other reelection-oriented activity in order to provide a controlled experiment from which political scientists can determine the electoral effectiveness of each activity, in isolation or in combination with one another. Once it is borne in mind that in *all* the districts measured in political scientists' models, the incumbents are engaging in casework and other activities to the extent they think

18. See generally Richard F. Fenno, Jr., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978).

19. See, e.g., John R. Johannes & John C. McAdams, *The Congressional Incumbency Effect: Is It Casework, Policy Compatibility, or Something Else? An Examination of the 1978 Election*, 25 AMERICAN JOURNAL OF POLITICAL SCIENCE 512 (1981). For additional references, see John C. McAdams & John R. Johannes, *Congressmen, Perquisites, and Elections*, 50 JOURNAL OF POLITICS 412, 419–20 (1988).

20. See, e.g., Lyn Ragsdale & Timothy E. Cook, *Representatives' Actions and Challengers' Reactions: Limits to Candidate Connections in the House*, 31 AMERICAN JOURNAL OF POLITICAL SCIENCE 45 (1987).

21. See Bruce Cain, John Ferejohn & Morris Fiorina, THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE (1987).

necessary to assure their reelection, the inability to find correlations between varying levels of activities and the electoral results becomes less surprising.

These considerations help explain the studies that find no correlation between casework and votes, but they also point beyond a narrow focus on casework. None of the more general evidence that is available about representatives and their constituents supports the idea that members seek to impress constituents or that constituents evaluate their representatives on the basis of a single activity. Rather, incumbents try to win the trust of their constituents, and they do this by trying to establish that they are qualified to hold the position and that they both identify and empathize with the people in their districts.[22] The "home style" by which each incumbent relates to his or her district varies with the nature of the district and its expectations, as well as with the personality and priorities of the representative.

Campaign finance. The increasing advantage of incumbents in fund-raising in congressional elections is well-known and well-documented.

> House and Senate incumbents in 1978 raised only 38 percent of all the money raised by all candidates for the Congress; that proportion rose steadily to 62 percent in 1990.... House incumbents fared even more famously in the same period. What was a 1.5 to 1 advantage over their challengers in receipts in 1978 became a 3.7 to 1 spread by 1990.[23]

We shall look more closely at the connection between campaign finance and the incumbency advantage in Section IV of this chapter. For now, we should note that comparing the amounts spent by incumbents and challengers is not the most helpful way to understand the effects of campaign money on electoral competition. There is considerable evidence that the absolute amount spent by the challenger has more of an effect on vote percentages than the ratio of incumbent to challenger spending. For present purposes, then, the causal significance of campaign finance can be subsumed under the broader question of the quality of challenges to incumbents. We turn to that question next.

Strategic politicians. There is some irony in the theory of strategic politicians. The theory was put forth by its originators, Gary Jacobson and Samuel Kernell,[24] as a solution to a puzzling disparity between aggregate national election data and data from voter surveys. As it turned out, the theory would not have provided much of a solution and the puzzle it was designed to solve was shown to be illusory. Nevertheless, by focusing attention on the importance of the challenge that is leveled against the incumbent and by providing a framework within which the interplay of national and local conditions in House campaigns could be studied, the theory has helped generate some of the most important insights into congressional elections during the last two decades.

Aggregate data had shown that votes cast in midterm congressional elections reflected national conditions. The better the state of the economy and the more popular the president, the smaller were the vote losses of the House candidates of the president's party in the midterm election. However, national surveys at best

22. See e.g., Fenno, HOME STYLE, at 56–67.

23. Frank J. Sorauf, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 16 (1992).

24. See Gary C. Jacobson & Samuel Kernell, STRATEGY AND CHOICE IN CONGRESSIONAL ELECTIONS (1981).

could find only weak and inconsistent evidence at the level of the individual voter that opinions on national conditions affected House votes. How could national conditions be reflected in aggregate vote totals if individual voters were not influenced by them?

Jacobson and Kernell's answer was that even if voters were not influenced by national conditions, political elites were. Potentially strong challengers to an incumbent would be more likely to run when national partisan trends appeared favorable. When the partisan winds were blowing in the opposite direction, they were more likely to wait. Similarly, potential campaign contributors and other supporters would be attracted to likely winners, and therefore would be more forthcoming in years when the partisan trends were favorable. When conditions were adverse, they would be more likely to channel their efforts and their funds to support endangered incumbents. These inclinations of candidates and supporters would mutually reinforce each other. Strong challengers would be more likely to run when the prospects of picking up support seemed good, and contributors would be attracted to strong challengers.

The result would be that for a voter in a district with an incumbent whose party was benefiting from national trends, the challenger would probably be a weak candidate with little money or support. On the other hand, a voter in a district with an incumbent from the party that was disadvantaged by national trends had a better chance of having the opportunity to vote for a strong, experienced, well-financed challenger. The voter, then, as the survey evidence seemed to suggest, could make a choice based on evaluation of the candidates. It would be the correlation of strong challenges with national trends that would produce the aggregate vote in accordance with national phenomena such as presidential approval, without the necessity for voters to be directly influenced by the national trends at all.

This explanation, clever though it was, contained a central flaw, which Jacobson and Kernell themselves acknowledged would prevent the system they described from being very stable. If voters really were not influenced by national trends in deciding between House candidates, why should potential challengers be influenced by those trends in deciding to run, and why should supporters and contributors be influenced by national trends in their allocations? Citing V.O. Key's dictum that "voters are not fools," Jacobson and Kernell (p. 19) had declared: "Neither... are politicians." The trouble was that their system depended precisely on politicians being fools.

Furthermore, their explanation turned out to be unnecessary. Improved analyses of the survey data showed that direct influence on votes could be found from perceptions of national conditions.[25] Ironically, the discovery that undermined the theory's initial premise gave new plausibility and significance to a modified version. Strategic politicians, if they really were strategic, would not bring national conditions into House campaigns if there were no basis for doing so in voter

25. See, e.g., Eric M. Uslaner & M. Margaret Conway, *The Responsible Congressional Electorate: Watergate, the Economy, and Vote Choice in 1974*, 79 AMERICAN POLITICAL SCIENCE REVIEW 788 (1985). Jacobson and Kernell later conceded the point. See Gary C. Jacobson, *Strategic Politicians and the Dynamics of U.S. House Elections, 1946–86*, 83 AMERICAN POLITICAL SCIENCE REVIEW 773, 774 (1989); Gary C. Jacobson & Samuel Kernell, *National Forces in the 1986 U.S. House Elections*, 15 LEGISLATIVE STUDIES QUARTERLY 65, 74 (1990).

behavior. Once it became apparent that national conditions had a discernible influence on votes, it became possible for the actions of strategic politicians to *amplify* the effects of national conditions.

This amplification can occur only if voters are influenced by both candidate evaluations and by national conditions. If voters responded solely to national conditions, strong challengers would run only when partisan conditions were favorable, but there could be no amplification because voters would already be voting on a referendum basis and the strength of the challengers would have no effect on outcomes. If, as Jacobson and Kernell initially assumed, voters were moved solely by their evaluations of the candidates, strategic politicians would form their strategies without regard to national conditions. But if both candidate evaluations and national conditions influence votes, strategic politicians will have reason to make their challenges in favorable partisan years, and the presence of strong challengers will amplify the already beneficial effects for that party of the favorable national conditions.

There is evidence supporting the amplification version of the strategic politicians theory. Even before the theory had been developed, scholars had begun to become aware of the importance of the challenger in determining the incumbent's vote share. Thomas Mann[26] found that most voters could recognize the incumbent's name in all districts in his sample, but that there were considerable differences in the name recognition of challengers. Voters who were unable to recognize the challenger's name were much more likely to vote for the incumbent. Indeed, a basic premise of the strategic politician theory was that a strong challenger could make a difference. Jacobson and Kernell[27] found that challengers whose strength was evidenced by their having held prior elective office and raised substantial funds by mid-September were successful in defeating incumbents one-third of the time in 1978.

The importance of the strength of the challenge to an incumbent must be considered together with the previous discussion of the decline of party voting and the electoral value of incumbents' activities. The connection is illuminated by the fact that during the postwar era, there has been considerable growth in the disparity between the electoral success of strong and weak challengers. The expected value in vote percentage for a challenger having held prior office was 1.1 percentage points in the late 1940s and over 4.5 points in the 1980s.[28] A high quality challenger is now able to make more of a difference in vote percentage. However, incumbents win by greater average margins, so it takes more of a gain by the strong challenger to defeat the incumbent. Thus, the advantage of an experienced over an inexperienced challenger in terms of chances of defeating the incumbent grew only slightly, if at all, during the same period.[29]

When people vote on the basis of party, challengers can expect to win the votes of most of their partisans whether or not their names are recognized or voters have any impressions of them. The decline of party voting meant that well-liked incumbents could win more partisan defections away from unknown chal-

26. UNSAFE AT ANY MARGIN.

27. STRATEGY AND CHOICE, at 75–76.

28. See Jacobson, *Strategic Politicians and the Dynamics of U.S. House Elections*, at 781–89.

29. Id.

lengers with relative ease. We have seen that incumbents' reelection-oriented activities may help them gain their constituents' favor. By so doing, it may be that those activities contribute to the enhanced incumbent vote percentage and to the vanishing marginals, *but with small impact on actual electoral competition*. Votes are being piled on top of already safe majorities with no effect on outcomes.

Determined and skillful challengers with adequate resources can become known to the voters, can seek to become liked and trusted, and can seek to undermine the popularity of the incumbent. If they do, they can cut into the incumbents' victory margins. To some extent, at least, the benefits incumbents receive from declining partisanship and increased public relations are "soft." But it is very difficult to say, on the available evidence, how much. Probably not all—incumbents usually win even when they are strongly challenged, but not nearly at the high rate of incumbents generally.

In a sense, it might be said that the decision to make or not make a serious challenge is more important than what happens when the challenge is made. Since strong challenges are the exception rather than the rule, it is at the earlier stage that most of the election outcomes are determined. For example, Jacobson contends that the surge in the reelection rate of incumbents after 1982 resulted from a contemporaneous decline in strong challenges.[30] The question then becomes, what influences the incidence of strong challenges?

Presumably, strong challenges are likely when the prospects for victory are highest. It is often stated that incumbents' reelection-oriented activities affect electoral competition indirectly, by discouraging strong challenges. But if politicians are truly "strategic," strong challengers will be deterred only by "hard" incumbency advantages that affect the likelihood of victory, not by "soft" advantages that merely result in oversized margins against weak challengers. Unfortunately, it is difficult to press the analysis beyond this point, because political science has done very little by way of studying highly competitive House campaigns.

Divided government and partisan bias. Our discussion to this point has treated all incumbents alike, without distinguishing between Democrats and Republicans. However, a phenomenon that makes change more difficult would seem on its face likely to benefit the party that is favored by the status quo. Republicans, in particular, often contended (prior to the 1994 election!) that the incumbency advantage trapped them in a minority position in the House during a period when they dominated presidential elections and temporarily (from 1980–1986) were able to win control of the Senate.[31] Other commentators, less concerned with the partisan welfare of the Republicans, have expressed concern over the frequent occurrence since 1954 of divided government[32] or over possible deleterious effects on legislators that can result from being either in a permanent majority or a permanent minority.[33]

The assumption that divided government is harmful to the country has long been a mainstay of party government theory. As we saw in Chapter 7, that

30. ELECTORAL ORIGINS, at 57–58.

31. See, e.g., Lee Atwater, *Altered States: Redistricting Law and Politics in the 1990s*, 6 JOURNAL OF LAW & POLITICS 661 (1990).

32. See, e.g., James L. Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 POLITICAL SCIENCE QUARTERLY 613 (1988).

33. See, e.g., Thomas E. Mann, *Is the House of Representatives Unresponsive to Political Change*, in ELECTIONS AMERICAN STYLE 261, 268 (A. James Reichley, ed., 1987).

assumption recently received a major challenge from David Mayhew, who surveyed the postwar era and was unable to find any pattern that periods of united government were superior to periods of divided government when measured by the passage of significant legislation.[34] Mayhew's book will not bring an end to discussion of divided government. His empirical conclusions will no doubt be carefully scrutinized and, perhaps, challenged by other scholars. In addition, Mayhew does not address the argument that united government is important for government accountability to the public,[35] even if it has no true superiority in government performance. One possible interpretation of the 1994 election is that the two-year period of united government following President Clinton's election made it possible for the electorate to hold the Democratic Party accountable for the performance of government. The perhaps ironical result was the quick reintroduction of divided government.

Even if it is assumed that divided government is a bad thing, it does not appear that the incumbency advantage has been a major contributor to its existence. The incumbency advantage may have reduced the rate at which shifts in the vote from one party to the other are translated into seat shifts in the House.[36] However, this effect has not had a major long-term partisan effect. This can be seen from the fact that during the long period of Democratic dominance following the mid-1960s growth in the incumbency advantage, Republicans were unable to make consistent gains in open seat races. From 1968 to 1990, the Democrats won 80 previously Republican open seats while the Republicans won 71 previously Democratic open seats. Even during the Reagan and Bush years, the Republicans had only a 31–29 lead in capturing open seats from the opposing party, more than offset by a net Democratic gain of five seats in newly created districts.[37] And these results must be read against the fact that the Democrats had more open seats to defend.

Commentators have generally offered two types of explanations for the pattern of Republican domination of the presidency and Democratic domination of the House. The first type assumes that divided government reflects people's preferences, either to prevent either party from controlling the government[38] or because the issues on which voters prefer Republican positions seem more important in the presidency, while the issues on which voters agree with the Democrats are those more within the province of Congress.[39] The 1994 election appears to favor the first of these views. However, proponents of the second, which is known as the theory of "issue ownership," might try to explain the 1994 results on the

34. See David R. Mayhew, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING AND INVESTIGATIONS, 1946–1990 (1990).

35. See Morris P. Fiorina, *An Era of Divided Government*, in DEVELOPMENTS IN AMERICAN POLITICS 324 (Gillian Peele et al., eds., 1992).

36. See Stephen Ansolabehere, David W. Brady & Morris Fiorina, *The Vanishing Marginals and Electoral Responsiveness*, 22 BRITISH JOURNAL OF POLITICAL SCIENCE 21, 31–32 (1992).

37. See Gary C. Jacobson, *The Persistence of Democratic House Majorities*, in THE POLITICS OF DIVIDED GOVERNMENT 57, 62–63 (Gary W. Cox & Samuel Kernell, eds., 1991).

38. See Fiorina, *An Era of Divided Government*.

39. For different versions of this view, see John R. Petrocik, *Divided Government: Is It All in the Campaigns?*, in THE POLITICS OF DIVIDED GOVERNMENT, at 13; Jacobson, ELECTORAL ORIGINS; Byron E. Shafer, *The Election of 1988 and the Structure of American Politics: Thoughts on Interpreting an Electoral Order*, 8 ELECTORAL STUDIES 5 (1989).

grounds that historical events, especially the demise of the Soviet Union, may have altered the arrangement of issues that are "owned" by the Democrats and the Republicans.

The other type of explanation focuses on challengers. Scholars have noted that strong Republican challengers have been less "strategic" than Democrats in their selection of favorable years to run,[40] and Jacobson has documented that during the postwar period Republican challengers have been less experienced and therefore presumably weaker candidates than Democratic challengers.[41]

The questions why Republicans have not been able to recruit stronger challengers and why voters may have preferred Democratic control of Congress and Republican control of the presidency over an extended period of time are beyond the scope of our concern here. It is sufficient to note that the incumbency advantage appears to have played a modest role, if any, in the longtime dominance of the Democrats in the House of Representatives. The 1992 election, which sent more new members to the House than any post-war election, produced only a small Republican gain. Fewer incumbents were defeated in 1994 than in 1992. What made the 1994 election one of historic importance was not the defeat of incumbents but the fact that all the districts in which party control shifted, whether or not an incumbent was running, went in the same direction.

3. Conclusion.

This survey of recent research on the incumbency advantage has yielded these conclusions:

1. House incumbents have enjoyed considerable success since 1950, though over the long term a House member's electoral security is comparable to that of a Senator.

2. There was a lasting surge in the incumbency advantage, as measured by vote percentage, in the mid-1960s. However, the second celebrated surge in reelection rates cannot now be said to have been more than a temporary phenomenon of the 1980s.

3. Electoral success is not something that comes automatically to incumbents. Rather, they work hard to accomplish it, by a variety of activities. The effectiveness of these activities in winning votes has been surprisingly difficult to document by rigorous statistical methods. Nevertheless, until the contrary is demonstrated, it seems reasonable to assume that incumbents' activities have been effective in boosting their vote percentages.

4. Although the assumption that incumbents' activities increase their vote percentages seems reasonable, how resistant this advantage will be to a strenuous challenge is harder to say.

5. Experienced, well-funded challengers can cut substantially into incumbents' margins and are successful in a surprisingly high percentage of attempts. The high reelection rate from 1984 to 1990 was not because incumbents regularly defeated strong challengers but because they were rarely confronted with strong challengers.

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40. See Jacobson, *Strategic Politicians and the Dynamics of U.S. House Elections*; William T. Bianco, *Strategic Decisions on Candidacy in U.S. Congressional Districts*, 9 LEGISLATIVE STUDIES QUARTERLY 351 (1984).

41. See Jacobson, ELECTORAL ORIGINS, at 61–63.

6. It does not necessarily follow, however, that many more incumbents would have been defeated if there had been more strong challengers. Strong challenges are much more likely to occur when there is a good chance of success.

7. Many of the uncertainties regarding cause and effect result from the lack of concentrated research on hotly contested House races.

8. As the 1992 and 1994 elections have demonstrated, all of the above are subject to change.

This complex and in some respects unclear picture does not suggest firm answers to the legal and policy questions that will be considered in the remainder of this chapter. Perhaps it will help us to avoid facile responses based on unfounded or oversimplified assumptions.

Notes and Questions

1. The preceding essay has emphasized empirical rather than normative considerations. Normative evaluation will be guided by one's overall perspective on how democratic government should work. Two such perspectives are the progressivist view, described in Chapter 1, and the party government view, expounded by Morris Fiorina in Chapter 7. Which aspects of the picture of electoral competition described above would be most encouraging or discouraging to a progressivist? To a party government proponent? Are there institutional changes that would improve the situation from either or both perspectives?

II. Perquisites

People v. Ohrenstein
77 N.Y.2d 38, 565 N.E.2d 493 (1990)

WACHTLER, Chief Judge.

The primary question on this appeal is whether the Minority Leader of the State Senate may be prosecuted criminally for having assigned employees of his Senate staff, largely during the year 1986, to work on political campaigns for members of his party seeking election or reelection to the Senate. The case also presents the question whether defendants may be prosecuted criminally for having placed on the Senate payroll, during that same period, "no-show" employees—persons who did no work and were not expected to do anything to earn their salaries.

The trial court dismissed hundreds of counts relating to the use of Senate staff employees in political campaigns, and the Appellate Division precluded the prosecutor from proceeding on the remaining counts in that category. However, both courts sustained the counts relating to the "no-show" employees. The prosecutor and the defendants have cross-appealed. We now affirm, emphasizing that we are not dealing here with a civil action to enjoin the expenditure of funds or to recover funds already expended. Nor do we condone the challenged expenditures. Our focus is solely on whether defendants' acts subjected them to criminal prosecution under the circumstances of this case.

I. The Facts....

The defendant Manfred Ohrenstein is a Democratic Senator and the Minority Leader of the State Senate. The indictment alleges that in 1986 he conspired with his chief of staff, defendant Francis Sanzillo, and Senator Howard Babbush to use Senate employees from their staffs in seven campaigns for the Senate in which the incumbents were considered vulnerable. In two of the campaigns Democratic Senators were seeking reelection; in the others Democratic candidates challenged Republican incumbents.

[T]hese employees fell into three categories. Some were regular legislative aides who were temporarily assigned to work on the campaigns (Category 1). Others were hired for the campaigns and retained afterwards (Category 2) or let go when the campaigns were over (Category 3). These employees received regular salaries biweekly from the Senate payroll. In each instance the Senator or his designee certified that the employee was on the Senate staff and had performed "proper duties" during the relevant period. If the campaign efforts had been wholly successful, it is likely that the Democrats would have obtained a majority in the Senate and that Senator Ohrenstein would have become the Majority Leader. But the efforts did not succeed entirely; in all seven of the targeted campaigns the incumbents, including the two Democratic incumbents, were reelected.

In 1988, the defendants and others were indicted by a Manhattan Grand Jury. The indictment contains 665 counts charging the defendants, individually or in various combinations, with felonies and misdemeanors generally related to theft allegedly committed between 1981 and 1986. The bulk of the charges concern the use of Senate staff in political campaigns and most of these charges relate to the 1986 election. The defendants were also charged with placing four persons on the payroll who performed no services of any kind. It is alleged that the defendants knew that these employees did nothing and, in fact, had no duties but that the Senators or their designees nevertheless certified that the employees had performed "proper duties."

[The trial court dismissed the counts relating to employees in Categories 1 and 2, but denied defendants' motion to dismiss the counts relating to Category 3 and "no-show" employees. The Appellate Division ruled that the Category 3 counts should have been dismissed, and otherwise affirmed the rulings of the trial court. In this opinion, the Court of Appeals—the highest court in the New York system—affirms the decision of the Appellate Division.]

II. The Campaign Worker Counts

On the prosecutor's appeal to our Court, it is urged that all counts relating to use of staff employees by these defendants for campaign work should be restored and that there is no constitutional impediment to prosecution. However, there is a threshold question as to whether the acts alleged were subject to criminal prosecution. We have concluded that they were not and therefore find it unnecessary to reach the constitutional questions with respect to these counts.

The indictment charges the defendants with violating various generic sections of the Penal Law dealing with theft, but all of the charges relating to the campaign workers rest on a single prosecutorial premise: political campaign activities were not a "proper duty" of a legislative staff member. Based on this premise the defendants are charged with filing false instruments for certifying that members

of the staff active in political campaigns performed "proper duties," and are further charged with committing larceny by false pretenses for inducing the State to pay the salaries in reliance on the allegedly false statements. The defendants are also charged with theft of services on the theory that legislative employees assigned to campaign work have been diverted from their "proper duties". Counts charging the defendants with engaging in a conspiracy and a scheme to defraud the government rest on the same premise.

It is important to emphasize that we are not dealing here with broad policy and ethics questions concerning the propriety of permitting State employees generally to participate in political campaign activities. This case focuses narrowly on alleged criminal activities of legislative employees who are unique in several respects because of the nature of the Legislature's function.

...The Legislative Law delegates to the Minority Leader the power to "appoint such employees to assist him in the performance of his duties as may be authorized and provided for in the legislative appropriation bill" (§ 6[2]) and to determine their tenure (§ 8) and salaries (§ 10). Similar powers are delegated with respect to committees (§ 9). However, there is no statute fixing the hours of work for such employees or defining the duties of legislative aides or the duties of the Minority Leader they are hired to assist. And at the times relevant here, there was no rule or regulation concerning these matters. The Legislature is not always in session, and when it is in session, legislators and their staffs often work late into the night and through holidays and weekends until the Legislature's work is done. They were not required to account for their time and received no additional compensation or formal compensatory time allowances for overtime. Legislative staff members worked when they were needed and were often given free time when they were not needed, at the discretion of the particular legislator.

The appropriation bill that authorized the salaries in this case limited the amount of money available but did not otherwise limit the legislator's powers with respect to the allocation of staff time or function. It provided simply that the funds were to be used for "personal service of employees and for temporary and expert services of legislative and program operations... [and] of standing committees."

Thus the statutes permitted the individual legislator to appoint staff members, to determine the terms and conditions of their employment and to assign duties and the hours of work as the legislator deemed necessary to fulfill the broad range of legislative duties. Despite this extensive grant of authority, the prosecutor urges that a Senator's power to assign duties to legislative assistants should be limited to governmental activities and should not include purely political ones. Although this distinction may be relevant to other State employees, the line between political and governmental activities is not so easily drawn in cases dealing with legislators and their assistants.

The Legislature is the "political" branch of government. All of its members are elected every two years and all legislation is the product of political activity both inside and outside the Legislature. Indeed, by statute the State Legislature itself is structured along party lines with the majority and minority parties in both houses organized behind elected party leaders. As noted, the Minority Leader is expressly authorized to appoint persons to assist him with his duties, and annual appropriations specifically authorize the expenditure of State funds to compensate these employees and enable the party leaders to carry out that party's "program

operations." In addition to political activities formally recognized at law, there are additional functions which a legislator performs to gain support in the community, such as distributing newsletters and meeting constituents. Although these activities may be fairly characterized as political, as opposed to governmental, they are considered an inherent part of the job of an elected representative and thus perfectly legitimate acts for a legislator or legislative assistant to perform (*Hutchinson v. Proxmire*, 443 U.S. 111 (1979)). Indeed, the prosecutor does not suggest that every legislator who uses State facilities or personnel for any type of political activity should be indicted for misuse of government funds. As the People make clear in their reply brief, for example: "The People recognize that some 'political' activities of legislators and their aides do fall into an uncertain or 'gray' area." Conduct is not illegal "merely because legislative employees worked on election campaigns." It has "never been [the People's] position that legislative employees are prohibited from engaging in political campaign activity." Thus the prosecutor's objection to the defendants' use of Senate staff for the campaigns is not based on the fact that it is a political activity but on the belief that it is too political.

...Although prior to 1987 some felt that the use of staff employees in political campaigns should be prohibited or subject to limitations, it is apparent that for many years that was not the prevailing view.

In 1945, a Joint Legislative Committee recommended that legislative staff employees not be included with other State employees in the Civil Service system. The study notes that: "Under our theory of government where party programs have been the basis for legislation, it might hamstring a legislator to surround him with employees unsympathetic to his point of view or to whom party strategy cannot be confided...[furthermore] civil service employees would not be free to participate in the political activity generally required of a legislator." In subsequent years..., critics and concerned legislators recommended curtailing the practice or suggested imposing restrictions or "guidelines" regulating the use of legislative staff members in political campaigns. But it was not until 1987 that the Legislature placed any restrictions on the practice.

In that year the Legislature created a commission to study the subject and adopted interim guidelines reaffirming the right of legislative employees to participate in political campaigns, provided that did not interfere with legislative duties, which for the first time was defined to include specified activities excluding political campaigns. Later in the year Governor Cuomo signed the Ethics in Government Act, establishing a Legislative Ethics Committee to review such matters (L.1987, ch. 813) and adopted the New York State Governmental Accountability, Audit and Internal Control Act of 1987 (L.1987, ch. 814), which required the Senate to adopt procedures regulating its personnel and their salaries.

Thus prior to 1987, when the activities at issue here occurred, the Legislature was aware of the fact that its members were using staff employees in political campaigns perhaps excessively, and nevertheless chose to place no restrictions on the practice. Although it is arguable that the defendants' conduct might have exceeded the custom in some respects, the controlling factor for the purposes of a criminal prosecution is that there was no law which, either expressly or as interpreted by the courts, declared the acts to be criminal. Moreover, it cannot fairly be said that the Legislature otherwise forbade the conduct so that it could serve as a predicate for a conviction under general Penal Law provisions.

The prosecutor urges that the matter does not end here. He contends that the defendants' conduct is prohibited by article VII, § 8 of the State Constitution, which prohibits the use of State moneys for "private undertaking[s]." ... In other words, the prosecutor's position is that if prior to 1987 the Legislature did not actually prohibit the defendants' use of Senate staff in political campaigns, it nevertheless must be deemed to have done so because the Constitution would not permit the Legislature to expend State moneys in this manner or authorize others to do so.

... The prosecutor recognizes the need for a legislator or someone in the legislator's office to respond to constituent inquiries, as well as the need to have staff members take some part in a legislator's reelection campaign which may incidentally involve some use of State facilities. He argues, however, that exclusive or extensive use of legislative personnel for election campaigns is prohibited by the Constitution, although he concedes that this provision would not preclude the Legislature from authorizing public funding for political campaigns but urges that it would have to be done impartially to avoid being treated as a "private undertaking."

These arguments are far removed from the type of analysis appropriate to a criminal prosecution and need not be resolved here. Notably, although this provision has been a part of the State Constitution for well over a century, and the courts have frequently been called upon to construe it, this is the first time that it has been suggested that a violation, if it be that, should serve as a predicate for criminal prosecution. A review of the section and its history shows that it was never intended to be used in this manner.

[The court's review of the history of article VII, § 8, which is omitted here, leads it to this conclusion:] The constitutional prohibition limits the power of the Legislature to appropriate, but it does not create a hidden limitation in every appropriation so that any expenditure which is facially valid, but constitutionally prohibited, can be deemed an unauthorized expenditure and therefore a predicate for a criminal prosecution. That would elevate and convert an ordinary fiscal responsibility measure into an extraordinary penal one and distort the purposes of the constitutional prohibition.

The dissent agrees that all the charges relating to the use of Senate staff in political campaigns should be dismissed, except those dealing with employees hired for the campaigns and released afterward (Category 3). Dismissal of those charges, the dissenter contends, will permit the Legislature to determine how State funds should be spent without any oversight by the courts. However, it should be emphasized that in this case we have not been called upon to decide whether what occurred here should be civilly enjoined in the future or whether the money spent in the past may be recovered as an unauthorized expenditure of State funds. All we have before us is a criminal indictment and we hold only that the defendants cannot be held criminally liable for their use of Senate staff in these campaigns under the practice that existed prior to 1987.

Nor are we saying, as the dissent suggests, that such conduct would be permitted today or that it can continue in the future with impunity unless the Legislature adopts a statute specifically prohibiting it. The statutes dealing generically with theft provide a basis for prosecution in cases where government employers use State employees for activities which are prohibited or are not within the employees' duties as defined by statute, rule or regulation. The point we are mak-

ing in this case is that at the time the defendants acted, their conduct was not prohibited in any manner; nor could they have known that they were subject to criminal prosecution for their acts; there was no statute, nor was there any rule or regulation defining the duties of legislative assistants or limiting the nature or extent of their permissible political activities. In a criminal prosecution where these defendants are charged with engaging in activities prohibited by law, the absence of any such legal prohibition is fatal to the prosecution.

Our holding is a narrow one based on circumstances which no longer exist. As indicated, the Legislature, acting as employer, has now adopted a joint resolution which defines some of the duties of legislative assistants and imposes limitations on a legislator's use of such assistants. Additionally, the Legislature has adopted statutes requiring such staff members and their employers to make a more extensive account of their activities and has also created a panel to further study the matter and make additional recommendations. The joint resolution specifically addresses the dissenter's concerns and prohibits legislators in the future from hiring staff assistants solely to work in political campaigns. We cannot decide future cases not before us; but in response to the dissent it is only fair to note that those who engage in such conduct in the future will not be able to make the arguments that we find determinative here in the event they are criminally prosecuted.

III. The "No-Show" Counts

On the defendants' appeal they urge that the Appellate Division erred in holding that prosecution of the counts relating to the "no-show" employees is not prohibited by...the separation of powers doctrine. We agree with the Appellate Division.

The theory underlying these counts is that the defendants filed false instruments when they certified on the payroll records that these employees performed "proper duties," and committed larceny when they induced the State to rely on the false statements. Here there is no question as to what "proper duties" include, because no matter how they are defined, they must at least include the performance of some services, of some type, at some time. Here it is alleged that these employees did nothing, that the defendants knew this and that the defendants also knew that they had no duties. These allegations are sufficient to sustain these criminal counts.

This should also dispose of the defendants' argument that the indictment and prosecution constitutes an unwarranted intrusion into the affairs of the Legislature in violation of the separation of powers concept because it will permit the executive and the courts to determine what are proper duties for legislative staff. No such inquiry is necessary in this case if, as alleged,, these staff members did nothing and were not expected to perform any duties.

Accordingly, the order of the Appellate Division should be affirmed and the judgment of the Appellate Division should be affirmed, without costs.

SIMONS, Judge (dissenting in part).

I agree with the majority that the counts of the indictment founded on defendants' use of their regular employees for political activities in addition to legislative duties must be dismissed (Categories 1 and 2). I also agree that the counts of the indictment charging defendants with certifying the salary of four "no-shows,"

persons placed on the legislative payroll who performed no duties, should stand (Category 4). I disagree, however, with the dismissal of the charges alleging that defendants unlawfully authorized payment from State funds to persons whose only duties consisted of working for Democratic senatorial candidates during the election campaign (Category 3). Certifying their payment from State funds was criminal and the counts alleging defendants did so should be reinstated.

I would have thought the use of public funds to finance the election campaigns of the candidates of one party and defeat candidates of the opposition was so clearly unlawful that it was not worth discussion. Any other view devalues the democratic process by leaving incumbent legislators free to perpetuate themselves in office at government expense. The majority concludes otherwise, however, reasoning that partisan political activities are "proper duties" of a legislative employee. Once this premise is accepted, it follows easily that employees may be hired to engage in a broad range of purely political activities and be paid for it by the State because they are doing no more than fulfilling their public duties. The Legislature may restrict such political activities, the majority holds, but since it had not done so in 1986, defendants' conduct was not criminal and the charges involving employees in Categories 1, 2 and 3 must be dismissed.

I know of no authority, and the majority cites none, which would support such reasoning. Political activities are private, not public, matters and the use of public funds to pay employees hired for private purposes is unlawful. Thus, the question is not whether the Legislature has ever restricted the power of its members to hire campaign workers at State expense or criminalized such conduct. It has never had the power to authorize such employment....

I

[The work performed by the Category 3 employees] served no public purpose. On the contrary, everything they did was political. Thus, a determination that defendants were guilty of criminal conduct for certifying their payment from State funds does not involve intrusion by the Court into matters of legislative discretion. It involves no more than a determination of whether political activities are a part of a legislator's public duties which may be paid for from public funds.

...The employees performed a wide range of political duties. For example, one was assigned as an employee of the Commission for Water Resources and Needs for Long Island at a salary of $500 per week but acted as the campaign manager for one of the candidates. She was not even aware that she was assigned to a commission until terminated after the election. Another worked as a "gofer" for one of the candidates and was paid $1,400 from funds allocated to the Commission on Rural Resources. One appointee, listed on defendant Ohrenstein's payroll as a Senate "research analyst", received a total of $10,000 from the State for checking the biographical backgrounds of two Republican incumbents. Others were hired as publicists, campaign coordinators, poll takers or in similar jobs at comparable salaries....

II

...The statutes in question, like penal laws generally, do not proscribe specific practices or methods but rather focus on whether the conduct causing the injury was blameworthy. The essence of the larceny charges against defendants is that

they used State funds knowing the use was unauthorized, i.e., that the funds could not be used for the private purpose of campaign activity. The defendants' claim, accepted by the Appellate Division and the majority in this Court, is that the charges cannot stand because no provision in the Penal Law defines this conduct as criminal. There is no statute proscribing payments of State funds to "no shows" either, but doing so is a crime. The myriad ways in which the improper use of governmental funds may be accomplished precludes such specificity and the majority, by sustaining the counts in the indictment involving "no shows", recognize as much.

The majority asserts a specific statute is required in this case, however, because political activities are an inherent part of a legislator's public duties. They hold that unless the Legislature proscribes the use of legislative aides for political purposes the practice is proper. The presence or absence of a statute prohibiting the specific conduct is irrelevant. As New York and every other jurisdiction which has addressed the issue has found, partisan political activities are private, not public functions, and the use of public funds for such purposes is improper....

Some of these authorities relate to the use of public funds by State agencies to support propositions rather than candidates but the logic of applying them to legislative election campaigns is inescapable. Campaigning, whether for a cause or a candidate, is a private activity. The government has no interest in paying for partisan activity to obtain a particular election result. Political parties, by definition, represent only a portion of the public and their purpose is to advance the views of the group they represent. It is not possible, therefore, to render a service to the public or perform "proper duties" of the Legislature by working solely to elect the candidates of a particular party or to increase the power and influence of a particular political leader. Such work has no reasonable connection with serving the public....

The necessity for the rule is apparent when viewed from a broader perspective also. Elections are the central event in any democratic society. If they are to fulfill their function, two aspects must be preserved: (1) voters must have an effective voice in choosing their representatives and (2) candidates, whether incumbents or challengers, must have a reasonably equal chance at success. Permitting the Legislature, which has access to the biggest campaign war chest of all, the public treasury, to use public funds solely for campaign purposes in an attempt to dominate elections, threatens the basic integrity of the democratic process and implicates important constitutional concepts of government neutrality and fair dealing....[3]

The majority, in holding that political activities are part of a legislator's public duties, has failed to distinguish between the many legitimate representational activities performed by legislative staff, e.g., distributing newsletters and answering constituent inquiries, and those purely political activities directed at securing reelection. There is a world of difference between paying a staffer performing proper and legitimate duties to handle constituent concerns, however, and paying an employee from funds appropriated for the Commission on Water Resources to

3. These principles do not render legislation for the public financing of political campaigns unlawful. It is only the partisan use of the public treasury which is prohibited....

be the campaign manager for a Democratic candidate seeking to oust a Senate incumbent. The former is perfectly proper; the latter most certainly is not....

The majority in support of its position that staffing Democratic headquarters and campaign organizations at public expense is in the "gray area" between legitimate representational activity and purely political activity, cites the prosecutor's acknowledgment that sometimes differentiation between the two is difficult. The prosecutor did not concede that the work performed by the campaign-only employees was proper in this case, however. He contended that the activities of employees in all three categories covered by the indictment were not "even near" the gray area.... It is difficult to disagree with that assessment when workers in Category 3 did only political work, many were on commission, not Senate payrolls, and most worked to elect five private citizens seeking office and could not be performing public duties of a representational nature for legislators.

If the State had given conflicting interpretations of the propriety of hiring campaign workers at public expense, defendants could reasonably contend that they acted in good faith and that the authorities cited should not serve as a predicate for conviction under the general Penal Law provisions. But neither the New York courts nor the State's agencies have ever authorized this conduct....

Moreover, defendants knew the law on the subject for they had researched the issue themselves. [In] 1984, two years before the events covered in this indictment, defendant Ohrenstein retained a law professor to thoroughly research the question. The professor issued a 26-page opinion which discussed the Penal Law provisions at issue and analyzed most of the same judicial authorities relied on in this dissent. He concluded that the use of legislative employees for campaign purposes could be illegal. More importantly, he carefully distinguished between staffers who performed legislative functions but devoted part of their time to political activities and employees hired solely for campaign purposes, noting that while permanent staffers might justifiably use free time for political activities, the employment of persons at public expense solely for campaign work would present grave questions under the Penal Law sections relating to larceny, offering false instruments for filing and theft of services. Instead of heeding their lawyer's warnings or inquiring of State agencies about the propriety of their intended conduct, however, defendants chose to hire people at public expense to staff these Senate campaigns.

...Had defendants genuinely believed that campaigning was a proper public duty, they would have identified the employees listed on the payroll certifications as "campaign workers", not as "research assistants", "legislative aides", etc. Moreover, had they believed their conduct proper, there would have been no need for the efforts revealed in the Grand Jury testimony to conceal the payments from the public. There was evidence, for example, that one candidate had two "campaign managers", one figurehead whose name was disclosed to the press and a counterpart not publicly acknowledged but paid by the State; that several "farmed out" staffers were instructed to avoid the media or to use pseudonyms when dealing with reporters so that they would not be recognized; that campaign workers paid from public funds left campaign headquarters at the first sign of a reporter to avoid disclosure and that message boards at campaign headquarters were altered to avoid reporters recognizing names. These actions bespeak guilty knowledge, not a good-faith belief by defendants that their conduct was permissible under the law....

V....

The majority's assertion that defendants' conduct cannot be repeated, notwithstanding its concession that the Legislature possesses the authority to finance purely political campaign activities at State expense and its broad view of the Legislature's power over its employees virtually assures that similar conduct will occur in the future. Only the bounds of human ingenuity will limit it. Accordingly, I dissent and would reinstate the counts relating to the 18 employees who worked only on campaigns.

Notes and Questions

1. If some plaintiffs had brought a civil action action in 1986 seeking to enjoin Ohrenstein and the other defendants from assigning public employees to pure campaign activities, would the New York Court of Appeals have upheld an injunction? Should the fact that the actual *Ohrenstein* case was a criminal prosecution make a decisive difference?

2. Given the majority's decision to throw out all the counts related to public employees engaging in campaign work, was it correct to uphold the counts related to public employees who were not required to work at all? If it is a crime to appropriate state funds to pay "employees" not to do any work at all, why is it less of a crime to use those funds to pay "employees" to work, but not to work for the state? If a state legislator is accused in New York of theft for using state funds to hire an individual to tutor the legislator's children, would the charge be upheld under *Ohrenstein*?

3. Is the dissenter right to agree with the dismissal of the counts based on Category 1 and 2 employees while voting to uphold the counts based on Category 3 employees? If the dissenter's view had prevailed, what incentives would be created for legislative party leaders who want to have state-paid employees available to perform important campaign functions?

4. The *Ohrenstein* majority emphasizes that it is holding only that abuse of legislative perquisites cannot be regulated by means of criminal charges based on general criminal offenses such as theft. Nevertheless, other courts often have been equally inhospitable to efforts to employ civil remedies against abuse of legislative perquisites.

