

# **ELECTION LAW**

## **CASES AND MATERIALS**

### **THIRD EDITION**

## **2007 Supplement**

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## Chapter 2. The Right to Vote and Its Exercise

ADD THE FOLLOWING TO SECTION 4 ON PAGE 40:

Although the nonpermanent provisions of the Voting Rights Act were not scheduled to expire until 2007, Congress acted early on renewal. On July 20, 2006, a renewal bill was approved, and President Bush signed it on July 27. The 2006 renewal extends the provisions for another 25-year period. There were only a few substantive changes in the law, none comparable in importance to the changes in the 1970, 1975, and 1982 renewals. However, the changes are of interest to voting rights attorneys and are described in the Supplement to Chapter 5. For a history of the 2006 renewal and analysis of its few substantive changes, see Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE LAW JOURNAL (forthcoming 2007), draft available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=989008](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=989008).

ADD THE FOLLOWING TO THE END OF NOTE 8 ON PAGE 50:

Voting by felons and former felons continues to be an absorbing subject for litigants, scholars, and a variety of activists.<sup>a</sup> The Supreme Court denied certiorari in the *Farrakhan* and *Muntaqim* cases. *Locke v. Farrakhan*, 543 U.S. 984 (2004); *Muntaqim v. Coombe*, 543 U.S. 978 (2004). Subsequently, the Second Circuit granted en banc review in *Muntaqim*, consolidated it with another case, and reaffirmed the panel's earlier ruling that the Voting Rights Act does not preclude felon disfranchisement. *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006). Meanwhile, the Eleventh Circuit switched sides by granting en banc review of the panel decision described in the Casebook. The en banc panel granted summary judgment dismissing constitutional and statutory challenges to felon disfranchisement. *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005), cert denied sub nom. *Johnson v. Bush*, 126 S.Ct. 650 (2005). That still leaves a split in the circuits by reason of the Ninth Circuit's decision in *Farrakhan*. Additional proceedings are under way in other circuits. It seems likely the Supreme Court will need to address the merits of the issue sooner or later.

A listing of the policies of each state on voting by felons may be found in Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSPECTIVES ON POLITICS 491, at 494 (2004). These authors recently published a book on the topic of felon disfranchisement in the United States. Jeff Manza & Christopher Uggen, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006).

ADD THE FOLLOWING AFTER THE FIRST PARAGRAPH ON PAGE 63:

A recent paper takes a new look at the subjects broached in Wolfinger and Rosenstone's landmark study, by examining recent data on the policy preferences of voters and non-voters. Jan E. Leighley & Jonathan Nagler, *Who Votes Now? And Does*

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<sup>a</sup> However, contrary to the suggestion in the Casebook, felon disfranchisement turned out not to be an issue in Congress in connection with amendment and renewal of the Voting Rights Act.

*It Matter?* (March 7, 2007), available at [http://www.nyu.edu/gsas/dept/politics/faculty/nagler/leighley\\_nagler\\_midwest2007.pdf](http://www.nyu.edu/gsas/dept/politics/faculty/nagler/leighley_nagler_midwest2007.pdf). Leighley and Nagler question the “conventional wisdom” that the policy preferences of voters are similar to those of non-voters and, therefore, that the question “who votes” is of little consequence. According to Leighley and Nagler, those who vote are substantially more conservative than those who did not in elections between 1972 and 2004.

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 69:

As stated in footnote a on page 67, the state of Oregon has moved to an all vote-by-mail voting system. Rather than having designated polling places, all registered voters are automatically sent a ballot that they may complete at home and mail back. Research on Oregon’s experiment has revealed that this system has increased turnout, particularly in local elections in which turnout is typically low. This research also suggests, however, that turnout has disproportionately increased among those already most likely to vote, specifically “those who are white, educated, older, and have higher incomes.” Jeffrey A. Karp & Susan A. Banducci, *Going Postal: How All-Mail Elections Influence Turnout*, 22 POLITICAL BEHAVIOR 223, 233 (2000); see also Adam J. Berinsky, et al., *Who Votes By Mail? A Dynamic Model of the Individual Level Consequences of Voting-by-Mail Systems*, 65 PUBLIC OPINION QUARTERLY 178, 191 (2001) (vote-by-mail “mobilizes older voters, those who are well educated, and those with substantial amounts of campaign interest”). In sum, Oregon’s vote-by-mail system seems to improve turnout, but may also increase the socioeconomic bias of the electorate. Is such a trade-off desirable?

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 64:

If the state can ban vote buying, can it also ban payments to “flushers” and “haulers” to get out the vote on Election Day? See *State v. Brookins*, 844 A.2d 1162 (Md. App. 2004).

ADD THE FOLLOWING TO THE END OF THE TEXT ON PAGE 70:

Controversies surrounding the use of DRE machines continue to grow. For a detailed history and recommendations, see Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM LAW REVIEW 1711 (2005). Professor Tokaji also has a blog, Equal Vote, devoted to issues of election administration reform. You may find it at <http://www.moritzlaw.osu.edu/blogs/tokaji/>. For a summary of post-2000 scholarship concerning voting technology, see Susan M. Boland & Therese Clarke Arado, *O Brave New World? Electronic Voting Machines and Internet Voting: An Annotated Bibliography*, 27 NORTHERN ILLINOIS UNIVERSITY LAW REVIEW 313 (2007). Recent litigation regarding electronic voting machines is discussed in the Supplement to Chapter 3, Pt. III.

### Chapter 3. Voting and Representation

INSERT THE FOLLOWING AFTER THE THIRD PARAGRAPH OF NOTE 8, ON PAGE 89:

Most lower courts seem to be interpreting the Supreme Court's action in *Cox* as meaning that a maximum population deviation under ten percent places the burden of proof on the plaintiff to show arbitrariness or discrimination, but does not create a safe harbor. For example, in *Moore v. Itawamba County*, 431 F.3d 257 (5th Cir. 2005), the Fifth Circuit disapproved the District Judge's treatment of a maximum deviation of 9.38 percent as creating a safe harbor. "The formulaic threshold is not an absolute determinant. Rather, it effectively allocates the burden of proof." Following that principle, the court found that allegations of discriminating against the west side of the county by overpopulating the western districts were insufficient to withstand summary judgment dismissing the claim.

ADD THE FOLLOWING TO THE END OF NOTE 8 ON PAGE 89:

Of course, state law may impose population requirements more strict than those imposed by the federal Constitution. See, e.g., *Fay v. St. Louis County Board of Commissioners*, 674 N.W.2d 433 (Minn. App. 2004).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 135:

In a case arising out of Ohio, a panel of the Sixth Circuit held that the use of punch card voting equipment in some counties but not others should be judged under strict scrutiny and that the practice violated the Equal Protection Clause under *Bush v. Gore*. *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006). The *Stewart* majority cited statistical evidence that punch-card voting equipment results in more ballots that do not register a valid vote, in comparison to newer voting technology that provides voters with notice and the opportunity to correct mistakes. The dissenting judge, relying on Hasen, *supra*, concluded that *Bush v. Gore* had no precedential value. The majority "reject[ed] the dissent's claim that Professor Hasen's article has overruled the Supreme Court's decision in *Bush v. Gore*." On July 21, 2006, the Sixth Circuit granted a petition for rehearing en banc and ultimately found the case moot because Ohio had by then replaced its punch card voting system. *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007). For background on the litigation surrounding punch cards in Ohio and other states, including the empirical research on punch card voting, see Richard B. Saphire & Paul Moke, *Litigating Bush v. Gore in the States: Dual Voting Systems and the Fourteenth Amendment*, 51 VILLANOVA LAW REVIEW 229 (2006).

With the demise of punch card ballots, attention has shifted to the security of new voting technology, most notably paperless direct record electronic (DRE) systems such as touchscreens. Relying in part on *Bush v. Gore*, critics of paperless DRE systems have argued that they deny voters equal protection due to the increased risk that their votes will not be counted. Thus far, constitutional challenges to DRE systems have not fared well in the lower courts. See *Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006); *Weber*

*v. Shelley*, 347 F.3d 1101 (9th Cir. 2003). In both *Wexler* and *Weber*, the courts concluded that strict scrutiny should not apply. Rejecting a challenge to Florida's touchscreen DRE machines, *Wexler* stated:

The plaintiffs ... did not plead that voters in touchscreen counties are less likely to cast effective votes due to the alleged lack of a meaningful manual recount procedure in those counties. Thus, if voters in touchscreen counties are burdened at all, that burden is the mere possibility that should they cast ... ballots [that are not counted], those ballots will receive a different, and allegedly inferior, type of review in the event of a manual recount. Such a burden, borne of a reasonable, nondiscriminatory regulation, is not so substantial that strict scrutiny is appropriate.

Can the (now vacated) Sixth Circuit panel opinion in *Stewart* be squared with the Ninth and Eleventh Circuit opinions upholding the use of paperless DRE systems? If the use of punch card ballots in some counties but not others triggers strict scrutiny, why shouldn't the use of paperless DRE machines in some counties but not others be treated the same way? Does it matter whether there is statistical evidence that a certain type of equipment results in more "lost" votes? What sort of evidence should plaintiffs challenging DRE technology be required to produce, in order for strict scrutiny to apply?

Would the result in *Wexler* have been different, if it had been decided after the November 2006 election for Florida's 13th congressional district? In that election, Democrat Christine Jennings lost to Republican Vern Buchanan by 369 votes, according to the final tally, with over 18,000 "ballots" cast on electronic voting machines registering no vote in that contest. Some experts believe that poor ballot design was to blame for the high number of ballots registering no vote, while others think that there may have been flaws in the voting machine's software. Thus far, Jennings has been unsuccessful in her attempts to persuade courts to force the release of the software code, which the voting system manufacturer claims is a trade secret. *Jennings v. Elections Canvassing Comm'n of the State of Fla.*, No. 1D07-0011, slip op. (Fla. Dist. Ct. App. June. 18, 2007). Court papers and other materials relating to the Buchanan-Jennings litigation may be found at

<http://moritzlaw.osu.edu/electionlaw/litigation/Jenningsv.ElectionsCanvassingCommission.php>.

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 135:

Greene further explores this question in Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?*, 80 NOTRE DAME LAW REVIEW 1643 (2005).

ADD THE FOLLOWING TO THE END OF NOTE 13 ON PAGE 140:

Scholarship on Florida 2000 continues to grow. For a look at the Florida 2000 litigation surrounding the counting of military and other overseas ballots, see Diane H. Mazur, *The Bullying of America: A Cautionary Tale about Military Voting and Civil-*

*Military Relations*, 4 ELECTION LAW JOURNAL 105 (2005). JULIAN M. PLEASANTS, HANGING CHADS: THE INSIDE STORY OF THE 2000 PRESIDENTIAL RECOUNT IN FLORIDA (2004) contains interviews with many of the major participants in the Florida controversy, including Florida Supreme Court Justice Major Harding, and Judges Nikki Ann Clark and Terry P. Lewis. See also Clifford A. Jones, *Out of Guatemala?: Election Law Reform in Florida and the Legacy of Bush v. Gore in the 2004 Presidential Election*, 5 ELECTION LAW JOURNAL 121 (2006); Charles Stewart, *Residual Vote in the 2004 Election*, 5 ELECTION LAW JOURNAL 158 (2006) (examines improvements in voting technology from 2000 to 2004).

For differing perspectives on *Bush v. Gore*'s impact and legacy, see Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STANFORD LAW REVIEW (forthcoming 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=976701](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976701), and Edward Foley, *The Future of Bush v. Gore*, 68 OHIO STATE LAW JOURNAL (forthcoming 2007), available at <http://moritzlaw.osu.edu/lawjournal/issues/volume68/issue4/foley.pdf>. Professor Hasen argues that the promise of election reform has not been fulfilled, largely because *Bush v. Gore* has become a "dormant" precedent, and expresses pessimism about the prospect that the decision will lead to improvements in election administration. Professor Foley offers a taxonomy of *Bush v. Gore* claims and takes the view that the case should be understood mainly as a caution against lower court intervention in election administration. See also Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO STATE LAW JOURNAL (forthcoming 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=976960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976960) (offering an alternative taxonomy and arguing that *Bush v. Gore*'s holding carries the greatest force in cases where "[i]dential items of evidence are treated inconsistently under the direct supervision of a single state or county authority").

14. In the run-up to the 2004 presidential election, many observers worried that the election would again end up in the courts. Responding to Florida 2000, Democrats and Republicans dispatched "armies of lawyers" to litigate controversies over the rules of engagement. Controversy over everything from ballot access for Ralph Nader to the rules for counting provisional ballots under the new Help America Vote Act led to scores of court cases across the country.

The battle was most intense in the state of Ohio. There, Democrats and their allies were involved in litigation before Election Day over numerous issues, some stemming from discretionary decisions made by Ohio's Secretary of State, Kenneth Blackwell. Blackwell, a Republican elected to the office of Secretary of State, co-chaired President Bush's reelection campaign committee in Ohio and was viewed by many Democrats with distrust. In his capacity as the state's Chief Elections Officer, he had decided, among other things, that provisional votes cast by a voter in the "wrong precinct" would not be counted and that voter registration forms printed on paper not of sufficient weight were to be rejected (a decision he later reversed).

Republicans meanwhile had made their own plans for using election law to achieve political advantage. They announced shortly before Election Day that they planned to challenge the registrations of 35,000 Ohio voters. The announcement led to litigation which made it all the way to the Supreme Court in the hours before the polls opened on Election Day. *Spencer v. Pugh*, 125 S.Ct. 305 (2004) (Stevens, J., in chambers).

Though the presidential race was in fact closer in other states, such as Iowa (where Bush won by a little over 10,000 votes), the focus on Ohio turned out to be correct because the election results hinged on Ohio's 20 electoral votes. Preliminary results from Ohio that night showed incumbent President George W. Bush with an approximate 136,000-vote lead over Democratic candidate Senator John Kerry, out of approximately 5.5 million votes cast, with approximately 153,000 provisional ballots yet to be considered for inclusion in the totals.

There was much more potential litigation in light of the events on Election Day in Ohio. Besides concerns about long lines at the polls—some longer than eight hours—one of the more promising suits for Democrats concerned the lack of uniform standards for Ohio county election judges to use in determining whether or not to accept a provisional ballot. At issue was whether such a lack of uniformity violated *Bush v. Gore*. In addition, any manual Ohio recount would have required bipartisan election judges to discern the intent of voters, many of whom voted using the now-infamous punch cards with their “hanging chads.” There was also a great deal of concern over the integrity of the vote counting itself, concern that only intensified a few days after the vote when elections officials revealed that an error with an electronic voting system gave President Bush 3,893 extra votes in suburban Columbus.

Despite the potential for litigation, facing these numbers—a 136,000-vote lead with 153,000 votes to be counted—Kerry lawyers “did the math” and concluded that the election was beyond the “margin of litigation,” while Democrats had identified many problems with the way the election was conducted in Ohio, it was hard to come up with a legal theory that could capture enough votes to swing the results in Ohio, and therefore in the country, to Kerry. The morning after Election Day, Kerry conceded the race and agreed that Bush was victorious in his reelection quest. After the provisional ballots were counted, Ohio's final election results showed Bush finishing with 2,859,764 votes, compared to Kerry's 2,741,165, a difference of 118,599 votes.