One such case was UNITED STATES ex rel. JOSEPH v. CANNON, 642 F.2d 1373 (D.C.Cir. 1981), cert. denied, 455 U.S. 999 (1982). *Cannon* was an action brought under the False Claims Act, a Civil War statute permitting citizens who have discovered fraudulent claims against the government to bring an action requiring reimbursement and, if successful, recover a portion of the repayment. The claim in this case was that a United States Senator, Howard Cannon, had defrauded the government by assigning one of his staff aides, Chester B. Sobsey, to do full-time campaign work while Sobsey was drawing a federal salary. The only specific regulation of the subject was Senate Rule 43, prohibiting Senate aides from soliciting or receiving campaign contributions unless the aide had been designated by the Senator to perform such services. The court denied the claim, basing its conclusion on an interpretation of the False Claims Act. However, this interpretation was based in large part on the possibility that the form of review that would be required if such claims were permissible would require the resolu-

tion of a nonjusticiable question, namely, which "political" activities are permissible for legislative staff. Excerpts from the *Cannon* opinion follow:

> [T]he construction of the Act for which appellant contends—the only construction through which appellant could hope to achieve victory—would require us to venture far beyond the limits of acceptable judicial action....
>
> [S]o-called political questions are denied judicial scrutiny, not only because they invite courts to intrude into the province of coordinate branches of government, but also because courts are fundamentally underequipped to formulate national policies or develop standards of conduct for matters not legal in nature. A challenge to the interworkings of a Senator and his staff member raises at the outset the specter that such a question lurks....
>
> Even assuming, as fairly we may, that the funds appropriated were intended solely to compensate staffers for performance of their "official" duties, we are left with the perplexing question whether campaign work is official activity. Not even the Senate itself has been able to reach a consensus on the propriety of using staff members in reelection campaigns; rather, the history of its attempts to develop a suitable rule reveals the lack of a firm standard during the period relevant to this case, and vividly portrays the keen difficulties with which courts would be faced were they to attempt to design guidelines on their own.
>
> [As of 1976, when the alleged fraudulent claim occurred, the only regulation of staff campaign activity was Rule 73. Even after 1976, although serious efforts were made in the Senate to adopt regulations, it proved difficult to do so. For example, one proposal] met a very early demise..., a fate reflective of the still-continuing inability of the Senate to prescribe binding standards of behavior in that regard, as well as of the perceived need for further study of the problem....
>
> [T]he interpretation of the False Claims Act suggested by appellant would license the courts to monitor every action taken by a Senator and his aide in an effort to determine whether it is sufficiently "official" or too "political."
>
> The dilemma thus posed is just as unsurmountable here as we found it to be in another recent case—one involving a presidential reelection campaign. *Winpisinger v. Watson*, 628 F.2d 133 (D.C.Cir. 1980). There we cited both lack of standing and general prudential considerations in declining to exercise jurisdiction to deal with claims of misuse of federal power and funds by a candidate who allegedly had followed
>
> > a concerted course of conduct designed to use the public treasury for salaries, travel expenses, costs of meetings and other political outlays; to grant and withhold public employment based upon political support by the employee; and to promise and award federal programs and funds to communities as political inducements and rewards, all in order to obtain support for President Carter's renomination.
>
> These accusations, we noted, "relate[d], quite literally, to virtually every discretionary decision made by the Administration acting through...high

government officials;" "[c]onsequently," we said, "any relief, to be effective, would have to be as broad as the authority of the high offices held by the federal defendants." So,

> [w]hether shaped as declaratory relief, or injunctive relief, or both, the court's judgment would have to interject itself into practically every facet of the Executive Branch of the federal government, on a continuing basis, for the purpose of appraising whether considerations other than pure public service motivated a particular defendant in the performance of his or her official duties.

But this, we concluded, was beyond the ability of the judiciary, for the courts simply are "not suited to undertake neutral consideration of every Executive action." And we pointed out that resolving the issue drawn would compel us to make fundamental policy decisions:

> For this court to undertake the inquiry which would be required in this case would be to invade the far corners of the Executive Branch by subjecting countless Administration decisions to judicial scrutiny for any vestige of political motivation.... [I]n addition to being unmanageable[,] [n]either would that inquiry proceed on the basis of a discrete judicial standard.... Rather the court would be assessing the correctness of an action assigned to the Executive Branch and often requiring substantial supporting personnel and expertise, as well as a significant time investment.
>
> In the absence of any discernible legal standard or even of a congressional policy determination that would aid consideration and decision of the question..., we are loathe to give the False Claims Act an interpretation that would require the judiciary to develop rules of behavior for the Legislative Branch. We are unwilling to conclude that Congress gave the courts a free hand to deal with so sensitive and controversial a problem, or invited them to assume the role of political overseer of the other branches of Government.... We do not, of course, say that Members of Congress or their aides may defraud the Government without subjecting themselves to statutory liabilities. We simply hold that under the facts alleged in count one of appellant's complaint, no cause of action has been made out under the Act.

In both *Cannon* and *Ohrenstein*, the fact that the legislative bodies themselves had not developed standards of conduct was given as a reason for the judiciary to decline to intervene. Is this the equivalent of saying the gate to the chicken coop should be left open because the foxes are unable to agree on how it should be closed?

5. Erwin Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 OHIO STATE LAW JOURNAL 773 (1988), calls for a more active judicial policing of what he calls "abuse of incumbency." He catalogues the abusive practices as follows:

> The phrase "abuse of incumbency" refers to the use of government resources, not available to any other candidates, to aid an incumbent

> running for reelection. There are many ways in which officeholders have used their positions to further their election campaigns. For example, some candidates have tried to use government funds to pay campaign expenses, including the costs of travel, publications, and salaries. Many officials have been accused of abusing the "franking privilege," sending campaign literature to constituents at government expense.
>
> Another form of abuse of incumbency is using government workers to perform campaign tasks while they are on the government payroll. In fact, some incumbents purportedly threatened to fire workers who refused to support the officeholders' campaigns for reelection. Incumbents also allegedly have manipulated the award of government grants and contracts to reward supporters and thereby encourage potential receipts to support the reelection effort.
>
> Other forms of abuse of incumbency are more subtle and virtually impossible to control. For example, some presidents have been accused of manipulating government statistics around the time of an election to make their administration look better. Officials at all levels have manipulated news events to coincide with the election. The common theme in all of these examples is that the incumbent is taking advantage of government powers and resources which are not available to challengers. The government is aiding one candidate and no others.

Id. at 774–76. Despite his belief that incumbents' abusive practices "are inconsistent with the very definition of a democratic government," id. at 776, Chemerinsky reports that the federal judiciary, as in *Cannon*, has been reluctant to intervene:

> No other institution but the judiciary has the authority to restrain unconstitutional behavior by government officials. Unfortunately, most courts have held that it is not the role of the federal judiciary to resolve challenges to improper actions by incumbents. Although occasionally courts have allowed candidates to bring suit, most courts have held that such litigation is not justiciable. Relying on restrictive interpretations of the standing doctrine, courts have declared that challengers and their supporters lack standing to sue. As a result, voters in many areas of the country have no way of restraining unconstitutional actions by an incumbent during an election campaign.

Id. at 774.

6. An indirect effort to regulate the use of legislative staff for campaign purposes succeeded in FAIR POLITICAL PRACTICES COMMISSION (FPPC) v. SUITT, 90 Cal.App.3d 125, 153 Cal.Rptr. 311 (1979). The FPPC alleged that a legislative staff member worked for the reelection of Assemblyman Tom Suitt and contended that because the staffer's salary was paid by the state legislature, Suitt's campaign committee should have disclosed receipt of an in-kind contribution from the legislature. The court agreed that campaign services from legislative employees constituted reportable in-kind contributions. The California campaign disclosure law required listing the name of each "person" who made a contribution over a specified amount. "Person" was defined as "an individual, proprietor-

ship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert." Does the catch-all phrase at the end of the definition include the state legislature or other governmental entities? The *Suitt* court thought so, and gave the following responses to counterarguments:

> Respondents assert first that "much of what is done by the Legislature, and consequently by legislative aides, is done for a political purpose;" therefore application of the Act to the Legislature would result in "...an interference with the normal functioning of the sovereign powers of the Legislature." Just how this comes about is not clear to us; presumably the claim is that the effort of legislators would be hampered by their inability to distinguish work on a political campaign from work on legislation in deciding what is or is not a contribution under [Government Code] section 82015. As the FPPC points out in response, this argument is not convincing; for even if the definition of "contribution" might be unclear as applied to certain legislative activities not here involved, the Act obviously does not infringe on the performance of Suitt's official duties insofar as the activities alleged in this case are concerned. The use of state employees by a legislator's campaign committee to solicit contributions, plan campaign strategy, coordinate volunteers, and prepare the campaign budget, all at state expense, is in no way a proper part of a legislator's official functions; that is not to be questioned. If it is to be done at all, the public has a serious interest in its disclosure.
>
> The Legislature's asserted difficulty here, if indeed it exists, is no different from that faced by government officials in distinguishing between the improper expenditure of public funds for "campaign" purposes and the proper expenditure thereof for "informational" activities. In *Stanson v. Mott*, 17 Cal.3d 206, 223, 130 Cal.Rptr. 697, (1976), the Supreme Court resolved that problem by holding governmental officials liable only if they fail to use due care in authorizing the expenditure. Analogously the Legislature need not be absolutely perfect in distinguishing between the performance by its employees of proper legislative functions as distinguished from election campaigning; it should nonetheless exercise due care in separating the two activities.
>
> ...[T]he alleged activities in the present case were unambiguously political. Of course, there may be certain marginal activities which are neither specifically included by the Act's campaign disclosure provisions nor excluded from them. Thus, there may be some ambiguity as to whether certain activities by legislators are "contributions." However, any ambiguity can be cured through regulations or judicial constructions which draw clear lines for the marginal cases. The FPPC points out that analogous line-drawing is required and has taken place in other types of campaign activity....
>
> With respect to campaign activities by publicly paid staff, the FPPC acknowledges that a situation may arise in which lines are difficult to draw, although no such difficulty is presented by the instant case. Therefore, the FPPC advises us in its reply brief that pursuant to its rule making authority it is now preparing to take public testimony and to develop

guidelines which will eliminate any possible ambiguity with respect to campaign activities involving public employees, office facilities and supplies. The solution to any ambiguity that may exist in the statute is to develop clear, enforceable standards for the marginal cases, not, as respondents suggest, to eliminate the reporting requirement entirely.

Respondents' next argument is that the stated policy of the Political Reform Act, along with the arguments in the Voter's Handbook accompanying the initiative measure, show that the Act was intended to apply only to private entities. Indeed the Act and the handbook demonstrate a preoccupation with the influence of private campaign contributions on elections. But a very obvious reason for the absence of discussion of *public* campaign contributions is not that the Act intended such to remain secret and undisclosed, but that contributions by governmental entities to political campaigns are per se illegal. Gifts of public money to private persons, associations, or corporations are prohibited by article XVI, section 6 of the California Constitution. It was thus inconceivable in 1974 to the draftsmen of the initiative measure, and to the electorate, that public funds would be expended by or for the benefit of certain legislators to reelect themselves rather than their adversaries. Hence the need to specify such a proscription in the Act would have been deemed unnecessary, and even demeaning to lawmakers and public employees generally. It does not follow however that such expenditures were meant to be unreportable, for the electorate would then be saying in effect: "We recognize that such a use of public money is illegal and unconstitutional, but where it nonetheless occurs, it may be kept secret." This is absurd. The Act's silence bespeaks incredulity that such practices would occur rather than an intent to exempt them from disclosure.

The Act undeniably was intended to deal comprehensively with the influence of money, *all money*, on electoral and governmental processes. Its paramount purpose, as expressed in section 81002, subdivision (a), is that "(r)eceipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and *improper practices may be inhibited.*" (Emphasis added.) It would be anomalous in the extreme to hold that such a blatantly improper practice as a gift of public money to a candidate was nevertheless intended to remain undisclosed under the Act.

...Section 82047's definition of "person" broadly includes "...any other organization or group of persons acting in concert." The Legislature and the Assembly Democratic Caucus are unmistakably "other organization[s] or group[s] of persons acting in concert," and thus literally within the definition....

7. As the *Suitt* court notes, the California Supreme Court held in *Stanson v. Mott* that it is illegal to use public resources to advocate a position in a political campaign in the absence of express statutory authorization. The same conclusion has been reached in the courts of several states, though most of the cases involve use of public funds to support or oppose a ballot measure. See generally Note, *Governmental Referendum Advocacy: An Emerging Free Speech Problem*, 29 CASE WESTERN RESERVE LAW REVIEW 886, 895–900 (1979) (citation of cases

from several jurisdictions, and discussion). However, most such decisions permit agencies to disseminate information on public subjects, including those that are the subject of a pending ballot measure. How would you distinguish between "information" regarding the issues in a campaign and advocacy? Would you conclude that any government-sponsored communication that does not meet the "express advocacy" standard set up by the Supreme Court in *Buckley* would be permissible under a case like *Stanson*?

If an elected official engages in campaign activities during "working hours" (or even full-time during part of his or her term of office) without refunding all or part of the salary, is the official acting unlawfully under *Stanson*? Must the official disclose all or a portion of the salary as a campaign contribution from the government under *Suitt*? If the official uses his or her government office for a campaign-related meeting, is there a violation of law? Should the official's campaign committee disclose an in-kind contribution of the office space from the government? Cf. *Colorado Taxpayers Union v. Romer*, 750 F.Supp. 1041 (D.Colo. 1990), dismissed on other grounds, 963 F.2d 1394 (10th Cir. 1992).

8. Suppose Sam Staffer is a state-paid administrative assistant to Barbara Boss, a member of the California legislature who is actively seeking reelection. Which, if any, of the following activities are unlawful under *Stanson* or reportable under *Suitt*?

A. He writes a speech on tax policy for Boss to deliver to the Chamber of Commerce in her district. Boss is chairman of the Tax Committee.

B. He writes a speech on immigration for Boss to deliver to the PTA in her district. There are no bills pending in the legislature relating to immigration, but immigration is a very controversial subject in the district.

C. He writes a speech covering a variety of legislative subjects for Boss to deliver to the state convention of her party.

D. He prepares a press release defending Boss' tax policies against attacks by her opponent in the election.

E. He engages in numerous lengthy discussions with Boss over her votes and other actions on bills. These discussions cover both the substantive merits of the bills and the likely effect of various actions on Boss' reelection prospects.

F. At the request of Boss' campaign manager, Staffer reviews all campaign literature, advertisements and speeches to assure that they are consistent with Boss' legislative record.

G. Throughout the year, he coordinates Boss' schedule. During the campaign he continues to do this, in consultation with Boss' campaign manager.

9. To what extent are the questions in paragraphs 7 and 8 answered by the following regulation, adopted by the FPPC a few months after the *Suitt* decision?

18420. (a) Any candidate or committee that receives contributions from a state or local government agency shall report receipt of those contributions.

(b) The payment by a state or local government agency of the salary or expenses of its employees or agents is an expenditure or contribution only if the salary or expenses are for campaign activities and meet the requirements

of 2 Cal. Adm. Code Section 18423.[a] For purposes of this subsection, "campaign activities" shall include, but are not limited to, the following:

(1) Arranging or coordinating a campaign-related event;

(2) Acting in the capacity of the campaign manager or coordinator;

(3) Soliciting, receiving or acknowledging campaign contributions or arranging for the raising of contributions;

(4) Developing, writing or distributing campaign literature or making arrangements for campaign literature;

(5) Arranging for the development, production or distribution of campaign literature;

(6) Preparing television, radio or newspaper campaign advertisements;

(7) Arranging for the development, production, publishing or broadcast of campaign advertisements;

(8) Establishing liaison with or coordinating activities of campaign volunteers;

(9) Preparing campaign budgets;

(10) Preparing campaign statements; and

(11) Participating in partisan get out the vote drives.

Nothing in this subsection shall require the reporting of employee's campaign activities if such activities are performed on vacation time or other than during publicly paid working hours.

(c) Notwithstanding subsection (b), the payment of salary or expenses by a state or local government agency to an elected official shall not be an expenditure or contribution....[b]

Does the FPPC regulation prevent abusive use of staff by incumbents? Note that under subsection (b) the employee's campaign activities are exempt from disclosure if they are performed "on vacation time or other than during publicly paid working hours." May an employee who has worked overtime during a nonelection year use "compensatory time off" during the election year to work on the campaign? A common practice is for legislative staff members to take unpaid leaves of absence for the two or three months prior to an election and work on the campaign during that period. Does this practice satisfy the legal requirements? Are you satisfied from a policy standpoint?

10. The houses of Congress have taken some steps to control campaign work by congressional staff. For example, the HOUSE ETHICS MANUAL 283 (1992), states that "House employees are compensated from funds of the Treasury for regular performance of official duties. They are not paid to do campaign work." The Manual notes, however, that congressional employees are free to do campaign

a. Section 18423 deals generally with the question of the contribution of an employee's services to a political campaign. It does not deal specifically with government employees. It requires that an employee must spend more than 10% of his or her compensated time working for the campaign before the donation of services will be regarded as a reportable contribution by the employer. Do you agree with this threshold requirement? What is its purpose?

b. A "comment" is appended to the regulation, stating that "[n]othing in this regulation should be read as condoning or authorizing campaign-related activities by a state or local government agency," pointing out that such activities may be illegal, and containing references to the California Penal Code and to *Stanson* and two additional California cases.

work during their free time, so long as they are not required to do so as a condition of keeping their jobs. The manual acknowledges, quoting *Bolger*, *infra*, that "it is simply impossible to draw and enforce a perfect line between the official and political business of Members of Congress," *id.*, but gives several examples intended to illustrate the distinction. See *id.* at 284–85.

11. One of the perquisites most commonly cited as giving incumbents an electoral advantage is the ability to send mass mail to constituents at government expense. In state legislatures, postage and printing may be paid out of the legislative budget, though reformers have had success in some states in controlling political use of state-paid mail. See, e.g., California Government Code § 89001 for a simple prohibition, and 2 California Code of Regulations § 18901 for complex implementing regulations.

It is around Congress that the greatest controversy over government-paid political mail has centered. By reason of the franking privilege, members of Congress can send mail that may or may not be politically motivated at the expense not of their own legislative budgets, but at the expense of the Postal Service. The congressional franking privilege is governed by 39 U.S.C. § 3210, which permits Senators and Representatives to frank their mail for a variety of purposes, the most controversial of which are:

> (B) The usual and customary congressional newsletter or press release which may deal with such matters as the impact of laws and decisions on State and local governments and individual citizens; reports on public and official actions taken by Members of Congress; and discussions of proposed or pending legislation or governmental actions and the positions of the Members of Congress on, and arguments for or against, such matters;
>
> (C) the usual and customary congressional questionnaire seeking public opinion on any law, pending or proposed legislation, public issue, or subject.

39 U.S.C. § 3210(a)(3)(B) and (C). The statute does contain some restrictions, including one against "mail matter which specifically solicits political support," Section 3210(a)(5)(C), and one against sending mass franked mail less than 60 days prior to a primary or general election in which the sender is a candidate. Section 3210(a)(6)(A).

In COMMON CAUSE v. BOLGER, 574 F.Supp. 672 (D.D.C. 1982), aff'd without hearing 461 U.S. 911 (1983), plaintiffs challenged the use of the frank for political purposes as unconstitutional on a number of grounds. After receiving extensive evidence, the court found that Senators and Representatives systematically used the frank for electoral purposes, and that indeed they were trained in how to do so by their respective parties. Many franked mailings were used "in ways that frequently have no relationship to official business and which are closely connected to reelection plans and strategy." Other findings included:

> The volume and timing of franked mass mailings... indicate widespread use to promote incumbents' reelection efforts. The volume of franked mass mailings is significantly higher in the year preceding House or Senate elections than in the year following elections. The volume builds to a peak just before the pre-election cutoff and drops sharply. The volume of non-mass franked mailings stays relatively constant from year to year in both the House and the Senate. It is an undeniable conclusion

that the fluctuations in the volume of franked mass mailings are caused by the electoral cycle, rather than by fluctuations in legislative activity.

Measured in financial terms, the franking privilege confers a substantial advantage to incumbent Congressional candidates over their challengers....

However, consistent with the social science research reported earlier in this chapter, the court added:

> We make no specific finding concerning the extent to which use of the franking privilege has contributed to the electoral victories of any incumbent Members of Congress. We are inclined by the lack of evidence on this point to conclude only that there is no statistical relationship between the use of the frank and the outcome of an election and that proof of the decisive impact of the privilege in any particular election is elusive, whatever the potential financial benefit of the frank.

Despite its findings that the frank was being used extensively for electoral benefit, the court upheld the constitutionality of Section 3210. Following are excerpts from the court's opinion:

> Were the frank shown to be available and widely used for reelection purposes and had plaintiffs demonstrated that such use has a substantial detrimental impact on opposing candidates or members of the voting public seeking to educate themselves on the candidates and the issues, plaintiffs' claims, particularly those based on the First Amendment, would have considerable merit. But such level of interference with the electoral process has not been shown in this case. We are hesitant to apply a standard under the guise of strict judicial scrutiny to a situation where there has been no demonstration of significant harm to the plaintiffs' constitutional rights. The conceded and undisputed legitimate interests promoted by the franking statute are sufficient to justify the limited impacts on the rights of the plaintiff class and to satisfy the invocation of the rational basis test, which we apply in this case. We cannot hold the franking statute unconstitutional simply because it sets forth a standard to determine "official" uses of the frank different from that proposed by plaintiffs.
>
> It is important to view the franking activities of Members of Congress from an overall perspective. It seems undeniable that all mailings, franked and unfranked, from any particular Member of Congress may be grouped into three types. The first type is composed of "official" mailings, those related directly to the legislative and representative functions of Congress. This is the type of communication which Members of Congress arguably are under a duty to provide and to which the frank has been extended over the past 200 years. At the other extreme are mailings which are on their face political or private and therefore "unofficial" in nature. Congress itself has recognized the dangers, constitutional as well as practical, of extending the franking privilege to these types of mailings and has excluded them or expressly prohibited them under the statute and rules in both Houses. Between these two extremes lies a class of mailings whose purposes are less easily discernible. For example, it is

undeniable that Senator X, acting in his elected capacity, should have a right to make mailings within this middle area related to his official duties. It is equally obvious that this same individual acting as candidate for the Senate has an interest in mailing the same material to prospective voters to promote his campaign efforts. Thus the motivations, even behind a particular mailing, may be mixed. Plaintiffs' complaints here can only be about the actions and purposes of the candidate, however, and not the senator.

Congress drafted the franking statute expressly to include many of the types of mailings which unquestionably fall within this middle area. This of itself does not require that we invalidate the scheme as unconstitutional. The question before us is not whether the particular line which Congress has drawn between "official" and "unofficial" uses of the frank necessarily has the least possible potential, in comparison with other methods of drawing the line, for adversely affecting challengers' effective access to the mails. The question is only whether the line is a reasonable one....

To state the obvious, it simply is impossible to draw and enforce a perfect line between the official and political business of Members of Congress. The franking privilege is only one of many perquisites afforded to them which may be turned one way or another into a campaign advantage over any challenger. [A]n incumbent is, by virtue of his incumbency alone, much more visible to the voting public than is a would-be challenger. He has greater access to the media, both local and national; he usually has one or more offices in his home district, in addition to his Washington office; he has a staff paid out of public funds; he has a WATS line for telephone calls which he may use to communicate with his constituents.

Plaintiffs do not suggest that the incumbents' use of these tools of office be strictly limited to purposes which cannot possibly contribute to efforts at reelection. This would be a most difficult standard to administer in any case, for each and every act of an elected representative may, in a political context, be seen as an effort to demonstrate that the voters' choice was a good one. It is impossible, without probing into the deepest thoughts and motives of an individual Member of Congress, to determine exactly why he votes as he does on a particular issue, why he casts a letter to a constituent in the terms in which it is cast, why he communicates with other Members of Congress as he does, why he assigns particular staff functions as he does, or why he does any of the myriad of things that a Member does in his day-to-day routine. It is no less difficult to apply and administer a subjective standard in the use of the frank. Moreover, we cannot require that such a standard be substituted for what we accept as an already reasonable objective standard adopted under section 3210.

In 1992, a federal judge relied on *Bolger* to reject a narrower challenge to congressional franking practices. In particular, plaintiffs challenged the sending by a House member of franked mass mailings to persons who were not residents of the district from which he or she had been elected, but who lived in the newly

reapportioned district from which the Representative intended to seek reelection. See *Coalition to End the Permanent Congress v. Runyon*, 796 F.Supp. 549 (D.D.C. 1992). On July 30, 1992, the Court of Appeals reversed, thus ruling that the practice was unconstitutional. The court announced its ruling and indicated it would issue an opinion later. See 971 F.2d 765. However, Congress quickly responded to the publicity that the court's ruling attracted, by amending Section 3210 to prohibit franked mass mailings by House members into the new portions of their districts. The Court of Appeals decided that in light of this development, it would refrain from issuing an opinion explaining its ruling that the now-prohibited practice was unconstitutional. See *Coalition to End the Permanent Congress v. Runyon*, 979 F.2d 219 (D.C.Cir. 1992).

III. Legislative Term Limits

The simplest and most drastic way of eliminating the incumbency advantage is to prohibit incumbents from running for reelection. The principle of "rotation in office" was popular at the time of the American Revolution, and many state constitutions that were adopted in the mid-1770s restricted the ability of incumbents to run for reelection. The popularity of rotation diminished over the next decade, and although mandatory rotation for members of Congress was proposed at the constitutional convention in 1787, it was rejected.

Term limits for executive officials—governor and mayor, primarily—have been fairly common in the United States in the twentieth century, and an executive term limit was added to the federal government system in 1951, with the approval of the 22nd Amendment, which limits presidents to two terms. Legislative term limits were rare, however, until 1990, when initiatives were passed in Colorado, limiting terms of congressional representatives and state legislators, and in California and Oklahoma, limiting state legislative terms. By the end of 1994, 22 states had adopted congressional term limits (all but one, Utah, had done so by the initiative process), and a similar number had adopted state legislative term limits. A number of local governments, including the cities of New York and Los Angeles, have also adopted term limits in the 1990s.

The election returns suggest that the movement for term limits has strongly resonated with contemporary popular sentiment. Probably an equally strong majority of students of government have been opposed to term limits. The debate has been very vigorous. In part it has been a partisan debate, but history has a way of confounding those who seek or oppose structural changes for short term partisan reasons. The 22nd Amendment, for example, was advocated by Republicans who reacted to Franklin Roosevelt having been elected four times as a Democrat. Yet, the only two presidents to date who have been affected by the 22nd Amendment, Dwight Eisenhower and Ronald Reagan, were both Republicans. Similarly, part of the contemporary drive for congressional term limits has been supplied by Republicans hoping to break the long-term Democratic control of the House of Representatives. In 1994 the Republicans won control of Congress without the help of term limits, and many of them faced the prospect of their own careers being cut short. However, as we shall see in the concluding note to this section, the Supreme Court gave them a reprieve by declaring congressional term limits to be unconstitutional.

Term limits are best thought of not for their short term consequences, but for their long term implications for American politics and government. The heat of the debate over term limits reflects not only the fact that the careers of many individuals are at stake, but that both supporters and opponents of term limits agree that the long term consequences may be profound. The following materials consist first of an effort by one political scientist, Bruce Cain, to sort out in a relatively neutral fashion the analytical and empirical issues that underlie the term limits controversy. The following four essays are vigorous statements of the pro and con positions.

Bruce E. Cain, Political Science and the Term Limits Debate[c]

In recent years, as interest in and support for legislative term limits have grown dramatically, a number of political scientists have been drawn into the debate. A few find merit in the idea, arguing that it would reinvigorate American politics by reversing the trend toward the "professionalization" of representation,[1] or claiming that it would create a fortuitous opportunity for parties to gain more control over the nomination of legislative candidates.[2] Most political scientists, however, are skeptical about the alleged benefits of "political amateurism," and fear, as does Nelson Polsby, that term limits would likely "degrade the skills that Congress as a whole deploys in dealing with the rest of the highly professionalized Washington environment."[3]

From the standpoint of empirical findings, the term limits controversy caught the political science profession unprepared. There is a great deal of literature on such matters as turnover rates in state legislatures and Congress, the importance of incumbency, the role of specialization and leadership in the organization of legislatures, and the trend towards legislative professionalism, but up until a few years ago, there were only a few studies on term limits per se.[4] Since that time, there has been a spate of new scholarship which, among other things, has tried (1) to predict the policy-making effects of term limits[5] and the likely impact that term limits would have on state legislatures;[6] (2) to define theoretically different

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c. This essay was adapted for this volume from a paper presented at the annual meetings of the American Political Science Association, Chicago, September 4, 1992. An expanded version will appear in TERM LIMITS: PUBLIC CHOICE PERSPECTIVES (Bernard Grofman, ed., forthcoming, 1995).

1. Mark Petracca, "Pro: It's Time to Return to Citizen-Legislators," *San Francisco Chronicle*, March 26, 1991.

2. David Brady and Douglas Rivers, "Term Limits Make Sense," *New York Times*, October 5, 1991.

3. Nelson Polsby, *Constitutional Mischief: What's Wrong with Term Limitations,* THE AMERICAN PROSPECT, Summer, 1991.

4. E.g., Guy Benjamin, *The Diffusion of Executive Power in American State Constitutions: Tenure and Tenure Limitations*, PUBLIUS, Fall, 1985.

5. E.g., Linda Cohen and Matthew Spitzer, "Term Limits," Paper presented at Conference on Term Limits at UC Irvine, May 31–June 1, 1991.

6. Bruce Cain, "Term Limits: Predictions about the Impact on California," Paper presented at Conference on Term Limits at UC Irvine, May 31–June 1, 1991; David Everson, "The Impact of Term Limitations on the States: Cutting the Underbrush or Chopping Down the Tall Timber," Draft manuscript, October, 1991.

types of term limits;[7] and (3) to speculate about how interest groups would fare with term limited legislators.[8]

The task of saying anything remotely "scientific" about term limits is elusive, to say the least. It will be years before we will have enough reliable data to make any confident generalizations (or even tentative ones) about the experiences of the states that have decided to venture boldly into what Jeffrey Katz refers to as the "unchartered realm of term limitation."[9] My contribution is therefore necessarily modest. I will identify the most frequently mentioned propositions about term limits and place them in the context of the conventional political science models of voting, policy-making and legislative organization. This allows me to make two points: first, that the impact of term limitations may vary depending on many other factors, and second, that their effects will vary in particular with the type of legislature on which they are imposed.

Whatever we lack in terms of hard evidence about term limits, we more than make up for with conjecture. In the various opinion pieces about term limits and in the voluminous pleadings in state and federal courts, there are a number of different predictions about the likely effects term limits will have on the conduct of elections, policy-making and legislative power. The most remarkable feature of the term limit debate is that almost every prediction in one direction is matched with an equally confident prediction in the opposite direction—in short, there is little agreement between supporters and opponents about the facts of this debate, let alone the values and goals that underlie their respective positions. We will consider these predictions by category, and then put them in the context of standard political science models.

1. Electoral Effects

A number of the term limits predictions deal with the effects that they will have on turnover, candidate recruitment, and electoral competition. An important motivation behind the term limits movement is the perception that incumbents are entrenched and hard to beat, causing them to be unresponsive to all but special interests. Specifically, some of the most important electoral predictions are as follows.

a. *Term limits will increase/have no effect on the rate of turnover in the legislature.* Proponents argue that gerrymandering, the incumbency advantage and the advent of the career politician have ruined political competition in America and made the reelection of incumbents a virtual certainty. Opponents point out that turnover already was pretty considerable, even before the 1992 and 1994 elections. For instance, as of 1990, 63% of the House of Representatives had entered in the 1980s, as had 52% of the US Senate. Opponents argue that mandated turnover by limitations on the terms of office only throws out the good with the bad.

7. Bernard Grofman and Neil Sutherland, "Three Kinds of Term Limits," Paper presented at conference on term limits at UC Irvine, May 31–June 1, 1991.

8. Gary Copeland and John David Rausch, "Interest Groups and Term Limits," Paper presented at conference on term limits at UC Irvine, May 31–June 1, 1991.

9. Jeffrey Katz, "The Unchartered Realm of Term Limitation," GOVERNING, January, 1991.

b. *Term limits will improve/weaken the quality of candidates who run for the state legislature.* Proponents argue for the value of fresh blood, some suggesting that more women and minorities will get elected. Opponents predict that retirees, wealthy individuals and interest group ambassadors will be more likely to run, or as Nelson W. Polsby has characterized them, "the old," "the rich," and "the bought."

At the present time, local government officials, state legislators, and legislative aides have the highest success rate of all House candidates, usually waiting for open seats before they challenge. This is probably because they have had fund-raising advantages and good contacts that are particularly valuable when the party-as-organization and the party-in-the-electorate are weak. Only the party-in-the-legislature is strong, and it favors experienced candidates. A third hypothesis, therefore is that we may simply be substituting faces rather than exchanging different types of individuals.

c. *Term limits will improve/weaken electoral competition.* Proponents want to weaken the incumbency advantage, and by so doing restore electoral competition. Opponents question whether many areas of the state or country can be much more competitive than they presently are given existing residential patterns and differences in candidate resources. For instance, we know empirically that open seats attract more candidates, but will term limits really create more open seats than there would be otherwise, and will they additionally prompt competitiveness in districts with incumbents running?

To understand these predictions more completely, it is useful to put them in the context of a generic political science voting model. Such a model typically posits vote choice in a legislative race as a function of (1) the respondent's party identification, (2) his/her ability to recognize the candidate's name, (3) his/her assessment of the candidate's record/policy positions, and (4) his/her perception of the candidate's personal attributes:

$$\text{Vote} = f[\text{partyid, namerec, policy, cand attrib}]^{d}$$

In addition, incumbency, years in office and campaign money (e.g., amount of money raised) are causally related at a minimum to the candidate's name recognition level and possibly also to perceptions of his/her policy record and personal attributes.

$$\text{Namerec} = f[\text{yrs in off., money, incumb status}]$$

In other words, the longer incumbents are in office, the more likely it is that they acquire advantages in name recognition or have the time and resources to build favorable job ratings and personal perception.

The key to term limits predictions is the implicit equation relating years in office/incumbency to the included variables (i.e., namerec, policy and cand attrib). In the strongest case, if the average years in office is high, and if the relationships between years in office and the included variables are strong, then term limits should increase turnover and promote electoral competition between incumbents and challengers. But turnover will only be increased if the average of

d. For the benefit of those for whom "statistics" is a foreign language, this formula can be read as follows: The vote is a function of the independent variables named within the brackets.—ED.

years in office is high relative to the proposed limit—if, for instance, the limit is 12 years and representatives on average are turning over in 6, the formal limitation will only promote turnover in a few instances, not on average.

Turnover by increased competition (i.e., a level playing field between challengers and incumbents) as distinguished from *turnover by periodically opening a seat* will result when the relationship between years in office and namerec, etc., is upward sloping over the length of a representative's career. If the advantages of incumbency are acquired early (e.g., the so-called "sophomore surge"), then the only real contribution term limits would make to electoral competition is through creating open seats at a regular interval. If on the other hand it matters whether a candidate is a ten term or a two term candidate, then limiting the length of incumbency will promote electoral competition by changing the mix of incumbent types.

Finally, we should note that the model reminds us that a number of competing factors can confound the effect of term limits. In elections where party identification is important (e.g., Congress), turnover may be more linked to shifting partisan tides (e.g., Watergate turnover or the 1994 Republican triumph), but in nonpartisan local races, party will have little or no impact on turnover. Unpopular policies and personal scandals can also cause turnover and increased competition.

2. Policy-Making and Representation Effects

It would mean little if term limits merely changed the faces of representatives and had no impact upon their policies. A major attraction of term limits is that proponents believe that they will lead to better policy-making. Opponents are equally sure that term limits will have disastrous effects on the quality, quantity and craftsmanship of legislation.

a. *Term limits will affect the time horizons of policy-making.* Opponents have argued that term limits will eliminate programs that have long incubation periods by shortening the time that a legislator can nurse a project through the system. In addition, they say, lame ducks rarely produce landmark legislation and are usually less assiduous in their work. Proponents deny this and predict that citizen legislators will put forward more responsive and courageous legislation if they know that their terms are finite.

b. *Term limits will weaken/strengthen ties to special interests.* Opponents argue that information and fund-raising needs (in order to run for another office at the end of the term) will at least perpetuate and perhaps enhance legislators' dependence upon special interests. Proponents believe that by weakening careerism, one weakens the tie to special interests. Citizen amateurs will not need special interest money and will be able to make clearer policy judgments.

c. *Term limits will improve/worsen the quality of representation.* Apart from policy-making, representatives further the interests of constituents in other ways—e.g., doing casework for people who have problems dealing with the bureaucracy, bringing projects into the district, keeping in touch with constituents, etc. Experienced staffs and a knowledge of and an ability to work within the system are important assets to a representative. But, once again, the critical questions are how do limited terms affect the incentives of representatives and what is the shape of the new legislator's learning curve?

As before, we can ask how these predictions fit into generic political science models. The essential question that underlies these predictions is what motivates

legislators to behave the way they do once they are in office? Without pretending that there is any consensus about the relative weights of various factors, we can lay out the most important considerations. A representative's vote on a bill is usually thought to be influenced by constituent opinion (i.e., the electoral incentive), the representative's own ideology, the input of key contributors/interest groups, and the wishes of party leaders:

Roll Call Vote = f[Mean const. opin., interest group pos., rep ideol., party pos.]

The contention that term limits affect policy-making amounts to contending that the relative average weights of these factors (think of them as regression coefficients) are different in a regime of term limits than they are in a regime of no term limits. In particular, proponents think that because there is no prospect of a permanent legislative career, the first two factors will matter less, and the third will matter more. Brady and Rivers argue that party will matter more because of the increased turnover.

In general, political science is pretty weak when it comes to predicting the attitudes individuals will hold or explaining why some are more important than others. We are lucky if we can measure them accurately and tell retrospectively which mattered more. The difficulty of prediction is especially great when the rational incentives are unclear or the structure of opportunities are not sufficiently limited, as is the case here. Is it true that limited terms lead representatives to care less about reelection to this or some future office? Maybe, maybe not. Furthermore, predictions about the representatives' motives address second order effects of earlier predictions about the types of people who will run for office. If Polsby is right about term limits encouraging "the old, the rich and the bought," then we might be inclined to expect one relative ordering. If we get more of the same kinds of people who currently run, then we might expect a different ordering.

3. Effects on the Power and Independence of the Legislature

Perhaps the most intriguing and important effects of term limits deal with the relative power and independence of the modern legislature. The central issues at stake are what role does longevity and experience play in an independent, expert and influential legislature, and what happens to the balance of power when the legislature no longer has experienced legislators?

a. *Term limits will affect the legislature's expertise, craftsmanship and ability to handle technical issues like the budget.* Opponents believe that technical issues require expertise and experience if they are to be handled properly. If the required learning period is lengthy and turnover is high, then term limits will weaken the legislature's policy-making capacity. On the other hand, if, as proponents argue, the learning period is relatively short and legislators can be effective early in their careers, term limits should have no negative consequences in this regard.

b. *Term limits will lower the volume of legislation.* Proponents think that this is good, and opponents think it is bad. We can also ask whether it is true.

c. *Term limits will destroy/improve leadership in the legislature.* State legislative and congressional leadership positions tend to be filled by experienced legislators—and for good reason. Legislative rules and strategies can be quite complex. Moreover, leaders have to know their members in order to organize them effec-

tively, and if there is a great deal of instability in the membership, it will be harder to organize effective collective action. But the critical question is how much experience is necessary, and whether the length of the proposed limit is sufficient to allow experienced leadership to develop.

d. *Term limits will alter the balance of Legislative/Executive power.* This is perhaps the most important contention in the term limits debate. Opponents argue that a law-making legislature must have staff, division of labor and longevity to be effective, and that term limits/resource limitations will redistribute power to the executive branch. At stake is the legislature's capacity to make independent policy judgments. As that capacity lessens, we would expect power to shift from the legislative to executive branches. Term limit supporters either challenge the premise that longevity is related to legislative power, or prefer the shift from legislative to executive power.

To put the issue of term limits and legislative power in context, we need to distinguish three situations: those in which 1) the legislature is dominant, 2) the executive is dominant, and 3) there is a competition or balance of power between the legislature and the executive. Weak mayor and city manager forms of local government are examples in which the legislative body (i.e., the city council or county governing board) is dominant; parliamentary governments are examples of the second form; and the U.S. separation of powers is perhaps the best example of the third type. The constitutional implications of term limits should be greatest in the Type 3 situation and weaker in the other two.

Focusing for the moment on constitutional arrangements that set up a competition for power, the influence and independence of the legislature will depend on its formal powers (i.e., control over the budget and the policy agenda, the ability to amend and initiate laws, etc.) and "its own capacity to form judgments about the merits of alternative proposals and diagnoses independently from whatever is advocated by the executive branch, the governor, lobbyists, fixers, hangers-on and interest groups."[10] Krehbiel in a similar vein argues that the structure and rules of Congress are best understood as ways of reaping collective benefits from specialization.[11] Operating in a complex and uncertain policy environment, legislators have to evolve ways to divide up tasks and share the burden of expertise if they are to compete effectively with other political actors in the system—especially the executive branch.

If, as Polsby and other contend, longevity is one of the crucial components of legislative expertise, and if, as propositions *a* and *c* suggest, the loss of sufficient longevity through term limits weakens the leadership abilities and policy sophistication of the legislature, then the adoption of term limits will redistribute power to the executive branch (or to outside interests) in those constitutional arrangements where legislative and executive power are competitive. The impact of term limits in this regard will also depend upon how complex the task of legislation is (hence, how long it takes to master the job) and how short the term limit is (how long the legislator has to learn the job).

10. Nelson Polsby, "Con: America Needs Skilled Professional Representatives," *San Francisco Chronicle*, March 26, 1991.

11. Keith Krehbiel, INFORMATION, LEGISLATURES AND ORGANIZATION (1991).

Notes and Questions

1. Cain identifies numerous empirical and normative issues that have been prominent in the debate over term limits. There is no reason to suppose *a priori* that the answers to all these questions, especially the empirical ones, will all point in the same direction. Yet, as Cain implies, the positions taken on these sub-issues by supporters and opponents of term limits tend to be predictable. Are there general or overriding conceptions of politics that might inspire the opposing positions on term limits and might account for the tendency of individuals to line up fairly consistently on one side or the other of these issues? How would a person adhering strongly to progressivism stand on term limits? A person who favors strong party government?

2. The following essays are by some of the more prominent supporters and opponents of term limits.

William Kristol, *Term Limitations: Breaking Up the Iron Triangle*

16 HARVARD JOURNAL OF LAW & PUBLIC POLICY 95 (1993).

From the perspective of *The Federalist Papers*, one can say that the current issue of term limitations is historically analogous to the 1978 California voters' initiative known as Proposition 13.[1] At first glance, *The Federalist Papers*, which defended representative democracy against participatory or direct democracy, seem to teach that popular initiatives are a poor way to make policy. Upon further reflection, however, such a wooden application of this Federalist principle fails to account for differences between the political environments of the Eighteenth and Twentieth Centuries.