For more information on the Ohio litigation and related controversies, see Daniel P. Tokaji, [\*Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act\*](#), 73 GEORGE WASHINGTON LAW REVIEW 1206 (2005).

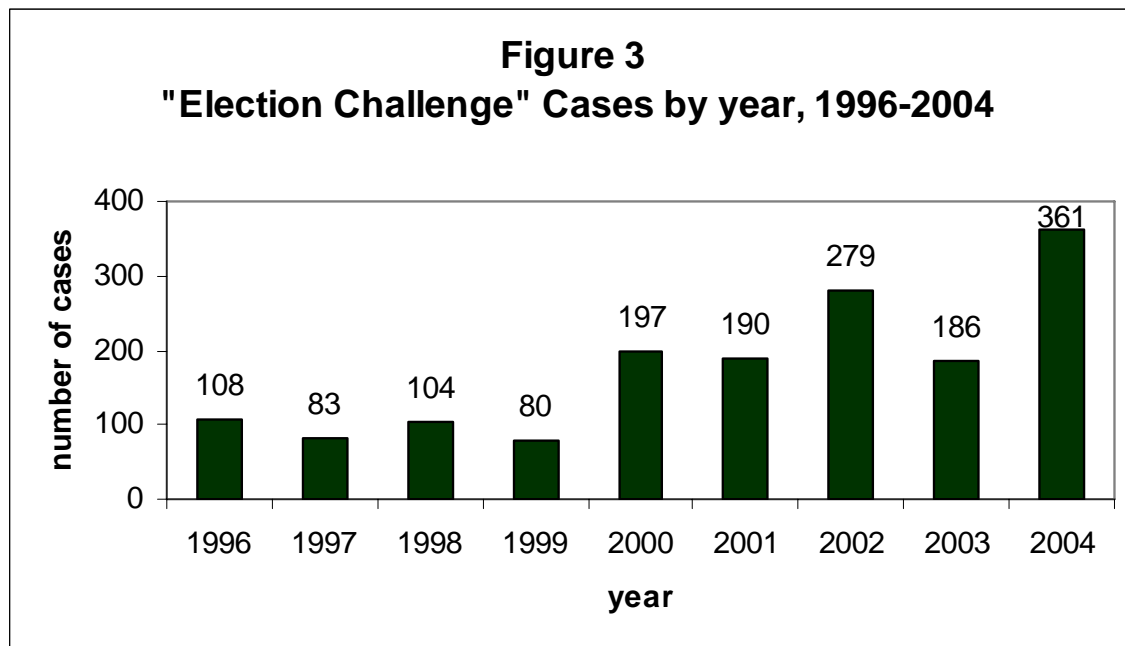
Ohio had the potential to be the next Florida, but the anticipated meltdown did not occur. In a handful of state and local races, however, the 2004 election did go into overtime. Puerto Rico and Washington state saw extensive litigation over exceedingly close gubernatorial elections—following a statewide hand recount, the top two candidates in Washington's race were separated by 133 votes out of six million votes cast. The city



of San Diego saw a very close mayor's race, where a write-in candidate came close to winning but for many of her supporters' failure to properly complete write-in ballots. Significantly, in each race losing candidates tried to use *Bush v. Gore* to create an equal protection issue in the courts. The Washington and San Diego cases went to trial, and the Puerto Rico case made it all the way to the United States Court of Appeals for the First Circuit. Ultimately, none of the courts overturned the election results as declared by election officials at the end of the recounts. For background on the cases, see David Postman, *Rossi Loses in Court; Won't Appeal Ruling*, SEATTLE TIMES, Jun. 7, 2005, available at:

<[http://seattletimes.nwsources.com/html/localnews/2002319850\\_chelan07m.html](http://seattletimes.nwsources.com/html/localnews/2002319850_chelan07m.html)> ; Istra Pacheco, *Anibal Acevedo Vila Officially Declared New Governor of Puerto Rico*, AP Newstream, Dec. 29, 2004 [available on Westlaw at: 12/29/04 APDATASTREAM 01:03:08]; Greg Moran, *Court Case on Behalf of Frye Votes is Dropped*, SAN DIEGO UNION-TRIBUNE, May 13, 2005, available at: <<http://www.signonsandiego.com/news/metro/20050513-9999-1n13bubbles.html>>.

In the meantime, the number of election law cases continues to grow, perhaps at least in part as a result of *Bush v. Gore*. Consider the following chart, reprinted with permission, from Richard L. Hasen, [\*Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown\*](#), 62 WASHINGTON AND LEE LAW REVIEW 937, 958 (2005):



The average number of election-related cases in the 1996–99 period was 96 per year, compared to an average of 254 cases per year from 2001–04. This may be good news for election lawyers and bad news for everyone else.

15. Since 2004, there has been a move in some states to enact voter identification laws. So far, all such laws (with the exception of Arizona, which adopted its law by voter



initiative) have been adopted by Republican legislatures and opposed by Democrats. Why might Republicans support strict voter identification laws? Why might Democrats oppose them? See Richard L. Hasen, *Fraud Reform? How Efforts to ID Voting Problems Have Become a Partisan Mess*, SLATE, Feb. 22, 2006, <<http://www.slate.com/id/2136776/>>.

In several states, voter identification laws have been challenged, with mixed results. The U.S. Court of Appeals for the Seventh Circuit upheld Indiana's voter identification law against constitutional challenge in *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007). In his opinion for the *Crawford* majority, Judge Posner applied a balancing test instead of strict scrutiny, explaining:

[T]here is something remarkable about the plaintiffs considered as a whole.... There is not a single plaintiff who intends not to vote because of the new law--that is, who would vote were it not for the law.... There thus are no plaintiffs whom the law will deter from voting....

The fewer the people who will actually disfranchise themselves rather than go to the bother and, if they are not indigent and don't have their birth certificate and so must order a copy and pay a fee, the expense of obtaining a photo ID, the less of a showing the state need make to justify the law. The fewer people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer....

On the other side of the balance is voting fraud, specifically the form of voting fraud in which a person shows up at the polls claiming to be someone else--someone who has left the district, or died, too recently to have been removed from the list of registered voters, or someone who has not voted yet on election day. Without requiring a photo ID, there is little if any chance of preventing this kind of fraud because busy poll workers are unlikely to scrutinize signatures carefully and argue with people who deny having forged someone else's signature.

Dissenting in *Crawford*, Judge Evans saw Indiana's law much differently:

Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic. We should subject this law to strict scrutiny--or at least ... something akin to "strict scrutiny light"--and strike it down as an undue burden on the fundamental right to vote.

For a view similar to that taken by Judge Evans, see *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006) (preliminarily enjoining a Georgia law requiring photo identification on the ground that it unduly burdened the right to vote, in violation of the Equal Protection Clause). In addition, the Missouri Supreme Court struck down a law requiring photo identification on state constitutional grounds.

*Weinschenk v. Mo.*, 203 S.W.3d 201 (Mo. 2006). A petition for certiorari was filed in the *Crawford* case, available at: <http://electionlawblog.org/archives/crawford-cert.pdf>.

Most recently, the Michigan Supreme Court issued an advisory opinion, upholding a state statute requiring voters to either present photo identification or sign an affidavit in order to vote. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71* (Mich. 2007), available at <http://electionlawblog.org/archives/mich-voter-id.pdf>. Michigan's statute was first enacted in 1996, but the state attorney general had issued an opinion concluding it was unconstitutional, preventing its enforcement. After the statute was amended in 2005, five justices of the state supreme court found it facially constitutional with two justices dissenting. All of the justices voting to uphold Michigan's voter identification law were Republicans, while both of the dissenting justices were Democrats. Does the party-line vote raise questions about the ability of state courts to adjudicate election administration cases? Are federal judges likely to approach these cases any differently than state judges?

The Supreme Court considered a challenge to an Arizona voter identification requirement in *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006). Arizona's Proposition 200 required voters to show either one form of photo identification, or two forms of non-photo identification. Without making a conclusive determination on Proposition 200's constitutionality, the Court's *per curiam* opinion vacated an injunction against the law that had been issued by the Ninth Circuit. In explaining its decision, the Court stated:

Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Countering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the "fundamental political right" to vote...Although the likely effects of Proposition 200 are much debated, the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges.

For criticism of *Purcell*, see Hasen, *supra*, 60 STANFORD LAW REVIEW (forthcoming 2007), and Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO STATE LAW JOURNAL (forthcoming 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=978290](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978290).

These cases suggest that the constitutionality of voter identification laws may depend in part on some vigorously disputed facts, such as: (1) the effect of identification laws on participation, (2) the prevalence of voting fraud, (3) the extent to which legitimate voters are discouraged from voting due to fraud, and (4) the likelihood that identification laws will curb fraud. Much depends on who bears the burden of coming

forward with evidence, given the limited data available on these subjects. Should voters challenging identification laws be required to show that those laws really have an impact on turnout? Should they be required to show a disparate impact on certain groups of voters? On the other side of the ledger, should a state be required to produce evidence that such laws would really stop fraud, in order to justify stringent voter identification requirements? Or is it enough, as *Purcell* might be read to suggest, that voters “fear” that fraudulent votes will nullify their own votes? Should the state be required to produce evidence that fraud, real or perceived, has an impact on turnout by legitimate voters?

Battles over voter identification continue in these states and others, in courts and legislatures. For a look at the constitutional and statutory voting rights issues, see Spencer Overton, *Voter Identification*, 105 MICHIGAN LAW REVIEW 631 (2007), Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S. CAROLINA LAW REVIEW 689 (2006), *Developments in the Law, Voting and Democracy III. Voter Identification Laws*, 119 HARVARD LAW REVIEW 1144 (2006).

16. Would it help (or hurt) the chances of post-election litigation in the *Bush v. Gore* era to switch from the use of the Electoral College for choosing the President to election via popular vote? For a suggestion that the answer is indeterminate, see Hasen, *supra*, 62 WASHINGTON AND LEE LAW REVIEW, at 947-48. Moving to a popular vote directly would require a constitutional amendment. Would such an amendment be supported by states with many electoral votes? With few electoral votes? Talk of reform of the Electoral College has picked up steam recently, with some state legislatures considering a proposal for an agreement among the states to divvy up their electoral votes according to the popular vote. The plan would not go into effect until enough states adopted it, and it is meant to achieve reform without formally amending the Constitution. See John R. Koza et al., [EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE](#) (2006). For another view skeptical of the current means of choosing the president, see Robert W. Bennett, *TAMING THE ELECTORAL COLLEGE* (2006).

## Chapter 4. Districting Criteria

ADD THE FOLLOWING NOTE AFTER NOTE 1 ON PAGE 150:

1.5 When a districting plan is adopted legislatively, state courts often tend to apply state criteria in a permissive manner. For example, in *Kilbury v. Franklin County Board of Commissioners*, 90 P.3d 1071 (Wash. 2004) (en banc), the court applied a state requirement that districts be “as compact as possible” by asking whether the plan was adopted arbitrarily or capriciously.

In Idaho, two legislative plans adopted by a redistricting commission were found to be unconstitutional on population grounds. A third plan was held to satisfy the population requirements but was attacked for a district unnecessarily divided among two counties. A state constitutional provision required that districts not be so divided if “ideal district size may be achieved by internal division of the county.” The Idaho Supreme Court upheld the plan, saying “[w]e simply cannot micromanage all the difficult steps the Commission must take in performing the high-wire act that is legislative district drawing. Rather, we must constrain our focus to determining whether the split was done to effectuate an improper purpose or whether it dilutes the right to vote.” *Bonneville County v. Ysursa*, 129 P.3d 1213 (Idaho 2005). In *Ysursa*, the only way to have avoided the split in question may well have been to split one or more other districts among counties. But if the commission split a district in a manner that was not dilutive and not improperly motivated but that nevertheless was not needed to attain equal population, what justification would there be under the language of the Idaho constitution to uphold the split?

A similar question can be posed regarding a provision in the Rhode Island constitution requiring that districts be “as compact in territory as possible.” In *Parella v. Montalbano*, 899 A.2d 1226, (R.I. 2006), the Rhode Island Supreme Court upheld a plan against a compactness challenge, reaffirming an earlier statement that the Constitution is “clearly intended to leave the [L]egislature with a wide discretion as to the territorial structuring of the electoral districts.” Is that a correct reading of the compactness clause? It is perhaps worth noting that the legislature was undoubtedly under considerable difficulty when it adopted the plan in question, as it was the first redistricting following a constitutional amendment cutting the membership of the legislature by a fourth.

## Chapter 5. Minority Vote Dilution

ADD THE FOLLOWING PARAGRAPH TO NOTE 3 AFTER *GEORGIA V. ASHCROFT* ON PAGE 183:

The Democrats controlled both houses of the Georgia Legislature when the plan under challenge in *Georgia v. Ashcroft* was adopted. In the first election under the plan, the Republicans won control of the Senate. In 2004, the first election after *Georgia v. Ashcroft*, the Republicans enlarged their lead in the Senate and won control of the House. The plan may have benefited the Democrats, but not enough for them to withstand the Republican tide. Presumably, the Democratic African-American members of the Senate lost considerable influence by reason of the shift in partisan control. Are these developments relevant to your assessment of the Court's decision?

For a recent analysis of Republican gains in state and local elections throughout the South, see David Lublin, *THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE* (2004).

ADD THE FOLLOWING AFTER NOTE 4 ON PAGE 183:

One of the amendments to the Voting Rights Act in the 2006 renewal was an express effort by Congress to statutorily overrule *Georgia v. Ashcroft*. A new paragraph was added to Section 5, as follows:

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees [protecting language minorities], to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

An additional new paragraph (d) specified that “[t]he purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.”

There can be no doubt but that the main purpose of these changes to Section 5 was to change the law to what Congress perceived it to have been before *Georgia v. Ashcroft*. Thus, the House Report accompanying the renewal legislation stated:

[L]eaving the *Georgia* standard in place would encourage States to spread minority voters under the guise of “influence” and would effectively shut minority voters out of the political process. In essence, the Committee heard that Section 5, if left uncorrected, would now allow “States to turn black and other minority voters into second class voters who can influence elections of white candidates, but who cannot elect their preferred

candidates, including candidates of their own race.” This is *clearly not* the outcome that Congress intended the Voting Rights Act and Section 5 to have on minority voters. [House Report at 70.]<sup>b</sup>

The House Report, at 71, stated the legislation’s intent as follows:

This change is intended to restore Section 5 and the effect prong to the standard of analysis set forth by this Committee during its examination of Section 5 in 1975, such that a change should be denied preclearance under Section 5 if it diminishes the ability of minority groups to elect their candidates of choice. Such was the standard of analysis articulated by the Supreme Court in *Beer v. United States*, the retrogression standard of analysis on which the Court, the Department of Justice, and minority voters relied for 30 years, and the standard the Committee seeks to restore. Voting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5. Furthermore, by adding the adjective “preferred” before “candidate,” the Committee makes clear that the purpose of Section 5 is to protect the electoral power of minority groups to elect candidates that the minority community desires to be their elected representative.

Is it clear how the new Section 5 will be applied? According to one scholar who testified before the Senate Judiciary Committee:

There are three points that all supporters of this revised standard agree upon concerning its meaning. First, the standard does not freeze in place minority percentages in districts for the 25 year tenure of this reauthorization. Second, the standard does not place special emphasis on majority-minority districts—that is, districts in which minorities comprise 50 percent of the voting age population (VAP), citizen voting age population (CVAP), or registered voter population. Third, the standard prevents retrogression by way of overconcentration, as well as underconcentration.

Supplemental Testimony of Nathaniel Persily to Senate Judiciary Committee, available at <<http://electionlawblog.org/archives/persily-answers.pdf>>. Beyond these points of agreement, Persily suggests that “preclearance determinations will depend on context-specific inquiries according to a number of factors,” including the extent of racial polarization, incumbency, turnout rates, and the potential for coalitions between the minority group and majority voters or between different minority groups.

For a detailed analysis of the *Georgia v. Ashcroft* “fix,” see Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE LAW JOURNAL (forthcoming 2007), draft available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=989008](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=989008).

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<sup>b</sup> The House Report can be found at <http://judiciary.house.gov/media/pdfs/109-478.pdf>

ADD THE FOLLOWING TO THE END OF NOTE 7 ON PAGE 187:

In the 2006 renewal of the Voting Rights Act, Congress modified the language to nullify *Bossier Parish II*. The House Report referred to above made it clear that the change was “intended to restore the ‘discriminatory purpose’ standard that was in place and administered until 2000.”

ADD THE FOLLOWING AFTER NOTE 8 ON PAGE 187:

9. As is indicated in Note 8, Section 5 and related provisions of the Voting Rights Act were set to expire in 2007. Rather than wait until then, the 109th Congress (2005-06) set out to renew ahead of schedule. As Shakespeare said of true love, the course of important legislation never did run smooth, and VRA renewal was no exception. Congressional action seemed possible in the fall of 2005 but was derailed by Hurricane Katrina. It seemed likely again in late spring of 2006, but was derailed again when a group of House Republicans proposed modifying or deleting Section 203, which requires voting materials to appear in foreign languages under specified circumstances.<sup>c</sup> Other proposals insisted that the formula for determining which jurisdictions are “covered” under Section 4 and therefore subject to Section 5 preclearance should be changed or updated and that the “bail out” requirements for a covered jurisdiction to free itself should be eased. Although these controversies temporarily stalled the legislation, the proposed changes were finally rejected and the legislation passed in July.

Although the proposed amendments just mentioned were defeated, the new legislation does contain some changes to the Voting Rights Act. As is explained above in this chapter of the Supplement, the most important of these changes were intended to nullify the Supreme Court’s rulings in *Georgia v. Ashcroft* and *Bossier Parish II*.

One noteworthy feature of the debate on the renewal legislation was the differences of opinion that emerged among long-time voting rights supporters who have usually been allies. As is mentioned in Note 8, some of these supporters were concerned that unless Section 5 was made less stringent, a conservative Supreme Court might find it unconstitutional. For discussion of renewal-related issues by several voting rights specialists, see

<[http://electionlawblog.org/archives/cat\\_vra\\_renewal\\_guest\\_blogging.html](http://electionlawblog.org/archives/cat_vra_renewal_guest_blogging.html)>.

ADD THE FOLLOWING TO NOTE 5 ON PAGE 212:

Does it follow from the Court’s recognition in *Georgia v. Ashcroft* of the possible advantages to minorities of inter-racial coalitions that Section 2 should now be construed to require the creation of influence districts when possible? This argument and other arguments in favor of mandatory influence districts were rejected in *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004). Two years later, in *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594, 2625-26 (2006), Justice Kennedy, joined by Chief Justice Roberts

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<sup>c</sup> For a recent development in California applying Section 203, which may have fueled congressional concern about the section, see Chapter 8 in this Supplement.



and Justice Alito, strongly rejected the argument that *Georgia* required the creation of influence districts under Section 2. In discussing whether the district court erred in rejecting an influence district claim in District 24, formerly held by a white Democrat, Martin Frost, Justice Kennedy wrote:

That African-Americans had influence in the district, does not suffice to state a § 2 claim in these cases. The opportunity “to elect representatives of their choice,” [Section 2], requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. There is no doubt African-Americans preferred Martin Frost to the Republicans who opposed him. The fact that African-Americans preferred Frost to some others does not, however, make him their candidate of choice. Accordingly, the ability to aid in Frost’s election does not make the old District 24 an African-American opportunity district for purposes of § 2. If §2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions. See *Georgia v. Ashcroft* (KENNEDY, J., concurring).

Appellants respond by pointing to *Georgia v. Ashcroft*, where the Court held that the presence of influence districts is a relevant consideration under § 5 of the Voting Rights Act. The inquiry under § 2, however, concerns the opportunity “to elect representatives of their choice,” not whether a change has the purpose or effect of “denying or abridging the right to vote.” *Ashcroft* recognized the differences between these tests, and concluded that the ability of racial groups to elect candidates of their choice is only one factor under § 5. So while the presence of districts “where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process” is relevant to the § 5 analysis, the lack of such districts cannot establish a § 2 violation. The failure to create an influence district in these cases thus does not run afoul of § 2 of the Voting Rights Act.

Justices Thomas and Scalia, who concurred separately in *LULAC*, more strongly rejected plaintiffs’ voting rights claims, apparently making a Court majority rejecting a reading of Section 2 to require the creation of influence districts following *Georgia*. Congress’ disapproval of *Georgia* in its 2006 renewal of the Voting Rights Act presumably reinforces the rejection of influence district claims in the Section 2 context.

ADD THE FOLLOWING TO NOTE 6 ON PAGE 212:

Ordinarily polarized voting is demonstrated by statistical analysis of voting patterns. But in *Cottier v. City of Martin*, 445 F.3d 1113 (8th Cir. 2006), a ruling that no violation of Section 2 had occurred was overruled in part because the District Court failed to give adequate weight to exit polls suggesting polarized voting.

ADD THE FOLLOWING AFTER THE FIRST PARAGRAPH OF PAGE 226:

The District Court in *Cottier v. City of Martin*, 475 F.Supp.2d 932 (D.S.Dak. 2007), ordered the use of a six-member district with cumulative voting as a remedy for a Section 2 violation. While acknowledging the “strong preference for single-member districts in judicially fashioned remedial plans,” the court found that by reason of the small population of the city, if six single-member districts had been created there were likely to be vacancies on the city-council because of the difficulty in finding “an interested candidate from each ward.” The court also had found that a minimum of 60 percent of the voting-age population of a district needed to be native Americans to assure that group the opportunity to elect its preferred candidate. According to the court, native Americans were so evenly distributed throughout the city that no 60 percent native American district could be drawn without engaging in a racial gerrymander. Under these circumstances, could the first prong of *Gingles* have been met?

ADD THE FOLLOWING AT THE END OF PAGE 244:

On June 28, 2006, the Supreme Court ruled on several challenges to a controversial congressional redistricting plan adopted in Texas after Republicans won control of the state legislature in 2002. The most publicized challenge attacked the plan as a whole as an unconstitutional mid-decade partisan gerrymander. The political background of the case and the disposition of that challenge is presented in Chapter 7 of this Supplement. Two of the districts were also challenged as violating Section 2 of the Voting Rights Act. In *League of United Latin American Citizens v. Perry*, the Supreme Court ruled that one of the districts violated Section 2 but that the other did not. In surprising ways, the Court drew on concepts taken from the constitutional doctrine known as racial gerrymandering. To facilitate understanding, we present the Section 2 portion of the *LULAC* decision in Chapter 6, following the racial gerrymandering cases.

## Chapter 6. Racial Gerrymandering

ADD THE FOLLOWING PARAGRAPH TO NOTE 7 ON PAGE 306:

Chief Justice Rehnquist, author of the Court's opinion in *Shaw II*, implies that a state would violate Section 2 when geography permits a compact majority-minority district in one area but the state, for political reasons, draws a non-compact majority-minority district elsewhere. Lowenstein, in the article cited at the end of Note 7 in the Casebook, questions whether in fact Rehnquist would actually have declared a plan violative under those circumstances.

The Chief Justice having gone to his eternal rest, we shall never know the answer to that question. But we do know that Justice Kennedy, together with the four liberal justices who dissented from all the Court's findings of unconstitutional racial gerrymanders, took Rehnquist at his word. As we shall see shortly, in the Court's most recent Section 2 decision, they relied on the pertinent passage from *Shaw II* as the basis for finding a violation of Section 2 in Texas' controversial mid-decade congressional plan.

ADD THE FOLLOWING TO THE END OF THE CHAPTER ON PAGE 316:

In Texas the legislature was unable to agree on a congressional districting plan after the 2000 census, so a federal court adopted a plan (Plan 1151C). The Republicans, who took control of the legislature in 2002, adopted a new plan (Plan 1374C) that was challenged by Democrats. Their challenge to the plan as a whole as a partisan gerrymander, together with more background on the politics of the plan, is described in the next chapter of the Supplement. Two districts, numbered 23 and 24, were also challenged as violations of Section 2 of the Voting Rights Act.

Justice Kennedy wrote the lead opinion. In Part IV of his opinion, in which he was joined by Chief Justice Roberts and Justice Alito, the challenge to District 24 was rejected. District 24, located in Dallas, had long been represented by senior (and white) Democrat Martin Frost.<sup>d</sup> The Republican plan dismembered his district and he was not reelected in 2004. Plaintiffs conceded that District 24 had not been a majority-minority district under Plan 1151C. They contended that African-Americans were able to control the Democratic primary, which was tantamount to control of the Democratically-oriented district. Therefore, they contended that the dismemberment of the district violated Section 2. Kennedy, Roberts and Alito rejected this theory of liability. They were joined in the result by Justices Scalia and Thomas, who adhered to the views in Thomas' concurrence in *Holder v. Hall*.

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<sup>d</sup> Earlier in his opinion Justice Kennedy noted, perhaps with irony intended, that Frost was the mastermind of a plan adopted in 1991, regarded by Republicans as a Democratic gerrymander. The pro-Democratic results continued in 2002 under the court-drawn plan. Perhaps Justice Kennedy found it fitting that Rep. Frost, who had lived by the gerrymandering sword, should die by it.

Much more complicated was the Court's treatment of District 23 in Part III of Kennedy's opinion, in which he wrote for the Court, as he was joined by Justices Breyer, Ginsburg, Souter, and Stevens:

**League of United Latin American Citizens v. Perry**

126 S.Ct. 2594 (2006)

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to [Part III]. . . .

III.

Plan 1374C made changes to district lines in south and west Texas that appellants challenge as violations of § 2 of the Voting Rights Act.... The most significant changes occurred to District 23, which—both before and after the redistricting—covers a large land area in west Texas, and to District 25, which earlier included Houston but now includes a different area, a north-south strip from Austin to the Rio Grande Valley.

After the 2002 election, it became apparent that District 23 as then drawn had an increasingly powerful Latino population that threatened to oust the incumbent Republican, Henry Bonilla. Before the 2003 redistricting, the Latino share of the citizen voting-age population was 57.5%, and Bonilla's support among Latinos had dropped with each successive election since 1996. In 2002, Bonilla captured only 8% of the Latino vote and 51.5% of the overall vote. Faced with this loss of voter support, the legislature acted to protect Bonilla's incumbency by changing the lines—and hence the population mix—of the district. To begin with, the new plan divided Webb County and the city of Laredo, on the Mexican border, that formed the county's population base. Webb County, which is 94% Latino, had previously rested entirely within District 23; under the new plan, nearly 100,000 people were shifted into neighboring District 28. The rest of the county, approximately 93,000 people, remained in District 23. To replace the numbers District 23 lost, the State added voters in counties comprising a largely Anglo, Republican area in central Texas. In the newly drawn district, the Latino share of the citizen voting-age population dropped to 46%, though the Latino share of the total voting-age population remained just over 50%.

These changes required adjustments elsewhere, of course, so the State inserted a third district between the two districts to the east of District 23, and extended all three of them farther north. New District 25 is a long, narrow strip that winds its way from McAllen and the Mexican border towns in the south to Austin, in the center of the State and 300 miles away. In between it includes seven full counties, but 77% of its population resides in split counties at the northern and southern ends. Of this 77%, roughly half reside in Hidalgo County, which includes McAllen, and half are in Travis County, which includes parts of Austin. The Latinos in District 25, comprising 55% of the district's citizen voting-age population, are also mostly divided between the two distant areas, north and south. The Latino communities at the opposite ends of District 25 have divergent "needs and interests," owing to "differences in socio-economic status,

education, employment, health, and other characteristics.”

The District Court summed up the purposes underlying the redistricting in south and west Texas: “The change to Congressional District 23 served the dual goal of increasing Republican seats in general and protecting Bonilla’s incumbency in particular, with the additional political nuance that Bonilla would be reelected in a district that had a majority of Latino voting age population—although clearly not a majority of citizen voting age population and certainly not an effective voting majority.” The goal in creating District 25 was just as clear: “[t]o avoid retrogression under § 5” of the Voting Rights Act given the reduced Latino voting strength in District 23.

A

The question we address is whether Plan 1374C violates § 2 of the Voting Rights Act. . . .

B

Appellants argue that the changes to District 23 diluted the voting rights of Latinos who remain in the district. Specifically, the redrawing of lines in District 23 caused the Latino share of the citizen voting-age population to drop from 57.5% to 46%. The District Court recognized that “Latino voting strength in Congressional District 23 is, unquestionably, weakened under Plan 1374C.” The question is whether this weakening amounts to vote dilution.

To begin the *Gingles* analysis, it is evident that the second and third *Gingles* preconditions—cohesion among the minority group and bloc voting among the majority population—are present in District 23. The District Court found “racially polarized voting” in south and west Texas, and indeed “throughout the State.” . . .

The first *Gingles* factor requires that a group be “sufficiently large and geographically compact to constitute a majority in a single-member district.” Latinos in District 23 could have constituted a majority of the citizen voting-age population in the district, and in fact did so under Plan 1151C. Though it may be possible for a citizen voting-age majority to lack real electoral opportunity, the Latino majority in old District 23 did possess electoral opportunity protected by § 2.

While the District Court stated that District 23 had not been an effective opportunity district under Plan 1151C, it recognized the district was “moving in that direction.” Indeed, by 2002 the Latino candidate of choice in District 23 won the majority of the district’s votes in 13 out of 15 elections for statewide officeholders. And in the congressional race, Bonilla could not have prevailed without some Latino support, limited though it was. State legislators changed District 23 specifically because they worried that Latinos would vote Bonilla out of office.

Furthermore, to the extent the District Court suggested that District 23 was not a Latino opportunity district in 2002 simply because Bonilla prevailed, it was incorrect. The circumstance that a group does not win elections does not resolve the issue of vote dilution. We have said that “the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.” *De Grandy*. In old District 23 the increase in Latino voter registration and overall population, the concomitant rise in Latino voting power in each successive election, the near-victory of the Latino candidate of choice in 2002, and the resulting threat to the Bonilla incumbency, were the very reasons that led the State to redraw the district lines. Since the redistricting prevented the immediate success of the emergent Latino majority in District 23, there was a denial of opportunity in the real sense of that term.

Plan 1374C’s version of District 23, by contrast, “is unquestionably not a Latino opportunity district.” Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group’s opportunity to elect candidates. In sum, appellants have established that Latinos could have had an opportunity district in District 23 had its lines not been altered and that they do not have one now.