The fact is that Proposition 13 was the correct policy choice in 1978, and it was also consistent with the arguments of *The Federalist Papers*, properly understood. In a phrase liberally borrowed from Madison, Proposition 13 was "a populist remedy for the diseases most incident to populist government." One can think in a fresh way about contemporary problems—in a way animated by the spirit of *The Federalist Papers*, but not enslaved to their letter. One can apply the principles of Madison, Hamilton, and Jay to modern politics, and yet reach conclusions that appear different from those reached by these men. In an ideal world, populist initiatives would be unnecessary. In the last 200 years, however, various developments have forced us to apply the philosophy of *The Federalist Papers* in light of present-day realities. By 1978, the creation of a welfare state had given government nearly unrestrained power to levy taxes and dole out benefits. The citizens had (and still have) difficulty controlling that power. Proposition 13 was worth supporting as a check on that power, not just for the sake of the economy, but for the polity.

A similar case exists today with respect to the issue of term limits. In the best of all possible democracies, one would not want term limits for legislators. The

1. Proposition 13 was a California voters' initiative concerning the limitation and control of state and local governmental spending....

authors of *The Federalist Papers* emphasized the need for wise, capable, and experienced representatives. On that basis, they considered term limits and rejected the idea. In today's American democracy, however, three considerations outweigh their arguments against term limits.

First, term limits would effectively confront the enormous, paralyzed government produced by the welfare state. The development of the welfare state has created an "Iron Triangle" consisting of Congress, the federal bureaucracy, and special interest groups. This Iron Triangle has changed the character of Congress and, indeed, the entire political system. The separation of powers no longer functions in the manner which had originally been envisioned. According to *The Federalist Papers*, the separation of powers is a device for the protection of liberty; it prevents the distinct branches of government not only from intruding upon one another, but also from intruding upon the citizenry.

Today, the different "powers" are no longer so distinct. Congressional committees, bureaucracies, and interest groups work *together*. Insulated from the public, these bodies cooperate rather than check one another. The benefits distributed through the welfare state make it possible for legislators to coopt particular constituencies and interest groups. Term limits would help dismantle the Iron Triangle by increasing turnover among the long-serving committee and subcommittee chairmen who dole out benefits.

Opponents of term limits argue that greater congressional turnover would increase the power of congressional staffs. This reasoning is not valid. A staff's power is derived from the power of the congressmen it serves, and the staffs of congressmen who have reached seniority are more powerful than the staffs of recently elected congressmen.

A second consideration weighing in favor of term limits is that they would foster more competitive elections. Today, incumbents are virtually assured of reelection. In the 100th Congress, more congressmen left office because of death (seven) than were defeated at the polls (six). Incumbents have huge advantages over challengers, including access to $44.7 million of taxpayer-financed mailings to constituents and the ability to control or influence the petitioning process.

Competitive elections would not only make our political system more open and democratic, but they would also elevate the importance of merit, rather than access to power, in the election process. In this manner, term limits may encourage better-qualified people to run for Congress, and thus provide more capable legislators than we have today. These changes are important considerations that have not been sufficiently addressed by either the proponents or the opponents of term limits.

In *The Federalist Number 57*, Madison wrote that "[t]he aim of every political constitution is, or ought to be, first to obtain for rulers men who possess the most wisdom to discern, and most virtue to pursue, the common good of the society." Instituting term limits today would increase the likelihood of obtaining such rulers. The current system prevents legislators, especially in the House of Representatives, from achieving significant power until they have attained seniority. It discourages people who have accomplished something in other walks of life from running for Congress. Such individuals are put off by the notion that they will have to serve as members of Congress for fifteen or twenty years before they have amassed enough influence for their voices to be heard by the others on Capitol Hill.

Opponents of term limits argue that the limits would deprive Congress of the technical knowledge and mastery of the issues that are necessary for representatives to legislate wisely. If term limits would result in less capable, less experienced and less responsible people running for Congress, indeed, such measures would be undesirable. If, however, one randomly compares five House members who have been in Congress less than twelve years with five who have been there longer, it is unlikely that he will find that the senior representatives possess a greater degree of wisdom, knowledge, and technical mastery than their junior colleagues. In the executive branch, the political appointees who administer the departments perform jobs as difficult as those of congressmen, and they do so competently, without the benefit of twelve years of experience.

The final advantage of term limits is that they would change the culture of Congress and the culture of our politics. An example of the culture presently prevailing is the attitude ingrained in members of Congress regarding the proper relationship between those governing and those governed. In *The Federalist Number 57*, Madison wrote that the following safeguard would prevent the House of Representatives from engaging in oppressive measures:

> [T]hey can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it.

Congressional self-exemption from many of the laws that ordinary citizens must obey is one of the most unhealthy developments in recent decades. Structural changes such as term limits would restore the community of interest and sympathy of sentiments between the representatives and the represented.

The current system of representation in America breeds resentment among the American people. Many citizens now feel disaffected and rebellious toward the very government that exists to serve them. In contrast, *The Federalist Papers* paint a picture of a political system that will encourage boldness, responsibility, and courage among the people. The increased turnover produced by term limits would be a breath of fresh air for the political system and would improve the performance of Congress. More importantly, these limits would improve the overall political culture of the country in a way that would benefit the future of a liberal democracy.

In essence, the debate over term limits is a debate between those who consider our current political system to be sufficiently flawed as to warrant basic reform, and those who believe either that the current system works well enough or that any systemic reform would fail to provide significant improvement. Rather than dismiss term limits as too drastic a measure, Americans should engage in

this debate and welcome it as an opportunity to think through what we want from our Congress and what we want from our government.

Nelson W. Polsby, *Some Arguments Against Congressional Term Limitations*

16 HARVARD JOURNAL OF LAW & PUBLIC POLICY 100 (1993)

The most important argument against Congressional term limitations is that term limitations will almost certainly weaken Congress and decrease the influence that Congress has in the American political system. I will save for last the elaboration of this argument and deal briefly with four subsidiary points that in my opinion also weigh against term limits for Congress.

These points are (1) term limits are unconstitutional; (2) they violate conservative principles and reflect partisan strategies only tenable over the short run; (3) their advocacy rests on faulty factual premises; and (4) they constrict options available to electorates that electorates are entitled to have.

1. Term Limits are Unconstitutional

[The constitutional issue to which Polsby refers is summarized in the notes and questions later in this section.]

2. Term Limits Are a Partisan Gambit Violating Conservative Principles

Not all advocates of term limits are Republicans, but most are. The current movement for term limits started and was organizationally maintained in the offices of Eddie Mahe, an ingenious Republican political consultant. It is animated by the same partisan spirit that enacted the constitutional amendment establishing two-term limitations on American Presidents as a retroactive rebuke to the memory of Franklin Roosevelt. Conservatives should in particular consider whether constitutional amendments are the best solution to their current political problems. Madison's view was that a constitution should be hard to amend, an attitude compatible with the conservative "propensity to use and to enjoy what is available rather than to wish for and to look for something else."[6]

We observe self-identified conservatives, such as President Bush or newly-elected Republican members of Congress, asking for constitutional changes on such issues as balanced budgets, line-item vetoes, school prayers, flag desecration, and term limitations. Some of these issues require restrictions of rights the Supreme Court has determined that Americans enjoy. Others seek to weaken Congress, currently and for many years dominated by Democrats.

Another approach would be for Republicans to nominate better candidates for Congress and work harder to elect them. This is an approach more in keeping with conservative principles.

3. Arguments for Term Limits Are Founded On Factual Error

Most of the substantive arguments in favor of congressional term limitations are grounded upon misleading statistics that conceal the actual turnover in the

6. Michael Oakeshott, *On Being Conservative*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 407, 408 (1991).

membership of Congress. Common Cause's frequently quoted reelection rate for Congress of over ninety-eight percent is supposed to be evidence that individual members are improperly entrenched. But suppose this figure actually demonstrates that members of Congress are doing a good job of serving their constituents? If in fact members are representing their districts, then this reelection rate would not be too high. Independent evidence of voter dissatisfaction is needed to sustain the view that high rates of reelection show improper entrenchment.

In fact, numerous surveys demonstrate that constituents actually approve of their members of Congress by substantial margins. One factor that no doubt leads to such a result is that members of Congress communicate effectively with their constituents. This communication includes listening to constituents and providing them with services and information when they have problems with their government. It is rightly observed that these services come at the expense of taxpayers. But this, in part, is the job we have elected members of Congress to do, to inform themselves about the human consequences of public policy and the impact of government on the lives of ordinary Americans.

The actual turnover rate in Congress exceeds ten percent in every election. As a result, one-half of the House is replaced every eight to ten years. The average length of service for members has been between four and five terms for the last forty years. In that time period, on three occasions as many as twenty-five percent of members departed, and three times the departing members were as few as ten percent. Turnover between all the other Congresses has been between these figures.

There is no way to determine whether these numbers are ideal; they do, however, appear to be within reason. Any organization, Congress included, that does serious business, needs some members to provide experience, continuity, and institutional memory. It does not seem entirely unreasonable that twenty of the 435 members of the House of Representatives who voted on the Persian Gulf resolution in 1991 were also present in the House to vote on the Tonkin Gulf resolution twenty-seven years earlier.

4. Term Limits Limit Electorates, Not Just Members of Congress

If American voters, in the free exercise of their judgment, wish to reelect members of Congress that they believe have served them well, ought they be permitted to to so? To what extent should one electorate, in enacting a term-limitation initiative, be able to constrain the choices available to another electorate, voting in the same geographical space but at a later time? One of the stronger arguments for requiring that changes in a constitution take place only through the act of special majorities is the supposition that no single electorate voting at one moment in time has some greater entitlement to make choices for an ongoing community than a later electorate. Indeed, the later electorate may have a better understanding of contemporary needs and wishes, more experience and information. Or it may be larger, and reach more effectively into the community.

Thus, there may be a class of decisions that have to be protected from ephemeral majorities. Whether term limits fall within that domain requires deliberation and discussion. I am inclined to say that the imposition of a limitation of this kind upon electorates in the face of strong evidence that, left to their own devices, electorates would actually make the choices to be forbidden to them and

would reelect senior members to Congress creates at the least a presumption that we are dealing with an issue of constitutional dimension.

5. Term Limits Weaken Congress As A Branch of Government

It seems self-evident that Congress as an institution would function less well under term limits. While time-servers would be automatically eliminated by term limits, so would conscientious legislators, specialists, and other members whose acumen is sharpened by experience.

Term limits would cripple the ability of Congress, by which I mean elected members working collectively, to do its job properly of legislating and not legislating, appropriating and not appropriating, advising, consenting and not consenting, checking and balancing, and legitimizing the acts of government. This follows from propositions that might seem too obvious to need an elaborate defense: Experience helps in the acquisition of knowledge. Knowledge is necessary to have influence in a complex system, where measures require technical mastery. Legislation is complicated. Public policy requires knowledge. Influence over public policy requires knowledge, technical understanding, and experience. The fact that some members never acquire this knowledge is no argument for requiring that none ever should. So in the end congressional term limits merely empower lobbyists, congressional staff, bureaucrats, presidents, journalists, all those upon whose experience and guidance an inexperienced Congress would have to depend. Reducing the strength and the competence of Congress reduces the legitimacy of all the acts of government over which Congress is entitled to express an opinion. Given the diversity of people that our Constitution is required to serve, anything that reduces the legitimacy of our government strikes at our capacity to govern ourselves. Congressional term limitations, arising out of mean-spirited, shortsighted, historically ignorant partisanship, are capable of doing real damage to our fundamental constitutional order.

6. Contrary Arguments

Proponents are not all of one mind about the effects term limits for Congress might have. There is some sentiment, however, for at least three propositions: (1) Term limits would weaken the "iron triangle" through which interest groups, executive branch agencies, and congressional committees act to serve narrow clientele without proper regard for the larger public interest; (2) prolonged congressional incumbency is an evil in itself, leading to complacency, narrowness of vision and a lack of legislative creativity; (3) by shaking up the culture of Congress, term limits might improve the overall legislative product.

The idea of weakening iron triangles rests on at least two weak presumptions that responding to clientele sector-by-sector will add up to bad news in the aggregate and that only the President can be trusted to police the net effects of policy properly. I think it is more apt to say that Republican presidents will arrive at different conclusions about the overall shape of public policy than Democratic presidents, or Democrats in Congress. Differences of this sort are contemplated in a constitutional design featuring a separation of powers. Congress under a separation of powers scheme is required to contribute to policy making and to express the needs and desires of its constituents who, after all, add up to an electorate roughly the same size as the President's.

If the real target of an attack on iron triangles is meant to be interest groups, term limits on Congress are an inefficient device, because they tend to strengthen the dependence of members on interest groups. This occurs because term limits create turbulence in congressional organization and reduce the number of experienced members having independent knowledge of policy. Term limits require members to think about next stages in their careers outside Congress, in which interest groups may play a significant part. They increase members' reliance on interest groups in order to get elected in the first place. And they heighten the usefulness of policy information that non-term-limited lobbyists can offer green legislators.

So the notion that term limits weaken iron triangles seems far-fetched; they merely weaken the Congressional component—the one to which ordinary citizens have by far the best access—and strengthen bureaucrats and interest groups.

There is no empirical basis for the idea that incumbency leads to legislative inertia. If anything, the opposite seems to be the case; experience in office leads to mastery of subject matter and to independent impact on public policy. The culture of Congress, which nurtures this independence, needs to be appreciated rather than attacked. The underlying idea is that the system of checks and balances and separation of powers built into the Constitution ought to be permitted to work, rather than trashed, because the inevitable disagreements between the two elected branches of government produce frustrations for Presidents and their appointees.

Paul Jacob, *From the Voters with Care,*

in THE POLITICS AND LAW OF TERM LIMITS 27-43 (Cato Institute, 1994)

The American people want term limits for members of Congress as well as for virtually every person serving in electoral office. That desire is strong and consistent as demonstrated by national polls and election results in seventeen states and hundreds of cities and counties across the country. Seventeen states have passed congressional and/or state legislative term-limits laws overwhelmingly. The margin of victory in those elections was on average 2 to 1, with the victory percentage going as high as 77 percent in both Florida and Wyoming. In the last year, voters in the nation's two largest cities—New York and Los Angeles—limited terms for city officials.

Polls have consistently shown support for a constitutional amendment for uniform congressional term limits to be between 75 and 80 percent. The incredible aspect of the polling is that support shows almost no demographic variation. People of all races, both major parties, all political philosophies, both genders, and all ages favor limiting terms. A May 1993 survey by Fabrizio, McLaughlin & Associates showed 75 percent of Democrats favor limits, 76 percent of Independents, and 79 percent of Republicans.

Opponents concede that the voters are strongly in favor of term limits, but then are quick to add that just because the people support an idea does not make it a good idea. Their enthusiasm in making this latter point, I believe, underscores a strong disdain for the very people government is supposed to be serving. In the private economy, a producer of a product could likewise claim that whether or not consumers purchase the product has no bearing on whether it is a "good product." But unless that producer changes to fit what is "popular," he or she

will soon be out of business. Likewise, government has no legitimacy if it ignores the will of the people. Barring an abridgement of the fundamental rights of citizens upon which our American government was instituted—i.e. life, liberty, and pursuit of happiness—government should function and be structured precisely as the majority feels will be most beneficial.

Congressional term limitations are also portrayed by opponents as nothing more than blind citizen anger fueled by scandals like the House bank fiasco. Debbie Dingell, the wife of Representative John Dingell (D-Mich.) and organizer of the opposition campaign in Michigan, referred to term-limit activists as "frustrated children." That attitude not only displays the kind of arrogance citizens are seeking to curb; it also ignores the fact that the success of term limits at the local level is driven most often by a desire to rejuvenate citizen participation and is not tied to any scandal or corruption. Term-limitation laws have been passed by the voters, again with usually overwhelming majorities, in major cities including New York, Los Angeles, Cincinnati, San Francisco, Houston, Kansas City, San Antonio, and New Orleans. Vast support for existing term limits on the President and 37 state governors demonstrates that support for term limits has much less to do with voter anger and more to do with the fact that the voters believe regular rotation in office is sound public policy.

What are the public policy implications of congressional term limits? Why does such a significant majority of citizens want term limits? Who opposes term limits and why do they oppose them? What will be the effect of term limits?

People support term limits to accomplish two primary goals: (1) rejuvenate the election process and (2) restore a citizen legislature. Let's examine what problems currently exist in these two areas and what effect term limits could have.

The Election System

The present system is marked by a tremendous reelection rate for incumbents. In 1988, incumbents who sought reelection were returned to Congress 96 percent of the time. In 1990, the reelection rate was 98 percent with 74 Congressmen drawing no major party opponent. In 1992, the House bank scandal combined with increasing gridlock to push out some of the most respected members of Congress with some of the least respected. Still the reelection rate was 93 percent.

Why do so many congressmen win reelection? The answer is fairly simple: Incumbents have all the advantages. Incumbent advantages include both those naturally occurring and those that congressmen have voted to bestow upon themselves.

The Franking Privilege. The franking privilege allows members of Congress to send mail to their constituents at taxpayer expense touting the work the congressman has been doing. In fact, last year members were able to send mail to voters outside their congressional districts to prepare for redistricting. There can be no more blatant sign that these mailings are oriented for reelection purposes, as opposed to educational purposes, than letting them be sent to people who are presently *not* constituents, but future voters. In order to get a sense of the impact of that free mail on an election campaign, it is important to understand that the average incumbent spends more of the taxpayers' money on franked mailings than the average challenger spends on his entire campaign. Congressmen could vote to put an end to unsolicited franked mail, but they have steadfastly refused to do so because it would make their careers in Congress less secure.

Congressional Staff. Members of Congress average 22 staff members and more than one office per district. Those staffers work not only on legislative business, but also on constituent services—which amounts to helping cut through the very red tape that members of Congress have created or allowed to exist—and public relations. Staff, public employees, are charged with getting the congressman's name in the paper or picture on television, as well as putting the right "spin" on news. Constituent services and public relations win votes for the reelection of the congressman while the taxpayers foot the bill.

Sometimes the use of staff for campaign purposes is even more blatant. Trudy Pearce writes in *Cleaning Up Congress*:

> Many legislators have found ways to encourage some of their congressional staffers to become campaign staffers. Staffers can take "leave without pay" for a month or so to go work the legislator's campaign. During this time they still receive their health and life insurance benefits and can still build their pension benefits. They simply do not get their paycheck for that period of time. But calling this absence "leave without pay" is somewhat deceiving. By using temporary pay increases before and/or after the leave, legislators, in effect pay the staffers for the campaign work with our tax money.

Media Advantages. Though the politicians in Washington, D.C., have built themselves a TV and radio studio at taxpayers' expense, the incumbents' main advantage in garnering media attention accrues naturally. Because a member of Congress represents approximately 575,000 people, what a congressman says or does is news and receives a great deal of coverage—as it should. Challengers simply cannot expect to receive the same degree of media attention. The dilemma for our system is that without significant news coverage of a challenger, voters opposing the incumbent may stay home, or if they do vote, decide not to vote for someone about whom they feel they are not fully informed. Some suggest mandating coverage, but this creates First Amendment problems and it may be almost impossible to truly equalize coverage.

Campaign Finance Rules. The rules governing the financing of campaigns are passed by members of Congress. It is little wonder then that the rules, no matter how often they are changed, continue to benefit incumbents and hurt challengers. The recent bills passed by the House and Senate demonstrate the same tendency for incumbents to rig campaign finance laws in order to protect themselves from competition.

Political Action Committees (PACs) give over 90 percent of their funding to incumbents. Could that be why PACs have been allowed by Congress to give five times as much money to campaigns as an individual can? Though there is public support for abolishing PACs, H.R. 3 passed by the House doesn't touch them because many House members are dependent on PAC funding.

[B]ecause incumbents have the power to vote on the spending of $1.5 trillion dollars annually, they have an incredible advantage in raising funds not only from PACs, but also from individuals who want to gain access or influence.

What the House campaign finance bill does include is also revealing. It includes public financing even though voter surveys strongly show Americans oppose having taxpayers pick up the bill for congressional campaigns. The legislation includes spending caps, which many believe adversely impact challengers

who often must outspend incumbents to make up for the numerous other advantages incumbents enjoy.

But worst of all, the House bill includes protections for incumbents from those they fear most: organized voters. The House's so-called reform would give additional taxpayer money to incumbents when voters independently spend money against them. This measure seems designed to stop an individual (like Ross Perot) or an organized group from being able to negatively impact an incumbent.

Furthermore, the House bill would require that any advocacy organization that lobbies Congress report all its contributors to Congress. The purpose is clear: To intimidate any donor supporting an organization whose purpose might be against the interests of the careerists in control of Congress.

While most Americans strongly favor campaign finance reforms, Congress not only refuses to enact real reforms, but arrogantly uses campaign finance legislation as a ruse to try to push citizen groups out of the election process and to further their own advantages—all the while pretending to selflessly reform the system....

Term limits will not directly change or diminish all incumbent advantages. However, limits will prevent incumbents from parlaying these advantages into a lifetime career in Congress. Term limitation creates open seats where experience shows the races and the campaign funding are much more competitive. The vast majority of women and minorities in Congress today have not defeated long-time incumbents, but won in open-seat races.

[A] new Congress of citizen-legislators who cannot have a lifelong political career will no longer have their own self-interest standing in the way of necessary reforms. That is why supporters argue that term limits will open the door to a plethora of reforms. Congressmen today are largely careerist, giving them a personal interest in keeping the numerous election advantages they enjoy in order to make their careers more secure. By contrast congressmen under term limits will not be able to make a career out of service in Congress, removing the inclination to interfere with campaign reforms or other institutional reforms.

A Citizen Legislature

Though cynical Washington, D.C., insiders argue that it is not achievable, the American people deeply believe in a citizen legislature. The concept that people in public office should be "of the people," as Lincoln said, serving the public for a short period of time, as opposed to professionals pursuing their own careers, is part of the American democratic experience.

Ed Crane, president of the Cato Institute, observes: "What I would like to see is a return to the citizen legislatures envisioned by the Founders of this nation who, I believe, would have been appalled at the idea of professional politicians, of professional legislators."

Our nation's Founders were not the first to recognize rotation in office as an important ingredient of representative democracy. Term limits were part of the democratic system in ancient Athens. Aristotle believed that rotation in office was a crucial principle of representative democracy, the idea of "ruling and being ruled in turn." The great Roman Cicero also praised rotation in office.

The danger of the corrupting influence of long service in public office was well understood by our Founders as well as other great American leaders. George

Washington stepped down after two terms and established a tradition contrary to lifetime tenure. Thomas Jefferson's critique of the Constitution argued that it lacked two essential elements—a bill of rights and a provision for mandatory rotation in office. He wrote, "Whenever a man has cast a longing eye on them [offices], a rottenness begins in his conduct."

Abraham Lincoln stepped down after one term in Congress as was the custom in his congressional district. As President, he stated:

> If our American society and the United States Government are overthrown, it will come from the voracious desire for office, this wriggle to live without toil, work, and labor—from which I am not free myself.

Ed Crane points out what many people today believe: "The less time a member of Congress spends in Washington, D.C., the less chance there is for that insidious process of corruption to occur."

Congress's antagonism toward mandatory rotation in office and the average members' strong desire to make a career of serving in the institution is evident. But the issue of passing laws for the mass of citizens that do not apply to Congress may be the most egregious strike by Congress against the concept of citizen-legislators. As James Madison stated:

> It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents. But this principle can extend no further than to those circumstances and interests to which the authority and case of the representative relate.... That [representatives] can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society....

Our Congress has exempted itself from countless laws that the mass of society must obey. These include sexual harassment laws, fairness in employment, worker safety regulations, and others. Is not something wrong with congressmen enjoying one of the most lavish pension systems in the world and then voting on the Social Security retirement benefits of others?...

Many citizens feel politicians, especially those in Congress, are out of touch with their life experiences....

A striking example of the disconnectedness of Congress comes from the statement of Senator George McGovern who, after retiring from 24 years in the U.S. Senate, went into a business venture that failed. McGovern commented, "I wish that someone had told me about the problems of running a business. I have to pay taxes, meet a payroll—I wish I had had a better sense of what it took to do that when I was in Washington." Citizen legislators would necessarily have experiences outside of campaigning for and serving in elected office. They would thereby be more connected to and representative of their constituents.

The danger of professional politicians' using the power of their offices to remain in office and for a separate political class to form is significant and alarming. Yet, the citizen-legislator is not merely the absence of the negative career politician but a positive force in its own right. Citizen participation is essential to our system of government. As Madeleine Kunin, the former Democratic governor of Vermont, wrote in the *Los Angeles Times*:

> Breaking the gridlock of incumbency could throw the doors wide open to new people and new ideas that would make politics rewarding, meaningful, even fun.

Citizens coming to Washington to serve for no more than six years in the U.S. House or one or two terms in the U.S. Senate knowing from the very first day in the Capitol that soon they will return to private station to live under the laws they have made: That is the goal of term limits. It means replacing a system that is closed to the people with an open system encouraging new participants. It means replacing the attitude of "what's in it for me" with "what's best for the country." It won't usher in an age of perfect government, but it will serve to change the incentive system in Congress—as limits are already doing at the state and local level.

Finally, support for a citizen legislature runs counter to the seniority system now at work in Congress whereby some members gain disproportionate power simply by staying in office longer and longer. Term limits will end this seniority system. Thomas Mann, a political scientist with the Brookings Institution who opposes limits, was quoted as saying, "The seniority system makes no sense in a body that has term limits." I agree. In fact, the seniority system makes no sense—period. Term limits, especially short limits of three terms (six years) in the U.S. House, will mean a swift return to a system of picking committee chairs on the basis of merit, not longevity.

Opponents of Term Limits

Who opposes term limits for members of Congress? The members themselves are the main opponents, but are joined by many major corporations (usually those heavily regulated by the federal government), labor union officials, Common Cause, the League of Women Voters, congressional staffers, lobbyists, and public employees.

A look at the campaign finance reports in state term-limits initiatives or at who is suing to overturn the votes in favor of limits reveals a list of opponents that reads like a who's who of special interests and the insiders of the political system. Campaigns against the state term-limits initiatives have been funded by the liquor lobby, tobacco lobby, drug companies, and those special interests mentioned above—one of which, the League of Women Voters, receives government funding.

It is a sign of the overwhelming support of term limits among the public and the opposition of special interests that term-limits opponents have never been able to sustain an organization or to gain the financial support of any significant number of private citizens. Most campaigns in opposition to limits have had less than a dozen individual contributors. Virtually every penny spent against term limits has been from politicians and special interests. *Common Cause* magazine reported, "Indeed, the contributor report for 'No on 573,' a coalition formed to oppose Washington state's term limits, includes some of the nation's most well-financed lobbying interests: tobacco giants Philip Morris and RJR Nabisco, defense contractors Northrop and General Electric, five labor unions, and the National Rifle Association." It is ironic that the opposition to term limits among politicians and special interests crosses all political lines in the very same way that mass support is evenly found across the political spectrum.

Why do politicians and the organizations mentioned above oppose term limits? They may feel term limits will be bad public policy or will reduce their power and influence. Politicians seeking a career in Congress, or other public office, clearly see term limits as an obstacle to their personal career plans. Victor Kamber, a consultant to organized labor and one of the most vocal opponents of term limits, said recently that organized labor's political strength "is far greater than our numbers." This could explain the opposition of labor leaders to term limits—the resultant turnover might make it increasingly difficult for organized labor to maintain power in excess of its numbers. Yet, rather than attempt to explain the motives of term-limits opponents, an exercise I'm certain they would prefer I not be assigned to perform, I will instead address their arguments against the proposal to limit terms.

One of the major arguments advanced by term-limits opponents is that term limitations are anti-democratic. The opponents' supposed love of democracy is pretty disingenuous when one considers the fact that politicians, the League of Women Voters, Common Cause, and others have regularly and unsuccessfully sued to prevent the people from having an opportunity to vote on term limits. Opponents have also charged that the ultimate aim of the term-limits reformers is a plebiscitary democracy—heady stuff for supposedly antidemocratic interests.

The truth is that term limiters hope to advance the straightforward cause of more competitive elections and democracy in the structuring of government. Term limits in California were largely credited with a significant number of incumbents seeking other public office or retiring in 1992. The resultant open-seat elections caused a 50 percent increase in the number of candidates in legislative races. That simply means more choices for the voters. Ending the near-monopoly control of public office opens the system to new people, and more people, which enlivens democracy.

The curious part of the argument made by term-limits opponents is that they seem to favor democracy only in the narrow confines of candidate races under the present system which is universally condemned as unfair. Term limiters believe in a more robust and meaningful democracy not limited to simply choosing between candidate A and candidate B, but able to impact the functions and structure of government. It is nothing short of absurd to call a movement antidemocratic that has collected the signatures of close to four million Americans, fought off legal challenges to be able to allow their fellow citizens to cast ballots, and won the overwhelming vote in countless elections. The actions of the citizen activists in the term-limits movement are democracy at its finest.

Opponents argue that experience is necessary to run a complex government. But one only has to point to the savings-and-loan debacle or the $4 trillion national debt to demonstrate that the experience of the most experienced Congresses in American history was the problem, not the solution. Limit proponents argue that we need people experienced in what has become known as "the real world," the nongovernmental sector of the economy. Americans embrace term limits precisely because they have faith, not in the knowledge of experts, but in the common sense of their fellow citizens.

Finally, adversaries claim that term limits on Congress will only shift power from elected officials to unselected bureaucrats, congressional staffers, and lobbyists. It may be enough evidence to the contrary that a 1992 Gallup poll showed all of these groups oppose term limits. Lobbyists have filed suit in Florida to overturn

the successful term limits amendment. A congressional staffer is part of the lawsuit now before a federal court in Washington state. The public employees' unions in Washington state, Michigan, and elsewhere have contributed financially against term-limits initiatives and even served as headquarters for the opposition campaigns.

The rise in tenure of members of Congress has seen a corresponding rise in the size and power of the bureaucracy, the staff, and lobbyists. Lobbyists depend on long-term relationships that term limits will take away. The staff clearly gains power as members stay in office over long periods of time. The bureaucracy also gains from those serving longer in Congress, because, according to a National Taxpayers Union study, the longer a member of Congress serves the more likely he is to vote for increased spending.

Do Term Limits Work?

Perhaps the most important question of all is: Will term limits work? Because none of the measures passed by voters at the state level have yet required anyone to step down and only a relatively few local term-limits laws have gone into effect, there is little empirical evidence. However, what evidence does exist, mainly anecdotal, points to the success of term limits.

A study of the considerable experience of term limits on gubernatorial elections by John Armor, author and constitutional lawyer, shows that gubernatorial elections in term-limited states are more competitive than in nonlimited states. That is true not only in the open-seat elections created by a governor's having to step down, but also in the election cycle where a governor can run for reelection. Knowing an open seat is approaching in the future seems to encourage candidates to run aggressive campaigns in order to increase their name recognition for the future, even if they don't win at that particular election. And sometimes they do win. There is every reason to believe that the same dynamic will take place in congressional elections.

In California, where Proposition 140 passed in 1990 limiting the state's assemblymen to six years in office, a large number of careerists have already left, allowing 27 freshmen to go to Sacramento in 1993. These persons include more women and minorities and people from all walks of life—precisely the kind of citizen-legislators term-limits advocates desire. As Jerry Gillam reported in the *Los Angeles Times*:

> Among the 27 [freshmen legislators] are a former U.S. Air Force pilot, a former sheriff-coroner, a paralegal, a retired teacher, a video store owner, a businesswoman-homemaker, a children's advocate, an interior designer, a retired sheriff's lieutenant, and a number of businessmen, lawyers and former City Council members.

The result of all those new citizen-legislators was a less partisan session and the first state budget passed on time in recent memory.

Henry Lyons, a black businessman, led a successful term-limits initiative in Kansas City, Missouri, in 1990. Although the measure was attacked by black politicians as racist during the campaign, and upon winning was sued under the Voting Rights Act (the measure was upheld in federal court), after the term limits took effect the minority representation on the city council increased, as did the number of women serving.

The Michigan legislature is now under term limits that were passed only last year, but already lobbyists say that the legislature has changed. Commenting on the effect of term limits, Linda Govvler, president of the Michigan Grocers Association, said:

> It becomes very important for lobbyists to be extremely credible, to have good reputations, and to know what they're talking about. Gone are the days when you belly up to the bar and ask somebody for a vote on a bill.

Good riddance to those days.

Restoring Government "Of the People"

When our nation began its experiment in government of, by, and for the people, no one could have known for certain the outcome. Thankfully, the freest, most prosperous nation in the history of human civilization was the result. Term limits, or mandatory rotation in office, are part of a restoration of government of the people. No one can precisely predict the impact, but the preliminary indications show that the term limits will work—that is, they will restore a competitive election process and return Congress to a citizen legislature. Without term limits, Congress will surely not act to change its sizable election advantages. The idea of a citizen legislature, no matter how politicians and the political elite deride it, is alive and well with the American people who pay the bills and who are this country's rightful owners.

The American people care very deeply about the present state of our nation. In an effort to investigate the great deal of voter frustration regarding politics, the Kettering Foundation commissioned a study which found:

> Apathy is not rampant among citizens. A sense of civic duty is not dead. Americans are not indifferent to public debate and the challenges our nation faces. Americans simply want to participate in this process we call representative government.

The American citizenry has carefully deliberated and debated the issue of term limits. At town meetings, on talk radio, on the editorial pages, and at the polls, the voters have spoken loud and clear. Yet, Congress has stonewalled at every turn because limits run counter to the members' personal career plans. In this crucial showdown between the people and the politicians, the people shall prevail.

"Congress as we know it," said the Brookings Institution's Thomas Mann, "is incompatible with a term-limited membership." Yes, that's the point, and why I join 80 percent of the American people in supporting congressional term limits.

Thomas E. Mann, *Congressional Term Limits: A Bad Idea Whose Time Should Never Come,*

THE POLITICS AND LAW OF TERM LIMITS 83–95 (Cato Institute, 1994)

In the last several years term limits have become the preferred vehicle for expressing public frustration and anger with the political system. Citizen initiatives to limit congressional terms have succeeded in all fifteen states where they were on the ballot, most by overwhelming margins. Numerous state and local

jurisdictions have voted to limit the terms of their legislators. Public opinion polls reveal overwhelming popular support for term-limits proposals. If our Constitution could be amended by national initiative, I have no doubt that term limits would soon be enshrined in the fundamental charter of our democracy.

Fortunately, however, we enjoy a representative system of government that requires a level of deliberation before our basic democratic rules can be altered. We are forced to stop and think before acting. Precious little reasoned discussion has accompanied the debates over term limits in the states....

I welcome a thoughtful public discussion of congressional term limits—what they are designed to achieve, what their consequences might be, and whether more effective remedies might be available for dealing with the problems identified by term-limits advocates. During this debate it is important to remember that the burden of proof—diagnosing the problem and demonstrating that the cure is likely to work without debilitating side effects—properly falls on those who would alter the constitutional order. My view is that a persuasive case for term limits has not been made....

Careerism

The crux of the case for term limits is a rejection of professionalism in politics—or legislative careerism. Careerism is seen as fostering in members of Congress an exclusive focus on reelection and power and a devaluation of the public interest. Advocates see rotation as a way to cure these ills, by preventing a concentration of political power and enhancing government by amateurs—selfless citizens who temporarily answer their country's call to legislate in the public interest. In support of this, they point to the extensive American experience with rotation in office as well as the philosophical underpinnings for rotation expressed in the founding period, particularly by the Antifederalists.

Most advocates of term limits embrace a conception of democracy that is plebiscitary in character. This conception involves a series of related assertions: Representation is a necessary evil that works only if elected officials closely mirror the instincts and wishes of their constituents. Careerism breeds an arrogance among officeholders that insulates them from the concerns of the people. A permanent political elite turns a deaf ear on the citizens it is elected to serve and pursues its own self-interested agenda.

However, one prominent proponent of term limits, George Will, argues that legislative careerism produces just the opposite effect: Risk-averse members hypersensitive to public sentiment and unwilling to exercise independent judgment. Will champions term limits as a means of restoring deliberative democracy; his compatriots in the movement prefer to empower the people and revitalize direct democracy. What unites them is a belief that citizen-legislators, by virtue either of their more accurate reflection of public sentiment or their wisdom, independently expressed and untainted by career considerations, will more faithfully pursue policies that term-limits proponents favor, which in most cases means a government that spends, taxes, and regulates less.

Since careerism or professionalism is the central malady term limitation is designed to cure, it is important that the several components of the professionalism critique be evaluated. Were the Founders truly sympathetic to mandatory rotation? Is professionalism damaging to our politics and policymaking? Is pro-

fessionalism in government avoidable? Will term limits replace professionals with amateurs in Congress? Let me address each of these questions in turn.

Whatever the objections raised by the Antifederalists, the Constitution speaks clearly on the issue of mandatory limits. The Founders directly and unanimously rejected the idea of term limits. After much debate, they concluded that frequent elections would be a sufficient safeguard against abuse by incumbents. Indeed, their strategy was not to deny or negate personal ambition but to channel that ambition to serve the public interest. That required giving members a longer-term stake in the institution so that they might look beyond the public's immediate concerns and in Madison's words "refine and enlarge" the public view. Will argues rather lamely that a vastly changed political and social situation necessitates trying to restore core values of the Founders' generation by embracing measures that they deemed unnecessary. But Hamilton's words in 1788 ring true today:

> Men will pursue their interests. It is as easy to divert human nature as to oppose the strong currents of selfish passions. A wise legislator will gently divert the channel, and direct it, if possible to the public good.

What can we say of the costs of professionalism to our politics? Critics of Congress routinely attribute everything they dislike about the institution to careerism. Careerists in Congress are said to be more corrupt, more beholden to special interests, more consumed with pork barrel-projects, more supportive of increased spending, and less responsive to the public interest than amateurs would be.

If these claims were true, we would expect that to be revealed by differences in the behavior of more and less professional legislators. We can search for these differences by comparing junior and senior members in the contemporary Congress. We can compare the behavior of the more professionalized twentieth-century Congress to the more amateur nineteenth-century Congress. We can compare amateur and professional legislatures across countries, states, and localities. None of these comparisons shows that professional legislators are more corrupt, parochial, or influenced by interest groups than their amateur counterparts.

Instead, careful study of Congress and every other sector of society suggests that greater professionalism is a necessary offshoot of the growth and specialization of the modern world. If the political rules are rewritten to make it impossible to build a career in Congress, then the institution will have to rely on the professionalism of others to do its job, whether they are staff members, bureaucrats, or lobbyists. The revolt against professionalism is part of a broader populist resentment of elites in all spheres of society and a nostalgia for a bygone Golden Era. But advocates of term limits are hard pressed to offer any examples of amateurism operating successfully in contemporary society, in the United States or abroad. George Will got it right the first time when he wrote: "The day of the 'citizen legislator'—the day when a legislator's primary job was something other than government—is gone. A great state cannot be run by citizen legislators and amateur administrators."[9]

Finally, there is the critical issue of whether term limits would succeed in replacing career politicians with citizen-legislators and whether the latter would fit the image sketched by term-limits proponents. The precise form of the term

9. George F. Will, STATECRAFT AS SOULCRAFT 16 (1983).

limits would have a bearing on this question: Simple limits on continuous service in one house would have a very different effect on candidate recruitment from a lifetime limit on service in Congress. The former is likely to foster a class of itinerant professionals who move up and within a hierarchy of term-limited legislatures, no less engaged in the profession of politics, but probably less committed to the larger purposes of the institution of which they are a part. The latter, depending upon the severity of the limit, would alter recruitment patterns; but would the average member fit the image of the disinterested citizen-legislator? I think not.

Absent other changes in the legal and political context of congressional elections, the enormous costs—personal and financial—of running for Congress would not diminish under term limits. Candidate-centered, media-dominated, weak-party campaigns require entrepreneurial skills and resources that are not evenly distributed across American society. Removing the possibility of developing a legislative career would skew the membership of Congress even farther in the direction of a social and economic elite. As political scientist Morris Fiorina has observed, "Amateur political settings advantage the independently wealthy, professionals with private practices, independent business people, and others with similar financial and career flexibility."[10] Moreover, Syracuse University professor Linda Fowler is almost certainly correct in arguing that patterns of recruitment and forced retirement under term limits will increase the influence of special interests in the legislature.

In sum, the linchpin of the case for term limits—the desirability and feasibility of ending legislative careerism and returning to the citizen legislature originally conceived by the Founders—fails in every key dimension. Mandatory rotation destroys the primary incentive used by the Federalists in writing the Constitution to nurture a deliberative democracy. The perceived ills of contemporary American government—from policy deadlock to pork-barrel spending—have little connection to careerism in Congress. Professionalism is an essential feature of a complex and specialized world. Finally, any effort to use term limits to replace careerists with citizen-legislators is likely to produce some combination of musical chairs by professional politicians with weak institutional loyalties and of participation by elite amateurs with sufficient resources and connections to make a brief stint in Congress possible and profitable.

Competition and Turnover

Another crucial argument advanced on behalf of congressional term limits is the need to restore electoral competition and turnover to a body in which the incumbents exploit the advantages of their office to ensure automatic reelection and perpetuate a permanent Congress. Term limits, it is argued, will reinvigorate democracy by leveling the playing field between incumbents and challengers, preventing dynasties from forming in Congress, and guaranteeing that fresh blood and new ideas reach Washington on a regular basis....

One concern of critics can easily be put to rest. There is no permanent Congress. Indeed, it is ludicrous that the term continues to be used following the 1992 elections, which produced the largest turnover in the House since 1948. Many analysts overgeneralized from the quiescent House elections between 1984 and

10. Morris P. Fiorina, *Divided Government in the States*, in THE POLITICS OF DIVIDED GOVERNMENT 192–93 (1991).

1988. The fact is that the membership of the House and Senate is largely remade every decade. The years between 1974 and 1982 produced a high level of turnover from retirements and incumbent defeats. By the early 1980s three-fourths of senators and representatives had served fewer than 12 years. Membership stabilized during the rest of the decade as the new members settled in and the public showed little interest in throwing the rascals out. That pattern began to change in 1990, although a weak field of challengers kept House incumbent losses to fifteen members in spite of the widespread signs of public discontent. But 1992 confirmed that we are once again in a period of rapid membership turnover. Every indication is that high levels of voluntary retirement and incumbent defeat will continue in 1994.

While achieving a healthy flow of new blood is not a serious problem for the House or Senate, ensuring a reasonable level of competition is. Incredibly high reelection rates and large margins of victory (more so in the House than in the Senate) are a legitimate concern. But term limitations are unlikely to increase the competitiveness of congressional elections. Increased competition requires more high-quality, well-financed challengers, but term limits would neither materially reduce the disincentives to running for Congress nor increase the effectiveness of party recruiting mechanisms. Potential candidates would continue to weigh the disruptions to family life and career, loss of privacy, demands of fundraising, and the other unpleasantness of modern campaigns. Moreover, there is no reason to believe that term-limited incumbents would be any less determined to retain their seats for the full period permitted by the amended Constitution. The odds of a challenger's defeating an incumbent would not increase under term limits. Indeed, a term limit would very likely turn into a floor, with would-be candidates deferring their challenges and awaiting the involuntary retirement of the incumbent. If a norm of deference to term-limited incumbents took root, elections would be contested only in open seats, and then only those not safe for one political party or the other. This would mean a net reduction in the competitiveness of congressional elections....

Accountability

Another argument advanced by term-limits supporters, one that is related to the critique of careerism, is that members of Congress are not genuinely accountable to the people who send them to Washington. The overriding goal of reelection leads members to pursue a manipulative relationship with their constituents—they buy safe districts by shoveling pork and catering to special interests with access to campaign resources. Ordinary citizens are anesthetized and potential challengers discouraged, thereby allowing members to pursue their own agendas in Washington without any realistic fear that they will be held to account for their actions.

There are grounds for concern here. Uncontested elections and halfhearted challenges are unlikely to have a bracing effect on incumbents and over time may breed an unhealthy feeling of invulnerability and arrogance. Moreover, heavy investments in constituent service tend to depoliticize the relationship between representatives and constituents and minimize the possibility of policy accountability. Yet most members of Congress remain unbelievably insecure about their political futures and highly responsive to the interests of their constituencies. One major reason incumbents are so successful is that electoral accountability is alive

and well: Representatives conform to the wishes of their constituents and are in turn rewarded with reelection.

The problem is not individual accountability. Voters show no signs of suffering from inattentive or unresponsive representatives. If anything, members of Congress are too solicitous of their constituencies and insufficiently attentive to broader national interests, too consumed with their personal standing in their district or state, and too little dependent on their political party.

What many of us sense is in short supply in the contemporary Congress is a collective accountability that provides an appropriate balance between local and national interests, between narrow and general interests, and between short-term preferences and long-term needs. The present system appears to favor local, special, and immediate interests over national, general, and future concerns. Will believes the way to right that balance and to restore congressional deliberation in service of the public interest is to remove members of Congress from the unseemly and demeaning business of elections, to proscribe ambition in public life rather than to channel it, and to take the politics out of government.

I believe this effort is self-defeating. It would deny the democratic connection rather than revitalize it. There is simply no reason to believe that a term-limited Congress would be more accountable to the American people or that it would be more inclined to advance the public interest. If anything, term limitations are likely to shift the focus of members of Congress even more in the direction of local and immediate concerns.

Congressional Organization and Power

The final argument offered by proponents is that term limits would transform the institution of Congress, making it more productive, more deliberative, less dependent on staff and special interests, less disposed to micromanage programs and agencies, and better structured to reward members on the basis of ability rather than seniority. As I understand the logic of this argument, term limits would change the motivations of legislators and subsequently their behavior by removing the incentive to put reelection and personal power within the chamber above other considerations, such as making public policy in the national interest.

It requires an extraordinary leap of faith to believe that term limits will produce these desirable institutional changes, especially in light of my earlier discussion of the electoral effects of term limits. We have no direct evidence on which to rely—term limitations have been in effect in the states for too brief a time to provide an empirical basis for any reliable generalizations. Indeed, there is much to be said for taking advantage of our federal system by assessing the state experiments with term limits before enshrining them in the U.S. Constitution.... But I suspect my call for experimentation and deliberation will not mollify leaders of the term-limits movement.

Absent any reliable evidence, I simply note that the institutional changes mentioned above do not logically follow from the imposition of term limits. Take legislative productivity. [A] legislature of well-meaning amateurs, determined to decide on the merits of an issue unsullied by career considerations, has no guarantee of success. While critics often attribute stalemate to cowardly politicians unwilling to make tough decisions, it more often occurs among legislators who want to do the right thing but disagree over what the right thing is.

Or take deliberation.... Ironically, the term-limits movement is the very antithesis of deliberation. It is riding the crest of a plebiscitary wave in our politics which favors initiatives, referendums, and other forms of direct democracy over the reasoned discussion insulated from public passions [that constitutes deliberation.] I find it hard to imagine how term limits would foster deliberation in Congress. Members would continue to have a reelection incentive until they came up against the limit. A greater impatience to build a record of achievement would not necessarily augur well for the national interest; short-sighted solutions to immediate problems could just as easily be the result.

More importantly, the intense individualism of the contemporary Congress would be strengthened, not weakened, under term limits. There would be little incentive for members to follow the lead of others, be they party leaders or committee chairmen. The elimination of seniority as a basis for leadership selection, a likely consequence of term limits, would intensify competition and conflict among members but devalue the authority of those positions. Few rewards and resources would exist for institutional maintenance and policy leadership—protecting the independence and integrity of Congress, setting legislative agendas, and mobilizing majorities. With little change in the media and interest group environment of Congress, the centrifugal forces in Congress would remain strong while the centralizing instruments would be weakened.

Much the same can be said for the other improvements in the institutional performance of congress that allegedly would flow from term limits. Term-limited members could prove to be more dependent on special interests for campaign funds, information, and a job after service in Congress than are present members. Less experienced members would perforce rely more heavily on congressional staff and executive branch officials.

Indeed, the more one examines the claims of term-limits advocates, the more one is struck by the utter failure of advocates to make a convincing case connecting remedies with problems. If Congress were to legislate in a complex policy area on the basis of theories and evidence no better than I have summarized here, it would be roundly (and properly) criticized by many of those who now embrace term limits. There is, I believe, no substantive case for amending the U.S. Constitution to limit the terms of members of the House and Senate. While I believe the failure of proponents to present a convincing argument for term limits is sufficient reason for rejecting a constitutional amendment, there are two additional reasons for resisting popular sentiment on this issue.

Democracy

Term limits would diminish our democracy by restricting it unnecessarily. Voters now have the power to end the career of their representatives and senators by the simple exercise of the franchise. At present they also enjoy the power to retain in office those officials whom they believe merit reelection. The Constitution properly precludes the citizens of one district or state from limiting the electoral choice of those residing somewhere else.

I firmly support efforts to increase the supply of able, well-financed challengers and to enhance the quality and quantity of relevant information about incumbents available to citizens. Such steps would increase the competitiveness of congressional elections and expand the choices available to voters. But an arbi-

trary limit on terms of congressional service is an antidemocratic device masquerading as the champion of democratic revival....

Experience

Longevity and experience do not correspond perfectly with wisdom and effectiveness. Some incumbents overstay their productive periods in Congress and are treated too generously by their constituents at reelection time. Every legislative body needs regular infusions of new members to reflect changing public sentiments and to put new ideas into the legislative process. Opportunities should exist for junior members to participate meaningfully in the legislative process.

That being said, I believe it would be a terrible mistake to end all careers in Congress after six or twelve years.[17] Legislative talent—which encompasses among other traits a respect for the public, a capacity to listen to people who disagree with you, bargaining skills, a willingness to compromise, an appreciation for parliamentary procedure, and a capacity to move easily between technical knowledge and ordinary experience—is not in overabundant supply. Able people must be encouraged to make substantial investments in developing these skills and applying them on behalf of the public interest. Anyone familiar with the current Congress can name dozens of senior members in both parties whose careers defy the stereotype of term-limits supporters. They have serious policy interests, they are legislative workhorses, they have the confidence to resist temporary passions and interest-group pressures, and they demonstrate a respect for their institution and the pivotal role it plays in the American constitutional system. History is filled with examples of legislative careerists who made substantial contributions to their country, including such notables as Robert LaFollette, Jr., Arthur Vandenberg, Edmund Muskie, and Sam Ervin. Term limits would have ended their careers in Congress before they made their mark. Rather than demonstrate contempt for such careers, we should think about how we might encourage others to make a comparable investment.

Conclusion

Term limitation is a false panacea, a slam-dunk approach to political reform that offers little beyond emotional release of pent-up frustrations with the performance of the economic and political system. Shortcomings in the electoral process and in the organization of Congress should be dealt with directly, in ways that strengthen representative democracy and the institution closest to the people.

Notes and Questions

1. Although the foregoing statements represent the term limits debate at its best, they are typical of much of the debate in their concentration on the broadest principles that underlie American democracy, including their focus on the intentions of the nation's founders. Whatever else may be said about the term limits movement, it has prompted a constructive deliberation on the foundations of the

17. John R. Hibbing has provided the most systematic evidence linking congressional tenure with legislative effectiveness: "Senior members are the heart and soul of the legislative side of congressional service." CONGRESSIONAL CAREERS 126 (1991).

Constitution and the American system of government. For a more elaborate argument that term limits are consistent with constitutional principles, though not with the letter of the Constitution, see James C. Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 DEPAUL LAW REVIEW 1 (1991). For a response, see Steven R. Greenberger, *Democracy and Congressional Tenure*, 41 DEPAUL LAW REVIEW 37 (1991). For more general debate on term limits, see LIMITING LEGISLATIVE TERMS (Gerald Benjamin & Michael J. Malbin, eds., 1992), as well as the conference proceedings in which the Paul Jacob and Thomas Mann papers reprinted above were published, THE POLITICS AND LAW OF TERM LIMITS (Edward H. Crane & Roger Pilon, eds., 1994).

2. Are term limits constitutional? Challenges to state and local term limits based on the First and Fourteenth Amendments have generally been rejected. See, e.g., *Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 112 S.Ct. 1292 (1992); *U.S. Term Limits v. Hill*, 872 S.W.2d 349 (Ark. 1994), *affirmed on other grounds*, 115 S.Ct. 1842 (1995).

The constitutionality of congressional term limits has been much more vigorously debated. The debate centers on the fact that the Constitution itself sets forth qualifications for Congress, primarily minimum age, citizenship and residency requirements. Opponents of term limits have claimed that these qualifications are exclusive, and that states cannot prohibit anyone who satisfies them, including a person who has already served in Congress for a specified period, from running for Congress. See, e.g., Troy A. Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 DENVER UNIVERSITY LAW REVIEW 1 (1992); Joshua Levy, Note, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEORGETOWN LAW JOURNAL 1913 (1992); Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 HARVARD JOURNAL OF LAW & PUBLIC POLICY 1 (1994). For arguments against this view, see, e.g., Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA LAW REVIEW 341 (1991); Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 UNIVERSITY OF PITTSBURGH LAW REVIEW 97 (1991); Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 CREIGHTON LAW REVIEW 321 (1993).

Three lower courts declared congressional term limits unconstitutional. *Stumpf v. Lau*, 839 P.2d 120 (Nev. 1992); *Thorsted v. Gregoire*, 841 F.Supp. 1068 (W.D.Wash. 1994); *U.S. Term Limits v. Hill*, 872 S.W.2d 349 (Ark. 1994). On May 22, 1995, the Supreme Court affirmed the Arkansas decision, and thus ruled that the "Qualifications Clauses" prohibit the states from imposing term limits or any other qualifications on candidates for Congress. *U.S. Term Limits v. Thornton*, 115 S.Ct. 1842 (1995). Justice Thomas wrote a dissenting opinion joined by Chief Justice Rehnquist and Justices O'Connor and Scalia.

IV. Incumbency and Campaign Finance

Gary C. Jacobson, *Enough Is Too Much: Money and Competition in House Elections,*

in ELECTIONS IN AMERICA 173 (Kay Lehman Schlozman, ed., 1987).

Most Americans think that too much money is spent on election campaigns. Nearly two-thirds of the people polled by Harris shortly after the 1982 midterm agreed that "excessive campaign spending in national elections is a very serious problem." The public's favorite campaign reform, by a wide margin, was to cut spending.

Many members of Congress concur; schemes to limit campaign spending have been a familiar component of campaign finance reform proposals for years. The ceilings on spending in House and Senate campaigns originally imposed by the Federal Election Campaign Act of 1974 ran afoul of the First Amendment. But the Supreme Court upheld limits on spending in publicly funded presidential campaigns, implying that spending restrictions could pass constitutional muster if combined with public subsidies for congressional candidates. So each periodic flurry of congressional attention to campaign finance regulation includes proposals for imposing spending limits in return for public funds.

By now, the arguments for and against ceilings on campaign spending provoke a sense of déja vu.... Proponents [claim] that limits (and subsidies) would reduce the demand for campaign contributions and hence the clout of special interests, especially those represented by political action committees (PACs). They would curtail the unfair advantage enjoyed by wealthy candidates. Members could spend less time hustling campaign cash and more time doing their job. Ceilings would defuse the arms-race mentality; candidates would no longer feel compelled to spend ever larger sums of money purely out of fear of what their opponents might spend. Most campaign spending is wasted anyway....

Inevitably, these arguments [are] countered with the equally familiar claim that spending limits, regardless of their benefits, remain fatally flawed because they stifle competition and protect incumbents. The resources of office give members an enormous head start; challengers must spend lavishly just to get in the ball game. The amount of money required for a serious House campaign varies widely according to local circumstances; no single limit could suit all of them. Most campaigns are underfunded; more rather than less money is needed for a healthy electoral system....

Proposals to limit campaign spending rest, at least implicitly, on the assumption that some level of spending is "enough"—enough to inform voters sufficiently for them to have a real choice between known alternatives. Candidates (including unknown challengers) who spend that amount will be as competitive as the substance of their campaigns can make them; money spent beyond the limit makes little or no difference. Furthermore, the same level of campaign spending is assumed to be "enough" under a wide variety of electoral circumstances. Both assumptions are certainly true at some level; $2 million is surely enough under all but the most improbable conditions, for example. The real question is whether the limits typically proposed allow sufficient spending for competitive campaigns—specifically, challengers to incumbents—across the usual range

of electoral circumstances. This is the question the work reported here is intended to answer. The research also illuminates some broader aspects of congressional election politics, which are discussed in due course.

How campaign spending limits would alter the competitive balance depends, of course, on how campaign spending affects election results. Previous research on campaign spending effects has focused almost exclusively on how spending is related to the share of votes candidates receive. The standard approach has been to regress the vote on the candidates' expenditures, variously measured, and some control variables. The reported findings have been remarkably consistent, particularly with regard to House elections. No matter what model is estimated (and many different specifications and functional forms have been tried), it turns out that campaign expenditures have sharply different electoral effects depending on whether or not the candidate is an incumbent.

The more nonincumbents (particularly those challenging incumbents) spend, the greater their share of the vote. The more the incumbents spend, the *smaller* their share of the vote. Incumbents do not lose votes by spending money, of course; they merely spend more the more strongly they are challenged, and the stronger the challenge, the worse for the incumbent. With the challenger's level of spending (the best measure of the strength of a challenge) controlled, the effect of the incumbent's spending is, in virtually every model or election year, very small and statistically indistinguishable from zero. In nonlinear models, the sign of the coefficient on incumbent spending is wrong more often than not....

These findings indicate that, in general, any policy restricting campaign spending is likely to protect incumbents and diminish electoral competition. The more specific question of how drastically any particular spending limit would curtail competition can also be addressed using these equations. But an alternative approach, taken in this paper, promises a clearer idea of what restrictions might do to the competitive position of challengers. It also provides a better sense of how much money is needed to wage a competitive campaign under a variety of electoral conditions.

The main difference is that I examine the effects of campaign spending on a challenger's *chances of winning or losing* rather than on his or her vote share. Despite the necessarily intimate connection between the two, the analyses do not merely duplicate one another. The most striking difference is that a focus on winning or losing turns up the first solid evidence that what incumbents spend *does* make a significant difference in House elections. It also indicates that, contrary to the common conception of "marginality," the margin of victory in one election has a relatively modest effect on the probable outcome of the next, once spending is taken into account. Before considering the evidence of these and other points, however, it is necessary to take a prefatory look at the simple relationship between how much challengers spend and how frequently they win.

Campaign Spending and the Chances of Winning

The basic data on the connection between how much money House challengers spend on the campaign and how frequently they win are summarized in Table 1. Dollar figures have been adjusted for inflation (1984 = 1.00), so the data can be aggregated across election years. These elementary figures are, by themselves, quite instructive. First, note that challengers who spend more money win

Table 1 Winning House Challengers by Level of Campaign Spending, 1972–1984 (percentages)

Expenditure Range ($1,000s)	All Years		Neutral Years		Good Years		Bad Years	
0–49	.1	(1,179)	0	(685)	.5	(218)	0	(276)
50 – 99	2.1	(326)	1.0	(195)	4.8	(84)	2.1	(47)
100–149	4.6	(194)	.9	(107)	10.7	(56)	6.5	(31)
150–199	11.6	(155)	6.3	(80)	29.5	(44)	3.2	(31)
200–249	16.0	(119)	12.1	(66)	34.5	(29)	4.2	(24)
250–299	26.2	(84)	12.2	(41)	55.2	(29)	7.1	(14)
300–399	27.3	(106)	20.6	(63)	48.4	(31)	8.3	(12)
400–449	34.0	(47)	28.1	(32)	58.3	(12)	0	(3)
500+	39.3	(61)	41.4	(29)	55.0	(20)	8.3	(12)
Total	6.4	(2,271)	4.2	(1,298)	15.9	(523)	1.8	(450)

Note: Expenditures are adjusted for inflation (1984 = 1.00); the number of cases is in parentheses; neutral years were 1972, 1976, 1978, and 1984; 1974 and 1982 were good years for Democratic challengers, bad years for Republican challengers; 1980 was a good year for Republicans and a bad one for Democrats.

more often. This is scarcely news, to be sure, in view of the thoroughly documented link between challengers' expenditures and votes. But viewing the actual proportion of victories at different levels of spending puts the connection in sharper perspective.

Taking all election years together, the odds against challengers who spend less than $100,000 are long indeed; two-thirds of all House challengers fall into this category. Chances are only slightly better for challengers who spend between $100,000 and $150,000; they and the first group subsume three-quarters of all challengers. Prospects improve considerably as spending rises from $150,000 to $300,000. The most extravagant challengers (spending $400,000 or more) win more than one-third of their contests. About 13 percent of all House challengers from 1972 through 1984 spent more than $250,000 and may be considered competitive by the arbitrary but reasonable criterion that they have at least one chance in four of winning. Most spent far too little to make a contest of it.

Of course, not all election years are alike. Some elections feature national political tides—driven by recessions, scandals, presidential politics, and the like—that strongly favor one party's candidates. Conditions in other years seem nearly neutral between parties. Obviously, a House challenger's chances of winning will vary with the strength and direction of national partisan tides. Table 1 shows that challengers favored by national forces—Democrats in 1974 and 1982, Republicans in 1980—win more frequently at every level of campaign spending. Those spending more than $250,000 win more than half the time; anything over $150,000 is enough to make a race of it. Note also that challengers are able to spend more money in good election years; for example, 23 percent spent more than $200,000 in the good years, compared to 18 percent in neutral years and 14 percent in bad years.

In the absence of strong partisan tides, challengers have a much harder time winning and need to spend more than $400,000 to have at least a one-in-four chance of winning; about 5 percent manage to do so. Against contrary partisan

Table 2 Probit Estimates of a House Challenger's Probability of Winning at Various Levels of Campaign Spending, 1972–1984

Challenger's Expenditures ($1,000s)	All Election Years	Neutral Election Years	Good Election Years	Bad Election Years
25	.00	.00	.01	.00
50	.01	.00	.03	.01
75	.03	.01	.07	.02
100	.04	.02	.11	.02
150	.09	.05	.20	.03
200	.13	.08	.28	.05
250	.18	.12	.35	.06
300	.22	.16	.42	.07
400	.30	.23	.52	.09
500	.37	.31	.60	.10

tides, challengers raise the least amount of money and find it difficult to win no matter what they spend.

This first pass through the data suggests that the budget adequate for a competitive campaign against a House incumbent varies considerably depending on national forces. When partisan conditions favor challengers, $250,000 is sufficient for an even chance of winning, and anything above $150,000 gives the challenger a fighting chance. Under more or less neutral conditions, more than $300,000 is necessary to have a fighting chance, and the rate of winning exceeds 30 percent only when spending surpasses $500,000. In bad election years, no amount of campaign spending gives much hope of victory; the best challengers can do spending at any level above $250,000 is to gain about 1 chance in 12 of winning.

The direction of national partisan trends is not the only variable likely to affect the connection between challengers' campaign spending and chances of victory. District-level variables may also intervene. Conceivably, for example, the more the incumbent spends in defense of the seat, or the better entrenched he or she is, the smaller the chance of a successful challenge at any given level of campaign spending.

Analysis of these interactions requires more complicated statistical techniques. The dependent variable—winning or losing—is dichotomous, so probit analysis replaces the multiple regression analysis commonly used in studying campaign spending effects. Probit equations estimate the probability that a challenger will win an election, given the values taken by the independent variables. A feature of probit is that the effects of any single independent variable depend on the values taken by the other independent variables.... Results are therefore presented in tabular form....[e]

As an example, probit-based estimates of a challenger's probability of election at different spending levels are listed in Table 2. This is simply another way of looking at the data summarized in Table 1, so the table makes the same substan-

e. The probit equations from which the table entries are derived are set forth in an appendix to Jacobson's article, but are not reprinted here.

tive points. The challenger's probability of winning increases with spending, but to very different levels depending on national partisan trends. For example, the probability of winning for a House challenger who spends $300,000 is .16 in years without strong partisan tides, .42 when partisan conditions are favorable, but only .07 in bad years. A challenger spending $200,000 in a good year is more likely to win than one spending $400,000 in a neutral year.

Does It Matter What Incumbents Spend?

A challenger's chances of winning seem to depend strongly on how much he spends on the campaign. Obviously, his prospects might also depend on what the incumbent spends. Certainly members of Congress believe so, for their campaign finance activity is sharply reactive; the more threatened they feel by a challenge, the more money they raise and spend. Few question the necessity for, and efficacy of, spending generously in response to a vigorous, well-financed challenge. But, as noted, extensive research has produced remarkably little evidence that spending by incumbents has any effect at all on the vote once other variables (including challenger's spending) are taken into account. Because it is hard to accept that members of Congress are so wrong about something so basic to their calling, these findings have remained puzzling.

In an earlier essay... I proposed as an explanation that perhaps

> spending by incumbents provides very small but still positive marginal returns, so that it makes perfect sense for incumbents to spend very large amounts of money to counteract serious challenges. After all, when an incumbent is defeated, it is normally in a very close contest; small shifts in the vote make the difference between victory and defeat. Even if the electoral effects of spending are too small to measure amid the noise of the data, they may be large enough to be worth the effort.

In other words, it may take a great deal of money to buy very few additional votes, but if the election is close enough, those few votes may make all the difference. If this is true, then spending by incumbents might influence the chances of winning or losing, even though its influence on the vote is statistically negligible. The results of probit analysis of the effects of campaign spending by both candidates on the challenger's probability of winning are consistent with this argument.... All the coefficients for incumbent spending have the proper (negative) sign; only in bad years for the challenger's party does the coefficient fail to achieve at least a .10 significance level (one-tailed).

The challenger's likelihood of winning at various combinations of campaign spending by the two candidates, computed from the probit estimates, is listed in Table 3. The table displays several noteworthy patterns:

1. As expected, campaign spending has a greater payoff to challengers than to incumbents. This is clearest from the entries along the diagonal (highlighted in the tables). At equal spending by both candidates, the higher the level, the more likely the challenger is to win. This holds for all election years. An obvious implication is that ceilings on campaign spending are, other things equal, biased in favor of incumbents, and the lower the ceiling, the greater the bias.

Proponents of spending limits like to argue that other things are rarely equal. Incumbents are usually able to raise much more money; only about 20 percent of House challengers achieve at least rough equality with incumbents in campaign

Table 3 Probit Estimates of a House Challenger's Probability of Winning at Various Levels of Campaign Spending by the Challenger and Incumbent, 1972–1984

Challenger's Expenditures ($1,000s)	Incumbent's Expenditures ($1,000s)					
	50	100	200	300	400	500
			All Election Years			
50	.02	.01	.01	.01	.00	.00
100	.07	.05	.04	.03	.03	.02
200	(.22)	.17	.14	.12	.11	.10
300	(.35)	(.29)	.24	.22	.20	.18
400	(.46)	(.40)	(.34)	.31	.28	.27
500	(.54)	(.48)	(.42)	.38	.36	.34
			Neutral Election Years			
50	.00	.00	.00	.00	.00	.00
100	.03	.02	.02	.01	.01	.01
200	(.14)	.11	.08	.07	.06	.05
300	(.27)	(.22)	.18	.15	.14	.13
400	(.39)	(.33)	(.27)	.24	.22	.21
500	(.49)	(.42)	(.36)	.33	.30	.28
			Good Election Years			
50	.06	.04	.02	.02	.01	.01
100	.22	.16	.10	.08	.07	.06
200	(.49)	.39	.30	.26	.22	.20
300	(.66)	(.57)	.47	.41	.37	.34
400	(.77)	(.69)	(.59)	.54	.50	.46
500	(.83)	(.77)	(.68)	(.63)	.59	.56
			Bad Election Years			
50	.01	.01	.01	.01	.00	.00
100	.04	.03	.02	.02	.01	.01
200	(.08)	(.06)	.05	.04	.04	.03
300	(.12)	(.10)	(.08)	.07	.06	.05
400	(.16)	(.13)	(.10)	.09	.08	.08
500	(.19)	(.16)	(.13)	.11	.10	.10

Note: Entries in parentheses are hypothetical; these combinations approximate fewer than 0.1 percent of the actual cases.

spending at levels (i.e., above $100,000) where it could matter. Challengers would be helped by ceilings that kept incumbents from fully exploiting their fund-raising advantage. By the evidence in Table 3, this view is mistaken. Consider, for example, a neutral election year. Suppose both candidates are limited to spending $200,000 and both spend this amount; the challenger has a .08 probability of winning. Now suppose that without the ceiling, the incumbent is able to raise an additional $300,000 but the challenger only another $100,000. The challenger would still be better off, for his probability of winning if he spends $300,000 to an incumbent's $500,000 is .13. The same holds in other kinds of election years and for many different combinations in which the increase in spending by incumbents is much larger than the increase in spending by challengers.

Of course, a spending ceiling would be accompanied by campaign funds from

the public treasury; otherwise, it could not survive a constitutional challenge. If every candidate were guaranteed $200,000 for the campaign, Table 3 projects that, on average, 14 percent of the challengers would be successful—considerably more than the 6.4 percent of the challengers who actually did win between 1972 and 1984 (see Table 1). But [no] public funding proposal has included a guaranteed floor of this sort. Some scheme of matching individual contributions is invariably proposed....If we assume that *all* contributions in previous elections were matchable (probably no more than half actually would have been [under proposals being considered in Congress]), make the adjustments, and impose a spending limit of $200,000, the projected percentage of challenger victories declines to about 4 percent. Advances made by low-spending challengers would not offset the diminished prospects of those who could have spent more than $200,000.

2. Under most plausible scenarios, then, spending limits would reduce the chances of a challenger victory, even though incumbents usually raise a lot more money. This is not to say that the incumbent's level of spending has no effect on the challenger's probability of winning. The more the incumbent spends, the less likely the challenger is to win.

Variations in levels of spending by both candidates have the most dramatic effect in election years favoring the challenger's party. This makes intuitive sense. The more money challengers raise, the more effectively they can exploit whatever weapons national conditions supply for attacking incumbents; the effects of money and powerful campaign themes are naturally interactive.

Incumbents facing contrary tides should also find more value than usual in campaign spending. Defensive campaigns require more than routine continuation of the reelection work a member has been doing all along. New messages have to replace old ones. Staunch loyalists find it necessary to open some distance between themselves and their party's leaders. Members may have to fight to impose a favorable definition of what the contest is about—for example, making its focus local rather than national. Changing the message, pushing a more profitable definition of what is at stake, and carving out a more independent political identity require extensive publicity, and publicity costs money. Hence it is not surprising that the incumbent's level of spending makes the most difference when national tides favor the challenger.

3. Theoretically, a well-financed challenger would enjoy a solid chance of defeating a poorly financed incumbent even without a favorable national tide. But the set of such campaigns is virtually empty. The entries in parentheses are almost purely hypothetical; they represent less than one-tenth of one percent of the actual cases. When seriously challenged, almost every incumbent responds with a vigorous campaign of his own. This is one reason why it has been difficult to find evidence that campaign spending by incumbents affects their vote share; there are simply too few cases of low-spending incumbents facing high spending challengers.

The Effects of Marginality

Regardless of election year trends, some members of Congress are more vulnerable than others—or so the preoccupation with incumbent "marginality" typical of the recent literature on congressional elections presupposes. Presumably, the

Table 4 Probit Estimates of a House Challenger's Probability of Winning at Various Levels of Campaign Spending and Previous Incumbent Vote Margins, 1972–1984

Challenger's Expenditures ($1,000s)	Incumbent's Previous Vote Margin (percentages)					
	40	30	20	10	5	.1
			All Election Years			
50	.01	.01	.01	.01	.02	.02
100	.03	.04	.05	.05	.05	.06
200	.10	.12	.13	.14	.15	.16
300	.18	.19	.21	.23	.24	.25
400	.24	.26	.29	.31	.32	.33
500	.30	.33	.35	.37	.39	.40
			Neutral Election Years			
50	.00	.00	.00	.00	.01	.01
100	.01	.01	.02	.02	.03	.03
200	.05	.06	.07	.09	.10	.11
300	.10	.12	.14	.17	.18	.19
400	.15	.18	.21	.24	.26	.27
500	.20	.24	.27	.31	.33	.35
			Good Election Years			
50	.03	.03	.04	.04	.04	.05
100	.10	.11	.12	.13	.14	.14
200	.24	.26	.28	.30	.31	.32
300	.37	.39	.41	.43	.45	.46
400	.47	.49	.51	.54	.55	.56
500	.55	.57	.59	.61	.62	.63
			Bad Election Years			
50	.00	.01	.01	.01	.01	.02
100	.01	.01	.02	.03	.03	.04
200	.02	.03	.04	.05	.06	.07
300	.03	.04	.06	.07	.08	.09
400	.05	.06	.07	.09	.10	.11
500	.06	.07	.09	.11	.12	.13

more firmly entrenched the incumbent, the less likely a challenger is to win at any particular level of campaign spending, and the more the challenger has to spend to achieve any given probability of winning. Put another way, a challenger's chances of winning may vary more sharply with levels of campaign spending the more precarious the incumbent.

The vote margin in the last election is the most widely used measure of incumbent's vulnerability. Probit equations estimating the challenger's probability of victory as a function of the vote share won by his party's candidate in the previous election and his level of campaign spending... are interpreted in Table 4, which displays the challenger's likelihood of winning at various levels of campaign spending and previous incumbent vote margins.

What is rather surprising, in the light of political scientists' fascination with the size of House incumbents' vote margins, is the modest influence of the incum-

bent's vulnerability, measured this way, on the challenger's probability of winning. Except, perhaps, in bad years, campaign spending is far more important. Only for all election years combined and for election years without clear partisan trends is last election's vote related to the challenger's chances of victory beyond a .05 level of statistical significance. In years especially good or bad for the challenger's party, the coefficient has the proper (positive) sign but is so imprecisely estimated as to be statistically indistinguishable from zero—a caveat to keep in mind while examining the table.

Money's primacy over marginality is especially striking in election years favoring the challenger's party. The table suggests, for example, that a challenger spending $200,000 against an incumbent who won by 40 percentage points last time would have a greater chance of winning (.24) than would one spending $100,000 against an incumbent who had barely squeaked through (.14). More generally, an extra $100,000 adds more to the chance of winning than does a drop of 30–40 points in the incumbent's previous margin of victory. On the evidence of these probit estimates, a wide margin of victory in one election does little to improve chances against a well-funded challenger riding a favorable partisan tide in the next election. Incumbent security rests far more on avoiding formidable opposition than on intrinsic electoral advantages.

The same holds true in election years without strong partisan trends, albeit to a lesser degree. A challenger's probability of winning depends more on what he or she spends on the campaign than on how "marginal" the incumbent is. Generally, an additional $100,000 is worth about 20 percentage points in vote margin. Note also that it takes a substantial amount of money to have much chance to defeat even the most marginal incumbent. That is, apparent "vulnerability" only translates into a serious risk of defeat if the challenger spends enough money to exploit it. Only in bad years for the challenger's party does campaign money not readily compensate for the supposed electoral handicap represented by the incumbent's previous vote margin. An extra $100,000 is equivalent to only about 10 percentage points in vote margin.

Proponents of spending limits often claim that the preoccupation with maintaining competition is misplaced because only a few seats are competitive in any event, and these few seats can be contested effectively by challengers with limited funds because they are inherently marginal. The evidence here suggests the contrary. It takes a substantial amount of money to have much chance of defeating even a very marginal incumbent, and even ostensibly "safe" incumbents can be put at serious risk by a well-financed challenge.[21]

These findings help clear up a puzzle in the recent literature on congressional elections. The typical vote margin enjoyed by House incumbents increased sharply during the 1960s. This inspired the extensive research literature documenting—and attempting to explain—what was variously specified as the "decline in competition" or the "vanishing marginals" or the "increased incum-

21. And incumbents with large margins in the previous election do sometimes attract well-funded opponents. The data include 32 cases in which a challenger spent more than $300,000 against an incumbent who had won by more than 30 percentage points last time. Eight of them won....

bency advantage." But by every reasonable measure, House members have been working harder than ever at staying in office. Are they paranoid, or have political scientists misread the data?

In another paper I argue the latter—specifically, that competition has not declined, the marginals, properly defined, have not vanished, and so House incumbents are just as much at risk now as they were before the changes of the 1960s. The evidence presented in this section underscores an important component of that argument: A "safe" margin in one election does not by itself assure victory in the next election. What happens next time depends far more on the strength of the opposition, the vigor of the incumbent's response, and the direction of partisan tides. The sense of insecurity incumbents express in their choice of activities is by no means unjustified.

Further evidence that House incumbents' campaign finance practices are rational appears when all four factors—spending by both candidates, partisan trends in the election year, and marginality—are taken into account. The equations... are interpreted in Table 5. Although all three variables necessarily interact in the probit model, the table basically reiterates the findings reported separately in Tables 3 and 4. The challenger's level of spending (along with the direction of partisan trends) has the greatest influence on his probability of winning, but the incumbent's spending and previous vote margin also make some difference. (Note, however, that only the coefficient on challenger's expenditures is statistically significant in bad years and that the coefficient on previous vote margin is not significant in good years.) For example, in a good year for the challenger's party, if both candidates spend $300,000, the challenger has a .34 probability of winning against an incumbent who had won by 40 percentage points last time, .41 if the margin was 20 points, and .47 if the incumbent barely won. If the incumbent spends $500,000 rather than $300,000, the respective probabilities are .27, .33, and .39.

Table 5 suggests that House members would be well advised to raise and spend more money the more their opponents spend, the narrower their victory last time, and the worse things look for their party. This is exactly what they do. All these variables are strongly related in the predicted direction to incumbent expenditures. By the evidence presented here, House incumbents' campaign finance practices reflect an accurate assessment of electoral realities. So do the financial practices of the challengers, who generally raise and spend all the money they can get their hands on.

Frugal Winners

Clearly, challengers have little chance to win unless they spend rather substantial amounts of money. Still, a few have managed to win with frugal campaigns. How did they do it? A case-by-case analysis reveals that scandal, good media markets, and unusually inept incumbents occasionally permit challengers to win on the cheap. From 1972 through 1984, 11 (of 1,505) House challengers spending less than $100,000 (in 1984 dollars) won: Six were Democrats who evidently benefited from Watergate in 1974; two defeated House members who were under indictment at the time of the election; the remaining three apparently capitalized on careless or inept congressmen, though as an explanation of incumbent defeats, this verges on tautology. The fit between most of these districts and

Table 5 A House Challenger's Probability of Winning at Various Levels of Campaign Spending by Both Candidates and Previous Incumbent Vote Margins, 1972–1984

		Incumbent's Expenditures ($1,000s)								
		100			300			500		
Vote Margin		40	20	.1	40	20	.1	40	20	.1
					All Election Years					
	100	.04	.06	.08	.02	.03	.05	.02	.02	.03
Challenger's	200	.14	.18	.23	.09	.11	.15	.07	.09	.12
Expenditures	300	(.24)	(.30)	(.25)	.16	.21	.26	.13	.17	.21
($1,000s)	400	(.34)	(.40)	(.46)	.24	.29	.35	.20	.25	.30
	500	(.42)	(.48)	(.54)	.31	.37	.43	.26	.32	.38
					Neutral Election Years					
	100	.01	.03	.04	.01	.01	.02	.00	.01	.01
Challenger's	200	.07	.11	.17	.04	.06	.10	.03	.04	.07
Expenditures	300	(.15)	(.22)	(.30)	.09	.13	.20	.06	.10	.16
($1,000s)	400	(.24)	(.32)	(.42)	.14	.21	.29	.11	.17	.24
	500	(.32)	(.41)	(.51)	.21	.29	.38	.17	.24	.32
					Good Election Years					
	100	.13	.17	.22	.06	.08	.11	.04	.05	.08
Challenger's	200	.35	.41	.48	.20	.25	.31	.15	.19	.24
Expenditures	300	(.51)	(.58)	(.65)	.34	.41	.47	.27	.33	.39
($1,000s)	400	(.63)	(.69)	(.75)	.46	.53	.59	.38	.45	.51
	500	(.72)	(.77)	(.82)	(.55)	(.62)	(.68)	.47	.54	.61
					Bad Election Years					
	100	.01	.03	.05	.01	.02	.03	.01	.01	.02
Challenger's	200	(.03)	(.06)	(.11)	.02	.04	.07	.02	.03	.06
Expenditures	300	(.06)	(.10)	(.15)	.03	.06	.10	.03	.05	.09
($1,000s)	400	(.08)	(.13)	(.19)	.05	.08	.14	.04	.07	.11
	500	(.09)	(.15)	(.23)	.06	.10	.16	.05	.08	.14

Note: Entries in parentheses are hypothetical; these combinations approximate fewer than one-tenth of 1% of the actual cases.

local media markets was close enough for House candidates to be considered worthy of news coverage and to use advertising dollars efficiently.

Another 30 (of 349) challengers won while spending between $100,000 and $200,000. Ten of them were 1974 Democrats; four more took advantage of incumbents beset by scandal of one sort or another; others defeated incumbents who displayed various signs of incompetence. More than two-thirds ran in good media markets. Taken together, these cases suggest that it is sometimes possible to defeat an incumbent with no more than $200,000—if national tides are very strong or if the incumbent is a crook or out of touch and if local media can be used efficiently. These are, to say the least, atypical circumstances.

The data also suggest that the chances of winning with less than $200,000 have diminished over time; 22 of the 41 were elected in 1972 and 1974, only 19 (6 of whom defeated incumbents who were in trouble with the law) from 1976 through 1984. A more general implication is that challengers have needed to spend more money with each passing election to have the same chance of win-

Table 6 Probit Estimates of a House Challenger's Probability of Winning at Various Levels of Campaign Spending, by Year, 1972–1984

Challenger's Expenditures ($1,000s)	1972	1974	1976	1978	1980	1982	1984
50	.02	.01	.01	.01	.01	.00	.00
100	.07	.06	.05	.04	.03	.03	.02
200	.20	.18	.15	.13	.11	.09	.08
300	.32	.29	.26	.23	.20	.17	.15
400	.42	.39	.35	.31	.28	.25	.22
500	.50	.47	.43	.39	.35	.32	.29
Percent spending more than							
$300,000	4.4	3.7	6.4	11.0	14.9	10.9	17.3
$500,000	.3	.3	.9	2.6	6.0	4.5	5.3

ning. Such is indeed the case according to a probit equation that includes the election year as a variable. Table 6 displays its results.

Even with expenditure figures adjusted for inflation, the cost of a competitive challenge has grown considerably over this period. For example, by 1982 it took $500,000 to gain the same chance of winning (.32) that was reached in 1972 with $300,000. Had challengers not been able to raise more money in real terms with each passing election, the number of successful challenges would have, by implication, fallen. But House challengers have managed to increase their fund-raising sufficiently to offset any effects of a decline in the marginal impact of campaign money on the probability of winning, so their chances of defeating an incumbent remain unchanged. The average level of (inflation adjusted) campaign spending by challengers has nearly doubled since 1972. More to the point, the lower two rows in Table 6 show a growing share of challengers spending at the higher levels. Indeed, about the same proportion spent more than $500,000 in the latest three of these elections as had spent more than $300,000 in the first three. Thus a kind of equilibrium has been maintained.

These findings deliver another blow to the notion that there is some level of campaign spending sufficient for all times and circumstances so that a ceiling could be imposed on expenditures without seriously interfering with electoral competition. What might have appeared a reasonable ceiling in 1972 would by now seriously stifle competition even if adjusted for inflation....

Concluding Observations

The question "How much is enough?" simply has no fixed answer in the ranges usually considered for campaign spending limits. A million dollars is probably "enough" in all but a tiny number of cases, though a few House candidates have spent more than that in recent years. But it is hardly worth imposing a ceiling that almost no one approaches anyway. Any limit that really does reduce campaign spending and its attendant problems of fund-raising, PAC influence, and so forth will also be low enough to diminish the chances of a successful challenge under a variety of normal electoral circumstances.

Table 7 Probit Estimates of Recall and Recognition of House Incumbents and Challengers, 1982, by Campaign Expenditures

Campaign Expenditures ($1,000s)	Recall Candidate		Recognize Candidate	
	Incumbent	Challenger	Incumbent	Challenger
25	.25	.11	.93	.51
50	.33	.17	.93	.60
75	.38	.22	.93	.66
100	.42	.27	.93	.69
150	.47	.33	.94	.74
200	.51	.38	.94	.77
250	.54	.42	.94	.79
300	.57	.45	.95	.81
400	.60	.50	.95	.84
500	.63	.54	.96	.86

The public, Common Cause, and many members of Congress clearly regard what is objectively only "enough" money for a competitive campaign under many conditions as being "too much." But competitive campaigns are unavoidably expensive. There is simply no way for most nonincumbent candidates to capture the attention of enough voters to make a contest of it without spending substantial sums of money. This reality is illustrated in Table 7, which lists probit-derived estimates of the probability that a voter in the 1982 House elections could (a) recall the names of the incumbent and challenger; or (b) recognize the names from a list. These are useful measures of campaign effects because familiarity with House candidates is well known to be strongly related to the vote choice; voters are particularly reluctant to cast votes for candidates whose names they do not recognize.