Considering the district in isolation, the three *Gingles* requirements are satisfied. The State argues, nonetheless, that it met its § 2 obligations by creating new District 25 as an offsetting opportunity district. It is true, of course, that “States retain broad discretion in drawing districts to comply with the mandate of § 2.” *Shaw v. Hunt (Shaw II)*. This principle has limits, though. The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others. See *id.* (“The vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State”). As set out below, these conflicting concerns are resolved by allowing the State to use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated.

As to the first *Gingles* requirement, it is not enough that appellants show the possibility of creating a majority-minority district that would include the Latinos in District 23. See *Shaw II* (rejecting the idea that “a § 2 plaintiff has the right to be placed in a majority-minority district once a violation of the statute is shown”). If the inclusion of the plaintiffs would necessitate the exclusion of others, then the State cannot be faulted for its choice. That is why, in the context of a challenge to the drawing of district lines, “the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice.” *De Grandy*.

The District Court found that the current plan contains six Latino opportunity districts and that seven reasonably compact districts could not be drawn. Appellant GI Forum presented a plan with seven majority-Latino districts, but the District Court found

these districts were not reasonably compact, in part because they took in “disparate and distant communities.” While there was some evidence to the contrary, the court’s resolution of the conflicting evidence was not clearly erroneous.

A problem remains, though, for the District Court failed to perform a comparable compactness inquiry for Plan 1374C as drawn. *De Grandy* requires a comparison between a challenger’s proposal and the “existing number of reasonably compact districts.” To be sure, § 2 does not forbid the creation of a noncompact majority-minority district. *Bush v. Vera* (KENNEDY, J., concurring). The noncompact district cannot, however, remedy a violation elsewhere in the State. See *Shaw II* (unless “the district contains a ‘geographically compact’ population” of the racial group, “where that district sits, ‘there neither has been a wrong nor can be a remedy’ ” (quoting *Grove*)). Simply put, the State’s creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right. And since there is no § 2 right to a district that is not reasonably compact, see *Abrams*, the creation of a noncompact district does not compensate for the dismantling of a compact opportunity district.

THE CHIEF JUSTICE claims compactness should be only a factor in the analysis, but his approach comports neither with our precedents nor with the nature of the right established by § 2. *De Grandy* expressly stated that the first *Gingles* prong looks only to the number of “reasonably compact districts.” *Shaw II*, moreover, refused to consider a noncompact district as a possible remedy for a § 2 violation. It is true *Shaw II* applied this analysis in the context of a State’s using compliance with § 2 as a defense to an equal protection challenge, but the holding was clear: A State cannot remedy a § 2 violation through the creation of a noncompact district. *Shaw II* also cannot be distinguished based on the relative location of the remedial district as compared to the district of the alleged violation. The remedial district in *Shaw II* had a 20% overlap with the district the plaintiffs sought, but the Court stated “[w]e do not think this degree of incorporation could mean [the remedial district] substantially addresses the § 2 violation.” The overlap here is not substantially different, as the majority of Latinos who were in the old District 23 are still in the new District 23, but no longer have the opportunity to elect their candidate of choice.

Apart from its conflict with *De Grandy* and *Shaw II*, THE CHIEF JUSTICE’s approach has the deficiency of creating a one-way rule whereby plaintiffs must show compactness but States need not (except, it seems, when using § 2 as a defense to an equal protection challenge). THE CHIEF JUSTICE appears to accept that a plaintiff, to make out a § 2 violation, must show he or she is part of a racial group that could form a majority in a reasonably compact district. If, however, a noncompact district cannot make up for the lack of a compact district, then this is equally true whether the plaintiff or the State proposes the noncompact district.

The District Court stated that Plan 1374C created “six *Gingles* Latino” districts, but it failed to decide whether District 25 was reasonably compact for § 2 purposes. It recognized there was a 300-mile gap between the Latino communities in District 25, and



a similarly large gap between the needs and interests of the two groups. After making these observations, however, it did not make any finding about compactness. It ruled instead that, despite these concerns, District 25 would be an effective Latino opportunity district because the combined voting strength of both Latino groups would allow a Latino-preferred candidate to prevail in elections. The District Court's general finding of effectiveness cannot substitute for the lack of a finding on compactness, particularly because the District Court measured effectiveness simply by aggregating the voting strength of the two groups of Latinos. Under the District Court's approach, a district would satisfy § 2 no matter how noncompact it was, so long as all the members of a racial group, added together, could control election outcomes.

The District Court did evaluate compactness for the purpose of deciding whether race predominated in the drawing of district lines. The Latinos in the Rio Grande Valley and those in Central Texas, it found, are “disparate communities of interest,” with “differences in socio-economic status, education, employment, health, and other characteristics.” The court's conclusion that the relative smoothness of the district lines made the district compact, despite this combining of discrete communities of interest, is inapposite because the court analyzed the issue only for equal protection purposes. In the equal protection context, compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines. See *Miller v. Johnson*. Under § 2, by contrast, the injury is vote dilution, so the compactness inquiry embraces different considerations. “The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district.” *Vera* (KENNEDY, J., concurring).

While no precise rule has emerged governing § 2 compactness, the “inquiry should take into account ‘traditional districting principles such as maintaining communities of interest and traditional boundaries.’ ” *Abrams*. The recognition of nonracial communities of interest reflects the principle that a State may not “assum[e] from a group of voters’ race that they ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’ ” *Miller*. In the absence of this prohibited assumption, there is no basis to believe a district that combines two far-flung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates. “The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race.” *Georgia v. Ashcroft*. We do a disservice to these important goals by failing to account for the differences between people of the same race.

While the District Court recognized the relevant differences, by not performing the compactness inquiry it failed to account for the significance of these differences under § 2. In these cases the District Court's findings regarding the different characteristics, needs, and interests of the Latino community near the Mexican border and the one in and around Austin are well supported and uncontested. Legitimate yet differing communities of interest should not be disregarded in the interest of race. The practical consequence of drawing a district to cover two distant, disparate communities is

that one or both groups will be unable to achieve their political goals. Compactness is, therefore, about more than “style points,” *post* (opinion of ROBERTS, C. J.); it is critical to advancing the ultimate purposes of § 2, ensuring minority groups equal “opportunity . . . to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b). (And if it were just about style points, it is difficult to understand why a plaintiff would have to propose a compact district to make out a § 2 claim.) As witnesses who know the south and west Texas culture and politics testified, the districting in Plan 1374C “could make it more difficult for thinly financed Latino-preferred candidates to achieve electoral success and to provide adequate and responsive representation once elected.” We do not question the District Court’s finding that the groups’ combined voting strength would enable them to elect a candidate each prefers to the Anglos’ candidate of choice. We also accept that in some cases members of a racial group in different areas—for example, rural and urban communities—could share similar interests and therefore form a compact district if the areas are in reasonably close proximity. See *Abrams*, (BREYER, J., dissenting). When, however, the only common index is race and the result will be to cause internal friction, the State cannot make this a remedy for a § 2 violation elsewhere. We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes. The mathematical possibility of a racial bloc does not make a district compact.

Since District 25 is not reasonably compact, Plan 1374C contains only five reasonably compact Latino opportunity districts. Plan 1151C, by contrast, created six such districts. The District Court did not find, and the State does not contend, that any of the Latino opportunity districts in Plan 1151C are noncompact. Contrary to THE CHIEF JUSTICE’s suggestion, moreover, the Latino population in old District 23 is, for the most part, in closer geographic proximity than is the Latino population in new District 25. More importantly, there has been no contention that different pockets of the Latino population in old District 23 have divergent needs and interests, and it is clear that, as set out below, the Latino population of District 23 was split apart particularly because it was becoming so cohesive. The Latinos in District 23 had found an efficacious political identity, while this would be an entirely new and difficult undertaking for the Latinos in District 25, given their geographic and other differences.

Appellants have thus satisfied all three *Gingles* requirements as to District 23, and the creation of new District 25 does not remedy the problem.

## C

We proceed now to the totality of the circumstances, and first to the proportionality inquiry, comparing the percentage of total districts that are Latino opportunity districts with the Latino share of the citizen voting-age population. As explained in *De Grandy*, proportionality is “a relevant fact in the totality of circumstances.” It does not, however, act as a “safe harbor” for States in complying with § 2. If proportionality could act as a safe harbor, it would ratify “an unexplored premise

of highly suspect validity: that in any given voting jurisdiction . . . , the rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class.”

The State contends that proportionality should be decided on a regional basis, while appellants say their claim requires the Court to conduct a statewide analysis. In *De Grandy*, the plaintiffs “passed up the opportunity to frame their dilution claim in statewide terms.” Based on the parties’ apparent agreement that the proper frame of reference was the Dade County area, the Court used that area to decide proportionality. In these cases, on the other hand, appellants allege an “injury to African American and Hispanic voters throughout the State.” The District Court, moreover, expressly considered the statewide proportionality argument. As a result, the question of the proper geographic scope for assessing proportionality now presents itself.

We conclude the answer in these cases is to look at proportionality statewide. The State contends that the seven districts in south and west Texas correctly delimit the boundaries for proportionality because that is the only area of the State where reasonably compact Latino opportunity districts can be drawn. This argument, however, misunderstands the role of proportionality. We have already determined, under the first *Gingles* factor, that another reasonably compact Latino district can be drawn. The question now is whether the absence of that additional district constitutes impermissible vote dilution. This inquiry requires an “ ‘intensely local appraisal’ ” of the challenged district. *Gingles*. A local appraisal is necessary because the right to an undiluted vote does not belong to the “minority as a group,” but rather to “its individual members.” *Shaw II*. And a State may not trade off the rights of some members of a racial group against the rights of other members of that group. See *De Grandy*. The question is therefore not “whether line-drawing in the challenged area as a whole dilutes minority voting strength,” *post* (opinion of ROBERTS, C. J.), but whether line-drawing dilutes the voting strength of the Latinos in District 23.

The role of proportionality is not to displace this local appraisal or to allow the State to trade off the rights of some against the rights of others. Instead, it provides some evidence of whether “the political processes leading to nomination or election in the State or political subdivision are not equally open to participation.” 42 U.S.C. § 1973(b). For this purpose, the State’s seven-district area is arbitrary. It just as easily could have included six or eight districts. Appellants have alleged statewide vote dilution based on a statewide plan, so the electoral opportunities of Latinos across the State can bear on whether the lack of electoral opportunity for Latinos in District 23 is a consequence of Plan 1374C’s redrawing of lines or simply a consequence of the inevitable ‘win some, lose some’ in a State with racial bloc voting. Indeed, several of the other factors in the totality of circumstances have been characterized with reference to the State as a whole. *Gingles* (listing Senate Report factors). Particularly given the presence of racially polarized voting-and the possible submergence of minority votes-throughout Texas, it makes sense to use the entire State in assessing proportionality.

Looking statewide, there are 32 congressional districts. The five reasonably compact Latino opportunity districts amount to roughly 16% of the total, while Latinos make up 22% of Texas' citizen voting-age population. (Appellant GI Forum claims, based on data from the 2004 American Community Survey of the U.S. Census Bureau, that Latinos constitute 24.5% of the statewide citizen voting-age population, but as this figure was neither available at the time of the redistricting, nor presented to the District Court, we accept the District Court's finding of 22%.) Latinos are, therefore, two districts shy of proportional representation. There is, of course, no "magic parameter," *De Grandy*, and "rough proportionality," *id.*, must allow for some deviations. We need not decide whether the two-district deficit in these cases weighs in favor of a § 2 violation. Even if Plan 1374C's disproportionality were deemed insubstantial, that consideration would not overcome the other evidence of vote dilution for Latinos in District 23. "[T]he degree of probative value assigned to proportionality may vary with other facts," *id.*, and the other facts in these cases convince us that there is a § 2 violation.

District 23's Latino voters were poised to elect their candidate of choice. They were becoming more politically active, with a marked and continuous rise in Spanish-surnamed voter registration. In successive elections Latinos were voting against Bonilla in greater numbers, and in 2002 they almost ousted him. Webb County in particular, with a 94% Latino population, spurred the incumbent's near defeat with dramatically increased turnout in 2002. In response to the growing participation that threatened Bonilla's incumbency, the State divided the cohesive Latino community in Webb County, moving about 100,000 Latinos to District 28, which was already a Latino opportunity district, and leaving the rest in a district where they now have little hope of electing their candidate of choice.

The changes to District 23 undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive. The District Court recognized "the long history of discrimination against Latinos and Blacks in Texas," and other courts have elaborated on this history with respect to electoral processes. . . . In addition, the "political, social, and economic legacy of past discrimination" for Latinos in Texas may well "hinder their ability to participate effectively in the political process," *Gingles* (citing Senate Report factors).

Against this background, the Latinos' diminishing electoral support for Bonilla indicates their belief he was "unresponsive to the particularized needs of the members of the minority group." *Ibid.* (same). In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation. Even if we accept the District Court's finding that the State's action was taken primarily for political, not racial, reasons, the redrawing of the district lines was damaging to the Latinos in District 23. The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo.

Furthermore, the reason for taking Latinos out of District 23, according to the District Court, was to protect Congressman Bonilla from a constituency that was increasingly voting against him. The Court has noted that incumbency protection can be a legitimate factor in districting, see *Karcher v. Daggett*, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents. If the justification for incumbency protection is to keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. By purposely redrawing lines around those who opposed Bonilla, the state legislature took the latter course. This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters. See *Gingles* (citing Senate Report factor of whether “the policy underlying” the State’s action “is tenuous”). The policy becomes even more suspect when considered in light of evidence suggesting that the State intentionally drew District 23 to have a nominal Latino voting-age majority (without a citizen voting-age majority) for political reasons. This use of race to create the façade of a Latino district also weighs in favor of appellants’ claim.

Contrary to THE CHIEF JUSTICE’s suggestion that we are reducing the State’s needed flexibility in complying with § 2, the problem here is entirely of the State’s own making. The State chose to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district. The State then purported to compensate for this harm by creating an entirely new district that combined two groups of Latinos, hundreds of miles apart, that represent different communities of interest. Under § 2, the State must be held accountable for the effect of these choices in denying equal opportunity to Latino voters. Notwithstanding these facts, THE CHIEF JUSTICE places great emphasis on the District Court’s statement that “new District 25 is ‘a more effective Latino opportunity district than Congressional District 23 had been.’” Even assuming this statement, expressed in the context of summarizing witnesses’ testimony, qualifies as a finding of the District Court, two points make it of minimal relevance. First, as previously noted, the District Court measured the effectiveness of District 25 without accounting for the detrimental consequences of its compactness problems. Second, the District Court referred only to how effective District 23 “had been,” not to how it would operate today, a significant distinction given the growing Latino political power in the district.

Based on the foregoing, the totality of the circumstances demonstrates a § 2 violation. Even assuming Plan 1374C provides something close to proportional representation for Latinos, its troubling blend of politics and race—and the resulting vote dilution of a group that was beginning to achieve § 2’s goal of overcoming prior electoral discrimination—cannot be sustained. . . .

JUSTICE SCALIA, with whom JUSTICE THOMAS joins. . . .

## II

I would dismiss appellants' vote-dilution claims premised on § 2 of the Voting Rights Act of 1965 for failure to state a claim, for the reasons set forth in JUSTICE THOMAS's opinion, which I joined, in *Holder v. Hall*. As THE CHIEF JUSTICE makes clear, the Court's § 2 jurisprudence continues to drift ever further from the Act's purpose of ensuring minority voters equal electoral opportunities....