A very large proportion of voters recognize the incumbent's name no matter what he spends on the campaign. Indeed, incumbent recognition rates are so high as to leave little room for improvement; familiarity on this level is one undeniable advantage of incumbency. For challengers, in contrast, campaign spending and recognition vary together strongly, so the more a challenger spends, the narrower the incumbent's advantage on this dimension. The gap between the proportion able to recall the names of the two candidates without being cued by a list also diminishes as spending increases. Both candidates improve their standing on this more stringent measure of familiarity by spending more money, but the challenger gains relatively more than the incumbent.

These patterns help to explain the connection between campaign spending and the probability of a successful challenge. They also show how much money it takes to apprise voters of even the most elementary piece of information—the candidate's name. Again, a fully competitive campaign, in which most voters know enough about the candidates to make a minimally informed choice, is obviously an expensive campaign.

In aggregate, the evidence is overwhelming that ceilings on campaign spending at the levels commonly proposed would stifle competition and protect incumbents in House elections. Competitive campaigns are not merely a product of

structural factors—for example, a distribution of partisans that makes some districts inherently marginal—overlain by national forces. They are far more the result of vigorous, amply funded challenges. If the goal is to retain or enhance the benefits of electoral competition—keeping legislators responsive, letting voters change the direction of policy by replacing elected officials—limits on congressional campaign spending are a fundamentally bad idea.

Notes and Questions

1. As Jacobson notes, he has converted campaign spending for all his calculations into 1984 dollars. To get a sense of how much spending is likely to produce a given level of competitiveness, it is useful to convert Jacobson's figures to take account of inflation since 1984. The Consumer Price Index inflated by 39 percent between 1984 and 1993. Thus, to get a more updated interpretation of Jacobson's findings, multiply the dollar figures in his tables by 1.39. For example, spending by a candidate of $400,000 in 1984 dollars would be the equivalent of spending $556,000 in 1993 dollars. Even this updating results in understating the amount of spending needed for a given level of competitiveness if the trend, reported by Jacobson, for campaign costs to rise faster than consumer costs has continued.

2. Some research published since Jacobson's essay has found that the benefits incumbents gain from increased spending are greater than Jacobson suggests. See, e.g., Donald P. Green & Jonathan S. Krasno, *Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections*, 32 AMERICAN JOURNAL OF POLITICAL SCIENCE 884 (1988); Scott J. Thomas, *Do Incumbent Campaign Expenditures Matter?*, 51 JOURNAL OF POLITICS 965 (1989); Kevin B. Grier, *Campaign Spending and Senate Elections, 1974–84*, 63 PUBLIC CHOICE 201 (1989); Donald P. Green & Jonathan S. Krasno, *Rebuttal to Jacobson's "New Evidence for Old Arguments"*, 34 AMERICAN JOURNAL OF POLITICAL SCIENCE 363 (1990). Jacobson and others continue to find that the effects of increased incumbent spending are slight (albeit potentially decisive in close elections). See, e.g., Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 AMERICAN JOURNAL OF POLITICAL SCIENCE 334 (1990); Alan I. Abramowitz, *Incumbency, Campaign Spending, and the Decline of Competition in U.S. House Elections*, 53 JOURNAL OF POLITICS 35 (1991).

Despite this disagreement over the electoral benefit of expenditures by incumbents, all these researchers agree that the marginal value of increased expenditures is greater for challengers than for incumbents. Indeed, the greater importance of spending for challengers than for incumbents has been a remarkably robust finding of political science research in the last two decades. For example, recent research has found that a surprisingly small percentage of campaign funds are actually spent on voter persuasion.

> Less than 40 percent of all the money spent by congressional incumbents during the 1990 election cycle was devoted to communicating with voters through the traditional methods: advertising, mailings, rallies, and the like. Instead, the bulk of the spending went to cover the costs of building their political organizations: overhead, consultants, and fund raising.

Sara Fritz & Dwight Morris, HANDBOOK OF CAMPAIGN SPENDING 7 (1992).[f] This finding raised the possibility that earlier studies of the relative effectiveness of spending by challengers and incumbents were flawed, because they were based on total reported expenditures rather than expenditures on direct campaign activity. However, when researchers controlled for this problem by considering only direct campaign expenditures, they found that the heightened importance of spending for challengers was even greater than earlier studies suggested. See Stephen Ansolabehere & Alan Gerber, *The Mismeasure of Campaign Spending: Evidence from the 1990 U.S. House Elections*, 56 JOURNAL OF POLITICS 1106 (1994).

What is the implication, if any, for the debate on campaign finance reform, of the finding that increased campaign spending benefits challengers more than incumbents? Does it matter for campaign finance reform how much benefit incumbents get when they spend more?

3. The section of Jacobson's essay entitled "The Effects of Marginality" begins with the sentence, "Regardless of election year trends, some members of Congress are more vulnerable than others—or so the preoccupation with incumbent 'marginality' typical of the recent literature on congressional elections presupposes." As should be evident, Jacobson's discussion of "marginality" refers to research of David Mayhew and others, summarized in Section I of this chapter, measuring the incumbency advantage by the decline in the number of House districts in which the incumbent's share of the vote was close to fifty percent.

Does the evidence presented by Jacobson purport to show that as a general rule, incumbents are equally vulnerable, regardless of the district they represent? Would such a conclusion be plausible?

f. This surprising finding, that only a fraction of campaign funds are spent directly on campaigning, apparently is not limited to congressional campaigns. An earlier study of campaign spending in a diverse sampling of California local governments found that only 38% of campaign funds were spent on voter contacts. See California Commission on Campaign Financing, FINANCING CALIFORNIA'S LOCAL ELECTIONS: MONEY AND POLITICS IN THE GOLDEN STATE 62–66 (1989).

Chapter 16

Public Financing and Beyond

For many reformers, public financing is the *sine qua non* of campaign finance reform. The logic supporting public financing is simple. Many Americans willingly contribute modest amounts to campaigns for such reasons as ideology, party, or the candidate's leadership abilities, without expecting the contribution to exert any particular pressure on the recipient. But experience shows that contributions of this type do not consistently meet the need of candidates and parties for funds in amounts sufficient to bring their messages home to voters and to allow for vigorous electoral competition. Sometimes this gap is not filled, as is often the case for challengers in House and state legislative races. In other cases—especially for incumbents in the same races—the gap is filled by contributors who hope to apply pressure or, perhaps, are pressured into making contributions. Public financing, according to supporters, is the only way to reduce or eliminate this gap so that informative, competitive campaigns can be run, while reducing campaign financing as a source of undue pressure and influence.

Other reformers support public financing not for its own merits, but because they believe it is important to have some form or other of spending limits. Under *Buckley v. Valeo*, such limitations generally cannot be imposed except as a voluntary condition of accepting a public benefit that is offered in exchange. Ordinarily that benefit is public funding, though we shall see in the last part of this chapter that there have been some efforts to fashion incentives for the acceptance of spending limits other than public funding. Whether these will pass constitutional muster is not yet clear.

The opposition to public financing is as vigorous as the support. In part it reflects a general opposition, in a conservative period, to new or expanded government programs. Opponents of public financing argue that in a time of fiscal pressure in which many vital programs are competing for funds, a new appropriation for political campaigns is objectionable. Furthermore, they contend, taxes should not be used for the propagation of political views that the taxpayers may disagree with or even find offensive.

Perhaps the most telling argument against public financing is that it would endanger the autonomy of the political process from the state. Even laws that merely regulate the flow of money in campaigns are often enacted and implemented with political advantage—partisan or personal—in mind. To make candidates and parties dependent on public funds and the strings that are or might be

attached to them would greatly magnify the danger of abuse, according to opponents of public funding.

Whatever may be the force of this last argument, there can be little doubt that partisanship and calculation of advantage have been central to the politics of public financing. In general and with a number of exceptions, Democrats have supported public financing and Republicans have opposed it. Part of the reason, of course, is that some of the ideological arguments against public financing are likely to appeal more to Republicans than to Democrats. In addition, both Republicans and Democrats may believe that in the long run, Republicans—with their affinity to the corporate sector—have a natural advantage over Democrats in a privately financed campaign system. Probably a third reason, less frequently mentioned, is that most of the public financing schemes that have been proposed and debated in the last couple of decades have been fashioned by Democrats and therefore have been more attuned to the needs of Democrats than Republicans.

The debate on public financing is complicated not merely because of the competing pro and con arguments and the political cross-currents that surround it, but because "public financing" is not a single concept. Following are only a handful of the options that must be considered in fashioning any public financing plan:

- Who will be eligible for public financing? All major party candidates? If so, will public financing be available in primaries? If so, on what terms? Or will eligibility be determined by other standards? The most common method proposed is that candidates be required to raise a threshold amount in private contributions. If this method is used, what will be the terms and conditions?
- How much should the candidates receive? Will all eligible candidates for the same office receive the same amount? Or will public funds match, on a dollar-for-dollar or other basis, private contributions the candidates receive?
- Will funds be paid directly from the public treasury? More commonly, a special "fund" is created. Individuals, when they pay their federal or state income taxes, are permitted to "check off" one or a few dollars of their taxes to go into the fund. This device is intended to deflect criticism that taxpayers' funds are used to support propagation of views to which they object. But many regard this device as deceptive, because the taxpayer who checks the box on a tax return pays no additional tax for doing so. To say that the taxes of individuals who decline to check the box are not being used is thus a dubious proposition.
- Should public funding take the form of cash grants that can be used for any campaign purpose, or should it consist of "in-kind" benefits, such as reduced postage rates or free or discounted radio and television advertising?
- What additional rules and regulations should control campaign financing to complement public funding?

Supporters of public financing are by no means agreed on the answers to these and many other questions. Take the last one, for example. As we have seen, some people support public financing solely or primarily because they must do so in order to advocate spending limits. But there are other supporters of public financing who oppose spending limits. This single disagreement may be sufficient to create deep division within any coalition for public financing, and it is only one of a large number of disagreements.

Part I of this chapter considers public financing as it presently exists. After briefly noting the few states that have adopted significant public financing, Part I considers the presidential public financing system, with emphasis on real or perceived problems that have emerged in recent years. Part II considers a variety of proposals for campaign finance reform that have been debated in the last decade or so, most of which call for some form of public subsidy. In Part III, we consider a few of the novel constitutional questions that are raised by some of the elements found in many of the current reform proposals.

As this book goes to press in the spring of 1995, major and immediate changes in the campaign finance system appear unlikely, at least at the federal level. Campaign finance reform is not a part of the House Republicans' Contract with America, and has received little or no discussion. If and when the Republicans turn their attention to campaign finance, the nature of the proposals that are likely to be considered seriously will undoubtedly be very different from most of the proposals mentioned in this chapter. That is partly because of the ideological differences between the newly-ascendant Republicans and the Democrats who have devised most of these proposals. At least as much, however, it is because reform proposals will reflect changing patterns of campaign finance. These patterns continually change under any circumstances, but the unexpected Republican victory in the 1994 elections, by giving the Republicans the advantages of incumbency in Congress and in an increased number of states, will itself be a major factor in the changing patterns of campaign finance.

The deeper purpose of this chapter—and, indeed, of the second half of this book—is not to be preoccupied with the specifics of existing campaign finance regulations or those that are proposed. Rather, it is to assist readers to develop the ability to evaluate critically any campaign finance proposals that may be forthcoming.

I. Public Financing

A. *In the States*

As of the beginning of the 1990s, there were 22 states with some form of public funding of campaigns, according to the most recent survey of campaign finance in the states. See Herbert E. Alexander, REFORM AND REALITY: THE FINANCING OF STATE AND LOCAL CAMPAIGNS 38 (1991).[a] However, in most of these states, the system does little to channel money to candidates' campaigns. For example, a number of states have a tax "add-on" instead of a check-off. Taxpayers may use their tax forms to give money to a party of their choice or a campaign fund, but the money they give is added to their tax (or subtracted from their refund). Add-ons have produced very low returns.

When Alexander published his study, three states—Michigan, Minnesota, and New Jersey—had had significant experience with public funding in statewide elections, and two states—Minnesota and Wisconsin—had had significant experience in legislative elections. In the following excerpt, Alexander describes some of

a. In addition, a number of municipalities, including New York City and Los Angeles, have some form of public financing. See id. at 46–48.

the problems that have arisen in the New Jersey system and the efforts to improve the system.

Herbert E. Alexander, Reform and Reality: The Financing of State and Local Campaigns 33–38 (1991)

Efforts to loosen the strictures of the expenditure limits date back to New Jersey's first publicly funded gubernatorial race in 1977, when Governor [Brendan] Byrne faced a stiff challenge from Republican state senator Raymond Bateman. That race illustrates the difficulties inherent in the expenditure ceiling issue: while such limits are tough to enforce, strict adherence to them can work to the detriment of a candidate without widespread name recognition.

In 1977, the general election ceiling was $1.5 million for each gubernatorial nominee. This was a relatively low limit given New Jersey's demographic realities. While it is small and the nation's most densely populated state, it is sandwiched between New York and Pennsylvania, with much of its population living in the New York City and Philadelphia media markets. Advertising time in either of these markets is among the most expensive in the country....

Bateman, less well known than his incumbent opponent, found himself sandwiched between high costs and a low spending cap late in the 1977 campaign. In a report issued later, [the state Election Law Enforcement Commission (ELEC)] wrote, "As public support for the candidates shifted toward Governor Byrne, Senator Bateman, solely because of the expenditure limit, was unable to react and mount an alternative campaign to counteract the growth of support for Governor Byrne."

Bateman had started the campaign with a significant advantage. Notwithstanding his landslide election in 1973, Governor Byrne had suffered through a bumpy transition in his introduction to the statewide political arena. He was widely accused of failing to keep his fences mended. But his largest political problem was that he had pushed a state income tax through the legislature in response to a court decision on statewide funding for education—a switch from his statements during the 1973 race that such a levy would not be needed.

In part, Byrne's victory in the June 1977 primary was the result of his opposition being split among nine different candidates. Early general election polls showed him as a ten-point underdog to Bateman....But the polls showed Bateman's lead to be less the result of support for the Republican than of opposition to Byrne. Consequently, Bateman faced the expensive task of carving out a clear identification among the voters.

Throughout the summer, he sought to solidify his image—with limited success. Polls indicated that opposition to an income tax was abating. The public came to be skeptical that an alternative plan put forth by Bateman could prevent serious cuts in state service. The political momentum began to move in the direction of the incumbent.

It was in this context that the Republican State Committee sought funding for an anti-Byrne television campaign. In what was to be the first of many efforts to circumvent the spending ceilings in the gubernatorial race, the Republicans sent out a fund-raising letter that read: "You can help Ray [Bateman] beyond the $600 individual contribution limit by supporting Republican legislative candidates."

The Byrne campaign promptly filed a complaint with ELEC, charging that the television campaign violated the spending limits of the governorship race. ELEC ruled that the Republican fund-raising appeal did not violate the law, in that the money was not solicited by or for the Bateman campaign itself. However, ELEC ruled that Bateman had benefited from the anti-Byrne television campaign, and said that two-thirds of the cost of the commercials had to be charged against Bateman's spending limit. The ruling came barely two weeks prior to Election Day, with both the Byrne and Bateman campaigns approaching the spending ceiling. As the commission later noted:

> Both campaigns were compelled to reimburse their respective political party committees and were unable to make other planned expenditures during the week before the election.
>
> Between the two candidates, Governor Byrne and Senator Bateman, the latter was more seriously hurt by the reallocation because his campaign committee had to shift more than $70,000 from planned expenditures to the Republican State Committee shortly before the election.

The problems encountered by Bateman led ELEC to call for a repeal of the expenditure limits, a recommendation that it repeated after both the 1981 and 1985 gubernatorial contests. In its 1986 report, the commission argued that expenditure limits put nonincumbents at a disadvantage and encourage independent expenditure efforts....

Three years after the Bateman-Byrne race, in 1980, the New Jersey legislature voted to do away with expenditure ceilings. But Governor Byrne, who had benefited from them, vetoed the measure. Almost a decade later, in 1989, the legislature acted to mitigate the problems caused by a low spending limit. It raised the general election ceiling by 125 percent (from $2.2 million to $5 million), while doubling the expenditure limit in the primary (from $1.1 million to $2.2 million). The legislature also adopted a system to provide automatic, inflation-adjusted increases for the spending ceilings as well as for contribution limits and amounts of public funding available to candidates. The legislature's action boosted the total cost of the 1989 New Jersey gubernatorial race to more than $25 million for the primary and general elections combined, with more than $15 million of that coming from public funds. That is almost two and a half times the $10.5 million spent in 1985 (an election that admittedly pitted a popular incumbent against a lesser-known challenger), underscoring the difficulty of simultaneously holding down total spending and ensuring competitive elections.

Notes and Questions

1. Does Alexander's account of the New Jersey gubernatorial election of 1977 show a problem in the public funding system as it then existed? If so, who or what was at fault?

2. Although the New Jersey ELEC has frequently urged the elimination of spending limits in New Jersey campaigns, it has regarded the public financing program that it administers as a success. In 1986, the ELEC reported, "All signs indicate that New Jersey's Public Financing Program has succeeded in allowing persons of limited means to run for governor and in eliminating undue influence

from gubernatorial campaigns." Would public financing continue to produce these benefits if the legislature followed ELEC's recommendation and repealed the spending limits?

3. Alexander, id. at 44–46, reports the following on legislative public funding at the state level:

> Minnesota and Wisconsin are the only states that provide significant public financing of legislative elections.... In both states, however, the funding is limited to the general election. Candidate participation in these programs, which has generally been high, has ebbed and flowed with the amount of public subsidy available. But some critics question whether the plans have achieved their goal of restraining costs and increasing competition.
>
> In Minnesota, candidates receive funding allocations based on a complicated formula that takes into account the right of a taxpayer to designate which party's candidates he or she wants to assist. In the 1988 contests for the Minnesota House, candidates participating in the program were limited to expenditures of $18,597; the average public funding allotment was $4,588, or about one-quarter of the spending ceiling. In the 1986 legislative election in Wisconsin, state Senate candidates were limited to spending $34,500 and received $15,525 each in public funding, 45 percent of the general election limit. Wisconsin's program has served to curtail PAC contributions through a provision that reduces the amount of a candidate's public subsidy by the amount of PAC donations received.
>
> In [Minnesota in] 1980...the rate of candidate participation in the program declined to 66 percent from 92 percent only four years earlier. At the time, with annual inflation running into double digits, neither the expenditure limits nor the amount of public grant had been raised to take that into account. Thus public money was insufficient to be attractive to some candidates.
>
> After the 1980 election, both spending limits and public fund allocations were tied to the consumer price index. In 1990, participation among Minnesota legislative candidates was back up to 92 percent, although this includes office seekers who signed onto the system but did not make it through the primary and therefore could not take advantage of the money. Since government cannot compel spending limits, and since the appeal of taxpayer subsidies rises roughly in proportion to their real value, it appears that public financing cannot effectively brake campaign spending.
>
> A similar problem has occurred in Wisconsin in recent years, as money raised from the one-dollar tax checkoff has declined. Public funding grants fell from $15,525 in 1986 to $13,630 in 1988 for state Senate candidates and from $7,763 to $6,355 for Assembly contenders. This had the effect of dropping public funding from about 45 percent to less than 40 percent of the overall spending ceiling. Consequently, while three-quarters of the candidates for legislature participated in the program in 1986, fewer than two-thirds of those running opted to do so in 1988.

In an effort to mitigate the problem, the Democratic-controlled legislature voted to increase the checkoff to two dollars in 1988 and again in 1989. In both instances, the move was vetoed by the state's Republican governor. Such incidents highlight the ideological differences between Democrats and Republicans over public funding, and raise questions as to whether it may benefit one party over another.

In states where the money goes into a single fund and is awarded without regard to partisan affiliation, many Republicans clearly have seen it in their self-interest to accept the funding—philosophical reservations notwithstand-ing....

There is mixed evidence as to how much legislative public funding has "leveled the playing field" and has reduced the tremendous name recognition and fund-raising advantages enjoyed by incumbents

In both Minnesota and Wisconsin, some encouraging trends have emerged with regard to legislative elections. Fewer incumbents are running unopposed, and the challenger share of total election spending is significantly higher than in other states. In Wisconsin challengers actually have received a greater proportion of public funding than incumbents during recent elections.

However, [a New Jersey commission that studied the Minnesota and Wisconsin legislative public funding programs found that they] were "not working entirely as intended," and that they tended to benefit incumbents rather than challengers. The commission noted: "In these states, candidates in 'safe' districts and not involved in competitive races usually opted for public financing to pay for their campaigns, because the expenditure limits were high enough and the money the program provided was sufficient to pay for such races. Yet, in races in competitive districts or in which a strong challenger sought to unseat an incumbent, the candidates did not accept public financing and consequently were not bound by an expenditure limit and...could spend as much money as they deemed necessary."

B. *In Presidential Elections*

The laws governing the Presidential Election Campaign Fund are described in detail in the segment of *Buckley v. Valeo* reprinted in Chapter 8 of this book. A more general discussion will suffice here.

Public financing is available to presidential candidates in both primaries and general elections, but the system works differently before and after the parties have chosen their nominees. In presidential primaries, partial public financing is provided on a matching basis. In the general election, the campaigns are entirely funded from public funds. At least, that was the original conception. As we shall see, much of the controversy that currently surrounds the presidential public financing system relates to the private funds that continue to influence presidential elections.

In primaries, candidates become eligible for public funding by raising $5,000 or more in contributions of $250 or less in at least twenty states. Candidates who accept public financing are subject to campaign spending limits. The nationwide spending limit for presidential primaries is adjusted for changes in the cost of liv-

ing, starting from $10 million in base year 1974. In addition to this basic limit, candidates may spend an additional twenty percent in fundraising costs. For the 1992 election, the nationwide spending limit including the allowance for fundraising was $33.1 million.

In addition to the nationwide limit, there is a spending limit for each state. The state-by-state limit serves no apparent purpose. It was initially explained as assuring "that relatively unknown candidates would have an opportunity to compete effectively against better-known or better-financed candidates in individual states."[b] If that was a plausible expectation in 1974, the information regarding incumbency and campaign spending in Chapter 15 of this book suggests that, if anything, lesser-known candidates may have a greater need than their better-known opponents to spend large amounts. As it is, the state-by-state limit interferes for no clear reason with the strategies of candidates who wish to spend disproportionate amounts in states with crucial primaries. In practice, this means Iowa and New Hampshire, which are usually the only states in which the state-by-state limits are a factor. In the past, some have evaded the limits. For example, staffers in the New Hampshire campaign would be lodged across the border in neighboring states, with the costs attributed to those states. Many candidates simply violated the limits, with no consequence beyond having to repay modest amounts of public financing after audits conducted long after the election year was over.[c] Prior to the 1992 election, the Federal Election Commission adopted revised accounting rules that make it possible for virtually any campaign to avoid the state-by-state spending limits legally.

Candidates who agree to the spending limits and who receive contributions sufficient to satisfy the threshold amounts described above get public funds for their campaigns equal in amount to the contributions they receive from individuals in amounts up to $250. The maximum amount a candidate can receive in public funds is half the nationwide spending limit. However, some of the money candidates raise, such as amounts over $250 and contributions from PACs, is not eligible for matching. On average, public funding amounts to about a third of major candidates' money in presidential primaries.

After the primaries, the major parties receive flat grants to pay the costs of their national nominating conventions. The parties are not permitted to raise private funds to add to the public funds they receive.

In the general election, the major party candidates receive a flat grant, which is equal to the spending limit. In other words, presidential candidates who accept public funding cannot spend any private funds in the general election campaign. The amounts of the grant are adjusted for changes in the cost of living, based on $20 million for the base year, 1974. In 1992, the limit for each major party candidate was $55.2 million. Each national party was also permitted to spend $10.2 million in coordination with the candidate's campaign, according to a formula based on the voting age population. Thus the combined amount each candidate and his party could spend in 1992 was $65.5 million.

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b. See Anthony Corrado, PAYING FOR PRESIDENTS: PUBLIC FINANCING IN NATIONAL ELECTIONS 6 (1993).

c. See Anthony Corrado, CREATIVE CAMPAIGNING: PACS AND THE PRESIDENTIAL SELECTION PROCESS 37–40 (1992).

Acceptance of public funding has been nearly universal. Since 1976—the first election held under the system—only one eligible major party candidate, Republican John Connolly in 1980, has declined public funding in the primaries. No major party candidate has declined public funding in the general election. Undoubtedly, one major reason for the widespread acceptance is that candidates are subject to the contribution limits even if they reject public funding. The contribution limits in presidential elections are the same as the limits in House and Senate elections—basically, $1,000 from individuals and $5,000 from PACs per election. (Primaries and the general are treated as separate elections, but all the presidential primaries are treated as one for purposes of the contribution limits.) It would be no easy matter to raise funds equal to the spending limits in amounts this small, and even harder to raise amounts enough over the spending limit to make the effort worthwhile.

The public money is paid out of the Presidential Election Campaign Fund. Money is deposited into the Fund at the behest of taxpayers, who are permitted to "check off" an amount to go into the fund out of their taxes each year. Until 1993, each individual taxpayer could designate one dollar to go into the fund. Two dollars could be designated on a joint tax return. However, the Fund was barely adequate to cover the claims of candidates in 1992, and projections made it clear that the Fund would be inadequate in 1996. Accordingly, Congress in 1993 raised the check-off amount to $3 for individual returns and $6 for joint returns.

The main reason the amount in the Fund became inadequate was that the check-off was fixed at one dollar, whereas the amounts candidates could collect were raised according to the increase in the cost of living. Thus, in 1976, the total amount paid out of the Fund to candidates and parties was $72.3 million. In 1992, that amount was $174.4 million.[d]

A lesser reason was that taxpayer use of the check-off appears to have declined in recent years. One reason may be that only people who have tax liability are eligible for the check-off, and the percentage of individuals who file tax returns but have no tax liability increased after the 1986 Tax Reform Act. Another reason is probably heightened disenchantment with government and politics. A major point of contention is whether the decline reflects disapproval of the public financing system itself and whether, indeed, most taxpayers understand the system, whether or not they use the check-off. Unfortunately, poor record-keeping by the Internal Revenue Service makes it impossible to be sure of the extent of the decline, and even less is understood of its causes.[e]

It is also difficult to estimate the extent of participation in any given year. Figures released by the Federal Election Commission, based on information received from the Internal Revenue Service, indicate a high of 28.7 percent participation in

d. The amount paid out in 1992 was actually lower than the amount for 1988, which was $178.1 million. The decline occurred because there was less competition in primaries in 1992 than in 1988. The Federal Election Commission had anticipated that the Fund would fall short in 1992, and had adopted rationing policies. However, the less-than-anticipated spending in the primaries meant that enough money was available to pay all claims.

e. For a careful analysis of these issues, see Corrado, PAYING FOR PRESIDENTS, at 16–36. For prospective consideration of the need to keep the Fund solvent, see Joseph Michael Pace, *Public Funding of Presidential Campaigns and Elections: Is There a Viable Future?*, 24 PRESIDENTIAL STUDIES QUARTERLY 139 (1994).

1981, with a decline to 17.7 percent in 1992. However, some scholars contend that the true participation rate is ten percentage points or more higher than the FEC figures.[f]

Public funding has worked well in presidential elections to accomplish many of the objectives of campaign finance regulation. As Anthony Corrado has written:

> [T]he matching funds program has proven to be an extremely popular form of campaign finance and an important source of revenue. It has been widely accepted by candidates and has encouraged them to solicit small contributions instead of large gifts and PAC donations. The program has been especially helpful to lesser-known aspirants who lack broad bases of financial support and to candidates who lack ready access to substantial numbers of large donors. By providing such candidates with the funds needed to introduce themselves to voters, public funding has increased the choices available to the electorate and enhanced the competitiveness of nomination contests.
>
> ...At the same time, it has served to diminish the role of special interest money in presidential campaigns. Because PAC contributions are not eligible for matching funds, candidates can raise more money by soliciting small contributions than PAC contributions....The law thus gives candidates a strong incentive to choose small private gifts over PAC money. This incentive, as well as the practice of many PACs to forego making contributions in processes that select major party candidates, have led to a system in which PAC contributions play an insignificant role. On average, only two to four percent of the total monies raised by presidential aspirants comes from PACs, as compared to congressional campaigns, which often rely on PACs for 30 to 40 percent of their total revenue.[g]

Recent controversy surrounding the presidential public funding system has centered on the spending limitations, which critics believe have become so riddled with loopholes that many of the objectives of the system are frustrated. Initially, it was independent spending that created this concern. *Buckley* and *NCPAC* prevented the regulation of independent-spending PACs and for a time it was feared that the activities of such groups would distort or even dwarf the publicly funded campaigns of the candidates. However, as we saw in Chapter 13, independent spending in presidential elections has greatly declined since the 1984 elections. Since then, public attention has shifted to the question of "soft money." We consider soft money in the following section, and in the final section of this Part we consider the issue of "precandidacy PACs," which has received less attention but may be at least as serious as soft money.

C. *Soft Money*

The expression "soft money" has not had a uniform meaning, but under one often-quoted definition that will be adequate for our purposes, soft money is "money raised from sources outside the restraints of federal law but spent on

f. See Corrado, PAYING FOR PRESIDENTS, at 20–22.

g. Id. at 38, 44–45.

activities intended to affect federal election outcomes."[h] The deployment of much of what is currently described as soft money is made possible by amendments to the FECA enacted in 1979. The following excerpt describes the emergence of soft money and some of the considerations that are relevant to evaluating it.

Anthony Corrado, PAYING FOR PRESIDENTS: PUBLIC FINANCING IN NATIONAL ELECTIONS 63–65, 70–74, 79–80 (1993)

The 1979 reforms were designed to address some of the criticisms arising out of the experience of the 1976 election. Because spending was limited, Gerald Ford and Jimmy Carter each chose to concentrate their spending on media advertising rather than grass-roots political activities. Members of both parties complained that the law decreased the funds available for traditional volunteer activities such as canvassing, posting signs, and getting-out-the-vote on election day. Critics also argued that the law's contribution and spending limits had reduced the role of party organizations in presidential elections since these committees were no longer an important source of campaign revenue and were limited in what they could spend to assist the party's nominee.

Congress responded to these concerns by adopting a recommendation made by the FEC to loosen the restrictions placed on contributions and spending so that party committees and other organizations could continue to finance grass-roots political activities. The new rules changed the law's definition of "contribution" and "expenditure" to exclude all monies used to conduct certain activities that were designed to promote grass-roots political participation in federal election campaigns. Such activities include the preparation and distribution of slate cards, sample ballots, and other listings of three or more candidates by state and local party committees; the production of campaign materials, such as pins, bumper stickers, brochures, and posters; and the carrying out of voter registration and turnout drives by state or local party organizations on behalf of their party's presidential ticket.

The law thus created a new realm of unlimited funding by allowing party committees to spend two types of money in presidential elections. First, a party could spend the amount established under the law for "coordinated expenditures." This category of funds, which could be used for activities that directly benefit the party's nominee, has come to be known as "hard money" because it is governed by FECA limits and set at a sum equal to two cents times the voting age population. Second, a party could raise and spend soft money, which could essentially be used to supplement hard money expenditures. This category of funds, since it was exempt from federal limits, was governed by state campaign finance laws and was subject to no aggregate spending ceiling. Presidential campaigns could thus gain access to an unlimited source of funds by raising soft money at the national level and transferring sums to state and local parties for use on exempt activities.

It did not take long for presidential campaign staff members and party officials to recognize the possibilities inherent in the new regulations. Beginning with the 1980 election, members of a presidential nominee's fundraising staff were

h. Herbert E. Alexander, "SOFT MONEY" AND CAMPAIGN FINANCING 5 (1986).

shifted to the national party's payroll at the end of the nomination process and given the task of working with party fundraisers to solicit soft money contributions. This allowed each party to solicit gifts from a broad donor base, since they could tap into the candidate's supporters as well as the party's traditional fundraising sources. The monies raised through these efforts could then be expended at the national level on activities carried out in conjunction with state and local organizations or directly channeled to state and local party committees for their use. Either way, the national party, which now included former members of the presidential candidate's campaign staff, could exercise control over the allocation of funds and devote them to purposes that would complement the strategic approaches being employed by the presidential campaign....

The new rules also gave rise to...complicated allocation schemes. Since the amount of hard money that could be spent was limited, the parties began to allocate these funds in combination with soft money. The goal was to minimize hard money expenditures, while at the same time maximizing their effect....

In an effort to end such practices and simplify the accounting process, the FEC in 1990 revised its regulations governing nonfederal funds. One of the major provisions of the new rules is a requirement that national party committees allocate a fixed 65 percent of their administrative expenses and voter drive costs as hard money expenses. Fixed or minimum percentages are also established for other types of expenses. While these provisions have eliminated some of the more blatant abuses, they have had no significant effect on the flow of soft money in presidential elections.

[Since soft money is regulated by state law, it is attractive to a national campaign to the extent that state campaign finance law is more lax than federal law. A number of states do not limit the size of contributions or restrict contributions from corporations and unions. Until 1990, soft money flowed largely in the dark, in part because state disclosure requirements were often loose and in part because even when transactions were reported under state law, it was often difficult or impossible to collect all the information and to collate information on federal and diverse state forms that were not compatible with one another. The FEC's 1990 regulations greatly improved federal disclosure of soft money.]

Overall the 1992 election was the fourth consecutive contest to witness significant growth in the amount of soft money raised by the national party committees. According to the reports filed with the FEC, the Republicans raised a total of $33.1 million in soft money and the Democrats raised $30 million....

As in 1988, big givers were the key to success in raising soft money funds. A Common Cause study of the soft money contributions received by the Democratic National Committee revealed that 72 contributors had donated $100,000 or more, including 23 who gave more than $150,000. The Democrats received gifts of more than $200,000 from seven individuals and five labor unions, including $398,876 from the United Steelworkers and $344,180 from the National Education Association. They also received 17 corporate contributions of $100,000 or more, including $171,573 from the Atlantic Richfield Company and $152,000 from the Philip Morris Company. The Common Cause study did not examine soft money gifts to the Republican National Committee, but FEC reports show that more than 60 contributors gave at least $100,000 in soft money. These included a combined total of $977,000 from the Archer-Daniels-Midland Corporation and its chair, Dwayne Andreas; $520,300 from the Atlantic Richfield

Company; and $450,000 from Edgar Bronfman, whose company, Seagrams and Sons, gave an additional $58,727....

Soft money contributions have made a shambles of the contribution and spending limits imposed on presidential general election campaigns. More importantly, they present a serious challenge to the notion that wealthy individuals and interest groups no longer enjoy special influence as a result of their contributions. For example..., Common Cause noted numerous instances of soft money donors [to a Republican fund called "Team 100"] who represented businesses with important regulatory concerns or substantial matters pending before federal agencies. [The Common Cause] study revealed dozens of regulatory decisions by the Bush administration that benefited soft money contributors and identified a number of soft money givers who had been nominated to serve as ambassadors or as members of regulatory commissions. In no instance, however, did Common Cause find any wrongdoing or improper action on the part of a federal agency, a member of the administration, or a soft money donor.

Soft money contributors typically deny that their donations are linked to some quid pro quo or desire for special influence. Since the practice was formalized in 1980, no presidential soft money donor has been judged guilty of any improper action or been shown to have received special consideration because of a donation. The problem with large soft money gifts has not been that they have led to massive corruption in the political system. Rather, it is that they encourage the appearance of corruption and widespread public perceptions that wealthy interests enjoy undue influence in the political process. With corporations and labor unions giving hundreds of thousands of dollars to be used in presidential elections, the public can reach no other conclusion that such gifts come with strings attached.

The perception that soft money is given for purposes of influence is fed by the actions of some donors, who appear to be "covering their bases." In 1988, for example, at least eight donors gave $100,000 to each of the major parties. Similarly, in 1992, a number of contributors gave major sums to each of the major parties. In some cases, these contributions were made late in the race as the likelihood of a Democratic victory increased. For example, Archer-Daniels-Midland donated $90,000 to the Democratic National Committee through seven subsidiaries four days before the election, after giving close to $1 million to the Republican National Committee. [T]he nonpartisan Center for Responsive Politics found that donors representing five traditionally Republican industries shifted their patterns of giving in the period after the Democratic National Convention. In three industries (investment and securities; pharmaceuticals and health; and beer, wine, and liquor), soft money contributions shifted from an average of three- or four-to-one in favor of the Republicans to an advantage in favor of the Democrats, while in two others (oil and gas, and insurance), the gap between Republicans and Democrats narrowed significantly....

Public debate on the role of soft money in the political system has focused almost exclusively on the sources of these funds. Overshadowed in these discussions is the original purpose of the law, which was to provide party organizations with a meaningful form of participation in national elections....

For decades, knowledgeable political observers have expressed concern over the declining role of party organizations in America. The 1979 FECA amendments represent a step toward addressing this problem by providing the national

committees with a means of funding joint activity with state and local organizations. This law was not, as many critics claim, a purposeful decision to create a "loophole" in federal regulations. It was a conscious effort on the part of the Congress to empower state and local party committees in federal campaigns. While the activities financed with soft money, which include voter registration and mobilization programs, have primarily been designed to assist the presidential ticket, they also help to promote the development of state and local party organizations and stimulate citizen participation in the electoral process.

...Advocates claim that soft money gives the party organizations a meaningful role in federal elections. It allows the national parties to place themselves in the role of financial broker and provide sorely needed resources and services to committees and candidates at all levels of government. In many instances, state and local parties would not be able to carry out grass-roots activities without these funds. By providing the monies needed to develop voter files and outreach programs that help more than one candidate, soft money encourages candidates to work with local party members and helps to stimulate grass-roots political activity. Since these activities do not simply benefit the presidential candidate, it is appropriate that their financing is not based solely on federally limited funds. Moreover, when the dust from the presidential election has settled, the state organization is left with materials and experience that can be used to assist candidates in other elections or serve as the foundation for future party-building efforts.

Critics note that these activities are primarily conducted for the benefit of the presidential candidate, with the funds raised by the candidate's former staff and the expenditures determined by individuals aware of the campaign's strategy. This, they allege, violates the intent of the campaign finance laws and public funding, since soft money spending amounts to little more than a thinly veiled means of channeling private funds into presidential campaigns. Consequently, soft money has diminished the value of campaign spending limits since it allows campaign organizations to spend significantly more than the amount established by public subsidies.

Notes and Questions

1. In introducing the discussion from which the above is extracted, Corrado says that the soft money system "has wholly undermined the basic purposes of the public funding program." Id. at 63. Do you agree?

2. A basic assumption underlying criticism of soft money is that the purpose for which it is raised and spent is to influence the presidential election. If this is true, then soft money does represent an evasion of the restrictions and limits on fundraising by presidential candidates. Corrado, in the above excerpt, seems largely to endorse this view, as he says soft money activities such as voter registration are "primarily...designed to assist the presidential ticket," though he notes that the activities also serve state and local party interests.

A recent study of transfers from the Democratic and Republican National Committees to state parties in 1992 reached conclusions that support the critics' assumption, but only partially:

> A cursory examination of DNC transfers to state parties suggests that while the demands of the presidential campaign are plainly associat-

> ed with the distribution of soft dollars, other factors are [at] work. There are states with large numbers of electoral votes and a close presidential margin, where the state committees received relatively little DNC soft money (Florida, Virginia, and Indiana, for example). On the other hand, some relatively small states received much more soft money than their size and competitiveness would suggest, such as Louisiana. Deviations from a purely presidential strategy are also apparent for RNC transfers as well. Here states like North Dakota, Washington, and South Carolina received far more soft money support from the national party than their place in the presidential campaign would imply. Large, competitive states like Texas, New Jersey, and Florida received less than one might guess. The existence of competitive gubernatorial elections seem to play an important role.

Robert Biersack, *Hard Facts and Soft Money: State Party Finance in the 1992 Federal Elections*, in THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES 107, 123 (Daniel M. Shea & John C. Green, eds., 1994).

3. A frequent criticism of congressional campaign finance is the inordinate time and attention congressional candidates and incumbents are required to devote to fundraising. Soft money does not seem to have affected presidential candidates in the same way. Corrado, *Paying for Presidents* at 85, writes that "at most, the candidates now spend a relatively small portion of their time attending fundraising events for their respective parties. In most cases, the candidates attend fewer than two dozen events and, in 1988, Democratic vice-presidential candidate Lloyd Bentsen attended no soft money fundraisers at all."

4. As Corrado notes, the FEC adopted regulations greatly strengthening federal disclosure of soft money and tightening the rules for allocating party expenditures between the federal component, for which only hard money could be used, and the state and local component, for which soft money could be used to the extent consistent with state law. The Commission had delayed the adoption of soft money regulations until Common Cause obtained a federal court order requiring it to act. See *Common Cause v. FEC*, 692 F.Supp. 1391 (D.D.C. 1987). The regulations went into effect at the beginning of 1991. For a more detailed account, see Biersack, *supra*, at 108–10. For the regulations themselves, see 55 FEDERAL REGISTER 26058 (June 26, 1990).

Is additional regulation of soft money needed? For Corrado's suggestions, see PAYING FOR PRESIDENTS at 96–100. In 1992, a Democratic majority passed a comprehensive campaign finance bill, S.3, secure in the knowledge that it would be vetoed by Republican President Bush. The bill contained strong provisions dealing with soft money, imposing FECA limitations and prohibitions on expenditures by national, state and local committees in their entirety even if the expenditures were only in part in connection with a federal election. In short, only activities clearly limited to state and local candidates could have continued to use soft money.

D. *Precandidacy PACs*

The controversy over soft money in presidential campaigns is focused on the general election. As Corrado described, once the Democratic and Republican candidates are named, their fundraising operations merge with those of the respective national committees to raise soft money. A much less-noticed device for raising money outside the normal federal limits on contributions and for exceeding the spending limits is the "precandidacy PAC."

Anthony Corrado, Creative Campaigning: PACs and the Presidential Selection Process 9–11 (1992)

One of the primary differences between the presidential contests of the 1980s as compared to those of the 1970s is that in the more recent period the preelection frontrunner won the nomination in almost every instance. This was not the case in the 1970s. During this period, lesser-known challengers enjoyed great success as evidenced by the victories of George McGovern in 1972 and Jimmy Carter in 1976, as well as by the serious challenge for the party standard waged by Ronald Reagan against then-President Ford in 1976....