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins.<sup>e</sup> . . .

I must . . . dissent from Part III of the Court's opinion. According to the District Court's factual findings, the State's drawing of district lines in south and west Texas caused the area to move from five out of seven effective Latino opportunity congressional districts, with an additional district "moving" in that direction, to *six* out of seven effective Latino opportunity districts. The end result is that while Latinos make up 58% of the citizen voting age population in the area, they control 85% (six of seven) of the districts under the State's plan.

In the face of these findings, the majority nonetheless concludes that the State's plan somehow dilutes the voting strength of Latinos in violation of § 2 of the Voting Rights Act. The majority reaches its surprising result because it finds that Latino voters in one of the State's Latino opportunity districts—District 25—are insufficiently compact, in that they consist of two different groups, one from around the Rio Grande and another from around Austin. According to the majority, this may make it more difficult for certain Latino-preferred candidates to be elected from that district—*even though Latino voters make up 55% of the citizen voting age population in the district and vote as a bloc*. The majority prefers old District 23, despite the District Court determination that new District 25 is "a more effective Latino opportunity district than Congressional District 23 had been." The District Court based that determination on a careful examination of regression analysis showing that "the Hispanic-preferred candidate [would win] *every* primary and general election examined in District 25," compared to the only partial success such candidates enjoyed in former District 23.

The majority dismisses the District Court's careful factfinding on the ground that the experienced judges did not properly consider whether District 25 was "compact" for purposes of § 2. But the District Court opinion itself clearly demonstrates that the court carefully considered the compactness of the minority group in District 25, just as the majority says it should have. The District Court recognized the very features of District 25 highlighted by the majority and unambiguously concluded, under the totality of the circumstances, that the district was an effective Latino opportunity district, and that no violation of § 2 in the area had been shown.

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<sup>e</sup> We give only the introduction to Chief Justice Roberts' argument on District 23. The whole contests Justice Kennedy's opinion point by point and extends for 21 pages in the U.S. Reports.

Unable to escape the District Court’s factfinding, the majority is left in the awkward position of maintaining that its *theory* about compactness is more important under § 2 than the actual prospects of electoral success for Latino-preferred candidates under a State’s apportionment plan. And that theory is a novel one to boot. Never before has this or any other court struck down a State’s redistricting plan under § 2, on the ground that the plan achieves the maximum number of possible majority-minority districts, but loses on style points, in that the minority voters in one of those districts are not as “compact” as the minority voters would be in another district were the lines drawn differently. Such a basis for liability pushes voting rights litigation into a whole new area—an area far removed from the concern of the Voting Rights Act to ensure minority voters an equal opportunity “to elect representatives of their choice.” 42 U.S.C. § 1973(b). . . .

### *Notes and Questions*

1. Does Justice Kennedy provide support for importing the standards of the racial gerrymandering cases into analysis of Section 2? Is doing so warranted by the language of Section 2? By the intent of the Congress that amended Section 2 in 1982? By precedent? On other grounds? Justice Kennedy appears to have regarded it as highly significant that the Texas Legislature went to great lengths to protect Representative Bonilla, who had very little electoral support from Hispanic voters in an area that was becoming increasingly Hispanic. How does that background fit into the Section 2 analysis, and how much weight should it be given?

2. Why do two of the three justices (Justices Scalia and Thomas) who consistently voted to strike down districts under the racial gerrymandering cases dissent from a holding based on importing the racial gerrymandering standards into Section 2 analysis? Why do the four justices who consistently dissented in those racial gerrymandering cases (Breyer, Ginsburg, Souter, and Stevens) all join Justice Kennedy’s opinion?

3. Whatever one thinks of the result in *Georgia v. Ashcroft*, the facts of that case illustrate that minority legislators<sup>f</sup> sometimes have goals in redistricting in addition to maximizing the number of majority-minority districts. In *LULAC*, the plan was drawn by a Republican legislature, in which the minority members—predominantly Democratic—presumably had little say. But *LULAC* will apply to redistricting plans drawn up by both parties. In a Democratic legislature containing minority legislators with considerable influence, *LULAC* may reduce these legislators’ ability to obtain majority-minority districts configured in accord with their own goals. Is that consideration relevant to the Section 2 analysis?

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<sup>f</sup> In this note, “minority” is used to refer to members of groups protected by the VRA, not to members of the minority party.



## Chapter 7. Partisan Gerrymandering

ADD THE FOLLOWING AT THE END OF NOTE 4 ON PAGE 360:

5. On page 333 of the Casebook, Justice Scalia quotes a famous passage from *Baker v. Carr* setting forth the reasons why a federal claim may be nonjusticiable. The plurality in *Vieth* bases its conclusion on the second reason, “a lack of judicially discoverable and manageable standards for resolving” the controversy. The Constitution gives Congress the power to direct the states with respect to the “time, place, and manner” of conducting House elections. Congress has exercised that power on a number of occasions, specifically with reference to redistricting. Would the plurality have been on stronger grounds if it had found nonjusticiability under *Baker*’s first reason, “a textually demonstrable constitutional commitment of the issue to a coordinate political department”? Note that such a ruling would not have required overruling *Davis v. Bandemer*, a challenge to a state legislative plan. For discussion, see Daniel H. Lowenstein, *Vieth’s Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?* 14 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 367, 370-73 (2005).

6. Justice Kennedy suggests in *Vieth* that partisan gerrymandering might violate the First Amendment. In an unpublished opinion, a three-judge District Court rejected a challenge on this ground to a mid-decade Republican plan adopted for the Georgia State Senate:

Plaintiffs make no attempt to relate the burden imposed on their ability to elect the candidate of their choosing to any restriction or limitation on their freedom of political expression. Nor can they; Plaintiffs are every bit as free under the new plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression. Instead, Plaintiffs essentially contend that the First Amendment entitles them to success in those endeavors. We reject that suggestion.

*Kidd v. Cox*, 2006 WL 1341302 (2006). The court rejected a claim that the plan infringed the Democrats’ freedom of association on similar grounds. “Georgia’s redistricting plan . . . has no effect on Plaintiffs’ ability to field candidates for office, participate in campaigns, vote for their preferred candidate, or otherwise associate with others for the advancement of common political beliefs.”

7. How should litigants and lower courts proceed under *Vieth*? Various answers have been suggested. Michael A. Carvin & Louis K. Fisher, “A Legislative Task”: *Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION LAW JOURNAL 2, 3-12 (2005), claim that “political gerrymandering claims are effectively dead.” Richard Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after Vieth*, 3 ELECTION LAW JOURNAL 626 (2004) asserts that plaintiffs will not and should not win partisan gerrymandering claims

until an “emerging social consensus” forms around the issue. James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION LAW JOURNAL 643 (2004) suggests that plaintiffs can seek relief in state courts, which will therefore have an opportunity to develop standards that might eventually satisfy a majority on the Supreme Court. Lowenstein, *supra*, argues that something cannot be replaced by nothing. Justice Kennedy’s pivotal opinion was “nothing” in the sense that it declined to approve either a negative rule such as that favored by the plurality or a positive rule such as those favored by the dissenters. Lowenstein concludes: “*Bandemer* was in effect when *Vieth* came to the Court. *Bandemer* was something and the outcome in *Vieth*, thanks to Justice Kennedy, was nothing. Not having been replaced, *Bandemer* is still binding precedent.”

8. A federal appellate judge has identified *Vieth* as an example of what he describes as a strong tendency on the part of the Rehnquist Court in its later years to “split the difference” in constitutional litigation. Thus, although four justices would have declared partisan gerrymandering nonjusticiable and four others would have imposed standards that might have invalidated the Pennsylvania congressional plan, Justice Kennedy’s pivotal opinion took an in-between position of neither setting forth a standard for judging districting plans nor exempting plans from review. J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STANFORD LAW REVIEW 1969 (2006). Judge Wilkinson gives strong reasons both for and against split-the-difference adjudication, but on balance he clearly is critical of the practice. One of his criticisms is based on the premise of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), that there is “no federal general common law.” Judge Wilkinson writes:

To the extent that constitutional interpretation adopts common law methods, and encourages judges to build case by case a corpus of constitutional law from the contours of their own experience, it would seem that Justice Brandeis himself [the author of *Erie*] might find something amiss. For the wisest, most reflective common law judge was always subject to being corrected by the most impulsive state legislature. . . . To see the common law method in the absence of this democratic check—i.e., to see it as a model for constitutional interpretation—is to grant the Justices a power that classic common law judges never possessed.

Wherever Justice Kennedy expects to find a standard for assessing partisan gerrymandering, he does not suggest he intends to look for it by reading the Constitution more carefully. He is looking for a policy that he and a majority of the Court will find workable. If he finds it, that policy will be binding on all of the states, without regard to the wishes or opinions of any other body, elected or otherwise. Is his position then vulnerable to Wilkinson’s criticism? Some supporters of judicial intervention would claim that even if Wilkinson’s criticism is sound as applied to substantive issue such as the death penalty or abortion rights, the judiciary is needed to police political processes such as redistricting. How would they support that claim? Would you agree?

9. Additional commentary on *Vieth* includes Mitchell N. Berman, *Managing Gerrymandering*, 83 TEXAS LAW REVIEW 781 (2005); Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 397 (2005); Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUPREME COURT REVIEW 409 (2004); James Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION LAW JOURNAL 643 (2004); Luis Fuentes-Rohwer, *Domesticating the Gerrymander: An Essay on Standards, Fair Representation, and the Necessary Question of Judicial Will*, 14 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 423 (2005); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 503 (2004); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 541 (2004); Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 443 (2005).

10. One of the hottest legal and political issues in redistricting this decade has been whether it is proper for a state legislature to change a districting plan after the first election held during a decade. In Colorado, the legislature changed a court-drawn congressional plan following a Republican victory in the 2002 election. The Colorado Supreme Court struck down the plan on state-law grounds, ruling that the Colorado Constitution prohibited a second redistricting plan during the decade. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), *cert. denied*, *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004). Chief Justice Rehnquist wrote an opinion, joined by Justices Scalia and Thomas, dissenting from the denial of certiorari.

The same issue arose in New Hampshire. The legislature was unable to update its own districts after the 2000 election, so a court-drawn plan was used in 2002. The New Hampshire Supreme Court upheld under state law a plan that the new legislature adopted in 2004. *In re Below*, 855 A.2d 459 (N.H. 2004). The court held that the legislature had authority under the state constitution to adopt a single plan each decade, but that its authority was not obviated by the occurrence of an election under a court-drawn plan.

The fiercest controversy was in Texas. As in Colorado and New Hampshire, a divided legislature and governor had failed to produce a congressional plan after the 2000 census. Republicans claimed that a court-drawn plan simply carried forward a Democratic gerrymander enacted in 1991. The Republicans won control of the state government in the 2002 elections and decided to turn the tables. The nation was entertained by the spectacle of Democratic legislators fleeing to Oklahoma and New Mexico to prevent the Republicans from obtaining a quorum. Eventually the Republicans succeeded in passing their plan and the Democrats challenged it on a number of grounds. A federal three-judge court rejected the Democratic challenge in *Session v. Perry*, 298 F.Supp.2d 451 (E.D.Tex. 2004).

On appeal, the Supreme Court vacated the decision and asked the lower court to reconsider it in light of *Vieth*. See *Henderson v. Perry*, 125 S.Ct. 351 (2004). Democrats argued that whatever the difficulty of finding constitutional standards in the case of ordinary redistricting that stumped the Court in *Vieth*, a mid-decade redistricting should be treated differently. Once a plan has been adopted that satisfies one person, one vote, no new plan is necessary. Therefore, a new plan adopted by a legislature controlled by one party should be treated as presumptively void. The three-judge court rejected this and other arguments, reaffirming the constitutionality of the Texas plan.

The Supreme Court affirmed in *League of United Latin American Citizens (LULAC) v. Perry*, 126 S.Ct. 2594 (2006). As we have seen in Chapters 5 and 6 of this Supplement, one Texas congressional district was found to have violated Section 2 of the Voting Rights Act. But the issue that received the most public attention was partisan gerrymandering. On that issue, the Court upheld the plan.

The Court was even more fractured than in *Vieth*.<sup>g</sup> Justice Kennedy again wrote the pivotal opinion. In one paragraph joined by the four *Vieth* dissenters and therefore speaking for the Court, he wrote that he would not revisit the holding of *Bandemer* and *Vieth* that partisan gerrymandering claims are justiciable.<sup>h</sup> Proceeding for himself only, Justice Kennedy emphasized that “a lawful, legislatively enacted plan should be preferable to one drawn by the courts,” because “to prefer a court-drawn plan to a legislature’s replacement would be contrary to the ordinary and proper operation of the political process.”<sup>i</sup> In Part II-C of his opinion, Kennedy addressed the main arguments made by the Democrats against the Texas mid-decade redistricting:

A rule, or perhaps a presumption, of invalidity when a mid-decade redistricting plan is adopted solely for partisan motivations is a salutary one, in appellants’ view, for then courts need not inquire about, nor parties prove, the discriminatory effects of partisan gerrymandering—a matter that has proved elusive since *Bandemer*. Adding to the test’s simplicity is that it does not quibble with the drawing of individual district lines but challenges the decision to redistrict at all.

For a number of reasons, appellants’ case for adopting their test is not convincing. To begin with, the state appellees dispute the assertion that partisan gain was the “sole” motivation for the decision to replace [the court-drawn plan that was in effect in 2002]. There is some merit to that criticism, for the pejorative label overlooks indications that partisan motives did not dictate the plan in its entirety. The legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, but partisan aims did not guide every line it drew. . . .

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<sup>g</sup> Even Part I of Justice Kennedy’s lead opinion, which simply described the facts and background of the case, was joined only by Chief Justice Roberts and Justice Alito.

<sup>h</sup> Part II-A of Kennedy’s opinion.

<sup>i</sup> Part II-B.

Evaluating the legality of acts arising out of mixed motives can be complex, and affixing a single label to those acts can be hazardous. . . . We are skeptical, however, of a claim that seeks to invalidate a statute based on a legislature’s unlawful motive but does so without reference to the content of the legislation enacted.

Even setting this skepticism aside, a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants’ sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants’ representational rights. For this reason, a majority of the Court rejected a test proposed in *Vieth* that is markedly similar to the one appellants present today. [Kennedy’s references to *Vieth* make it clear that the rejected test he is referring to is the one put forward by Justice Stevens.]

The sole-intent standard offered here is no more compelling when it is linked to the circumstance that [the plan] is mid-decennial legislation. The text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature’s decision to replace mid-decade a court-ordered plan with one of its own.<sup>j</sup> And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders. Under appellants’ theory, a highly effective partisan gerrymander that coincided with decennial redistricting would receive less scrutiny than a bumbling, yet solely partisan, mid-decade redistricting. More concretely, the test would leave untouched the 1991 Texas redistricting, which entrenched a party on the verge of minority status, while striking down the 2003 redistricting plan, which resulted in the majority Republican Party capturing a larger share of the seats. A test that treats these two similarly effective power plays in such different ways does not have the reliability appellants ascribe to it.