In the 1980s, however, lesser-known challengers enjoyed little success in the presidential sweepstakes, with the possible exceptions of Democrat Gary Hart's surprisingly strong challenge to Walter Mondale in 1984 and the victory of Michael Dukakis in 1988....The reason for this change is in large part due to the advent of candidate-sponsored PACs. Well-known candidates, especially Reagan in 1980, Mondale in 1984, and Bush in 1988, adapted to the reforms by forming PACs that could be used to capitalize on their public name recognition and broad bases of support. This tactic allowed them to avoid the level playing field dictated by the rules and thus gain a substantial head start in the race for the White House....

My central thesis is that presidential aspirants establish PACs in order to resolve the strategic problems generated by the campaign finance reforms. These new rules of the game fundamentally altered the strategic environment of the selection process, thus forcing candidates to develop new organizational and financial approaches in seeking the nomination. Specifically, the reforms place conflicting strategic and operational demands on presidential contenders. On the one hand, some provisions of the law, such as the contribution limits and the public subsidies program, compel candidates to begin campaigning early and increase the length of their campaigns. On the other hand, the legal spending limits imposed on nomination contests encourage contenders to delay the start of their campaigns and restrict their activities. The campaign finance regulations thus present candidates with a fundamental problem in developing their campaign strategies: how to conduct the early campaigning required by the system yet avoid violating the expenditure limits.

This strategic problem has intensified throughout the 1980s as a result of changes in the delegate selection process. Party rules reforms have produced a "front-loaded" primary calendar in which most of the delegates to the national nominating conventions are chosen before the end of March. As a result, candidates must engage in an extensive amount of preelection-year campaigning in

order to generate the funds and political support needed to advance a viable candidacy in this front-loaded system. In recent elections, candidates have found it increasingly difficult to fulfill their political objectives yet adhere to the financial parameters established by the Federal Election Campaign Act. To resolve this problem, presidential hopefuls began to search for ways to circumvent the restraints imposed on their campaigns. The best method discovered to date is to establish a precandidacy PAC.

By establishing a PAC prior to becoming a candidate, an individual can resolve the strategic problems created by the campaign finance reforms because a PAC's financial activities are not governed by the regulations established for presidential campaign committees. A PAC can accept large contributions that would be deemed illegal if given to a federal candidate. It can raise and spend an unlimited amount of money. And, most importantly, its expenditures do not have to be included on a candidate's financial disclosure reports or be allocated against a campaign's spending limits. This type of committee therefore provides a candidate with a means of raising and spending funds without having to worry about the campaign contribution and spending limits.

A PAC operation is particularly valuable to a prospective candidate because it can function as a surrogate campaign committee. Although the Federal Election Campaign Act specifically states that a PAC may not serve as a candidate's authorized campaign committee,[i] this type of committee can undertake most of the activities that are normally conducted at the outset of a presidential campaign. It can be used to develop a campaign organization because it can hire staff and consultants, develop state and local subsidiaries, and recruit volunteers. It can initiate and develop a nationwide fundraising network through its own fundraising devices and direct mail programs. It can recruit support for its sponsor by financing his or her public appearances, party activities, and political outreach programs. A prospective candidate can thus use a PAC to accomplish all of the basic tasks needed to launch a presidential candidacy. And, by taking advantage of some of the technicalities in federal regulations, the PAC can fulfill these tasks without having to report the monies spent on these activities as campaign-related expenditures subject to federal limits.

Note

The primary legal foundation for precandidacy PACs serving the functions described by Corrado is an advisory opinion issued by the FEC in 1986 to Jan W. Baran, an attorney who sought the opinion in behalf of the precandidacy PAC of then Vice President George Bush. Portions of this opinion follow.

Federal Election Commission

ADVISORY OPINION 1986-6 (1986)

The Fund for America's Future, Inc., ("the Fund"), is a multicandidate political committee that registered with the Commission on April 25, 1985. You state that Vice President George Bush is the founder and honorary chairman of the

i. See 2 U.S.C. § 432(e)(3).—ED.

Fund but that the Fund is not authorized by any candidate. You state that the Fund was created to support the Republican Party and Republican candidates for state and local office as well as for both houses of Congress. You add that the Fund seeks to build a stronger Republican Party at all levels, including local party organizations. [The Fund] has contributed to more than 100 Republican candidates for local, state, and Federal office.

You explain that the Fund's party-building and direct candidate support activities necessitate publications, fundraising solicitations, and travel and speechmaking by the Vice President, other Fund officials, and other well-known Republicans....

You further state that the Vice President is not a candidate for any office and that he has publicly stated that he will not consider any such potential candidacy until after the 1986 elections. You acknowledge that, by virtue of his office as the Vice President, he is frequently mentioned in the press as a potential presidential candidate in 1988. You state, however, that Vice President Bush... has not authorized the Fund to make any expenditures toward his consideration of any potential candidacy or which the Commission may view as "testing-the-waters" for a potential candidacy. Accordingly, you state the Fund is concerned that the Commission may view its expenditures for activities in support of the Republican Party and Republican candidates as allocable toward any potential future candidacy by the Vice President in 1988.

In this regard, you present several activities (and questions related to them) which the Fund proposes to undertake....

The Commission interprets your request as... asking whether the Fund's expenditures for these proposed activities must necessarily be treated as made for the purpose of influencing the Vice President's nomination or election to Federal office, notwithstanding any specific, express authorization or candidacy determination. If any of these expenditures must be so treated, they will, of course, constitute in-kind contributions to the Vice President with regard to his becoming a candidate for Federal office and will be subject to the Act's aggregate $5,000 contribution limitation....

I. *Candidate and Party Appearances*

You state that the Fund seeks to support Republican candidates and the Republican Party with appearances on their behalf by the Vice President. For these appearances, the Fund makes expenditures for travel, meals, and lodging for the Vice President, his staff, the Secret Service and other security protection, other Fund officials, and any others involved in preparing for the Vice President's appearances. In conjunction with the appearances at party events by the Vice President or other Fund officials, the Fund may host a hospitality suite to accommodate party dignitaries and the press. You state that the Vice President and Fund officials will urge support for the Republican candidates, the Republican Party, and the President and his policies at these appearances, but that their remarks will not refer to the possibility the Vice President may seek any Federal office in 1988, except in an incidental manner or in response to questions by the public or press.

You ask whether the Fund may pay the expenses of... such events.

Commission regulations provide that authorized expenditures made by a political committee on behalf of a candidate shall be reported as in-kind contribu-

tions to the candidate on whose behalf they are made. 11 CFR 106.1(b). The regulations also provide that expenditures by a political committee on behalf of more than one candidate shall be attributed to each candidate in proportion to, and shall be reported to reflect, the benefit reasonably expected to be derived. 11 CFR 106.1(a)....

According to your description of the Fund's proposed activity, the only references to any potential candidacy by the Vice President in 1988 at his appearances in 1986 will be made "in an incidental manner or in response to questions by the public or press." In the Commission's view, this statement should be narrowly interpreted to apply only to incidental contacts and incidental remarks, such as those in response to questions. Thus, the Commission assumes that it excludes public statements referring to the Vice President's possible intent to campaign for Federal office in the 1988 election cycle or to the campaign intentions of potential opponents for Federal office in 1988....Furthermore, the Commission also interprets your description of these appearances as excluding such activities on behalf of the Vice President's potential candidacy as soliciting funds, holding meetings (which constitute more than incidental contacts) with individuals or the press regarding such a potential candidacy or regarding the formation of a campaign organization, or distributing campaign paraphernalia related to such a candidacy. The Commission further interprets your request as referring only to the Vice President's appearances on behalf of local, state, or Federal congressional or senatorial candidates or party-building events as described by 11 CFR 110.8(e) rather than appearances primarily related to the presidential nomination process, such as the delegate selection process.

Accordingly, if the Fund makes expenditures for this activity as described by you in your request and as interpreted in this opinion, such expenditures so limited need not be allocated to a potential candidacy by the Vice President in 1988. This conclusion, of course, does not apply to the Fund's expenditures for this activity after the Vice President qualifies, if he does, under the Act and regulations, as a candidate for Federal office.

II. *Publications and Solicitations*

You state that the Fund makes expenditures for a variety of publications to inform contributors of the Fund's purposes and progress and to seek out and encourage potential contributors. These publications identify the Vice President as the Fund's founder and honorary chairman and state that the Vice President hopes recipients will support his efforts to aid the Republican Party and Republican candidates through gifts to the Fund. You state that these publications and solicitations will not suggest that the Fund will promote the Vice President's candidacy for any office in 1988 and will not represent that contributors to the Fund will be viewed as early supporters of such a candidacy.

You ask whether the Fund may, in the course of encouraging potential contributors and reporting to existing contributors, note the Vice President's association with the Fund and his desire that contributions be made to the Fund to support Republican Party activities and Republican candidates, so long as the materials do not refer to the possibility that the Vice President may decide to become a candidate for President in 1988 or actively consider such a candidacy.

Commission regulations provide that a political committee's expenditures for newsletters and fundraising solicitations need not be attributed to individual can-

didates, unless these expenditures are made on behalf of a clearly identified candidate and the expenditures can be directly attributed to that candidate. 11 CFR 106.1(c)(1). [Y]ou state, in effect, that the Fund in issuing publications and in soliciting contributions will make no references to any possible candidacy by the Vice President in 1988 and no representations to contributors about their being viewed as supporters of such a candidacy or about their benefiting such a candidacy through their contributions to the Fund....

Accordingly, if the fund's publications and solicitations merely note the Vice President's association with the Fund and his desire that individuals contribute to the Fund to support Republican candidates and the Republican Party without reference to any potential 1988 candidacy by him, the Fund's expenditures for such materials need not be allocated to a potential candidacy by the Vice President in 1988. This conclusion also applies only to expenditures made before the Vice President qualifies, if he does, under the Act and regulations, as a candidate for Federal office.

III. *Steering Committee*

You state that the Fund has established steering committees with members from every state. You add that the purpose of these committees is to involve local party officials, leaders, and officeholders in the Fund's activities and to permit them to advise and consult with the Fund concerning contributions to Republican candidates for Federal, state, local, and party office in such states. You explain that membership on the Fund's steering committee does not signify any commitment to support the Vice President, or to organize or serve in a campaign if he should become a candidate for Federal office in 1988.

You ask whether the Fund may establish such steering committees in an attempt to encourage participation in the Fund and to assist in distributing aid to Republican organizations and candidates.

The Commission notes that the establishment of steering committees by itself is a permissible activity for a multicandidate political committee. Expenditures for such steering committees need not be attributed to any individual candidate unless attributable to that candidate. 11 CFR 106.1(c). [T]he Commission assumes that the Fund's steering committee's activities will only be related to the Fund's stated purposes of aiding the Republican Party and Republican candidates and will not be related to any potential organization by the Vice President in 1988....The Commission also assumes that the committees will not link the distribution of aid to Republican candidates and organizations to the recipients' support for any potential future candidacy by the Vice President in 1988.

Accordingly, if the Fund operates its steering committees in the manner described above, its expenditures relating to these steering committees need not be allocated to a potential candidacy by the Vice President in 1988. This conclusion would not apply, however, if the role or activities of these steering committees should change or if the Vice President should become a candidate.

IV. *Volunteer Program*

[The Commission reached a similar conclusion with respect to volunteer programs conducted by the Fund, including "the establishment of local offices in

many states in order to identify, encourage, and organize Republican volunteers."]

V. *Precinct Delegate Recruitment and Assistance*

You state that the Fund plans to aid persons seeking party office in various states, particularly the candidacies of individuals seeking election in the August 1986 Republican primary election in Michigan as precinct delegates to county/district conventions.... You explain that precinct delegates in Michigan serve a two-year term and participate in the selection process for delegates to both state and national Republican Party conventions.

[In January, 1988, the precinct delegates elected in the 1986 primary that the Fund sought to influence would meet] in a county/district convention to select delegates for the state convention called to select delegates to the 1988 Republican national convention.... In this regard, you note that precinct delegates meeting in county/district conventions do not vote directly for delegates to the Republican national convention....

In question five, you ask whether the Fund may incur the expense of recruiting and encouraging individuals to run for... Michigan Republican precinct delegate, and disseminating information, including qualifying petitions, regarding election for such positions. In question six, you also ask whether the Fund may donate to the campaigns of individuals who seek... election as precinct delegates to county and district Republican conventions in Michigan....

The Commission has adopted regulations governing contributions to and expenditures by delegates to national nominating conventions (11 CFR 110.14), based on the assumption that such contributions and expenditures are made for the purpose of influencing a federal election and, therefore, fall under the regulatory scheme of the FECA. These regulations expressly apply only to the activities of delegates to national nominating conventions or to the activities of those who seek to become national nominating convention delegates, or, as in the case of the Michigan process, the activities of the delegates to the state convention in 1988 who select the national nominating convention delegates. The Commission has acknowledged that even a national convention delegate is not a candidate for federal office under the Act.

Individuals seeking election as precinct delegates in 1986 are not necessarily or presumptively seeking positions as national or state convention delegates for 1988. Individuals do not have to be elected a precinct delegate in 1986 to qualify for selection by their party as a national delegate in 1988. The individuals seeking election as precinct delegates in 1986 are not identified on a ballot as committed to or supporting any potential Presidential candidate, nor is any such commitment or support a requirement for their seeking a precinct delegate position. Furthermore, the precinct delegates elected in 1986 do not themselves select national convention delegates. Rather, Michigan precinct delegates, among other responsibilities, will select delegates to a state party convention in 1988 that choose[s] the national convention delegates....

The Commission concludes that the Fund's proposed activity in recruiting, assisting, and donating to individuals seeking election as precinct delegates in Michigan in August of 1986 as described in your request will not, of itself, constitute contributions or expenditures for the purpose of influencing the Vice

President's or any candidate's nomination or election to federal office, nor require allocation to any candidacy for federal office nor trigger any such candidacy....

DISSENTING OPINION OF VICE CHAIRMAN McGARRY: My dissent to Advisory Opinion 1986-6 involves the language adopted by the Commission in answer to questions posed by the Fund for America's Future regarding expenditures in connection with the election of precinct delegates in Michigan in 1986. This dissent is based upon my reading of the Commissions regulations at 11 C.F.R. 110.14 and upon my position that it makes no sense for a multicandidate committee with which a prospective presidential candidate is closely and actively associated to make expenditures to such precinct delegate candidates, or to recruit or otherwise encourage such candidates, and to not have such expenditures count against that candidate's expenditure limitations under the Federal Election Campaign Act once he or she becomes a candidate, since such expenditures would unquestioningly count against those limitations if incurred on or after the date of candidacy....

DISSENTING OPINION OF COMMISSIONER HARRIS: In its rulings on unannounced presidential aspirants the Commission has, step by step, gotten itself into the absurd position that it refuses to acknowledge what everyone knows: that Vice President Bush is running for President and is financing his campaign through the Fund for America's Future, Inc. which he organized and controls. Vice President Bush did not invent this scheme; he is merely doing what others have done and are doing, with the Commission's sanction.

Today, however, the Commission has loosened the reins more than ever by declining to adopt the General Counsel's view that disbursements by the Fund to influence the selection of delegates to the 1988 Republican Convention who will support the candidacy of Vice President Bush are expenditures for the purpose of influencing a federal election. The General Counsel is obviously right.

In one portion of the Advisory Opinion adopted by the Commission, the Commission rules, as it has before, that a presidential aspirant may create and control a multi-candidate PAC which may make contributions, within the statutory limits, to candidates for federal office, and also to state and local candidates, subject only to state law restrictions, if any. While one may suspect that these contributions are designed to secure support for the presidential hopeful, there appears to be no legal basis under the Act for barring them.

More important, however, the Commission has also sanctioned unlimited disbursements by PACs of this sort to finance a wide range of activities designed to promote the unannounced presidential candidacy of the PAC's founding father. Among the types of activities sanctioned are:

(1) appearances by the presidential aspirant at political events all across the country, (2) the distribution of partisan publications and solicitations containing references to the presidential hopeful, and (3) the establishment of organized groups of supporters and volunteers in various states that are key to the 1988 presidential nomination.

Only persons just alighting from a UFO can doubt that activities of these sorts, which are engaged in over a period of many months, will promote the candidacy of the founding father. That, of course, is why so many would-be Presidents, of both parties, have created and utilized PACs of this sort in recent years. The Commission, however, is willing to turn a blind eye to the realities so long as

the presidential hopeful announces periodically that he will not decide whether to run until some future date. (After the 1986 election is a popular date at present.)

This is just plain ridiculous. Disbursements for these activities are made for the purpose of influencing a federal election. They are contributions and expenditures under the Act, should trigger the requirement to register as a candidate with consequent reporting obligations, and should count against the national and state expenditure ceilings if the candidate opts for public financing....

I understand the natural reluctance of my fellow Commissioners to ascribe any activity in 1986 to the 1988 presidential campaign, and to warn a presidential aspirant that certain planned activities would, if carried out, render him a "candidate" under the law some nine months earlier than he had contemplated. The Commission did not create this predicament, however. It can and should only apply the law to the facts presented to it.

Notes and Questions

1. Corrado, *supra* at 66, criticizes the FEC's advisory opinion:

> The commission's decision essentially sanctioned an unintended form of political campaigning that presidential candidates had practiced since 1977. Instead of restricting the role of candidate-sponsored PACs in the presidential nominating process, the ruling approved of their activities. Moreover, the agency clearly stated that the funds raised and spent by these committees were not subject to the limits imposed on presidential campaigns so long as the groups did not engage in one of the handful of activities that would indicate a formal candidacy on the part of a PAC's sponsor. It thus opened the door to widespread abuse of the law by providing aspirants with guidelines that could be used to circumvent the law in the future. In essence the commission authorized a means by which presidential hopefuls could conduct most of the activities needed to initiate a presidential campaign at no cost to their authorized campaign committees.

2. In each of the 1980 and 1984 election cycles, precandidacy presidential PACs raised and spent a total of approximately $7 million. In the 1988 cycle, George Bush's Fund for America's Future, which was the subject of AO 1986-6, raised and spent $11 million, and the total amount raised and spent by all the precandidacy PACs was over $25 million. See id. at 86–96.[j]

Corrado argues that the FECA system for financing presidential nomination campaigns is undermined in four ways:

> First, an increasing number of candidates are establishing PACs in anticipation of a presidential campaign. Second, these committees are raising and spending increasingly large sums of money outside of the limits imposed on candidates. Third, the use of PACs generates significant

j. Apparently there was substantially less precandidacy PAC activity in the 1992 cycle, but Corrado argues that this fact does not mean the use of such PACs is likely to decline permanently. The decline in 1992 resulted from the lack of a nomination contest in the Republican Party and the dropping out of the race in 1990 and 1991 of many potential Democratic contenders. The eventual Democratic contenders started up their campaigns much later than would ordinarily be the case. See id. at 96–101, 187–88.

> resource inequities among contenders for the presidential nomination. Finally, the trend toward PAC sponsorship in the early years of an elections cycle increases the pressure to expand the length of a presidential campaign, thus contributing to further attempts to stretch the limits of the law.

Id. at 102. With respect to the second of these problems, if the precandidacy PACs were treated as authorized committees of presidential candidates—as was urged by Commissioner Harris in his dissent—then individuals would be limited to contributing $1,000 to such committees for the entire nomination campaign. PACs would be able to contribute $5,000. But because such committees can easily retain their status as multicandidate political committees (i.e., PACs) under AO 1986-6, they may receive $5,000 from both individuals and PACs, and this amount may be contributed *per year*. Thus, if a precandidacy PAC is started up the first year after a presidential election and if it keeps its status as such into the year of the next presidential election, an individual could contribute as much as $20,000 to the PAC, plus $1,000 to the candidate's campaign committee once that is established, for a total contribution of $21,000, compared to the maximum of $1,000 that the Act seemingly contemplates.

In the 1988 cycle, precandidacy PACs received $10,000 from 228 contributors, $15,000 from 68 contributors, and $20,000 from 22 contributors. About two-thirds of these contributions were made to the Fund for America's Future. See id. at 115.

3. Corrado contends that precandidacy PACs "violate the spirit of almost every major provision" of the FECA. Id. at 172. Yet, in the excerpt reprinted above, he notes that presidential candidates form precandidacy PACs as a response to strategic difficulties imposed by the Act and by the general presidential nominating system as it has evolved since the 1960s.

Three of these difficulties are particularly important. First, although the campaign spending limit is adjusted for changes in the cost of living, campaign costs have climbed considerably more rapidly than ordinary living expenses. Therefore, candidates have an increasing incentive to incur campaign expenses in ways that do not get charged to the spending limit. Second, the nominating process has become increasingly "front-loaded." That is, increasing numbers of delegates are chosen at primaries or caucuses that occur no later than March of the presidential year. This means that candidates must be able to raise money and have their campaigns in good working order early. At the same time, they need to husband money, lest they find themselves in a close race in the later primaries, without being able to spend adequate funds because they have used up too much of their spending limit. Third, although the spending limits have increased over the years with the cost of living, the contribution limits have not. To raise adequate funds, candidates need to receive a much larger number of contributions than when the FECA was first enacted. Direct mail as a means of fundraising has therefore become increasingly important. But developing a proven mailing list of contributors is a very costly and time-consuming process. The twenty percent allowance for fundraising expenses allowed by the FECA spending limits has become increasingly inadequate.

From a candidate's standpoint, a precandidate PAC that can develop fundraising mailing lists and build early support and good will before the primary

season begins—all with funds that do not count for purposes of the spending limit—is an ideal solution to these strategic problems.

4. On balance, should Congress adopt new restrictions on precandidacy PACs? If so, what sort of restrictions? Are other changes in the nomination funding system desirable?

II. Legislative Financing: Proposals for Reform

Almost since the ink was dry on *Buckley v. Valeo* and the 1976 FECA amendments that it necessitated, debate has occurred on proposals for additional campaign finance reform.

> For example, in the 98th, 99th, and 100th congresses [i.e., 1983–1988], approximately 173 bills and amendments were proposed that called for some change in the federal campaign finance regulations. Most of these measures were primarily concerned with the financing of congressional campaigns. At least 61 of the bills contained provisions designed to limit the influence of PACs in congressional elections directly by requiring a ceiling on the amount of PAC money a candidate may receive (33 bills), a lower limit on PAC contributions (26 bills), or a prohibition against the bundling of individual contributions by a PAC (26 bills). Approximately 29 of the proposals attempted to limit the influence of PACs indirectly by raising the contribution limit for individual donors (16 bills), providing tax-credits for non-PAC donations (10 bills), or recommending some other change that would serve this purpose (11 bills). Others sought to reduce the role of PACs and limit the cost of congressional campaigns by establishing some form of public financing (37 bills) or by allowing Congress to limit campaign spending without public funding (19 bills).[k]

Of course, only a small fraction of these bills were considered seriously, but the breakdown gives a rough idea of the content of the debate.

In 1992, Congress passed a comprehensive campaign finance bill, S 3, which was in major respects representative of the type of reform that has been sought by reform organizations such as Common Cause and the Center for Responsive Politics, and by Democrats in and out of Congress. House candidates would have received up to $200,000, matching dollar for dollar contributions received up to $200. Senate candidates would have received vouchers good for purchase of television advertising up to 20 percent of the spending limit. Eligibility for benefits in both the House and Senate was based on a threshold of contributions received in amounts of $250 or less. As a condition of receiving benefits, candidates would have to agree to spending limits of $600,000 for House candidates and amounts ranging from $950,000 to $5.5 million for Senate candidates. The limit on PAC contributions to Senate candidates would have been reduced from $5,000 to

k. Anthony Corrado, CREATIVE CAMPAIGNING: PACs AND THE PRESIDENTIAL SELECTION PROCESS 7 (1992).

$2,500, and candidates for both houses would be subject to an aggregate PAC limit, i.e., a limit on the total amount they could accept from PACs.[l]

The Democrats who controlled Congress were able to pass S 3 in 1992 because they had a friend in the White House—George Bush—who in 1991 had declared, "I intend to veto any campaign finance 'reform' legislation which features spending limits or taxpayer financing of congressional campaigns." On this occasion there was no disappointment for readers of Mr. Bush's lips, who no doubt included many Democrats who voted for the bill in reliance on the veto promise.

In 1993, the congressional Democrats faced a much more difficult situation. Bill Clinton, a Democrat, was president, and he had pledged to sign any campaign finance bill that Congress might send him. Democrats could not safely pass a bill purely for the purpose of scoring partisan political points.

Each house passed a bill covering its own elections in the 103rd Congress (1993–94). The Senate bill, again numbered S 3, contained "optional" spending limits ranging from $1.2 million to $5.5 million. To try to induce candidates to accept spending limits, the Senate bill imposed a 34 percent tax on campaign receipts, and then exempted candidates who accepted the spending limits. To say the least, this provision raised constitutional questions.[m] Candidates who accepted spending limits were also entitled to discounts for broadcast advertising and postage. If a candidate who accepted spending limits were opposed either by a candidate who exceeded the limits or by independent spending over $10,000, the spending limit on the candidate would be raised and the candidate would be entitled to vouchers for broadcast advertising and postage. PAC contributions would have been banned in all federal elections.[n]

The House bill, HR 3 (surprise!) was more conventional. It set spending limits for House candidates at $600,000, indexed for inflation. Candidates who accepted spending limits could receive up to $200,000 in vouchers that could be used to pay for voter contact material such as buttons and bumper stickers as well as advertising and postage. Candidates could not accept a total of more than $200,000 from PACs and were subject to a similar aggregate limit of $200,000 on contributions in amounts of $200 or more. If a candidate's opponent refused to accept the spending limits and contributed more than $50,000 of his or her own money to the campaign, then the candidate would be relieved of all contribution limits, though the opponent would continue to be subject to the contribution limits.[o] Although HR 3 was regarded more seriously by many observers than its Senate counterpart, the House bill had at least one serious flaw, namely, that it lacked any provision for funding the public financing. In any event, the two bills

l. This is a very simplified description. For more details, see Beth Donovan, *Campaign Finance Highlights*, 50 CQ WEEKLY REPORTS 862 (1992).

m. See Beth Donovan, *A Constitutional Question*, 51 CQ WEEKLY REPORTS 1539 (1993). Senator George Mitchell, the majority leader, said he had not studied the constitutional issue but that the tax provision was severable. A Republican senator, Mitch McConnell, said the provision was "DOA in the courts." Id.

n. For a more detailed account see Beth Donovan, *Senate Passes Campaign Finance By Gutting Public Funding*, 51 CQ WEEKLY REPORTS 1533, 1536–37 (1993).

o. For more details, see Beth Donovan, *House Will Vote on Limits Nearing $1 Million in '96*, 51 CQ WEEKLY REPORTS 3091, 3092–93 (1993). For critical commentary of S 3 and HR 3, see Herbert E. Alexander, WHITE PAPER ON ELECTION REFORM: A CRITIQUE AND COMMENTARY ON S.3 AND H.R. 3, 103D CONGRESS (Citizens' Research Foundation, University of Southern California, 1994).

languished in a conference committee, as the two houses were never able to reach agreement.

As of the spring of 1995, there was little or no activity relating to campaign finance in the newly-Republican Congress. So long as Bill Clinton is president, it is not inconceivable that the Republicans might attempt to pass a bill on this subject with the same friendly assurance of a veto that the Democrats enjoyed in 1992. If so, the content might resemble a plan put forward by House Republicans—and endorsed, among others, by then minority whip Newt Gingrich—in 1993. Their plan called for a ban on PACs and a requirement that congressional candidates raise a majority of their funds from individual contributors who reside in their districts. To benefit parties, and to take advantage of the fundraising advantage of the Republican Party over the Democratic Party, the plan would have allowed parties to contribute to congressional challengers facing incumbents with large war chests an amount sufficient to match the incumbent's initial funding advantage. This boon for parties would have been offset by a ban on soft money. There also would have been a ban on "bundling" of contributions by PACs and registered lobbyists. A candidate with an opponent spending over $250,000 would have been able to raise money free of contribution limits. Finally, restrictions on political spending by unions would have been tightened.[p] Whether the Republicans can pass such reforms if and when they control both Congress and the presidency remains to be seen.

So much for the recent politics of campaign finance reform. There is no shortage of proposals. Most of the books and many of the articles that appear on the subject every year contain a package of proposals, usually representing a distinct mixture of elements similar to some of those that appear in the bills just described. Some recent and worthy examples are: David B. Magleby & Candice J. Nelson, THE MONEY CHASE 139–213 (1990); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUMBIA LAW REVIEW 1126 (1994); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUMBIA LAW REVIEW 1160 (1994).

The rest of this Part consists of three proposals whose elements are slightly off the beaten track. Each proposal is followed by a sampling of published criticism.

Richard P. Conlon, *The Declining Role of Individual Contributions in Financing Congressional Campaigns*

3 JOURNAL OF LAW & POLITICS 467, 469–70, 482–86 (1987)

The primary cause of the drastic decline in small contributions over the past decade has been changes in the law which make PAC money readily available and easy to raise in large amounts, especially for incumbents. Moreover, there is little likelihood that the displacement trends of recent years will abate. PAC money will continue to grow... and small contributions from average citizens will continue to decline, since it is more difficult to raise large amounts via small contributions.

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p. For more details, see Beth Donovan, *House GOP Plan Backs Ban on PAC Funds*, 51 CQ WEEKLY REPORTS 2859 (1993).

Fortunately there is a simple way in which these trends can be significantly retarded, if not reversed. A 100 percent tax credit (up to $100) for contributions to congressional candidates would make it easier to raise small contributions by, in effect, giving every taxpayer $100 which he or she could use for only one purpose—to support a candidate or candidates for the House or Senate. A full credit would not give the contributor any more of an incentive to contribute; it would simply make it easier to make a contribution. But it would give candidates an incentive to place more emphasis on funding their campaigns through small contributions from the grassroots.

A full credit would make it as painless as possible for the average person to contribute to the candidate of his or her choice. Candidates would be able to ask contributors, in effect, to lend them up to $100 for a few months until they file their tax returns, at which point they would get their money back.

There are several other advantages to the 100 percent tax credit: it is uncomplicated; it is a familiar concept which already exists in law; it requires no new bureaucracy; it would increase citizen participation in the political process; it would restore the average citizen to a more prominent role in financing congressional campaigns; and it would reduce incumbent dependency on PAC money—without imposing limits.

It is clear that a 100 percent credit would increase both the amount of small contributions and the number of people making such contributions. The only question is whether $100 per person will enable candidates to raise the amount of money needed to fund a modern campaign, or whether the credit should be 100% up to a maximum of $200 per individual.

Responses to Criticisms of the 100 Percent Credit

Opponents of the 100 percent tax credit raise several objections to the proposal. None of these criticisms [is] capable of withstanding close analytical scrutiny. One of the primary arguments against the 100 percent tax credit is that if not coupled with an overall spending limit, it would simply increase total campaign spending. Candidates would use the credit as an additional, rather than as an alternative source of funding and would continue to seek PAC money.

Some candidates would use the credit to increase small contributions while continuing to raise as much PAC money as possible. However, many others would try to reduce their dependence on PAC money to the extent they could raise more small contributions, and some would use the credit to swear off PAC money entirely. And there would be a basis for public pressure on candidates to decrease their dependence on PAC money.

Moreover, increasing both the level of small contributions and the number of people participating in this way is important in and of itself, even if it were to result in an increase in campaign spending. The decline in small contributions, coupled with the steady increase in PAC contributions, represents a fundamental change in our political system with serious implications for the future well-being of representative government. Insistence on tying an overall campaign spending ceiling to enactment of a 100 percent tax credit would certainly doom the proposal, just as public financing was killed time and time again over the past decade because it was attached to a spending ceiling.

A second argument made against a 100 percent credit is that it would be too costly. This argument might ring true were the 100 percent credit to apply to all

political contributions—including contributions to PACs—as does the current 50 percent tax credit.[q] As indicated, however, the 100 percent credit would apply only to contributions to candidates for the House and Senate. In 1983–84 contributions of $100 or less to all House and Senate general election candidates totaled less than $76 million—an average of $38 million per year. This represents less than 15 percent of the estimated total revenue loss attributed to the current across-the-board 50% tax credit ($280 million per year).

Thus, were a 100 percent credit to double the amount of small contributions to House and Senate candidates, the additional annual revenue loss would be $38 million. And were such a credit to triple small contributions, it would cost $76 million more.

Anyone who has had experience raising campaign funds will testify that even with a 100 percent tax credit, it will take several election cycles to double or triple the level of small contributions. The experience in Alaska, which has a 100 percent state credit for all political contributions, is instructive. A contributor in Alaska can actually make a profit on contributions up to the $100 maximum by claiming both the 100 percent state credit and the 50 percent federal credit which also applies to all political contributions. Thus, a contributor who gives $100 can get $150 back.

Nonetheless, after an initial increase, the revenue loss to the state has stabilized at about $1 million annually for the past several years, according to officials of the Alaska Department of Revenue. Thus, there clearly are limits on the extent to which a tax credit—even a 150 percent credit such as in Alaska—can stimulate contributions.

The 100 percent credit has also been criticized on grounds that it is out of step with the recent move toward tax simplification in the 1986 Tax Reform Bill. Indeed, simplification is one of the main arguments used to justify the Reagan Administration's proposal to eliminate the current tax credit. However, given the arcane complexities of the tax code, it defies credulity to equate eliminating a single line from the tax form with tax simplification. Moreover, a tax credit—especially a full credit—is hardly a complex provision. Repeal of the 50 percent credit as part of Tax Reform was not based on simplification, but rather on the need for revenue to finance rate reduction.

Some opponents, including Common Cause, argue that enactment of a 100% credit would be self-serving on the part of Members of Congress.

The exact opposite is true. No credit whatsoever for small contributions will hurt non-incumbents much more than incumbents. Without the tax credit it will be more difficult to raise small contributions, and this will force candidates to seek even more money from PACs. Incumbents already get 80% of all PAC contributions, and the PACs would be pleased to provide more money to replace a further fall-off in small contributions. Thus, if any class of candidates would benefit from the 100% credit, it would be non-incumbent candidates, not incumbents.

With respect to other types of contributions, there are justifications for repealing the tax credit. For example, there is no need for a tax credit for contributions to presidential candidates because they receive public financing via matching

q. The 50 percent tax credit for contributions that Conlon refers to was repealed as part of the 1986 Tax Reform Act.—ED.

funds in the primary elections and total funding in the general election. Thus, a $100 contribution to a presidential primary candidate costs the government $150 ($100 in matching funds and $50 via the tax credit). Repeal of the credit for state and local candidates can be justified on grounds that this should be a state rather than a federal responsibility, and repeal of the credit for contributions to PACs can be justified on grounds that most PAC operations are part of a special interest lobby and there is no reason the government should, in effect, subsidize the lobbying efforts of various interests to influence congressional and governmental decisions.

With respect to political parties, justification[s] for repeal are mixed. On the national level, virtually all small contributions are in response to high-intensity issue, direct mail appeals. Thus, repeal of the credit would probably not hurt national party small-giver fundraising. However, it could hurt state and local party fundraising which is more heavily based on events designed to attract the party faithful, many of whom are people of low and moderate income.

It is also argued that the 100% credit will provide a windfall for high-intensity single issue movements (e.g., anti-abortion and pro-choice groups, pro and anti-gun control groups, evangelical religious groups).

Again, just the opposite is true. The 100% credit will probably be less useful to high-intensity single issue groups because people who care about these issues already contribute to the candidates who support their views. As with the case of high income versus those of low and moderate income, the tax credit will have the most impact in persuading people who are not committed to a particular issue to participate in the political process by becoming a contributor.

A related argument is that the 100% credit will benefit fringe and kook candidates as well as mainstream Republicans and Democrats.

So what? There is no reason why contributions to such candidates should be treated any differently than contributions to mainstream Republicans and Democrats. They are, after all, American citizens—the same as so-called mainstream politicians. Moreover, the point of the tax credit approach is to *let the people decide.* Fringe and kook candidates do not receive significant public support now, and there is no reason to believe that the American people are going to suspend their common sense and begin giving them more substantial support if a 100% credit is enacted.

Finally, some reform advocates argue that enactment of the 100% credit "will take the steam out of the drive for comprehensive campaign finance reform."

This is a fiction which is being promoted by Common Cause. The drive for comprehensive campaign finance reform ran out of gas six or seven years ago. Comprehensive campaign finance reform means spending limits, and Republicans are unalterably opposed to any kind of a limit on total campaign spending....

It is much easier to enact campaign reforms one at a time, rather than as part of a comprehensive package, because a comprehensive measure provides more reasons to justify voting against the entire package. Thus, the choice is not between a 100% tax credit and comprehensive campaign finance reform. It is between the 100% credit and nothing. The 100% credit has already passed the House, and it could also pass the Senate were more realistic attitudes to prevail. But coupling the credit to a spending ceiling which is an anathema to Republicans will doom it to certain failure.

Criticism of Conlon

Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA LAW REVIEW 301, 364, 365 n.272 (1989):

No one knows to what extent tax credits induce increased contributions. One thing that is clear is that tax credits represent an extremely inefficient method of publicly financing election campaigns. We know from current experience that a number of people do make contributions in the absence of tax credits. If tax credits are reinstated, a significant percentage of the lost revenues—possibly almost all of them—will be paid not for new campaign funds but as a gratuitous tax benefit. In short, tax credits are not worth it....

A 100% tax credit would waste twice as much in tax relief for people who would make contributions in the absence of tax incentives. It might induce more contributions than the 50% credit did, but to the extent it succeeded, its cost in lost revenues would soar. It is sometimes proposed to deal with this problem by limiting the credit to those who contribute to federal elections. This would only exacerbate the problem of campaign finance at the state and local levels, where the problem is sometimes at least as serious as in federal elections. Tax credits are a bad idea, but if they are adopted, they ought to be applicable to all federal, state and local elections, including ballot measure elections.

Joel L. Fleishman & Pope McCorkle, *Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform*

1 JOURNAL OF LAW & POLITICS 211, 227–31, 273–84 (1984)

[Elizabeth] Drew and [Judge Skelly] Wright advocate a series of extensive changes in the current FECA system. Their vision would first require extending a system of public financing to House and Senate campaigns. Regardless of whether public financing of congressional elections was enacted in a full or matching grant form, the control mechanism of strict overall expenditure limits would be the essential feature. They would also severely restrict—almost to the vanishing point—the independent spending of all non-candidate groups and individuals. The purpose of that severe constraint would be to insure that the spending of non-candidate persons could not, as Drew puts it, "uneven the balance" between the candidates.

Furthermore, PACs would not be major financial actors in their new campaign finance process. Full public financing would completely prevent both PACs and individuals from making direct contributions. Yet even a matching system would be designed to match the private contributions of *individuals* only, and its overall expenditure limitations would also reduce the prominence of PACs. Wright and Drew would similarly limit both or either the amount that any single candidate could accept from a PAC and the overall amount a PAC could contribute in a single year. And because the zone of independent spending would be so rigidly limited, PACs would have little room to recover their influence by means of independent advertising campaigns.

Professor Van Alstyne has cogently characterized this position as a form of "Level-Down" speech egalitarianism. He explains that the general goal of Level-

Down egalitarianism is to prohibit "more than a specified [level of] speech-use of one's own private property... without necessarily otherwise affecting private property holdings." Judge Wright perfectly displays the Level-Down nature of his and Drew's ideal in declaring:

> Unchecked political expenditures... may drown opposing beliefs, vitiate the principle of political equality, and place some citizens under the damaging and arbitrary control of others. *Limiting the amount that wealthy interests may spend to publicize their views enhances the self-expression of individual citizens who lack wealth*, furthering the values of freedom of speech.

As Van Alstyne suggests, this Level-Down position hardly represents a Marxist attack on possession of private property. In his *Economic and Philosophic Manuscripts of 1844*, Karl Marx explicitly attacked the general idea of "levelling down" the exercise of political rights to a "preconceived minimum." Marx labeled such reform measures as forms of "crude communism" which failed to accomplish the central radical goal of the "annulment of private property." The Level-Down position clearly allows for the continuance of unequal property possession and intends to affect *only* the unlimited exercise of political speech rights in the campaign context. These nonradical elements are the very features that make the approach seem plausible in a constitutional order more or less premised on the existence of private property.

Regardless of its non-Marxian nature, however, the Level-Down vision still presents a distinct contrast with the more familiar "Level-Up" egalitarian approach. Most welfare-state policies, for example, exhibit a general kind of Level-Up logic. They strive to establish a "floor" of income for poor individuals without attempting to impose a "ceiling" on rich individuals' acquisition or expenditure of income. In the campaign finance context, a Level-Up approach therefore eschews the idea of restricting the amount of any person's or group's political speech in order to equalize the *relative* position of others lower on the scale. A Level-Up approach instead advocates only the absolute enhancement of political speech opportunities. This requires the use of public subsidization to establish a floor of wealth for candidates but no overall ceiling on expenditures from private sources of support. Level-Up subsidies do not directly open up the avenues for more political speech production by ordinary citizens, yet they increase the speech-wealth of candidates so that a greater quantity and diversity of political speech can flow to citizen-consumers in the market place.

The vision championed by Drew and Wright certainly contains aspects of Level-Up egalitarianism. Drew and Wright, for example, advocate public subsidization of congressional as well as presidential campaigns. Yet, as Drew stated..., their scheme is designed primarily to "lower the amount of money that is spent on campaigns." The essential purpose of public subsidization in their Level-Down vision is to substitute a controllable stipend for the massive sums that can be accumulated through private fundraising.

[T]he Level-Down Vision results in inegalitarian policy outcomes. In a Level-Down political world, challengers would be prevented from countering the advantage of incumbency. The average political consumer would not receive a greater amount or a more informative assortment of political communication. Minor

party and independent candidates would still encounter strong protectionist barriers. Implementation of the Level-Down position would thereby reinforce rather than alleviate major inegalitarian aspects of the contemporary political system.

The conclusion to be drawn from this policy critique is that the Level-Down vision fails to possess any significant *political* justification. After its egalitarian veneer is pierced, the Level-Down vision loses all claims as a reform approach that will make the political system more "fair," "representative," or "democratic." All that remains at the irreducible core of the Level-Down vision is a moralistic or aesthetic antagonism toward the perceived "squalor" of "big spending." Judge Wright reveals these elements in this position by constantly referring to the "pollution" and "poison" of massive campaign finance expenditures. Drew similarly resorts to religious imagery in asserting, for example, that unrestricted campaign spending threatens "the soul of this country." At bottom, Level-Down reformers seem to believe that it is shameful for a civilized nation to allow large amounts to be spent in electing its representatives.

This kind of moralism or aestheticism hardly represents a compelling justification for instituting a comprehensive program of campaign spending restrictions. As John Stuart Mill warned in *On Liberty*, a civilized society must constantly guard against the tendency to "extend the bounds of what may be called moral policy until it encroaches on the most unquestionably legitimate liberty of the individual." The moral policy of the Level-Down vision unquestionably encroaches on the freedom of political expression. In so doing, moreover, Level-Down policy only makes the political system more unfair and less democratic. Finally, Level-Down advocates call for strict spending ceilings *even though it is extremely unclear whether campaign spending levels in the United States exceed or even match the amount spent per voter in many other Western democracies.* [T]he Level-Down vision appears to be so "fair" that only a first amendment absolutist would challenge its implementation. Yet it should be clear now that the egalitarian nature of the Level-Down vision is a grand illusion....

An obvious virtue of the Level-Up approach [is that it] avoids the unintended inegalitarian consequences generated by the regulatory restrictions in Level-Down policy. The three distinctive reforms advocated in the Level-Up approach would neither limit overall spending totals nor preclude the provision of public financing to candidates across the political spectrum. A Level-Up policy would first add an equalized bottom of public subsidization in House and Senate races. It would then take off all the overall spending top for presidential candidates and allow the existing system of public subsidization to become a spending floor supplemented by private contributions. Finally, a Level-Up policy would spread the opportunity to benefit from this public spending floor by establishing a matching system of public subsidization for new candidates in all races who demonstrate significant thresholds of present popular support. The absence of official spending tops will result in the avoidance of the pro-incumbency effect and excessive mass media concentration caused by Level-Down ceilings. The extension of publicly subsidized spending bottoms to candidates with a significant base of popular support will provide a competitive boost to poorer and outsider candidates.

This concluding section is designed, however, to demonstrate that the Level-Up approach is not simply shaped in makeshift response to the evidence about shortcomings in Level-Down policy. At its heart the Level-Up vision adheres to a pro-participatory principle that requires the rejection of overall spending ceilings

and the acceptance of reasonable contribution limitations. A Level-Up approach also allows for the design of a "siphon-off" strategy that diminishes the prominence of PAC contributions and independent expenditures in the campaign finance process. And by increasing overall access to money, a Level-Up structure actually insures that most major candidates can compete with their bigger spending opponents....

Dean Ely has forcefully argued that "ensuring broad participation in the processes and distributions of government" represents the prime political value enshrined in the Constitution and throughout the "the American system of representative democracy." Regardless of its exact constitutional status, however, the value of mass participation has assumed a central position in modern democratic theory at least since the era of John Stuart Mill. The Level-Up vision honors this mass participatory principle as a guiding value in its framework for campaign finance policy.

Level-Up policy recognizes that all direct restrictions on overall spending necessarily impose limits on the degree of mass participation in the campaign finance process. An overall spending ceiling outlaws mass participation in the process after a candidate has collected a certain level of money. The provision of partial public financing further cramps the amount of participation that can occur within the spending restrictions. And a system that restricts candidate spending to the level of public subsidization abolishes all direct participation in the process. The Level-Up approach therefore eschews all public financing schemes that restrict the level of private contributions.

Public subsidization in a Level-Up structure would instead only serve as a boost to candidates' private fundraising campaigns. In a Level-Up system, for example, major party congressional candidates could receive public subsidy directly after their nomination. This initial flat subsidy could fall somewhere between $50,000–$75,000 for House candidates and some analogous per voter sum for Senators based on statewide voting population. Additional sums reaching this initial public subsidy amount could be made available to candidates on a matching grant basis during the first months after their nomination. The limits on the Level-Up subsidy amounts will not cripple challengers because they will always be free to raise needed resources from private contributions. In most cases, moreover, the public subsidy amounts will serve as competitive boosts but hardly insure a full floor of financing for candidates.

For the sake of administrative convenience, this public subsidization process would not have to be exactly copied at the presidential level. The present public subsidization schemes for the primary and general election stage could be retained but without the accompanying overall spending ceilings. In presidential general elections, therefore, the $20 million plus public subsidy would probably come close to providing a full floor in the next few campaigns. Yet as campaign costs inevitably continue in an upward spiral, the need for private contributions will gain prominence and a Level-Up approach would not have to keep on providing huge increases of public money. Similarly, the provision of a matching grant system for demonstrably popular minor party and new candidates in all federal races will insure that public money is not wasted on flat subsidy grants to frivolous candidacies. A significant level in private contributions raised by these candidates could serve as the standard used to determine whether such a candidate possesses a qualifying threshold of present popular support.

Our previous policy critique can also be understood as centering on Level-Down theory's insensitivity—bordering on antagonism—-toward the degree of mass participation involved in the campaign finance process. Judge Wright reveals the characteristic Level-Down attitude in approving Rawls' notion that "the liberties protected by the principle of participation lose much of their value" in a society where wealth is unevenly distributed. And the Level-Down demand for overall spending ceilings unmistakably exposes its anti-participatory bias. In a Level-Down political world, for example, a congressional candidate would only be able to spend or receive a limited amount—such as $200,000. It would be illegal for a candidate to raise money over a $200,000 ceiling even by collecting *$1 each from 300,000 contributors*. This kind of mass participatory fundraising would be prohibited just as if the candidate had raised $300,000 from one single "fat cat" contributor (including the candidate himself).

This anti-participatory bias in Level-Down spending ceilings obviously provides a large part of the explanation for the inegalitarian outcomes generated by the Level-Down vision. Because *all* candidates and their supporters are prohibited from spending money above a certain strict level, the advantage in communication and other resources clearly falls to incumbent office-holders in an unoriginal political world. The candidates and groups most obviously hurt by such restrictions are political outsiders who by definition have no significant group of politicians in office. They must depend on galvanizing mass participation in order to counter insider political control.

In this respect, Wright's and Drew's support for a $1,000 Level-Down limitation on independent group spending looms as certainly the most menacing restriction against political outsiders. As Professor Powe has pointed out, this kind of restriction inhibits political participation by "equally prevent[ing] committees which have large numbers of small [or poor] contributors as well as those with a few large contributions from spending [over $1,000]." Level-Down policy, in other words, would not only thwart large expenditures by the wealthy who are already powerful "insiders;" it would snuff out the independent campaign activities of low-income populist organizations like ACORN or Citizens' Action who have virtually no other way to influence the political system. This anti-participatory bias against *all* concerted political action nicely illustrates the irreducible moralistic and apolitical core of Level-Down theory.

An equally important point in the shaping of Level-Up policy, however, is that adherence to the principle of mass political participation requires the use of contribution ceilings. A campaign finance system with no contribution limitations allows a congressional candidate to raise all his or her money through one fat cat contribution. A laissez-faire campaign finance policy thus displays an anti-participatory bias comparable to the Level-Down position. The Level-Up approach hardly disagrees with Congressman Frenzel's pro-participatory notion that the degree of a candidate's financial support should ideally represent a rough barometer of popular support. Yet the fundraising of candidates fails to represent any kind of reliable participatory "barometer" in a system that allows a candidate to contribute unlimited amounts of his own wealth or raise massive sums from a handful of rich contributors. This is why the pre-FECA campaign system often displayed more of a fat cat dominance than an open marketplace structure.

In a laissez-faire system wealthy candidates admittedly do not always enjoy insuperable advantages. Some wealthy candidates who do not demonstrate mass financial support may succeed only in turning off the voters. Yet other equally or

more popular candidates who are not personally wealthy and whose supporters are not fat cats cannot even get into the race. More important, this striking advantage inevitably tends to skew the pool of all individuals running for political office even more in the direction of the wealthy. And if most candidates can raise great sums out of their own pocket or from a few individuals, the truly participatory aspect of raising money disappears. Anti-monopolization provisions are needed to insure a marketplace genuinely open to mass participation and influence.

A sensible Level-Up approach must still stop short of advocating an extension of the "one man, one vote" principle to the campaign finance process. A contribution limitation of one dollar for each registered voter would appear to make the financial success of candidates hinge on the mass participation of the citizenry. Yet this literal transference of electoral principles to the campaign finance process would essentially move the crucial "voting" test to the beginning rather than the end of the campaign. As in the case of Level-Down expenditure limitations, such restrictive contribution limitations would thus tilt the advantage towards incumbents or otherwise well-known personalities.

A fair policy must strike a balance that takes into account the distinguishable inegalitarian dangers of incumbency and varying access to private wealth. It must stop fat cat candidates from bypassing the ordinary political rigors of raising money from more than a handful of sources and allow candidates enough money to compete with incumbents or well-known personalities. A balanced Level-Up policy approach therefore recognizes the need for comfortably high contribution limitations. These kind[s] of limitations, as the late Alexander Bickel argued, "meet the spectacle of somebody dumping $250,000 into *one* campaign" without imposing restrictions that prevent a challenger from raising large amounts from a "large[r] number of people."

In *Buckley* the Court seemed to suggest that the $1,000 individual contribution limitation satisfied this balancing goal *at least for congressional campaigns*. The Court pointed out that only 5.4% of the total money raised in 1974 congressional campaigns came in contributions of more than $1,000. Most of these larger contributions also went to incumbents rather than challengers. Thus the imposition of a $1,000 limit in 1974 did not appear to impose a significant burden on the fundraising patterns of either challengers or incumbents.

After the past decade of inflation and even larger jumps in mass media communication costs, however, the $1,000 limit per election cycle stands as unreasonably low *especially for presidential campaigns*. Individual contribution limitations need to be revised significantly upward. A revised FECA package could (if administratively feasible) display a graduated three-tier structure that would allow contribution levels to vary according to the differing size of presidential, Senate, and House race campaigns. And with the addition of partial public financing, all candidates should have reasonably easy access to adequate flows of money. Consequently, a reasonable limitation ($30,000–$40,000) could also justifiably be imposed on the personal contributions of wealthy congressional candidates to their publicly-subsidized campaigns.

Furthermore, in order to provide a final safeguard for the healthy flow of money to candidates, political parties could be allowed to collect more money and contribute increased amounts to candidates. The money channeled through the parties also diminishes the direct influence that particular contributors can wield over candidates. The money no longer represents such a clearly earmarked politi-

cal investment because all the money flows together into party coffers. Although parties in their weakened present condition are certainly susceptible to monopolistic investment influence, the threshold for such large organizations is bound to be somewhat higher than that of the single candidate. In apparent recognition of this fact, the campaign finance laws already allow individuals to give $20,000 to national party organization per year. This level could certainly be raised to reflect the impact of inflation over the last decade.

The complementary limitations on coordinated party expenditures in support of candidates are very complicated to explain. Yet their essential restrictiveness is evidenced by the fact that PACs contribute and spend more overall money in House and Senatorial races than party organizations are allowed to contribute and spend. Party expenditure levels should thus be loosened along with the contribution levels for parties. Moreover, subsequent increases in the flow of party money to candidates could relieve the pressure for periodic raises in the levels of public subsidization.

Criticism of Fleishman & McCorkle

1. Marlene Arnold Nicholson, *The Supreme Court's Meandering Path in Campaign Finance Regulation and What it Portends for Future Reform*, 3 JOURNAL OF LAW & POLITICS 509, 561, 563 (1987):

Fleishman and McCorkle suggest increasing contribution limitations and removing overall campaign expenditure limitations in subsidized races in order to siphon off some of the funds which would otherwise find their way into independent expenditures. Although this might help decrease independent expenditures, these devices would create other problems which might be greater than those posed by the independent expenditures themselves. The potential for corruption from contributions is not disputed. Fleishman and McCorkle's approach would increase that danger in order to prevent independent expenditures, which at worst are somewhat less corrupting than contributions....

Fleishman's suggestions that individual contributions should be increased to counter the influence of PACs is less convincing than his argument in favor of loosening contribution limitations applicable to parties. Such an approach would merely allow those who control PAC contributions to augment their financial investment through PACs with large individual contributions. It has been suggested that PAC contributions can be viewed as "old wine in new bottles," because large contributions usually emanate from special interest sources, whether they be individuals or PACs.

2. Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA LAW REVIEW 301, 365–66 (1989):

Fleishman and McCorkle show that [the "level-up" theory] has many attractive features. But...the campaign finance problem is too deeply rooted, too intertwined with a host of values and interests, to be resolved by any theory that looks at the problem from only one angle. Fleishman and McCorkle provide some unwitting empirical confirmation of this, for their good theory leads them to a bad proposal. The core of their proposal is to provide an amount of public financing in a range of $50,000 to $75,000 to each major party candidate for the

House and to increase the contribution limit for individuals from $1,000 to $5,000.

The grants they would give are hardly more than tokens compared with what it takes to run a competitive campaign for the House. Their grants would yield a marginal increase in the quantity of campaign debate, but no other benefits. Any increase in competitiveness would be barely noticeable. This is because the greatest share of the money they would give away would go either to safe incumbents with no need for it, or to hopeless challengers. The increase in the individual contribution limit would simply aggravate existing problems of corruption and inequality.

3. Most proposals for campaign finance regulation, including Fleishman and McCorkle's, contain some elements of level-up and some of level-down. Consider a system in which every voter is given a voucher that may be spent on campaign communication or contributed to a candidate or group for ultimate use for campaign communication. Each voter's voucher would be the same monetary amount and no one would be allowed to use any other money for campaigning. Would this be predominantly a level-up or a level-down plan? For a description and philosophical defense of this plan, see Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUMBIA LAW REVIEW 1204 (1994). For Foley's criticism of the level-up approach as inadequate, see id. at 1239–41.

Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*

18 HOFSTRA LAW REVIEW 301, 348–364 (1989)

IV. A Reform Proposal

A. *The Problem*

A major theme of this Article has been that because of the pervasiveness of money in politics, any regulation that effectively limits conflicts of interest will necessarily affect numerous other interests and values, so that reform proposals inevitably encounter a cross fire of conflicting demands and objections. Over the decade and a half since adoption of the FECA amendments, a particular set of difficulties have come to be regarded as centrally important in both the academic literature and political debate. These are based on the following circumstances, as to which there probably is little serious disagreement:

1. Although American legislative elections retain a significant partisan cast, they have become increasingly candidate-oriented. The identities, records and policy views of legislative candidates are not well known to voters. Nor do most voters do much to seek out such information. Accordingly, to have a chance to win a competitive election, most candidates need to spend large sums of money to get information into the minds of voters.

2. By and large, money that Americans acting individually are willing to contribute in small amounts to legislative candidates falls far short of the sums necessary to run a competitive campaign.

3. Under our current system, the only sources of funds available to fill this gap are larger contributions from individuals and funds collected through organi-

zations, most commonly at present through PACs. An unknown but substantial portion of funds from these sources is contributed in accordance with a legislative rather than an electoral strategy, and in this sense may be denominated special interest funds.

4. In the majority of districts, truly competitive elections probably are impossible because of the predominance of one party or the well-entrenched position of the incumbent. Categorization of districts as "safe" or "competitive" is possible, but not according to any fixed or simple criterion. It is a matter of expert judgment, and experts sometimes make mistakes or disagree among themselves.

5. Typically, the effects of campaign spending in a potentially competitive district are not symmetric. Incumbents, by reason of their status and assisted by the substantial subsidies they receive for communication with voters, tend to be better known than their challengers at the beginning of the campaign. Whether for this reason, or because some voters tend to vote for the incumbent in the absence of information suggesting otherwise, or for other reasons, challengers usually need to spend large amounts to have a chance to win. On average, challengers receive a higher percentage of the vote as the amount they spend increases. Incumbent spending has a much smaller effect on the election results on average, but the relatively small number of votes a large amount of spending by the incumbent can influence may mean the difference in a close election.

Given these circumstances, it has been widely supposed that an insoluble conflict exists between the anti-corruption goal of campaign finance reform and the value of maintaining (or restoring) vigorous competition in legislative elections. The dilemma arises from the following elements:

1. To accomplish the anti-corruption goal, candidates' demand for special interest contributions must be reduced drastically. This may take the form of limits on the size of contributions, limits on the aggregate amount of special interest money that may be accepted, or expenditure limits consented to as a condition of accepting public financing.

2. Small contributions from individuals do not come close to providing the amount needed for competitive campaigns. Therefore, limits alone, regardless of their form if sufficient to substantially limit the element of corruption in the finance system, would so reduce the flow of funds that challengers, for whom the absolute amounts they can spend are more important than their spending relative to incumbents, would find their hopes of victory seriously impaired.

3. Public financing is proposed to close the gap between what candidates need to spend and what they can raise in "clean" money. As a practical matter, however, the gap is too large for public financing to fill. If a flat amount is given to major-party candidates in each district, most of the money will be wasted on races that have little prospect of being competitive. If public financing is given on a matching basis, raising the private contributions eligible for matching may be difficult. As a result the matching of public funds makes private contributions more valuable, and may, to some extent, subsidize the efforts of contributors following a legislative strategy. The size of the gap and the practical limits on the amount of public financing that can be made available assure that a compromise between the goals of restricting special interest money and permitting competitive races will end up accomplishing neither. In Gary Jacobson's words, "enough" money for a challenger to run a competitive campaign is likely to be "too much" money to be compatible with reform goals.

The dilemma that is assumed to exist turns on the assumption that public funds cannot be allocated to particular races in differing amounts other than through the matching device, which is an imperfect measure of the true competitiveness of an election and which tends to undercut the goals of reform. No one is likely to propose that government officials should make judgments as to which are the competitive races and allocate funds accordingly.

This dilemma can be solved by recognizing that the political parties constitute an excellent conduit for the allocation of public funds. By and large, the parties can be expected to place the funds where they will do the most good. Public financing, then, can provide the greater part of the funds needed in competitive elections, obviating the need for private funds in amounts that come only from special interests. Public financing that is sufficient to fill the gap between what is needed and what can be raised in "clean" money need not be prohibitively expensive, because the parties will avoid wasting money in hopeless districts. The package proposed in this Article is not a cheap one, but it is no Rolls Royce....

B. *The Proposal*

1. *Public Financing Allocated by Legislative Party Leadership to Candidates.*—This is the heart of the proposal. It is important that the money be sufficient to provide most of the needed spending in districts seriously contested. Suppose we assume a House challenger needs $500,000 to run a competitive race. Assume also that serious challengers could be expected to raise at least $100,000 in private funds in light of the regulatory provisions of the proposal. This means that for $20,000,000, a party could fund fifty strongly competitive challenges. A similar amount should be provided for the defense of incumbents and another similar amount should be available for other races. Thus, a crude estimate of the amount that might be made available for allocation under this proposal would be $60,000,000 for each party in the House. Senate elections are held in two-thirds of the states each election year. Allowing for economies of scale in Senate campaigns, a total appropriation of half that for the House, or $30,000,000 for each party, is a similarly crude estimate.[r] Thus, for the two major parties, a cost of $180,000,000 would be involved, or $90,000,000 per fiscal year. In addition, all limits on party participation in federal campaigns, either by contributing privately raised funds to candidates or by direct spending, would be repealed.

The public funds would be allocated by the party leadership in the respective houses rather than by the Democratic and Republican National Committees. This is not essential to the overall thrust of the plan, and some might disagree with this feature out of a desire to centralize party power in a single entity. I favor the Congressional leadership for several reasons. First, although the package's greatest political weakness is that its overall thrust does not benefit incumbents, there is no reason to increase its unpalatability to incumbents gratuitously. Incumbents cannot be expected to be cheerful about handing considerable influence over their own destinies to any party group, but the pill should be less bitter when the group is directly accountable to the incumbents. Second, the in-house leadership is most directly concerned with the party's prospects in

r. On reflection, this estimate for the Senate seems inadequate, because a much higher percentage of Senate races are competitive. The Senate amounts under the proposal should be at least two-thirds of the House amounts and probably more.—Ed.

the particular chamber and presumably is most in touch with the ongoing political situation. Furthermore, the leadership has a more direct incentive to use public funds to win elections and, therefore, is less likely than the party national committees to be distracted by bureaucratic concerns. Third, as Michael Malbin has argued, at least in the case of the party that controls the White House, giving control to the party national committee could impinge on Congressional independence.

An objection to lodging control in the in-house party leadership could be made on the ground that the result will be that all or most of the money will be allocated to incumbents, many of whom do not need it. [However, incumbent legislators get significant benefits when their party increases its membership in the chamber, especially when it is a question of majority control. If it were a question of each incumbent individually contributing to challengers, free rider problems would be a severe inhibiting factor. But centralizing the allocation of public funds would overcome the free-rider problem.] This is especially so, since the leadership could hold a portion of the public funds in reserve until the late stages of the campaign, to be able to come to the aid of any incumbent facing unanticipated difficulties.

Another possible objection is that the proposal would give rise to "bossism" by giving too much power to the leadership. It is easy to exaggerate the extent to which this would happen. First, the membership has the ultimate ability to unseat the leadership, so that the power relationship would be a two-way street. Second, the leadership's main concern is always likely to be to elect and reelect party members, so that it may be reluctant to exercise the sanction of withholding funds from recalcitrant members. Furthermore, to the extent strengthening of the party legislative leadership does occur, it may be more good than bad. For many years, observers have been calling for an increase in the cohesiveness and discipline of political parties. Indeed, in a different way, the next portion of the reform package is intended to move in precisely that direction.

2. *Public Financing to Legislative Party Leadership for Generic Party Advertising.*—This portion of the proposal supplements the previous one by promoting competition in Congressional elections, and to that extent helps resolve what has been seen as the insoluble dilemma of campaign finance reform. However, as just indicated, its main rationale is to strengthen the party system, and in that sense it is, admittedly, somewhat gratuitous as a portion of this package.

Generic advertising is advertising urging a vote for candidates of the party generally rather than for a specific candidate. The Republicans used generic advertising in the 1980 and 1982 campaigns, as did the Democrats to a lesser extent, but the practice appears to have declined. To stimulate a revival, each party in each chamber would receive an appropriation, perhaps amounting to $10 million each.

The hope would be that by assuring a substantial amount of campaign communication focused more on party performance as a whole than on the personal qualities of the candidates, the partisan element in legislative voting might increase and the personal element decrease. If this were to occur, legislative incumbents would have a greater incentive to work for party accomplishment rather than simply for personal positioning and posturing in a manner intended to satisfy constituents who are only slightly attentive....

3. *Aggregate Limit on (Relatively) Unrestricted Contributions.*—The idea of putting an aggregate limit on the total amount a candidate can receive from spe-

cial interest sources first attracted prominence when it was incorporated into the Obey-Railsback bill that was approved by the House in 1979, only to be killed by a threat of filibuster in the Senate in 1980. The Obey-Railsback bill applied only to contributions received from PACs. The present aggregate limit applies to all contributions that are not permitted by either of the next two portions of the proposal. $50,000 could be received by a House candidate under this heading.

The purpose of an aggregate limit is to reduce the pressure imposed by contributions. An artificial limit is put on the demand for contributions, while the supply presumably remains constant. The result is that the "price" of the contribution in pressure or influence declines. In ordinary English, the hope is that the candidate will not feel overly indebted to the special interest contributor if there are dozens more lined up outside the door, ready to contribute in case the first contributor becomes dissatisfied. In line with this theory, the goal is to make it as easy as possible for the candidate to get to the limit. Accordingly, there is much to be said for allowing contributions within the aggregate limit from all sources, including corporate and union treasuries, and without limit as to size. However, the conventional antipathy to contributions of very large size or from corporate or union sources suggests that it is most politic to stipulate that within the aggregate limit, the currently existing contribution limits are applicable.

It may be asked why there should be any provision at all for special interest contributions if the objective is to eliminate conflict of interest. The answer is that in the spirit of moderation..., competing considerations must be balanced. Here, the relevant consideration is the desire to provide some foothold for the candidate who, for whatever reason, is allocated little or no money by the party leadership. This and the following two portions of the package make it possible, although difficult, to raise enough funds to put on at least a barely credible campaign.

If we think of legislative elections as party affairs to a large extent, as this package is designed to encourage us to do, then the notion that the party leadership should allocate resources in legislative elections becomes a natural one. But the doctrine of responsible party government never will and probably never should entirely displace the American traditions of progressivism and individualism, which demand that a man or woman have at least a chance of getting elected even if rejected by the party leaders. It is true that independently wealthy candidates able to finance their own campaigns would be some check on the party leaders' monopoly of resources. Progressivism and individualism, however, should not be limited to the upper fraction of the upper one percent. The aggregate limit on special interest contributions is intended to be small enough to minimize pressure from this source, while at least permitting a candidate to raise seed money on which to try to build on the basis of the small individual contributions permitted by the next portion of the package.

4. *$100 Limit on Individual Contributions.*—In addition to the general aggregate limit just discussed, the reform package contains a second aggregate limit for "qualified" PACs, to be described below. Except within these two aggregate limits, no contributions could come from anyone but individuals, and then in amounts not greater than $100.

This suggestion runs against the grain of proposals to increase the current individual contribution limit of $1,000. Often, these proposals are explained as a means to reduce the relative significance of PAC contributions. This approach confuses form with substance. There is nothing about the PAC form that makes

PAC contributions any worse than other contributions. The problem is the money contributed in pursuit of a legislative strategy. This can be money from individuals just as easily as money from PACs, especially when contributions of significant size can come from a large number of individuals in the same firm or industry.

The rhetorical question is often asked, can a legislator be bought for $1,000? The answer is that such a contribution can exert pressure when it is the largest that can be made and, as we have just seen, it can be multiplied without limit by contributions from others with similar interests. A $100 limit will make it much more difficult to use individual contributions as part of a legislative strategy. The limit also serves the egalitarian goal of reducing, though by no means eliminating, the disparate ability of people of different income levels to influence policy by means of an electoral strategy. It does this with a minimal effect on libertarian values. First, people are free to express themselves by making contributions that always will lend incremental assistance to the campaign. This would not be true under expenditure limits if the campaign had already raised as much as it was allowed to spend. Second, the existence of public funding assures that ample resources will be available for debate where it is most relevant. Third, the outlet of independent expenditures would still be available.

5. *Aggregate Limit on Contributions from Qualified PACs.*—Given the degree to which the public debate over campaign finance has tended to center almost entirely on PACs, it is surprising that there has not been more objection to the fact that PACs have been permitted to contribute $5,000 to candidates whereas individuals have been limited to $1,000. There is a justification for this discrepancy, but it applies only to certain PACs. Individuals who make very small contributions may need to pool their contributions to have any effect. Otherwise, the costs of determining to whom to contribute, and writing a check and sending it might consume a large percentage of the contribution itself. In such instances, pooling, if not a necessity, is at least a great convenience. Those able to make larger contributions are better able to make their contributions as individuals.

There are two major types of PAC that receive their funds in small contributions. The first is composed of labor union PACs....If there were no provisions permitting extra contributions by PACs whose receipts come from small contributions, labor would be placed at a disadvantage compared to business. Business and labor would have an equal opportunity to contribute within the basic aggregate limit. Beyond that, individual business managers could give substantial sums collectively in amounts of $100 each. The provision for a separate aggregate limit available only to PACs relying on small contributions is intended at least partially to offset that inequality.

The second type of political action committee relying on small contributions is composed of ideological PACs. These groups ordinarily pursue an electoral strategy, and they provide an additional avenue of expression for individuals who support their goals. They have been subject to criticism, some of which is less applicable to the extent they contribute to candidates rather than make independent expenditures. This proposal would, within limits, permit them to make such contributions.

Specifically, a PAC would qualify by accepting contributions only from individuals, and only in amounts of fifty dollars or less. A candidate could accept contributions from qualified PACs up to $5,000 each, and up to $50,000 in the aggregate. It should be noted that although it is assumed this device would be

most convenient for labor and ideological groups, other groups such as businesses and trade associations would be free to employ it as well.

6. *Independent Spending.*—The debate over independent spending has been particularly polarized. Some regard independent spending as an outlet for individual expression and a potential source for introducing new subjects and ideas into a campaign debate. Others see it as an evasion of whatever reform limits are in place that is unfair to the targeted candidate at best, and potentially corrupting at worse. Plainly, independent spending can be any of these, though at the small or medium-sized levels it is more likely to wear its benevolent aspect than at very large levels.

To date most independent spending has been by ideological groups. Although two trade associations have been among the larger independent spenders, by and large independent spending seems to have been engaged in as an electoral rather than a legislative strategic device. This could change if other avenues for a legislative strategy are closed off.

Aside from the question of pressure, when large amounts of independent spending occur on one side of a campaign, it seems unfair to the opposing candidate, especially since independent spending often goes for negative advertising. It is true, as Malbin has pointed out, that independent spending may not help the beneficiary as much as direct spending, and that in some cases it may be of no help at all or even counter-productive. He concludes that it is unfair to the beneficiary for the government to match the independent spending with grants to the opposing candidate.

Although Malbin is correct in his premise that independent spending is not always helpful, his conclusion does not follow. Ordinarily, independent spending will be helpful, at least to some degree. On average, providing offsetting payments to the opposing candidate should be fairer than not doing so.

A final reason for doing something about independent spending is that doing so is one of the major attractions of campaign finance reform for incumbents, whose votes are needed to pass legislation.

For all these reasons, my package matches independent spending, but only above a high threshold. The rough idea should be that independent spending amounting to one or two full page newspaper advertisements throughout the jurisdiction, or a few spot advertisements on television or on the radio should not trigger matching payments, but much more than that should. A possible approach would be that in a House race, up to $15,000 would not be matched, from $15,000 to $30,000 the opposing candidate would receive two dollars for every three dollars of independent spending, and above $30,000, the independent spending would be matched dollar for dollar.

This matching proposal should not be offensive to libertarians. Independent spenders would have considerable leeway to disseminate their ideas before matching begins. Even after matching begins, it is hardly a sympathetic ground for objection that speaking has the effect of triggering resources permitting one's opponent to reply.

C. *Something for Everyone*

The package I have proposed commends itself on three major grounds. First, it drastically reduces the opportunity for contributors to employ a legislative strategy, and thereby reduces the corruption inherent in the campaign finance system.

Second, it promotes electoral competition, and does so in an efficient manner by permitting the parties to channel public funds to the districts where they can be used most effectively. Third, it holds forth, if not the promise, at least the potential for shifting our system in the direction of responsible party government by assuring that a significant portion of campaign debate will be cast in partisan terms. This, as a consequence, encourages voters to hold candidates accountable, at least in part, on the basis of party performance.

Consistent with these broad purposes..., I have attempted to include in the package something for everyone. The following is a brief comment on how the polar positions of each of the major cleavages in the campaign finance debate are affected.

1. *Egalitarians.*—Several of the major inegalitarian features of the current system are ameliorated. Reducing the individual contribution limit to $100 does not level the playing field much for the poor, but it does for the broad middle class. More importantly, because the proposal reduces private contributions to a more supplemental role, those who cannot or do not contribute may find their relative position improved.

More fundamentally still, party renewal enthusiasts claim that parties in a system of responsible party government will be better able to promote the interests of the poor than in a candidate-oriented system. If so, there could be substantial egalitarian gains. Admittedly, these chickens are a long way from being hatched.

Finally, though perhaps it is not strictly an egalitarian gain, if the narrow interests that employ a legislative strategy in their contributions are losers, dispersed interests such as those of the environment, consumers and small business might be gainers. This too is speculative, for...concentrated wealth finds many avenues for the pursuit of power, and removing one of them, even if that can be done, may not have dramatic effects on overall outcomes.

2. *Libertarians.*—The only losses for libertarians in this package are the reduction in the individual contribution limit and the new aggregate contribution limits. Except for the most doctrinaire, these losses do not seem severe. For those willing to look beyond form to real consequences, the gains in genuine debate and dialogue resulting from a substantial inflow of money where it can be used most effectively will offset these minor losses. The best news for libertarians is what is *not* included in the package: spending limits. Those mythical candidates who, in the fantasies of libertarians, can raise massive sums in contributions of one dollar each are free to run their mythical campaigns free of interference from this proposal.

3. *Republicans.*—If Republicans are serious about their proclaimed desire for campaign reforms that will expand the role of the parties in federal elections, this proposal should make them ecstatic. If this proclaimed goal is simply a front for wanting to enlarge the advantage that superior fund-raising has given them over the Democrats, this plan will not meet their needs. However, they cannot hope to obtain a plan that accomplishes that objective from a Democratic Congress. In the plan proposed here, the equalizing effect of the public funding would dilute the Republican advantage, but this would be offset to some extent by the repeal of limits on party assistance to candidates. Furthermore, as the minority party, the Republicans gain from the assurance of a continuous and generous flow of funds for challenges to incumbents.

4. *Democrats.*—The Republican advantage in party fund-raising is not eliminated, but the assurance of significant funding for both parties means that the Democrats' absolute disadvantage is much higher on the curve of diminishing returns. The assured money for serious challenges might increase slightly the chances of the Democrats losing their majority in the House. However, compared to other possible changes that could have the same effect, such as a liberalization of party spending without public financing, or an increase in the amounts wealthy contributors can inject into campaigns, this proposal contains an important benefit for Democrats. It was only because the Democrats were the majority party that they were able to increase their share of business PAC contributions during the 1980s. If they were to lose their majority, they would face a financial disaster. The proposed plan is a form of disaster insurance for the Democrats.[s]

5. *Challengers.*—It might seem that some challengers will be better off and some worse off, since some will have access to a major new source of funding, while others will face new restrictions and get none of the new money. However, most challengers who receive little or no money from the party leadership will be the same ones who receive little in large contributions under the present system, and for the same reason, namely, that their cause is nearly hopeless.

The concern here is not really for challengers as a group, but for the public interest in a competitive system. That public interest exists for two reasons, described by Jacobson as "keeping legislators responsive" and "letting voters change the direction of policy by replacing elected officials." Most observers would agree that the first interest is amply satisfied by our present candidate-oriented system. The second goal requires more than a challenger's ability to mount a competitive campaign. So long as campaigns remain candidate-oriented and isolated from other campaigns in other districts, the second goal will not be met, even if several dozen congressional seats change hands every election. The present plan, because it promotes party discipline and encourages campaigns based on party performance rather than on candidate idiosyncrasies, holds out a prospect not only of increased competition, but of competition that can fulfill the purpose for which it is touted.

6. *Incumbents.*—Here's the rub. Most people who are not incumbent legislators believe that increased competition would be desirable under present circumstances. Plainly, any plan that increases competition will be inconvenient for incumbents. In addition, the proposed plan gives decision-making power to the parties over resources that are vital to the incumbents and the parties. Nothing can be done about this, and if these features assure that the plan can never seriously be considered, so be it. However, if these features are not fatal, the plan contains others intended to sweeten the bitter pill for incumbents.

First, the control is in the hands of the party leaders in the chamber, and therefore ultimately in the hands of the incumbents. Second, although the plan assures the funding of numerous serious challenges, it also assures ample resources for the defending incumbents. Although the increased spending is of greater benefit to challengers, the increased spending of incumbents can make a

s. From the perspective of 1995, the Democrats no doubt regret not having purchased this or any other form of disaster insurance. A Republican Party that is in the majority in Congress should have a significant fundraising advantage that could be a major obstacle to the Democrats' efforts to regain the majority.—ED.

difference. Furthermore, incumbents can expect to defeat even well funded challengers most of the time. Third, in contrast with public financing plans that assure funding to all challengers, the plan assures incumbents who are not targeted by the opposing party that they will not have to face publicly subsidized opponents who, although they may have little chance to win, can still create a nuisance for the incumbent. Fourth, the plan protects incumbents in the event of a massive influx of hostile independent spending. Finally, by greatly reducing the importance of special interest contributions, the plan relieves incumbents from systematically placing themselves in positions of conflict of interest.

Criticism of Lowenstein

1. Gary C. Jacobson, *Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers*, 18 HOFSTRA LAW REVIEW 369, 380–82 (1989).

[T]here are two major problems with [Lowenstein's] package. On the technical side, it ignores third parties (or independent candidates) and primary elections. Like most students of congressional elections, I do not take third parties very seriously; most of the time they are of no consequence. Nonetheless, at a few historically critical moments, third parties have been very important. Dams are designed to withstand the hundred-year flood; a campaign finance system should also be able to handle rare but momentous events. [R]egulation should not impose a permanent status quo but afford individuals the right to a continuing choice.

The third-party problem can presumably be solved through further tinkering with Lowenstein's proposal. Primary elections are another matter. Lowenstein says nothing about how, or under what restrictions, primaries are to be financed. Rather, he merely acknowledges in a footnote that, "[a]s should be clear from the nature of the proposals, they are not adaptable to primary elections." He was, no doubt, wise to ignore primaries because they introduce so many thorny complications. Not only do primaries vary widely in degree of competition and decisiveness (in some districts, the primary *is* the election), they are also spread out over seven months (early March or early October), and timing governs their relationship to the general election. Lowenstein's dilemma—reducing special interest contributions drastically while supplying sufficient money for serious competition and not wasting money in lopsided races—reappears in primary elections. However, Lowenstein's solution of party leaders deploying funds is not available.

The point is not that Lowenstein has slipped here, but that a major, perhaps intractable problem for any regulatory scheme of the kind he proposes is the diversity of circumstances to which it must be adapted. It is one thing to design a system of mixed public and private financing for a single office such as the presidency; it is quite another to design a system that does not have perverse consequences in primary or general elections in any of 435 districts and 50 states.

The other problem with Lowenstein's package is its politics. He does a reasonable job of sketching the advantages of the proposal to Democrats and Republicans, egalitarians and libertarians, incumbents and challengers. Indeed, he may even understate the attractiveness to incumbents, assuming they continue to regard fund raising as a "disgusting, degrading, demeaning experience." [The reference is to a comment once made by Hubert Humphrey.—ED.] Lowenstein, however, is wisely modest about the short-term prospects for such a package. Without

the stimulus of a major scandal, it is difficult to envision partisans overcoming their mutual suspicions and differences; partial public funding of presidential campaigns would have fallen to a presidential veto but for Watergate. Furthermore, the concentration of financial authority in legislative party leaders, congenial as it is to political scientists, will be hard to sell to a Congress composed of politicians whose career strategies are predicated on autonomy.

The more important political difficulty, however, is public opinion. Considering [the flak] members of Congress took over a proposed 51% pay raise in 1989, it is not hard to guess how the public would view spending more than three times as much ($90 million compared to about $25 million per year for the pay raise) to finance their election campaigns. Americans are disdainful of campaigning already, and excessive spending heads the list of complaints. Misguided as this view is, it is understandable to people at the receiving end of most contemporary campaigns. That Congress was willing to give up honoraria in return for a pay raise made no difference to the public. Similarly, the anticipated benefits of weakening "special interests" are unlikely to carry the day against an even deeper invasion of taxpayers' pockets. Of course, a sufficiently egregious scandal might move popular majorities to support public funds for congressional campaigns; but public opinion would probably insist upon perniciously low spending limits as part of the package.

2. Martin Shapiro, *Corruption, Freedom and Equality in Campaign Financing*, 18 HOFSTRA LAW REVIEW 385, 389–91 (1989):

Lowenstein's financing proposals appear [unsuccessful]. The leveling up proposal still maintains, and even extends, the deprivations of speech contained in the current regulations. Those deprivations were justified by the majority in *Buckley v. Valeo* in ways that could only be persuasive to those who care a lot about equality and nothing about freedom. The notion that when the first dollar is contributed to a candidate or party an individual has exercised all the "speech" possible, and the rest is merely "associating" and not speaking, is strained and artificial in the context of a modern and large state where electronic communications is the norm. It is so strained that those who normally favor freedom of speech would have ridiculed it to death were most of them not Democrats confronted with limitations on what they conceived to be Republican speech. The notion that even freedom of association, in the McCarthy period a darling of the left, could be balanced away by the mere "appearance of corruption" on the other side of the scale would have been equally ludicrous if it had not appeared to the usual first amendment specialists that right wing rather than left wing association would suffer.

In essence, Lowenstein deals with all this by treating the current statute as a sunk constitutional cost and pointing out that his proposed increments attack the appearance of corruption problem largely by giving out more public money rather than further limiting private speech (or private association if you prefer clinging to the bizarre distinction of *Buckley*). Such an approach reduces substantially the total new damage to free speech which Lowenstein's "reform" package would impose, but it does relatively little to reduce the damage done by the existing statute.

The resort to public funding plus the proposal of a complex set of arrangements for its distribution, in order to avoid the disadvantaging of non-incumbents

or the two major parties, most fundamentally raises the slippery slope argument. Lowenstein rightly and realistically acknowledges that when his proposed package runs through the actual mill of Washington politics, it will be battered by partisan and particularist pressures, most notably the desire of incumbents to preserve their seats. If we insist on pursuing an ideal participatory equality while acknowledging that every move in this direction entails potential unfairness to some of the participants (thus requiring that every reform must be multiplex and fine tuned), we will gradually erect an enormous web of government regulation and thus government power. This web will have to be woven by some of the spiders. These spiders will inevitably conclude that while all spiders are equal, incumbent, major party and majority party spiders are more equal than non-incumbent, minor party and minority party spiders. Admittedly, if there is to be further reform, a time when one major party controls the Congress and the other the Presidency is a relatively good time. There is, however, never going to be a time when non-incumbents do the weaving, nor can we foresee a time when minor parties will have much say. If every change in the rules of the game, including every administrative and judicial interpretation of these changes, advantages some players over others, any set of existent practices may be better than arming the government with the power to make rules and fine tune them.

Ultimately then, we arrive at a renewed consciousness that our fondness for many negative constitutional rights, that is rights against government intervention, depends as much on our distrust of government as on our belief that unregulated processes of individual freedom yield perfect or even excellent results. Despite all the talk of the marketplace of ideas, few of us believe that those forms of speech most controlled by the real marketplace proffer sufficient, if any, good content. The more complex and countervailing a web of new regulations Lowenstein weaves, the more he opens vistas of elected governors tampering with the rules of their elections and determining just how much free speech certain individuals should have. In this area as in many others, the evils of free speech may be preferable to the evils of government regulation.

3. Sanford Levinson, *Electoral Regulation: Some Comments*, 18 HOFSTRA LAW REVIEW 411, 413–14 (1989):

In reviewing the solution Lowenstein proffers to solve some of the problems presented by financing congressional elections, I note that he is placing extraordinary confidence in congressional leadership for the proper distribution of campaign funds. I do not have that same confidence for two different reasons.