Furthermore, compared to the map challenged in *Vieth*, which led to a Republican majority in the congressional delegation despite a Democratic majority in the statewide vote, [the Texas plan] can be seen as making the party balance more congruent to statewide party power. To be sure, there is no constitutional requirement of proportional representation, and equating a party’s statewide share of the vote with its portion of the congressional delegation is a rough measure at best. Nevertheless, a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority. By this measure, [the Texas plan] can be seen as fairer than the plan that survived in *Vieth* and the two previous

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<sup>j</sup> Suppose Party A controls the legislature after a census and adopts a partisan plan. Party B wins control in a later election that decade and adopts a new partisan plan benefiting itself. If Party A challenges the mid-decade plan, how does Kennedy’s opinion in *LULAC* bear on the controversy?

Texas plans—all three of which would pass the modified sole-intent test that [the Texas plan] would fail.

A brief for one of the *amici* proposes a symmetry standard that would measure partisan bias by “compar[ing] how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote.”<sup>k</sup> Under that standard the measure of a map’s bias is the extent to which a majority party would fare better than the minority party should their respective shares of the vote reverse. In our view *amici*’s proposed standard does not compensate for appellants’ failure to provide a reliable standard of fairness. The existence or degree of asymmetry may in large part depend on conjecture about where possible vote-switchers will reside. Even assuming a court could choose reliably among different models of shifting voter preferences, we are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs. Presumably such a challenge could be litigated if and when the feared inequity arose. More fundamentally, the counterfactual plaintiff would face the same problem as the present, actual appellants: providing a standard for deciding how much partisan dominance is too much. Without altogether discounting its utility in redistricting planning and litigation, we conclude asymmetry alone is not a reliable measure of unconstitutional partisanship.

In the absence of any other workable test for judging partisan gerrymanders, one effect of appellants’ focus on mid-decade redistricting could be to encourage partisan excess at the outset of the decade, when a legislature redistricts pursuant to its decennial constitutional duty and is then immune from the charge of sole-motivation. If mid-decade redistricting were barred or at least subject to close judicial oversight, opposition legislators would also have every incentive to prevent passage of a legislative plan and try their luck with a court that might give them a better deal than negotiation with their political rivals.<sup>l</sup>

Finally, Kennedy, joined by Justices Souter and Ginsburg, rejected plaintiffs’ argument that a mid-decade plan violates the one person, one vote rule, because it is based on the census taken at the beginning of the decade and fails to reflect population changes as the decade proceeds.

Justices Scalia and Thomas adhered to their position in *Vieth* that the partisan gerrymandering claim was nonjusticiable. Chief Justice Roberts, joined by Justice Alito, wrote this:

I agree with the determination that appellants have not provided “a reliable standard for identifying unconstitutional political gerrymanders,” [quoting

<sup>k</sup> For discussion of symmetry, see Casebook at 321-22.

<sup>l</sup> Is this paragraph relevant to the question posed in footnote j, above?

from Kennedy's summation.] The question whether any such standard exists—that is, whether a challenge to a political gerrymander presents a justiciable case or controversy—has not been argued in these cases. I therefore take no position on that question, which has divided the Court, see *Vieth*, and I join the Court's disposition in Part II without specifying whether appellants have failed to state a claim on which relief can be granted, or have failed to present a justiciable controversy.

In *LULAC*, the Democrats and, more generally, those who favor judicial policing of gerrymandering, were hoping that a mid-decade plan was a sufficiently distinctive target that the Supreme Court could be induced to shoot at it without having to worry too much about the implications for the general run of redistrictings after each census. Plainly, that strategy failed. But the obvious question raised by *LULAC* is how, if at all, the general constitutional law of redistricting has been affected. Has anything changed from *Vieth*?

That question can be broken down into two distinct sub-questions, neither of which has an obvious answer:

1. Has the law, as it stands, changed? Suppose a districting plan is challenged as an unconstitutional partisan gerrymander before a panel of conscientious lower court judges whose only goal is to enforce the law. Is there anything that the conscientious judges should do after *LULAC* that is different from what they would have done after *Vieth*?

2. Some lower court judges and all litigants are more interested in what the courts (and particularly the Supreme Court) will do than in the state of the law at the moment a case is filed. Does *LULAC* change your prediction of whether and why the Supreme Court will find some districting plans to be unconstitutional partisan gerrymanders?



## Chapter 8. Ballot Propositions

ADD THE FOLLOWING BEFORE THE LAST PARAGRAPH OF NOTE 1 ON PAGE 399:

The Florida Supreme Court continues to implement the single subject rule with a heavy hand. In 2005, redistricting reformers in Ohio and California placed proposals on the ballot to impose new redistricting criteria and to entrust the enactment of redistricting plans to commissions. Both proposals were decisively defeated, but the reformers had their day before the voters. In Florida, a similar effort was stifled by the Supreme Court, which ruled in *Advisory Opinion to the Attorney General*, 926 So.2d 1218 (Fla. 2006), that the redistricting initiative violated the single subject rule:

Not only would the proposed amendment create a new redistricting commission, but it would also change the standards applicable to the districts that are created by the commission. . . .

The other provisions of the proposed amendment exhibit “a natural relation and connection as component parts or aspects of” the new method proposed for apportionment. These provisions explain the composition of the commission, specify the apportionment process, and provide for judicial apportionment if the commission fails to complete its duty. However, the creation of new standards to be used in apportioning the districts is not a component part of this apportionment plan and results in logrolling. A voter who advocates apportionment by a redistricting commission may not necessarily agree with the change in the standards for drawing legislative and congressional districts. Conversely, a voter who approves the change in district standards may not want to change from the legislative apportionment process currently in place. Thus, a voter would be forced to vote in the “all or nothing” fashion that the single subject requirement safeguards against.

ADD THE FOLLOWING BEFORE THE FIRST FULL PARAGRAPH ON PAGE 419:

An Oregon initiative proposed to amend the state constitution by adding this paragraph:

Notwithstanding any other provisions of this Constitution, the people through the initiative process, or the Legislative Assembly by a three-fourths vote of both Houses, may enact and amend laws to prohibit or limit contributions and expenditures, of any type or description, to influence the outcome of any election.

This initiative was removed from the ballot on the ground that it made two changes to the Constitution: “by removing campaign contributions [and expenditures?] from the class of expression protected by [the constitution’s free speech provision, and] carving out an exception to the rule . . . that the legislature may pass and amend

legislation by a simple majority.” *Meyer v. Bradbury*, 205 Or. App. 297, 134 P.3d 1005 (2006).

ADD THE FOLLOWING TO THE END OF SECTION III ON PAGE 430:

8. Proponents of a redistricting initiative in California filed their petitions for what became known as Proposition 77 in early May, 2005. In mid-May, an attorney for the proponents discovered that there were differences between the text of the proposal filed with the Attorney General (and provided by the Attorney General to the legislature and to the public via the internet) and the version that was circulated. The attorney did not disclose the discrepancies to anyone except an attorney for Republican Governor Schwarzenegger, who was supporting the initiative. On June 10, a Friday, the Secretary of State certified that Proposition 77 had qualified for the ballot. The following Monday, the attorney for the proponents disclosed the discrepancies to the Secretary of State. The latter, also a Republican, waited until early July before reporting the problem to the Attorney General, a Democrat, who promptly made the problem known to the public and later joined in a challenge to the placement of Proposition 77 on the ballot. In the meantime, the governor called a special election for November to vote on Proposition 77 and several other initiatives.

Opponents of Proposition 77, joined by the Attorney General, sought removal of the proposal from the ballot. The trial judge ruled in their favor and a divided appellate court affirmed. In the appellate court, both the majority and the dissenter issued long and thoughtful opinions. Several days later, the California Supreme Court restored Proposition 77, saying in a two-paragraph decision that in “the absence of a showing that the discrepancies . . . were likely to have misled the persons who signed the initiative petition, we conclude that it would not be appropriate to deny the electorate the opportunity to vote on Proposition 77 at the special election to be held on November 8, 2005, on the basis of such discrepancies.” *Costa v. S. C. (Lockyer)*, 39 Cal.Rptr.3d 168, 128 P.3d 149 (2005).

In taking that action, did the Supreme Court overrule the appellate court on the merits, or simply rule that the merits should be decided after the election? Apparently the latter. As we shall see, the court issued an opinion on the merits long after Proposition 77 had been defeated. Is pre-election review appropriate in cases such as this one when there is a procedural question whether the measure is properly qualified for the ballot? One reason for denying pre-election review, which will be stronger in some cases and weaker in others, is that shortness of time may preclude a thorough review of the issues raised. To the extent that was true in the Proposition 77 case, were the delays caused by the proponents’ failure to disclose the discrepancies relevant?

As mentioned, the Supreme Court resolved the merits after Proposition 77 had been defeated at the polls. The court reaffirmed the correctness of keeping the initiative on the ballot. *Costa v. Superior Court*, 39 Cal.Rptr.3d 470, 128 P.3d 675 (2006). Although there were a few opponents who thought otherwise, most observers agreed that the differences between the two versions of the proposal were unlikely to affect anyone’s

support or opposition. On the other hand, they were more than mere typographical errors or trivial changes. The version circulated accidentally failed to reflect a final edit that had been performed by the attorney for the proponents. In addition to a large number of wording changes, a paragraph of the statement of purposes was omitted, and a deadline was changed. Should changes of this order—neither insignificant nor politically salient—have resulted in removal of the proposition from the ballot? The court wrote:

Although it has been suggested that the issue before us turns on whether the controlling decisions require “strict” or “substantial” compliance with the applicable election laws, in some respects such an approach presents a potentially misleading dichotomy. . . .

[T]he governing cases . . . have recognized that an unreasonably literal or inflexible application of constitutional or statutory requirements that fails to take into account the purpose underlying the particular requirement at issue would be inconsistent with the fundamental nature of the people’s constitutionally enshrined initiative power . . .

Whether or not the terminology is potentially misleading, the question of substantial compliance comes up in a wide variety of settings in election law and poses a difficult jurisprudential question that is worth serious consideration. An orderly electoral system requires a wide variety of deadlines, thresholds, and specific rules of all types. Those rules make it possible for all actors in the system to know what they must do to accomplish their objectives. Because humans are fallible, failure to comply with the rules in various ways and to various degrees is inevitable. Most such failures will be inadvertent but some will be calculated, and it usually will be difficult for outsiders to tell the difference.

Should a candidate or a proposition lose a position on the ballot, or should some other valuable right be lost, because of failure to comply with rules? As the California Supreme Court said, an overly literal or inflexible application of rules can lead to a system that sets traps and barriers for the unwary. But bending the rules can be unfair to those who have complied and can lead to a state of affairs in which requirements are more impressionistic than defined. Furthermore, when a court decides important electoral questions on the basis of “substantial compliance” rather than the rules, the judges face the serious danger that their judgment will be affected by their political preferences. A judge is not likely to say to himself that he will let this proposition or this candidate on the ballot because he supports it or because the candidate represents his party. But when the judge is favorably disposed to a candidate or proposition, he may be more receptive to the idea that removal is unreasonable. It did not escape notice that the majority of justices who kept Governor Schwarzenegger’s redistricting initiative on the ballot were Republicans.

ADD THE FOLLOWING NOTE AFTER NOTE 1 ON PAGE 434:

1.5. In *Eaton v. Meneley*, 379 F.3d 949 (10th Cir. 2004), plaintiffs in a federal civil rights action were supporters of a petition to recall the sheriff. It became known that the sheriff had run the plaintiffs' names through his department's criminal history check system. According to the plaintiffs, this action deterred others from joining in the recall drive and was a cause of the drive failing to obtain sufficient signatures. The sheriff enjoyed partial immunity from personal liability for such conduct, but the immunity would not protect him if his action violated the plaintiffs' first amendment rights. The only issue on appeal was whether the allegations of the complaint alleged a first amendment violation. The court held they did not. How would you compare the infringement on first amendment rights in *Eaton* and *Meyer v. Grant*?

ADD THE FOLLOWING TO NOTE 2 ON PAGE 434:

Initiatives may generally be used to amend the Massachusetts Constitution, but in order to amend certain provisions within the Constitution, other methods must be used. One of these provisions, known as the Anti-Aid amendment, was enacted in the nineteenth century as part of a national anti-Catholic campaign. It prevents public financial assistance to private religious primary and secondary schools. In addition, amendments relating to "religious institutions" may not be enacted by initiative. Supporters of school vouchers, finding themselves blocked from using the initiative to advance their proposals, challenged the limits on the use of the initiative, arguing in part that the restriction violates the First Amendment as interpreted in *Meyer v. Grant*. Is their challenge well-grounded? See *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005).

ADD THE FOLLOWING TO NOTE 8 ON PAGE 437:

Petitions to recall California Governor Gray Davis were circulated on the internet in 2003. From the circulators' viewpoint, the internet seems to offer an inexpensive method. From a public standpoint, is it better or worse than other methods? If security problems could be solved (a very big "if"), would it be a good idea for voters to be able to submit their signatures electronically over the internet?

ADD THE FOLLOWING NOTE AT THE END OF PAGE 438:

12. Section 203 of the Voting Rights Act requires a jurisdiction with significant numbers or percentages of members of a "single language minority [who] are limited-English proficient" to make available translations into that language when it "provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots." In *Padilla v. Lever*, 429 F.3d 910 (9th Cir. 2005), a federal appellate panel ruled that petitions to recall a school board member in Santa Ana, California, were invalid because neither the petitions nor required accompanying material—a statement of the reasons for the recall, and a rebuttal provided by the board member—had been translated into Spanish.

This was, to say the least, an innovative ruling. Two other circuits had held that initiative petitions were not subject to the translation requirement. *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988), and *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988). The majority in *Padilla* regarded the plain language of the statute as indicating applicability to recall petitions, especially when reinforced by the general practice of broad interpretation of the Voting Rights Act as a remedial statute. The dissenting judge maintained that the petitions and accompanying documents are “provided” by the proponents, not by the jurisdiction. The majority contended that the requirement that election officials approve the format of the petitions was sufficient to support the conclusion that the jurisdiction “provided” the document. The majority did not think the burden on proponents could override the command of the Voting Rights Act. As the dissent pointed out, the burden can be substantial. If it had been an Orange County official rather than a school board member who was being recalled, the proponents would have had to provide translations of their documents into Spanish, Vietnamese, Korean, and Chinese. Perhaps the dissent’s most interesting argument amounted to the contention that the translation requirement would serve little purpose:

Those who circulate recall petitions . . . have no incentive to exclude anyone from signing their petitions. There is no way, and no need, to vote “no” on a recall petition itself; those eligible voters who do not sign, for any reason, are effectively counted as “no” votes on the question of whether to have an election [because the required number of signatures is calculated as a percentage of total registered voters]. The purpose, therefore, of those who circulate recall petitions is to obtain as many signatures as possible in order to precipitate an election that otherwise would not occur. To the extent that they fail to provide translations of their petitions, they take the risk of failure of their enterprise.

It might be argued, however, that minority language voters ought to be able to have the opportunity to sign a petition in their language in order to help precipitate a recall election. It is difficult to see how such an argument can lead to an enforceable right, however. Certainly the circulators have no obligation to present a petition to any particular voter. Again, the incentive operating on the circulator is to reach as many potential voters as possible but if, for any number of reasons, the circulator does not reach an eligible voter and provide an opportunity for that voter to sign the petition, it is hard to see how there has been a violation of voting rights remediable by the Voting Rights Act and the courts.

The decision in *Padilla* prompted opponents of initiatives and recalls in several California jurisdictions to file challenges based on the failure to provide translations, sometimes with success. See, for example, *In re County of Monterey Initiative Matter*, 427 F.Supp.2d 958 (N.D.Cal. 2006); *Imperial v. Castruita*, 418 F.Supp.2d 1174 (C.D.Cal. 2006). The flurry of such cases was slowed when the Ninth Circuit granted en

banc review of *Padilla* and overruled the panel's decision. *Padilla v. Lever*, 463 F.3d 1046 (9th Cir. 2006). According to the en banc majority,

It is true that California regulates recall petitions in some detail. The petitions must follow a format provided by the Secretary of State, and must use a minimum type size. The petition also must include a copy of the Notice of Intention, the statement of grounds for recall, and the answer of the targeted officer if the officer submitted one. But these regulations do not mean that the petitions are *provided* by the State or subdivision. The form is regulated by the State, but the proponents fill out the petition, supply the grounds of recall, and have the petitions printed at their own expense. The fact that ... the Secretary of State “provides” the format does not mean that the State “provides” the petitions themselves within the meaning of the Voting Rights Act.

## Chapter 9. Major Political Parties

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 487:

In New York judges of the Supreme Court, which despite its name is a trial court of general jurisdiction, are nominated through a complex system of election of delegates to nominating conventions. In *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161 (2nd Cir. 2006), the system was struck down on the ground that, as a practical matter, it assured party insiders almost complete control of the nominating process. The Supreme Court has granted certiorari, *New York State Bd. of Elections v. Torres*, 127 S.Ct. 1325 (2007). For a case preview, see Christopher S. Elmendorf, N.Y. State Bd. of Elections v. Torres: *Is the Right to Vote a Constitutional Constraint on Party Nominating Conventions?*, 6 ELECTION LAW JOURNAL \_\_\_\_ (forthcoming October 2007).

ADD THE FOLLOWING AFTER NOTE 4 ON PAGE 503:

4.5 Voters in Washington adopted an initiative establishing a hybrid primary system with elements resembling both the blanket primary struck down in *Jones* and the Louisiana system, which is presumably constitutional (aside from the *Foster v. Love* problem in congressional elections). In Washington, as in Louisiana, the top two vote-getters in the primary would run against each other in the general election, regardless of party. Thus, as in Louisiana, if the top two vote-getters were from the same party, they would be the run-off candidates. However, the Washington system also differed from Louisiana's in certain respects, most importantly in that candidates were listed on the ballot by their stated party preference.

This system was successfully challenged by the Washington Republican, Democratic, and Libertarian Parties in *Washington State Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006). In the court's view, the fact that candidates were listed by party on the ballot was enough to make the run-off candidates the parties' "standard-bearers," entitling the parties to assert their associational rights to control the means by which their candidates were to be chosen.

The Supreme Court will hear the case in the October 2007 term. See 127 S.Ct. 1373 (2007). For a case preview, see Joseph M. Birkenstock, *Did I-872 Take Washington State's Voters on an Unconstitutional Detour?: Partisanship in Primaries* in *Washington v. Washington State Republican Party*, 6 ELECTION LAW JOURNAL \_\_\_\_ (forthcoming October 2007).

ADD THE FOLLOWING NOTES AFTER NOTE 6 ON PAGE 505:

6.5. Oklahoma uses a semiclosed primary. Only members of a party may vote in its primaries, unless the party permits independent voters to participate. In *CLINGMAN v. BEAVER*, 125 S.Ct. 2029 (2005), the Court rejected a challenge to these rules brought

by the Libertarian Party, which wanted to allow any voters, including those who were members of other parties, to vote in its primaries.<sup>m</sup>

Writing for a plurality that included Chief Justice Rehnquist and Justices Kennedy and Scalia, Justice Thomas wrote that there was no real “association” being denied by the Oklahoma rules, because any of the voters who wanted to significantly associate with the Libertarians were free to do so by disaffiliating from their other party. Alternatively, if there was a burden on association, it was a minimal one.

In the rest of Justice Thomas’ opinion he spoke for the Court, as he was joined by Justices O’Connor and Breyer.<sup>n</sup> He rejected the plaintiffs’ reliance on *Tashjian*, writing that:

as our cases since *Tashjian* have clarified, strict scrutiny is appropriate only if the burden is severe. In *Tashjian* itself, Independent voters could join the Connecticut Republican Party as late as the day before the primary. As explained above, requiring voters to register with a party prior to participating in the party’s primary minimally burdens voters’ associational rights.

Justice Thomas also said *Tashjian* was distinguishable, primarily on the obvious ground that in *Clingman*, unlike *Tashjian*, the state was not requiring voters to register as Libertarians in order to vote in the Libertarian primary. Is *Tashjian* a viable precedent after *Clingman*?

The foregoing reasoning led Justice Thomas to the conclusion that because of the lack of a severe burden on associational rights, strict scrutiny was not compelled. Several governmental interests justified the restriction under less severe scrutiny. First was the state’s interest in preserving the parties as “viable and identifiable interest groups.” Allowing members of other parties to vote could result in the nomination of candidates out of accord with the preference of Libertarian members. Although the party might be willing to take this risk in exchange for possible electoral benefit, the state had an interest in avoiding confusion. The state could believe democracy would be facilitated when voters classify themselves by party affiliations. Removing the connection between affiliation and voting in primaries could disrupt that system.

Second, the state could seek to facilitate efficient campaigning and party-building, which would be difficult without advance identification of which voters were likely to vote in the party’s primary. Third, the state could seek to prevent party switching, or what political scientists call “strategic voting” (i.e., a vote cast for a candidate in order to give another candidate or party a tactical advantage). For example, if there were no competitive race in the Democratic Party, some Democrats might vote in the Libertarian

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<sup>m</sup> The plaintiffs also included Republican and Democratic voters who wanted to vote in the Libertarian primary.

<sup>n</sup> Justice Breyer declined to join the majority and a portion of Justice O’Connor’s concurrence on a procedural issue not discussed here.



primary to try to nominate a candidate they thought would draw Republican votes in the general election.

In a concurring opinion, joined in part by Justice Breyer, Justice O'Connor wrote that she believes that when the state prohibits a party from allowing voters to participate in its primaries it implicates important associational interests, but she agreed with the Court that these interests were not seriously burdened in the Oklahoma case. Justice Stevens, joined by Justices Ginsburg and Souter, dissented.

6.6. The Democratic primary in Georgia's Fourth Congressional District in 2002 featured a spirited contest between incumbent Cynthia McKinney and challenger Denise Majette, both African Americans. Majette won the primary by a 58-42 margin and went on to win the general election easily. Georgia has an open primary, and McKinney's supporters claimed that Majette's margin of victory was provided by Republican crossover voters.<sup>o</sup> In a challenge to the use of the open primary under these circumstances, the 11th Circuit held that only the party, not a particular candidate and her supporters, could challenge the open primary in a *Tashjian-Jones* type action. The court also rejected a claim that the allegedly decisive role of crossover Republicans violated Section 2 of the Voting Rights Act. *Osburn v. Cox*, 369 F.3d 1283 (11th Cir. 2004).

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<sup>o</sup> Empirically, that claim is doubtful, but it does appear that McKinney received a large majority of the votes cast by African Americans. See Michael Barone with Richard E. Cohen and Grant Ujifusa, *THE ALMANAC OF AMERICAN POLITICS* 2004 471 (2003).

## Chapter 10. Third Parties and Independent Candidates

ADD THE FOLLOWING AFTER NOTE 1 ON PAGE 544:

1.5. *Bad Legislative Intent?* One might suspect that the reason the Washington state legislature enacted its new ballot access law was to squelch competition from third parties. It turns out that the legislature may have acted instead to avoid becoming a “laughing stock” and to save money. In the 1976 elections, a Jazz musician named Red Kelly formed the OWL Party, which stood for “Out with Logic; On With Lunacy,” which ran a series of joke candidates to mock the political system. For example, “Fast” Lucie Griswold ran for secretary of state as an OWL candidate. She advocated that the next secretary be able to “take shorthand or do typing.” She also took “unequivocal stands” against “(1) The heartbreak of psoriasis; (2) Bed wetting; (3) The big ‘O’; [and] (4) Post nasal drip.” The legislature may have been motivated, at least in part, to save the expense of having the OWL Party’s statements appear in ballot materials printed at public expense. If that more benign explanation of the legislature’s intent is correct, should it have any bearing on the constitutionality of its ballot access law? For an argument in the negative, see Richard L. Hasen, *Bad Legislative Intent*, 2006 WISCONSIN LAW REVIEW 843.

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 569:

Courts have begun weighing in on the extent to which courts should examine election rules to promote political competition. In *Nader v. Keith*, 385 F.3d 729, 732-34 (7<sup>th</sup> Cir. 2004), Judge Posner wrote the following in a lawsuit brought by Ralph Nader to get his name on the presidential ballot in Illinois despite having gathered insufficient signatures by the filing deadline:

Nader argues that [Illinois’s] rules that in combination ruled him off the ballot impose an unreasonable burden on third-party and independent (nonparty) candidacy (though the Libertarian Party’s candidate was able to qualify), and if this is so the rules are unconstitutional. Nader emphasizes the role that third parties have played in American democracy. The Republican Party started as a third party; and such third parties as the Progressive Party of Theodore Roosevelt, LaFollette’s Progressive Party, and the Reform Party have made significant contributions to political competition, whether by injecting new ideas or, in the case of the Republican Party, by actually displacing one of the major parties.

So the barriers to the entry of third parties must not be set too high; yet the two major parties, who between them exert virtually complete control over American government, are apt to collude to do just that. For like other duopolists they would prefer not to be challenged by some upstart--although if a major party believes that a third party will take more votes from the other party than from itself, it will support that third party

(surreptitiously, because it's supporting an ideological opponent), and the other party will oppose it (also surreptitiously, because it's opposing an ideological ally). . . .

It doesn't follow from what we said about the importance of preserving opportunities for the entry of new parties into the political arena that it would be a good thing if there were no barriers at all to third-party candidacies. A multiplication of parties would make our politics more ideological by reducing the influence of the median voter (who in a two-party system determines the outcome of most elections), and this could be a very bad thing. More mundanely, terminal voter confusion might ensue from having a multiplicity of Presidential candidates on the ballot--for think of the confusion caused by the "butterfly" ballot used in Palm Beach County, Florida in the 2000 Presidential election. That fiasco was a consequence of the fact that the ballot listed ten Presidential candidates. The butterfly ballot was a folded punchcard ballot in which the ten candidates for President were listed on facing pages.

This unusual design was innocently adopted in order to enable the candidates' names to be printed in large type, in consideration of the number of elderly voters in the county, while at the same time placing all the candidates for each office in sight of the voter at one time so that he would be less likely to overvote. Another ballot design might have effectively disfranchised voters who had poor eyesight, or who cast their vote before realizing there were additional candidates for the same office on the next page of the ballot, or who cast two votes for candidates for the same office because they didn't realize that candidates for the same office appeared on different pages. But with names on each side and the chads (the places in the ballot that the voter punches out in order to vote) in the middle, it was easy to punch the chad of the candidate on one of the facing pages meaning to vote for the candidate on the opposite page. Apparently a significant number of voters did just that: intending to vote for Al Gore, they voted for Patrick Buchanan. With fewer candidates, the "butterfly" design and resulting confusion would have been avoided.

Less obviously, third-party candidates would themselves be harmed if there were no barriers to including such candidates on the ballot. It is to the Libertarian Party's advantage that if Nader's challenge fails, its candidate will be the only independent candidate for President on the ballot. If there were 98 independent candidates, none could hope for a nontrivial vote.

So there have to be hurdles to getting on the ballot and the requirement of submitting a minimum number of nominating petitions is a standard one. In a state the size of Illinois—the population exceeds 12 million, of whom more than 7 million are registered voters—requiring a

third-party candidate to obtain 25,000 signed nominating petitions cannot be thought excessive. *Jenness* upheld a Georgia law that required petitions from 5 percent of the registered voters--in Illinois that would mean 350,000 petitions! Equally stringent requirements have been upheld in other cases. And especially in a state as notorious for election fraud as Illinois, the fact that the nominating petitions that a candidate submits have actually been signed by registered voters has to be verified. If the petition were not required to contain any identifying information (such as date of birth, mother's maiden name, or, the identifier that Illinois has chosen, the address at which the petitioner is registered to vote), there would be no practical impediment to a person's signing the name of anyone he knew to be a registered voter.

Consider as well these comments of Justice O'Connor (joined by Justice Breyer) concurring in *Clingman v. Beaver*, 125 S.Ct. 2029, 2044-2045 (2005) (O'Connor, J., concurring):<sup>p</sup>

We have sought to balance the associational interests of parties and voters against the States' regulatory interests through the flexible standard of review reaffirmed by the Court today. Under that standard, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*. Regulations imposing severe burdens on associational rights must be narrowly tailored to advance a compelling government interest. *Timmons*. Regulations imposing lesser burdens are subject to less intensive scrutiny, and reasonable, nondiscriminatory restrictions ordinarily will be sustained if they serve important regulatory interests.

This regime reflects the limited but important role of courts in reviewing electoral regulation. Although the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit. Recognition of that basic reality need not render suspect most electoral regulations. Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent reason for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the

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<sup>p</sup> *Clingman* is discussed more fully in the Supplement to Chapter 9.

State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.

See also *id.* at 2045 ("The semiclosed primary law, standing alone, does not impose a significant obstacle to participation in the [Libertarian party's] primary, nor does it indicate partisan self dealing or a lockup of the political process that would warrant heightened judicial scrutiny.")

For a criticism of Judge Posner's analysis of the third party issues in *Nader*, see Richard Winger, *How Many Parties Ought to Be on the Ballot?: An Analysis of Nader v. Keith*, 5 ELECTION LAW JOURNAL 170 (2006). See also Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 BOSTON UNIVERSITY LAW REVIEW 1277 (2005).

## Chapter 11. Campaigns

ADD THE FOLLOWING AT THE END OF THE TEXT ON PAGE 581:

Do the laws related to campaign finance, ballot access, and other election rules affect the nature and quality of American political campaigns? For a provocative answer, consider James A. Gardner, *Deliberation or Tabulation? The Self Undermining Constitutional Architecture of Election Campaigns*, 54 BUFFALO LAW REVIEW 1413, 1481 (2007):

Sometimes the law delivers what it promises, sometimes not. In the case of election campaigns, the law publicly proclaims a strong commitment to a widely held social conception of what election campaigns ought to be. In that understanding, campaigns ought to be deliberative in that their characteristic activity should be the practice of thoughtful and reasoned persuasion. Instead, the laws and jurisprudential doctrines structuring American election campaigns are built around a very different assumption: that the purpose of campaigns is primarily to tabulate exogenous voter preferences, and that political actors cannot reasonably expect, and therefore need not by law enjoy, meaningful opportunities during the campaign period to persuade voters to their points of view. Reasoned persuasion, in this environment, can thus be expected to play at most a minor, supporting role in most campaigns. Nothing in the law affirmatively prevents persuasion from occurring, but certainly the architecture of campaign law does nothing to facilitate it, and in some cases throws up obstacles to persuasion that may well be significant.