The first reason is purely political and concerns the wisdom of Lowenstein's proposal as a matter of public policy. I severely doubt the political wisdom of placing so much raw power in the hand of relatively few men (and I use the gender term advisedly) who currently head, or seem likely in the near future to head, the respective political parties in Congress. Still, it is possible that further reflection would lead me to believe that Lowenstein can answer this objection. However, that resolution only brings up the second reason for a lack of confidence in Lowenstein's proposal—the sheer implausibility of its adoption. Given the extraordinary fragmentation that, for better and almost certainly for worse, characterizes our party system, I find it next to inconceivable that Congress might vote for a scheme that would instantly transfer significant power from back-bench legislators to senior congressional leaders.

4. This Part presumably has demonstrated that among those who favor significant government intervention in the campaign finance system, there are enormous differences of approach. As Shapiro's comments in Note 2, above, suggest, there are many observers who oppose such intervention altogether. Statements of the skeptical viewpoint can be found in Chapter 10, in the notes following *Buckley v. Valeo*. Among the vigorous criticisms of campaign finance regulation published in recent years are Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Inscrutable Dilemmas*, 94 COLUMBIA LAW REVIEW 1258 (1994); Stephen E. Gottlieb, *The Dilemma of Campaign Finance Reform*, 18 HOFSTRA LAW REVIEW 213 (1989); and Roy A. Schotland, *Proposals for Campaign Finance Reform: An Article Dedicated to Being Less Dull Than Its Title*, 21 CAPITAL UNIVERSITY LAW REVIEW 429 (1992).

III. Some Novel Constitutional Questions

Some of the elements contained in various campaign finance proposals, including some that have been adopted at the state level, do not fit comfortably into the framework established by the Supreme Court in *Buckley* and the subsequent cases. We close with two lower court decisions that address questions that may eventually reach the Supreme Court if these elements are adopted more widely.

Gard v. Wisconsin State Elections Board

456 N.W.2d 809 (Wis.), cert. denied 498 U.S. 982 (1990)

HEFFERNAN, Chief Justice.

This is an original action brought by the petitioners... for a declaratory judgment seeking a declaration of the constitutionality of sec. 11.26(9)(a), Stats.,[1] of Wisconsin's campaign financing law, which establishes an absolute dollar cap on the amount of funding, in the aggregate, a candidate may receive from all committees, including PACs (political action committees), political party committees and legislative campaign committees ("party-related committees").[2] We conclude that sec. 11.26(9)(a) is constitutional.

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1. Section 11.26(9)(a) provides:

No individual who is a candidate for state or local office may receive and accept more than 65% of the value of the total disbursement level determined under § 11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees subject to a filing requirement, including political party and legislative campaign committees.

Section 11.31(1), Stats., sets forth a schedule of disbursement levels which operate as spending limits if a candidate accepts public financing. In addition, the disbursement levels provide a reference point for setting contribution limits such as in sec. 11.26(9). The disbursement level during the 1987 special election for an assembly candidate was $17,250 total in the primary and election, with disbursements not to exceed $10,775 for either the primary or the election.

2. "Committee" and "political committee" are defined in sec. 11.01(4), Stats., as "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements...."

Political party committees are statewide political organizations registered under sec. 11.05, Stats., such as the Republican Party of Wisconsin or the Democratic Party of Wisconsin. Sec.

[Petitioners were Gard and other Wisconsin legislators, Gard's campaign committee and several other committees, including those of other legislators and party committees. After the Elections Board sought a $500 fine against Gard and his campaign committee for violating Section 11.26(9)(a), petitioners brought an original action in the Wisconsin Supreme Court challenging the constitutionality of the section.]

The Campaign Finance Law creates essentially two classes of committees. An individual committee other than a political party committee or legislative campaign committee is what is commonly referred to as a PAC or special interest group. Limits are set on the amounts an individual committee, other than a political party committee or legislative campaign committee, may contribute to each candidate, depending upon the political office sought. Section 11.26(2), Stats. For example, in the 1987 Special Election, an individual PAC could contribute no more than $500 to an assembly candidate. Section 11.26(2)(c). The limits in sec. 11.26(2), apply only to PACs and not to political party committees and legislative campaign committees (party-related committees). Total contributions by each PAC to a party-related committee are also limited to $6,000 per year. Sections 11.26(8)(c) and 11.265(2). In addition to the limits on individual PAC contributions to party-related committees, no party-related committee can receive over $150,000 from all PACs in a biennium. Sections 11.26(8)(a) and 11.265(2). These limits on committee contributions to other committees do not apply to transfers between party-related committees.

Section 11.26(9)(a), however, places a restriction on party-related committees by limiting the total amount of money a candidate may accept from all committees combined. The cap in sec. 11.26(9)(a) is set at 65 percent of the total disbursement level in sec. 11.31, which is the schedule of maximum disbursement levels for various political offices if public financing is accepted. Furthermore, sec. 11.26(9)(b) limits the total amount of money a candidate may accept from all PACs combined to 45 percent of the disbursement level. Thus, while a candidate may accept up to 65 percent of the fixed disbursement level in sec. 11.31 from all committees, a candidate may accept only 45 percent of that amount from PACs.

To illustrate, during the November, 1987 special election campaign, the total disbursement level for a candidate for representative to the assembly was $17,250. Section 11.31(1)(f). The limit on contributions that an assembly candidate could receive and accept from all committees combined was $11,213 or 65 percent of $17,250. Of that total, no more than $7,763 or 45 percent of the total disbursement level, could be received and accepted by an assembly candidate from all PACs. Furthermore, each PAC was limited in the amount it could contribute to an assembly candidate to $500. Section 11.26(2)(c). Thus, candidates have the dis-

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5.02(13), Stats.

Legislative campaign committees are established by the members of each political party in each house of the Wisconsin Legislature. Section 11.265, Stats. There are currently four legislative campaign committees in Wisconsin: the Assembly Democratic Campaign Committee, the Republican Assembly Campaign Committee, the State Senate Democratic Committee, and the Committee to Elect a Republican Senate.

The term "committee" includes all committees. We use the term "party-related committees" to refer to legislative campaign committees and political party committees and "PAC" to refer to all other committees.

cretion to accept funds from these different committees in any amounts they choose, so long as they abide by the 65 percent limit for all committees and the 45 percent limit on PACs. For example, an assembly candidate could have accepted all of the $11,213 from party-related committees or could have accepted $7,763 (45 percent) from PACs and the remaining $3,450 (20 percent) from party-related committees. In any event 20 percent of the candidate's disbursement level is reserved for party-related committees....

It is subsection (a) of 11.26(9), which places a cap on the total amount of contributions a candidate may accept from all committees, including party-related committees and PACs, which the petitioners challenge. We conclude that sec. 11.26(9)(a), which restricts committee contributions to a candidate's campaign, burdens the first amendment rights to free speech and association of those committees and, therefore, is subject to strict judicial scrutiny. The statute will pass constitutional muster only if this court concludes that it is justified by the compelling state interest of preventing corruption or the appearance of corruption and if it is narrowly tailored to accomplish that end.

Respondents claim that sec. 11.26(9)(a) is a contribution limit, not an expenditure limit, and that restrictions on contributions require less compelling justification than restrictions on independent spending. *MCFL*. Petitioners, on the other hand, argue that sec. 11.26(9)(a) is an expenditure limit because it limits the amount of money a candidate can spend from a particular source—committees. Petitioners argue that all aggregate contribution limits have the effect of limiting a candidate's spending by placing an absolute ceiling on the amount a candidate may receive from a source.[11] Petitioners assert that aggregate limits on committee contributions are different than aggregate limits on individual contributions, which were upheld in *Buckley*. The aggregate limit on committees places a cap on *all* committees, so that a candidate cannot receive any additional contributions from committees, even from those which have not contributed to the candidate's campaign or any other candidate's campaign. This is unlike the aggregate limit on individuals because, once a candidate has received the maximum amount allowed from a particular individual, that candidate may seek a contribution from the "next" individual. Petitioners claim that by placing an aggregate cap on committee contributions, sec. 11.26(9)(a) prohibits candidates from seeking a contribution from the "next" committee. Put another way, sec. 11.26(9)(a) places a limit on the amount a candidate may receive, which by implication places a limit on the amount a candidate may spend....

We disagree with Petitioners that, by limiting the amount of money that a candidate can accept from committees, the legislature is placing a limit on the amount of money that a candidate can spend. After a candidate has received the amount of money allowed by the aggregate limit from committees, the candidate can still receive an unlimited amount of money from other individuals, from their own sources, and from individuals through other sources such as conduits.

11. Petitioners challenge only sec. 11.26(9)(a) and they claim that it is possible for this court to narrowly rule that sec. 11.26(9)(a) is unconstitutional, whereas the aggregate limit on PAC contributions in sec. 11.26(9)(b) may be upheld as constitutional. We disagree with this assertion. The same constitutional problems are implicated in both secs. 11.26(9)(a) and (b), because both place aggregate limits on contributions from a particular source.

Therefore, we conclude that sec. 11.26(9)(a) is a limit on the amount of money committees can contribute to a candidate and not a limit on the amount of money a candidate may spend and therefore is only a marginal restriction on speech.

This conclusion is supported by the legislative history of Wisconsin's Campaign Finance Law. The reformers of campaign financing were not concerned that candidates were spending too much money and, in fact, recognized that candidates needed to spend a considerable amount of money in order to have an effective campaign. The reformers were concerned, however, with large concentrations of money from an unrepresentative pool of contributors which would have a corrupting influence on candidates.

[W]here the first amendment is involved we cannot blindly defer to the legislative determination of where the constitutional balance should be struck.... Therefore we independently review the legislative determinations that sec. 11.26(9)(a) was necessary to prevent corruption or the appearance of corruption and that it was the least restrictive means of achieving that legislative goal. We emphasize that we are reviewing the legislative decision to place an aggregate limit on contributions from a particular source and not the legislative decision of where to place that limit, i.e. 65 percent....

First we address whether there is a compelling state interest in limiting aggregate committee contributions....The Respondents maintain that the aggregate limit is necessary to prevent PACs from circumventing the other contribution limits by passing money through party-related committees and, therefore, is directly related to the restrictions on the amount of money any individual committee may contribute to any individual candidate. In addition, they claim that the aggregate limits, together with other existing limits on PAC contributions, are essential in order to prevent undue influence of special interests on an individual candidate's campaign. We find that these arguments are supported by the facts revealed by legislative history and by examining the reports of the Wisconsin State Elections Board.

Our inquiry begins with the legislative history of Wisconsin's Campaign Financing Law....The impetus for this legislation was the findings of Governor Lucey's Study Committee on Political Finance, chaired by Professor [David] Adamany.

[T]he study committee was concerned that committees would circumvent contribution limits. The committee was particularly concerned with the ability of special interest PACs to "launder" money through the political parties. The report warned that restrictions on special interest committees must be tightly drawn.... Therefore, the committee recommended that a 25 percent contribution limit be set on the amount of money, in the aggregate, a candidate could receive from all committees combined....The committee emphasized that the aggregate limit did not prevent committees from collecting and forwarding contributions to the candidate in the name of an individual, nor did it prohibit committees from making certain independent expenditures on behalf of the candidate.

...The legislature placed [the] limit at 65 percent, not 25 percent as recommended by Professor Adamany. Section 11.26(9).

[I]n 1986, the legislature added contributions from legislative campaign committees to candidates to the 65 percent aggregate limit on all committee contributions set forth in sec. 11.26(9)(a).

While Wisconsin's aggregate limit on committee contributions is somewhat novel, it is not an aberration. Five other states have subsequently adopted similar provisions, and Congress is currently considering proposed legislation which is similar to Wisconsin's.[17] The proposed federal legislation is aimed at the same evil as is sec. 11.26(9)—to prevent PACs from having undue influence on any one candidate by circumventing the individual contribution limits through proliferation of committees or by channeling contributions through party-related committees. Report of the Committee on Rules and Administration, S.Rep. 101-253, 101st Cong., 2d Sess. (1990).

The findings of this Congressional Committee confirm the Wisconsin legislature's concern that without effective aggregate contribution limits, narrow interest groups have a corrupting influence on individual candidates. The Committee found that there was an enormous growth in the campaign financing role played by PACs and an increasing dependence by candidates upon such money.

> The Committee is concerned with the impact of such an increase in reliance on these [PAC] funds on the campaign finance system. The ability of political committees having similar interests to join together and make large contributions tends to undermine the effectiveness and integrity of the present system of limits on contributions. It believes that the imposition of a ceiling on *aggregate contributions* from such committees would restore the integrity and effectiveness of the existing and constitutionally sound limits on contributions by any single such political committee, person or other individual to a candidate.

Id. at 16. (emphasis supplied)....

A dramatic increase in PAC contributions and influence on individual candidates has also taken place at the state level. In Wisconsin, PAC contributions to state candidates rose by over 50 percent in just four years. More significant, however, is the potential impact of narrow interest PAC money, which is channeled through party-related committees, on an individual candidate. *See NRWC.*

...Respondents point out that, despite the aggregate limits on the amount of money all PACs may contribute to a party-related committee ($150,000), these committees are primarily funded with PAC money. During the 1983–84 period, 77 percent of contributions to legislative campaign committees came from PACs. In 1987–88, 70 percent of contributions to legislative campaign committees came from PACs. As Petitioners point out, these contributions to legislative campaign committees are within the aggregate limits set forth in sec. 11.26(8)(a), which limit the total amount of money party-related committees may receive from all PACs to $150,000. While the $150,000 aggregate limit may have some significance in the context of a particular committee, that aggregate limit has little significance in the context of an individual candidate's campaign. That is, if a legislative campaign committee received a total of $150,000 in contributions from PACs, the corrupting influence of that money on any one candidate is diminished only if there is a limit set on the amount an individual candidate may receive from

17. See Haw.Rev.Stat. sec. 11-205 (1985); Mont.Code Ann. sec. 13-37-218 (1989); Ariz.Rev.Stat.Ann. sec. 16-905 subd. C (1989); La.Rev.Stat.Ann. sec. 18:1505.2 subd. H(7) (1990); Cal.Gov't Code Sec. 85305 (1990). See also S. 197, 101st Cong., 2d Sess.,—Cong.Rec.——(Mar. 21, 1990).

that committee. Without a limit (such as in sec. 11.26(9)(a)), any one of these PAC-dominated committees could contribute an unlimited amount of this money to any individual candidate, thereby resulting in a "special interest" candidate. Without sec. 11.26(9)(a), the restrictions on the amount an individual committee may contribute to a candidate become meaningless. Instead of being limited to contributing $500 to an assembly candidate, for example, a PAC could contribute $6,000 to a legislative campaign committee, which in turn could give that $6,000 to the assembly candidate. Without limits on the party-related committee, it could pass $6,000 from each PAC to an individual candidate, thereby rendering the $500 PAC-to-candidate limit meaningless. We note that sec. 11.26(9)(a), is in fact the only limitation on a party-related committee's contributions to an individual candidate. By placing restrictions on the party-related committee's ability to contribute, the corrupting influence of large contributions to that committee, is diffused.

We conclude that respondents have demonstrated that there is a compelling state interest in placing an aggregate limit on the contributions that an individual candidate may receive from all committees. The purpose of sec. 11.26(9)(a), along with other restrictions on contributions to individual candidates, is to limit the impact of huge special interest contributions on a candidate and to encourage a broad and diverse base of support in order to prevent either actual corruption or the appearance of corruption. In *Buckley*, the Court recognized that, although the ceiling imposed on an individual's total contributions did impose an ultimate restriction upon the number of candidates and committees with which an individual could associate by means of financial support, an aggregate limit was necessary in order to prevent evasion of the individual-candidate contribution limit by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The Court concluded that this additional restriction imposed by the overall ceiling "is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." So, too, we conclude that the aggregate limit on committee contributions is necessary because of the ability of committees having the same interests to join together and make large contributions which could unduly dominate an individual candidate's campaign. All of the contribution limits set on PACs and party-related committees are necessary in order to prevent individual candidates from becoming unduly dependent upon large narrow interest contributions.

Next we consider whether sec. 11.26(9)(a) is narrowly tailored to pass the strict scrutiny test. Petitioners argue that sec. 11.26(9)(a) is unnecessary because other existing statutory limits on committee contributions prevent proliferation of PACs, laundering of PAC funds through political party committees, and excessive PAC influence on a candidate's campaign. First of all, candidates may not accept more than 45 percent of their disbursement level from PACs. Section 11.26(9)(b). A party-related committee may not receive more than $150,000 in aggregate contributions from PACs and other committees in a biennium. Sections 11.26(8)(a) and 11.265(2). All county, congressional, legislative, local and other affiliated committees of the party are also subject to these restrictions. Section 5.02(13). [T]he $6,000 limit on "committee" contributions to a party-related committee pertains to the subunits and affiliates of the contributing committee. Section

11.26(8)(b). Both "earmarking" contributions to a party for a specific candidate and "laundering" contributions for a candidate through a party are prohibited by secs. 11.16(4) and 11.30(1), respectively. In addition, all contributions by an individual, including those to committees, are limited in the aggregate to $10,000. Section 11.26(4). Finally, all political party committees, PACs, out-of-state committees, and national parties are subject to disclosure requirements. 11.06(1)(a) and 11.06(3w). Accordingly, Petitioners contend that sec. 11.26(9)(a) is not the least restrictive means of preventing corruption.

Respondents, however, contend that sec. 11.26(9)(a) is all that stands between PACs and the candidate. As illustrated by the example of the legislative campaign committees, Respondents' statement is not far-fetched. Despite all of the contribution limits on PACs, without sec. 11.26(9)(a) PAC-dominated party-related committees would be able to contribute $150,000 of PAC money to an individual candidate. Furthermore, we conclude that no provisions prevent narrow issue PACs from proliferating into several other committees. Therefore, there is potential for these narrow issue PACs with large aggregations of wealth to circumvent the PAC-candidate contribution limits if it were not for secs. 11.26(9)(a) and (b). While overt "earmarking" and "laundering" are prohibited, these measures are not enough. In order to maintain the integrity of the political process and prevent corruption caused by large contributions to an individual candidate from a narrow special interest group, effective and comprehensive contribution limits are required.

Petitioners suggest that legislative campaign committees and political party committees do not pose the same threat of corruption as PACs and should therefore be excluded from sec. 11.26(9)(a).

The legislature, by enacting sec. 11.26(9)(b), asserted that party-related committees can reflect a broader base of public support than PACs. Section 11.26(9)(b) prohibits PACs from contributing more than 45 percent of a candidate's disbursement level. Section 11.26(9)(a), however, sets the contribution limit for all committees, including party-related committees, at 65 percent, thus, guaranteeing them at least 20 percent of the candidate's disbursement level.

Although the legislature recognized that party-related committees can represent diverse interests, the contention that these party-related committees necessarily have a broader base of public support than PACs is not supported by the statistics of the Wisconsin State Elections Board. For example, the vast majority of contributions to legislative campaign committees come from PACs. (70 to 77 percent, see *supra*.) Furthermore, a handful of large PAC contributors dominate the field of contributors to these committees. Shea, LEGISLATIVE CAMPAIGN COMMITTEES: THE WISCONSIN EXPERIENCE (research report prepared for Common Cause in Wisconsin)(The contributions of the 7 largest PACs accounted for 40 percent of total PAC contributions.) It is interesting to note that these major PAC contributors generally give across the board to the campaign committees of both parties.

> The pattern of giving by these major PACs showed remarkable similarities. Except for the PACs associated with labor organizations, there was a strong tendency to give across the board to the campaign committees of both parties. However, the Democrats typically did receive larger total amounts from individual PACs, no matter what the partisan inclinations of the particular PAC might be. The explanation for this pattern of pro-

viding political money lies in the fact that the Democrats control both houses of the legislature. Legislators from both parties agreed that it is easier to raise money from PACs when your party is in the majority. Stated from a different perspective: PACs give more money to the people who have more power. Id.

...We conclude, based on this evidence, that there would be a potential for undue domination of a candidate's campaign by narrow interest PAC contributions if party-related committees were not restricted in their ability to contribute to an individual candidate. Therefore, we reject petitioner's argument that party-related committees should not be included in the aggregate contribution limit on all committee contributions set forth in sec. 11.26(9)(a).

Petitioners also argue that sec. 11.26(9)(a) unduly restricts a committee's ability to make even a symbolic expression of support by placing an absolute ban on committee contributions once a candidate has received the aggregate limit from committees. We conclude that sec. 11.26(9)(a) does not place an absolute ban on committee contributions. The 65 percent limit is not absolute. That is, the 65 percent limit is on contributions which have been "receive[d] and accept[ed]" by the candidate. Section 11.26(9)(a). Once a candidate has reached the aggregate limit, the candidate may always return some contributions from committees in order to accept contributions from other committees. As Professor Adamany recommended in 1974 to Governor Lucey, the candidate "will select which groups he receives support from and in what amounts." The aggregate limit encourages candidates to seek a broad base of support by allowing many people to make smaller contributions. Encouraging smaller contributions from a greater number of contributors is a legitimate legislative goal....

In addition, committees retain an extraordinary ability to express themselves, notwithstanding the aggregate limit set forth in sec. 11.26(9)(a)....

Petitioners point out, however, that legislative campaign and political party committees cannot make independent expenditures in support of or in opposition to candidates, and that therefore, sec. 11.26(9)(a) is overbroad. Party-related committees cannot make independent expenditures because it is assumed that due to their close relationship with the candidate all of their expenditures are made on behalf of the candidate.

First of all, petitioners overlook the special status conferred upon party-related committees. Other than sec. 11.26(9)(a), there are no limits on party-related committees' ability to contribute to the candidate. Even the limit set in sec. 11.26(9)(a) is generous, allowing a party-related committee to contribute up to 65 percent of a candidate's disbursement level and, in any event, reserving 20 percent of that amount for party-related committee contributions. In addition to these generous contribution limits, party-related committees can make unlimited expenditures on generic party-building activities, i.e. "Vote Republican." Party-related committees may also receive unlimited amounts of money from their national counterparts and distribute unlimited amounts to county and congressional district units of the party.

Moreover, party-related committees may act as a "conduit" for individual contributions to candidates. A "conduit" is any individual or organization that receives a contribution and then transfers the contribution to another individual or organization without exercising discretion over the amount of the contribution

or identity of the candidate who receives the contribution. Section 11.01(5m). A contribution which is passed through a conduit to a candidate is considered a contribution from the contributor and not from the conduit or its sponsoring organization. Section 11.26(12m).[20] Therefore, we conclude that both PACs and party-related committees retain significant methods of engaging in political expression in addition to contributing money directly to a candidate's campaign....

Next we consider petitioner's argument that the statute imposes a greater burden on the first amendment rights of committees which make their contributions "late" in the campaign than committees which make their contributions "early" in the campaign. Petitioners characterize the effect of the aggregate limit on committee contributions to be a race by committees to get their contribution in to a particular candidate before the aggregate limit is reached. Accordingly, they assert that there is nothing inherently more "corrupt" about those committees which wish to make a contribution after the aggregate limit is reached when compared to those committees which were able to get their contributions in before the aggregate limit was reached.

They point out that this is particularly significant with respect to political party committees because they typically are "late" contributors. Political party committees generally make contributions to individual candidates only after a primary run-off election has taken place. Because the aggregate limit applies to both the primary and general election, petitioners claim the aggregate limit has the effect of preventing political party committees from contributing to a candidate's campaign.

Perhaps in recognition of the fact that parties do not contribute until later in a candidate's campaign, sec. 11.26(9)(a) together with sec. 11.26(9)(b), reserves 20 percent of the candidate's disbursement level for party-related committees. Therefore, we disagree with petitioners that the First Amendment rights of party-related committees are burdened more than the First Amendment rights of PACs which are typically considered "early" contributors.

On the statute's face, PACs which contribute late are treated differently than PACs which contribute early to a candidate's campaign, just as party-related committees which contribute late are treated differently than party-related committees which contribute early. However, we conclude that no committees are ever guaranteed that a candidate will accept their entire contribution. A candidate may refuse to accept contributions over a certain amount. A candidate may refuse a contribution from a certain committee. As Professor Adamany recognized, a candidate may return part of a contribution and make room for another contribution, thereby allowing all committees to contribute, albeit in a smaller amount. Therefore, we conclude that whether or not a committee will ultimately be able to contribute to a candidate is left up to the candidate and does not necessarily correlate with the timing of the contribution. Accordingly, we conclude that sec. 11.26(9)(a) does not impose a greater burden on the First Amendment rights of "late" contributors than it does on "early" contributors.

In summary, we conclude that the aggregate contribution limit set forth in sec. 11.26(9)(a) places only a marginal restriction on the First and Fourteenth

20. *See* 1989 Wis.L.Rev. at 1482. This student author suggests that the aggregate contribution limits on committee contributions have led to an increase in conduit contributions as well as other "covert" campaign activity.

Amendment rights of committees and candidates. The aggregate contribution limit is necessary to serve the State's compelling interest in preventing narrow issue PACs from circumventing PAC-candidate contribution limits through contributions to party-related committees, thereby unduly influencing an individual candidate's campaign. We conclude that the aggregate contribution limit does not place a limit on a candidate's ability to spend money. The aggregate limit encourages candidates to seek contributions from a greater number of sources and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression. Section 11.26(9)(a) allows candidates to decide which contributions they will accept, from whom, and in what amount and, therefore, whether a committee contribution will be accepted is left to the discretion of the candidate, and is not necessarily related to the timing of the contribution. Furthermore, we conclude that sec. 11.26(9)(a) survives strict scrutiny, for it is narrowly tailored to accomplish this goal while allowing both PACs and party-related committees to retain significant methods of engaging in political expression in addition to contributing money directly to a candidate's campaign.

For the reasons set forth in this opinion we conclude that sec. 11.26(9)(a) does not violate the First or Fourteenth Amendments of the United States Constitution, nor the equivalent provisions of the Wisconsin Constitution.

Notes and Questions

1. For purposes of constitutional analysis, the Wisconsin Supreme Court treats the aggregate limit as a contribution limit rather than as an expenditure limit. Do you agree? Commentators have had disparate opinions. See California Commission on Campaign Financing, THE NEW GOLD RUSH: FINANCING CALIFORNIA'S LEGISLATIVE CAMPAIGNS 242–43 (1985)(aggregate limits are contribution limits); Fred Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZONA LAW REVIEW 603, 625 (1980)(same conclusion); Eric S. Anderson, Comment, *Campaign Finance in Wisconsin After Buckley*, 1976 WISCONSIN LAW REVIEW 816, 856 (aggregate limit "has aspects of expenditure limits"); Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAPITAL UNIVERSITY LAW REVIEW 381, 417 (1992)("the contribution limit/expenditure limit contrast is not a dichotomy after all, but a spectrum," and most proposed aggregate limits are in the middle of that spectrum); Lawton Chiles, *PAC's: Congress on the Auction Block*, 11 JOURNAL OF LEGISLATION 193, 213 (1984)("the limitation might be viewed as...limiting campaign expenditures"); Don M. Millis, *The Best Laid Schemes of Mice and Men: Campaign Finance Reform Gone Awry*, 1989 WISCONSIN LAW REVIEW 1465, 1475 (aggregate limits are "de facto expenditure limits").

2. For a strong argument that aggregate contribution limits are harmful and unconstitutional, see Millis, *supra*. For an argument that such limits can be a valuable part of an overall system of campaign finance regulation but that standing alone they may have perverse distributional consequences, see Lowenstein, *supra*, 21 CAPITAL UNIVERSITY LAW REVIEW at 413–24.

Day v. Holahan

34 F.3d 1356 (8th Cir. 1994), cert. denied 115 S.Ct. 936 (1995)

BOWMAN, Circuit Judge.

[In 1993 the Minnesota revised its campaign finance laws. Several of the new provisions were challenged in this action by IMPACE-MEA, the PAC of the Minnesota Education Association; Minnesota Citizens Concerned for Life, Inc. (MCCL); MCCL's PAC (MCCL-CSPC); and individuals affiliated with these organizations. The discussion of some of the challenged provisions is omitted here.]

I.

A.

[Minnesota provides public funding to candidates, but conditions the funding on acceptance of expenditure limits. One of the challenged provisions of the 1993 statute, Minn. Stat. § 10A.25 subd. 13, increased the expenditure limit in an amount equal to any independent spending directed either against the candidate in question or in support of that candidate's major party opponent. In addition, the candidate's public funding could be increased in an amount up to half of the independent spending. These provisions did not apply to independent spending for communications conveying an association's views of candidates if the communications were targeted solely to the association's dues-paying members.]

The District Court concluded that section 10A.25 subd. 13 was content-neutral and was not restrictive of speech (the latter conclusion making the first irrelevant), and ended its analysis there. We think the District Court took too narrow an approach in considering whether section 10A.25 subd. 13 restricts speech and whether the restriction is content-based, and therefore erred in holding that the First Amendment was not implicated.

Under Chapter 10A of the Minnesota Statutes, an independent expenditure is defined as "an expenditure expressly advocating the election or defeat of a clearly identified candidate," but one made neither with the consent or authorization of the candidate nor at his request or suggestion. Once any individual, political committee, or political fund makes... an independent expenditure of more than $100 on behalf of any candidate, or against any candidate, the following scenario is mandated by section 10A.25 subd. 13:

The candidate whose defeat is advocated (or whose opponent's election is encouraged) by the independent expenditure has her own expenditure limits increased by the amount of the independent expenditure. The Minnesota Ethical Practices Board then must pay her, if she is eligible to receive a public subsidy and has raised two times the minimum amount required for a match, an additional public subsidy equal to one-half the amount of the independent expenditure. Thus, by advocating a candidate's defeat (or her opponent's victory) via an independent expenditure, the individual, committee, or fund working for the candidate's defeat instead has increased the maximum amount she may spend and given her the wherewithal to increase that spending—merely by exercising a First Amendment right to make expenditures opposing her or supporting her opponent. Thus the individual or group intending to contribute to her defeat becomes directly responsible for adding to her campaign coffers. To the extent that a can-

didate's campaign is enhanced by the operation of the statute, the political speech of the individual or group who made the independent expenditure "against" her (or in favor of her opponent) is impaired.

It is clear that independent expenditures are protected speech.... It is equally clear that section 10A.25 subd. 13 infringes on that protected speech because of the chilling effect the statute has on the political speech of the person or group making the independent expenditure. As the potential "independent expenders" allege in their briefs (and as at least one sponsor of the legislation intended[4]), the mere enactment of section 10A.25 subd. 13 already has prevented many if not most potential independent expenditures from ever being made. The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech. This "self-censorship" that has occurred even before the state implements the statute's mandates is no less a burden on speech that is susceptible to constitutional challenge than is direct government censorship. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757–58 (1988).

Our conclusion that the most fundamental of rights is infringed by section 10A.25 subd. 13 does not end our inquiry, however. We now must decide whether the statute is content-neutral or content-based, "not always a simple task." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S.Ct. 2445, 2459 (1994). But that determination is critical, as it controls the level of scrutiny we apply in assessing whether the infringement results in a constitutional violation. Having reviewed the teachings of the Supreme Court on this subject and applied them to this statute, we conclude that section 10A.25 subd. 13 is content-based.

Section 10A.25 subd. 13 singles out particular political speech—that which advocates the defeat of a candidate and/or supports the election of her opponents—for negative treatment that the state applies to no other variety of speech.... We have no difficulty concluding that this is a statute that "by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed," and thus it cannot be content-neutral. *Turner Broadcasting*. Independent expenditures of any other nature, supporting the expression of any sentiment other than advocating the defeat of one candidate or the election of another, do not trigger the statute's limit-increasing and money-shifting provisions. We are bound to "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.*

Notwithstanding the content-based infringement on protected constitutional rights perpetrated by section 10A.25 subd. 13, the statute may be upheld as against constitutional challenge if the state can show that it is narrowly drawn to serve a compelling state interest. We hold that the state has made no such showing.

4. The appellants offered evidence that Senator John Marty, then chairman of the Senate Ethics and Campaign Reform Committee and chief author of the senate bill, explained to the Senate Committee on Finance how the legislation would prevent or dramatically limit independent expenditures, a goal that he recognized could not be accomplished directly because it would violate the First Amendment.

The state's professed interest "is the goal of enhancing the public's confidence in the political process by ensuring the viability of the legislature's statutory scheme designed to encourage candidates to accept the voluntary campaign expenditures [sic] of section 10A.25 and the accompanying public subsidies." While this may be a noble goal, we are not certain it is a sufficiently "compelling" interest to justify the burden that the statute imposes upon speech. We do not decide that issue, however, because we hold that, with candidate participation in public campaign financing nearing 100% *before* enactment of section 10A.25 subd. 13, the interest, no matter how compelling in the abstract, is not legitimate.

In 1988, eighty-nine percent of candidates for the Minnesota House of Representatives agreed to spending limits. In 1990, the total for all state candidates was ninety-six percent, and in 1992—still before the enactment of the campaign reform legislation challenged here—ninety-seven percent of the state legislative candidates filing for office agreed to abide by spending limits in order to receive a public subsidy. Clearly, the campaign reform legislation was not necessary to encourage candidates' involvement in public campaign financing, as participation was approaching 100% before the new campaign finance laws were passed in 1993. One hardly could be faulted for concluding that this "compelling" state interest was contrived for purposes of this litigation.

Moreover, it occurs to us that no statute that infringes on First Amendment rights can be considered "narrowly tailored" to meet the state's purported interest in these circumstances. Surely the three percent of non-participants could be brought in by means less burdensome to constitutional rights—assuming that group can be brought in at all. In any event, we have our doubts that this statutory scheme would achieve much success in increasing candidate participation in public campaign financing, when the chances of picking up the "bonus" subsidy are so remote. A candidate cannot qualify for the additional subsidy unless particular speech is made against her (or in favor of her opposition) by others who, as we noted above, are discouraged from exercising their rights to so speak by the very same statutory scheme that provides for the bonus subsidy. We have no doubt that section 10A.25 subd. 13 is assuredly *not* "necessary to serve the asserted interest."

Even if we were to hold that the statute is content-neutral and thus "pose[s] a less substantial risk of excising certain ideas or viewpoints from the public dialogue," *Turner Broadcasting*, we nevertheless would conclude that it violates the First Amendment even examining it with the less exacting scrutiny required when the infringement on speech is content-neutral.

A content-neutral statute will survive a First Amendment challenge if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* Regardless of whether or not the asserted governmental interest in instilling public confidence in the election process is "substantial," section 10A.25 subd. 13 cannot logically be characterized as "essential" to furthering the state's interest. As discussed above, no more than an additional three percent of all candidates could be brought into the public campaign financing scheme (given that ninety-seven percent already participate). Therefore, even if section 10A.25 subd. 13 were content-neutral, the statute's negative impact on political speech must be a violation of the First Amendment rights of those who

wish to make the independent expenditures at issue. The statute's burden on First Amendment rights does not satisfy strict, intermediate, or even the most cursory scrutiny.

We remand to the District Court with instructions to enter judgment for the plaintiffs on this issue and to permanently enjoin the implementation of section 10A.25 subd. 13 of the Minnesota Statutes....

III.

[The state appealed from the District Court's ruling that Minn.Stat. § 10A.27 subd. 12 was unconstitutional.] Under that section of the campaign reform law, a political committee or political fund cannot "accept aggregate contributions from an individual, political committee, or political fund in an amount more than $100 a year." We hold that the $100 limit is so low as to infringe upon the citizens' First Amendment right to political association and free political expression.

As emphasized by the Supreme Court's decision in *Buckley*, it is clear that state-enforced limits on campaign contributions and expenditures stifle First Amendment freedoms. Here, because the limit applies to contributions both by and to political committees and funds, the limit affects not only free political speech but also free association....

It also is well established that Minnesota's declared purpose in enacting its $100 limit—to avoid corruption or the appearance of corruption in the political process that could result from large amounts of special interest money circulating in the system—is a compelling state interest. *Buckley*.

But the fighting issue here is whether a $100 limit on contributions to political committees or funds is narrowly tailored to serve the state's interest, given the burden it imposes on political speech. *Buckley*. We hold that it is not.[8] "Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* And the concern of a political *quid pro quo* for large contributions, which becomes a possibility when the contribution is to an individual candidate,...is not present when the contribution is given to a political committee or fund that by itself does not have legislative power.

The *Buckley* Court, eighteen years ago, found that a $1000 limit—ten times the limit at issue here—was sufficiently high to pass constitutional muster as narrowly tailored to serve the state's concern for the integrity of the political system. We realize that the *Buckley* limit was never declared to be a constitutional minimum, but it does provide us with some guidance and a frame of reference in evaluating the constitutionality of Minnesota's $100 limit.

Among the undisputed facts relied upon by the District Court is the fact that a $100 contribution in 1976 would have a value of $40.60 in 1994 dollars, or approximately four percent of the $1000 limit approved in *Buckley*. The undis-

8. The District Court did not reach the equal protection argument raised in that court. It appears that the legislators who enacted the $100 limit on contributions to political committees and funds, and the governor who signed the limit into law, approved limits on election-year contributions to themselves that were many times higher than the $100 limit on contributions to committees and funds. See Minn.Stat. § 10A.27 subd. 1. Because we hold the statute unconstitutional under the First Amendment, we do not address the Fourteenth Amendment issue.

puted facts also show that one-fourth to one-third of MCCL-CSPC's contributions exceeded $100 in the most recent election cycle (presumably the cycle before the one now underway). Based on these facts, we agree with the District Court that a $100 limit on contributions to or by political committees and funds significantly impairs the ability of individuals and political committees and funds to exercise their First Amendment rights. An annual $100 limit on contributions to or by political funds and committees is too low to allow meaningful participation in protected political speech and association, and thus is not narrowly tailored to serve the state's legitimate interest in protecting the integrity of the political system. Accordingly, we hold that the $100 limit violates the protections afforded by the First Amendment for free political speech and free association.

The judgment of the District Court invalidating section 10A.27 subd. 12 and permanently enjoining its enforcement is affirmed.

Notes and Questions

1. Suppose Al is a candidate for state office who accepts a public financing/spending limits option and Diane, Al's opponent, declines the option. The voluntary spending limit is $100,000 and Al can receive a maximum of $40,000 in public funds, on a matching basis. The statute provides that if Diane intends to spend at least 25 percent above Al's spending limit (i.e, she intends to spend at least $125,000), she must declare her intention and the amount she intends to spend. Al's spending limit is increased to the amount of Diane's declaration, and the maximum public financing he is eligible to receive increases by one dollar for every two dollars over the spending limit that Diane intends to spend. For example, if Diane declares she will spend up to $150,000, then Al's spending limit goes up to $150,000 and the amount of public financing he can receive on a matching basis goes up to $65,000 (the original $40,000 plus half the $50,000 by which Diane intends to exceed the spending limit).

Is this statutory scheme constitutional? Is it a desirable mechanism for encouraging candidates to accept public financing/spending limit options?

2. Suppose there is no generally available public financing, but there is a "voluntary" spending limit, which Al accepts but Diane rejects. There is also a $1,000 contribution limit applicable to all candidates whether or not they accept the spending limit. The statute provides that a candidate like Al, who accepts the spending limit but whose opponent does not, can accept contributions twice as large as the normal limit, i.e., up to $2,000. Diane's contribution limit will remain at $1,000. In addition, as in Note 1, Al's expenditure limit will be increased to whatever level above the limit Diane declares she will spend.

Is this statutory scheme constitutional? Is it a desirable mechanism for encouraging candidates to accept spending limits?

3. Rhode Island's public financing statute allowed gubernatorial candidates who accepted the public financing/spending limits option to receive contributions up to $2,000, compared to the normal limit of $1,000. This provision was upheld in *Vote Choice v. DiStefano*, 4 F.3d 26, 37–40 (1st Cir. 1993), in which the court wrote:

> [Plainfiff] attempts to distinguish the public financing cases on the ground that they involve the propriety of conferring benefits in contrast to imposing penalties. She is fishing in an empty pond. For one thing, the

distinction that [plaintiff] struggles to draw between denying the carrot and striking with the stick is, in many contexts, more semantic than substantive. This case illustrates the point. The question whether Rhode Island's system of public financing imposes a penalty on non-complying candidates or, instead, confers a benefit on those who do comply is a non-issue, roughly comparable to bickering over whether a glass is half full or half empty. After all, there is nothing inherently penal about a $1,000 contribution cap.

For another thing, to the degree that the question does have a concrete answer, the answer appears contrary to the one [plaintiff] suggests. [Plaintiff] has adduced no legislative history or other evidence suggestive of punitive purpose. Moreover, the Rhode Island statute sets up a $1,000 cap as the norm and doubles the cap only if a candidate meets certain conditions. Logic suggests that the higher cap is, therefore, a premium earned by meeting statutory eligibility requirements rather than a penalty imposed on those who either cannot or will not satisfy the requirements.

Third, the blurred line between benefit denials and penalties is singularly unhelpful in the zero-sum world of elective politics. Because a head-to-head election has a single victor, *any* benefit conferred on one candidate is the effective equivalent of a penalty imposed on all other aspirants for the same office. In the last analysis, then, [plaintiff's] fancied distinction proves too much....

Coerced compliance with fundraising caps and other eligibility requirements would raise serious, perhaps fatal, objections to a system like Rhode Island's. Furthermore, there is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive. It is, however, pellucid that no such compulsion occurred here.

4. In 1994, voters in Missouri and Montana approved initiatives imposing general contribution limits of $100 in many elections. (A similar proposal was defeated in Colorado). Are these contribution limits unconstitutional? If Part III of *Day v. Holohan* is accepted, would it be dispositive? See *Carver v. Nixon*, 882 F.Supp. 901 (W.D.Mo. 1995), upholding the Missouri statute, in part on the ground that the contribution limits were "stepped," starting at $100 in districts under 100,000, but increasing to $300 in statewide elections. Is *Carver* inconsistent with *Day*?

5. Most campaign disclosure statutes contain a threshold below which transactions do not need to be reported. For example, under the FECA, contributions of $200 or less are not reportable. Is it unconstitutional for a state to require that all contributions, no matter how small, be disclosed? Is it unconstitutional to establish a threshold for reporting of independent expenditures and of contributions received by candidates but to require PACs to report all contributions that they receive? See *Vote Choice v. DiStefano*, 4 F.3d 26, 31–36 (1st Cir. 1993).

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