ADD THE FOLLOWING AT THE END OF NOTE 9 ON PAGE 594:

On remand, the Eighth Circuit, sitting en banc, went further than the Supreme Court in *White*, striking down both a clause limiting judges' partisan political activities and their personal solicitation of campaign contributions. *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) (en banc), cert. denied sub. nom. *Dimick v. Republican Party of Minnesota*, 126 S.Ct. 1165 (2006). A flurry of suits challenging judicial conduct rules are working their way through the courts, and it is unclear whether the new Roberts Court will tackle the constitutional questions any time soon. For an overview of the legal issues, see Richard L. Hasen, *First Amendment Limits on Regulating Judicial Campaigns*, in *RUNNING FOR JUDGE 15* (Matthew Streb., ed. 2007).

## Chapter 12. Incumbency

ADD THE FOLLOWING AFTER NOTE 3 ON PAGE 637:

3.5. Charles Chvala, Democratic leader in the Wisconsin Senate, was charged with the felony of “misconduct in office.” The offense applied to an officer who “exercises a discretionary power in a manner inconsistent with the duties of the officer’s ... office ... or the rights of others and with intent to obtain a dishonest advantage for the officer ... or another....” Chvala allegedly hired and oversaw employees of the Senate Democratic Caucus to work on campaigns. His motion to dismiss the charges on several grounds, including that the prohibition was vague as applied to his alleged conduct, was rejected in *State v. Chvala*, 678 N.W.2d 880 (Wis. App. 2004). The Wisconsin Supreme Court unanimously affirmed the Court of Appeals’ rejection of some of Chvala’s objections, but was evenly divided on others, including the vagueness claim. That had the effect of affirming the lower court’s decision, thereby allowing Chvala to be tried. *State v. Chvala*, 693 N.W.2d 747 (Wis. 2005).

Wisconsin enjoyed equal opportunity prosecutions. A couple of Republican legislators were charged under the same statute with hiring legislative employees for political purposes. The results in the Court of Appeals and the Wisconsin Supreme Court were similar to those in *Chvala*. See *State v. Jensen*, 681 N.W.2d 230 (Wis. App. 2004), *affirmed*, 694 N.W.2d 56 (Wis. 2005).

ADD THE FOLLOWING TO THE FIRST PARAGRAPH OF NOTE 2 ON PAGE 661:

The Wyoming Supreme Court struck down a term limits statutory initiative as violative of the qualifications clauses in the state constitution. *Cathcart v. Meyer*, 88 P.3d 1050 (Wyo. 2004).

ADD THE FOLLOWING AFTER NOTE 2 ON PAGE 661:

The qualifications clause was invoked in a surprising context in a controversial congressional election in Texas in 2006. After being routinely nominated for reelection in the Republican primary, Representative Tom DeLay, an influential member of the House leadership, resigned from the House amid scandal. Under Texas law, DeLay could be replaced on the ballot by another Republican candidate only if the party chair certified that he was ineligible for election. The party chair certified DeLay as ineligible after receiving a letter from DeLay stating that he had taken up residence in Virginia and accompanied by a copy of a Virginia driver’s license and other evidence supporting his assertion. The Texas Democratic Party challenged the proposed Republican replacement candidate being listed on the ballot.

In *Tex. Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006), the court ruled that the certification of DeLay as ineligible—a necessary prerequisite under Texas law for the replacement candidate to appear on the ballot—violated the qualifications clause.

The plain language of the inhabitancy requirement of the Qualifications Clause shows that a candidate for the House of Representatives must only be an inhabitant of the state “when elected.” U.S. Const. art. I, § 2, cl. 2.

...

When Benkiser [the Republican state chair] reviewed the public records sent by DeLay and concluded that his residency in Virginia made him ineligible, she unconstitutionally created a pre-election inhabitancy requirement. The Qualifications Clause only requires inhabitancy when that candidate is elected. Given this language, Benkiser could not constitutionally find that DeLay was ineligible on June 7, the date she made her decision. Therefore, her application of the ineligibility statute to DeLay was unconstitutional.

The qualifications clause, as interpreted in *U.S. Term Limits*, prevents a state from precluding a would-be candidate from seeking election to Congress. Does it do more than that? How could Texas impose an invalid qualification on an individual who declared his own ineligibility and explicitly disclaimed any desire to seek election? How could the placing or not placing of another candidate’s name on the ballot constitute the imposition of a qualification on DeLay? If the Texas statute had permitted the party to name a replacement candidate upon certification that the primary winner had voluntarily withdrawn and was no longer a resident of the state, would the result have been different? Should it have been?



## Chapter 14. Introductory Readings on Campaign Finance

ADD THE FOLLOWING TO THE END OF FOOTNOTE “b” ON PAGE 717:

Professor Patterson has calculated the total amount spent in connection with *federal elections*, including presidential candidates, congressional, national and state and local party spending, PAC expenditures, independent expenditures, and 527 spending in federal elections. (Thus, the number is not directly comparable to the numbers calculated by either Alexander or Nelson). The total for 2004 was \$4.273 billion. The comparable number for 2000 federal elections was \$3.8 billion. Kelly D. Patterson, *Spending in the 2004 Election*, in FINANCING THE 2004 ELECTION (David B. Magleby, Anthony Corrado, and Kelly D. Patterson, eds., 2006).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 757:

Spencer Overton takes issue with BeVier’s arguments as well. After noting that “Professor BeVier’s focus on the *income* of taxpayers also overlooks the important role of *wealth* in measuring class mobility,” Overton offers statistics showing that when measured by wealth, economic mobility is “dismal.” He continues by noting some racial disparities:

In a study of men who turned twenty-one after 1980, 47% of whites reached middle class earnings by age thirty, whereas only 19% of blacks had done so. African Americans are nearly five times more likely than whites to fall from the top income quartile to the bottom quartile, while African Americans born to the bottom quartile attain the top quartile at less than one-half the rate of whites. In a study of American wealth mobility over 15 years, 0% of African American males in the study rose from the lowest wealth decile to the highest.

Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 73, 94-96 (2004).

## Chapter 15. The *Buckley* Framework

ADD THE FOLLOWING TO THE END OF NOTE 7 ON PAGE 794:

Even if expenditure limits are impermissible in regular elections, might they be permissible in university student association elections, in light of a university's educational mission? *See Flint v. Dennison*, 361 F.Supp.2d 1215, 1221 (D. Montana 2005) ("When the cynicism of wealth invades the academy, students learn not the lessons of ordinary governance but instead are imbued with the anti-egalitarian notion that wealth is power."), *aff'd*, 488 F.3d 816 (9th Cir. 2007).

## Chapter 16. After *Buckley*: Who May Be Regulated, and for What Reasons?

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 823:

Disagreeing with *Miller*, the Washington state supreme court, with three justices dissenting, struck down a state statute passed by initiative requiring union members to “opt in” before the union could deduct from union member paychecks monies used for political purposes. *Washington State Public Disclosure Commission v. Washington Education Association*, 130 P.3d 352 (Wash. 2006) (en banc). The U.S. Supreme Court unanimously reversed, holding that a state does not violate the First Amendment when it requires public sector union members to opt in before spending nonmembers’ fees for election-related purposes. *Davenport v. Washington Educ. Ass’n*, 127 S.Ct. 2372 (2007).

ADD THE FOLLOWING TO THE END OF NOTE 10 ON PAGE 856:

The question of what happens to the media exemption in the Internet era landed at the Federal Election Commission in 2005. Following the passage of the Bipartisan Campaign Reform Act (BCRA) (discussed in detail in the next chapter), the FEC passed a series of implementing regulations, including a regulation that exempted communications over the Internet from coverage under the “public communications” portions of BCRA. 11 C.F.R. § 100.26. Congressional sponsors of BCRA brought suit challenging a number of the FEC’s regulations implementing BCRA, including the Internet exemption. A federal district court struck down the exemption as inconsistent with Congressional intent and ordered the FEC to write new regulations. *Shays v. FEC*, 337 F.Supp.2d 28, 65-70 (D.D.C. 2004). After a protracted process in which the FEC was lobbied heavily to keep Internet-based political activity as unregulated as possible, the FEC wrote new regulations granting a very wide exemption for most Internet-based election activity, aside from paid political advertising. The final rules, along with an explanation and justification for them, appear at 71 FEDERAL REGISTER 18589 (Apr. 12, 2006). The regulations were widely applauded by both supporters and opponents of campaign finance regulation. Does this open up a new “loophole” from regulation, or does it appropriately protect First Amendment rights of speech and association? What is different about Internet-based political activity that might justify a different set of rules?

## Chapter 17. The New Deference

ADD THE FOLLOWING TO THE END OF NOTE 7 ON PAGE 936:

There is no question that section 527 organizations played a major role in the 2004 election, with one estimate placing their spending at nearly \$400 million in the 2004 federal elections. Steve Weissman and Ruth Hassan, *BCRA and the 527 Groups*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT* (2007). George Soros topped the list of individual donors to 527s at \$24 million, though labor unions gave about 4 times as much as Soros to pro-Democratic 527s.

Some criticized the Federal Election Commission for not regulating 527s as political committees during the 2004 election season. Treating 527s as political committees would have a number of consequences, most importantly limiting contributions to such committees to \$5,000 per person. The former chair of the FEC and his legal counsel defended the FEC's inaction, arguing that regulation of 527s would have exceeded the FEC's authority. Alison R. Hayward and Bradley A. Smith, *Don't Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 4 *ELECTION LAW JOURNAL* 82 (2004). After the 2004 election, the action moved to Congress, where bills were introduced in both the House and Senate to change the rules related to 527s. But no bills passed, either when Republicans or Democrats controlled Congress. Meanwhile 527s were active in the 2006 elections, but did not spend at the levels seen in 2004. See Stephen R. Weissman and Kara D. Ryan, *Soft Money in the 2006 Election and the Outlook for 2008: The Changing Nonprofits Landscape*, Campaign Finance Institute, at 3, [http://cfinst.org/books\\_reports/pdf/NP\\_SoftMoney\\_06-08.pdf](http://cfinst.org/books_reports/pdf/NP_SoftMoney_06-08.pdf).

Reform groups sued the FEC for failing to issue rules setting forth when 527s would be treated as political committees. The FEC responded by settling with some 527 groups that failed to register as political committees, and issuing an "Explanation and Justification" explaining what factors it would take into account in deciding on a 527's political committee status. The lawsuits are ongoing. See Matthew Mosk, *FEC to Police '527' Groups' Campaign Activities*, WASH. POST, Feb. 2, 2007, at A13. For litigation documents from the FEC, see [http://www.fec.gov/law/litigation\\_related.shtml#shays\\_bush](http://www.fec.gov/law/litigation_related.shtml#shays_bush). For documents from the complainants and amici, see <http://www.campaignlegalcenter.org/cases-167.html> and <http://www.campaignlegalcenter.org/cases-186.html>.

As the FEC begins to regulate 527 organizations, albeit on a case-by-case basis, some election-related activity is expected shift to 501(c) organizations and newer "taxable" nonprofits. See Weissman and Ryan, *supra*, at 3. There are limits on how much election-related activity beyond "[c]ompiling and circulating lawmakers' voting records and voter guides" that 501(c)(3)'s may engage in without jeopardizing their non-profit status. Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 *GEORGETOWN LAW JOURNAL* 1181, 1193 (2007). Other 501(c) organizations apparently can do much more election-related activity, though the overlay of election law and tax law makes navigating in this area exceedingly complex. Weissman and Ryan, *supra* at 6-7, explain:

Social welfare organizations [organized under section 501(c)(4) of the tax code], labor unions [501(c)(5)s] and business associations [(501(c)(6)s] have been growing in importance in federal elections. They may get a further boost from the new FEC constraints because they primarily affect 527s. Under federal tax and election law respectively, these 501(c)s have been permitted to use unlimited soft money contributions to conduct virtually the same election activities as 527s, as long as “political campaign intervention” or “federal campaign activity” is not their “primary” activity or “major purpose.” Unlike 527s, 501(c)s’ contributions and expenditures are largely *undisclosed* to the public. Yet it is clear from available information that corporate and union treasuries and large donors are major financing sources.

Although the new FEC enforcement regime applies to 501(c) “advocacy” groups as well as 527 political organizations, it appears the former will not be treated as federal political committees if they comply with the Internal Revenue Service’s requirement that political campaign intervention be secondary to their social welfare, labor union, or trade association roles. As a result, the FEC rulings appear to leave the 501(c)s largely untouched. In theory, such groups are subject, under the Internal Revenue Code, to a 35% tax on either their political campaign expenditures or their investment income, whichever is lower. In practice, weak enforcement by the IRS and low investment income can often neutralize this constraint.

Weissman and Ryan wrote these words before the Supreme Court’s decision in *Federal Election Commission v. Wisconsin Right to Life*, 127 S.Ct. 2652, reprinted below. The decision may lessen the need for corporations and unions to use these 501(c) organizations for election-related activities in the 2008 elections.

Even if Congress or the FEC eventually decides to regulate 527s and similar organizations more aggressively, there remains the question whether such regulation is constitutional as to those groups that engage only in making *independent* expenditures. Professor Daniel Ortiz prepared the following memorandum (reprinted here with permission) for two campaign reform groups arguing for the constitutionality of one of the bills, Senate bill 271, the “527 Reform Act of 2005” (original bill available at <http://www.campaignlegalcenter.org/attachments/1317.pdf>; full version of Ortiz memorandum available at <http://www.campaignlegalcenter.org/press-1051.html>).

## Memorandum

FROM: Daniel R. Ortiz

RE: Constitutionality of Limits on Contributions from Individuals to 527 Organizations That Make Only Independent Expenditures

DATE: March 7, 2005

This memo addresses whether S. 271's limit on contributions from individuals to § 527 organizations that make only independent expenditures ("527 IECs") is constitutional.<sup>1</sup> *McConnell v. FEC*, makes clear that it is. In that case, the Supreme Court not only explicitly made this point, *id.* at n. 48, and upheld bans on soft money that were inconsistent with any other result, but also reaffirmed the first principles of *Buckley*, which compel it.

Any doubt that Congress can limit contributions to 527 IECs stems largely from a single source: dicta in the Supreme Court's fractured decision in *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (*CalMed*). In *CalMed*, the Supreme Court upheld the Federal Election Campaign Act's (FECA's) \$5,000 limit on individual contributions to multicandidate political action committees. At one point, however, the plurality appeared to avoid considering "the hypothetical application" of FECA to political committees that make only independent expenditures. And in a separate opinion, Justice Blackmun, whose fifth vote was necessary for the decision, appeared to suggest that FECA's \$5,000 limit could not apply to such committees. He wrote:

[a] different result would follow if [the \$ 5,000 limit] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates. . . . [Political action committees like the California Medical Association are] essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat.

Since independent expenditures could pose no threat of actual or potential corruption, Justice Blackmun thought contributions used for that purpose could not corrupt either. The corruptive potential of contributions, he suggested, depended solely on the ultimate use to which an organization would put them. Dissenting on jurisdictional grounds, none of the remaining justices reached the merits.

*CalMed* necessarily decided more, however, than the plurality and Justice Blackmun suggested. Justice Blackmun's own vote (as well as the plurality's) undercut his dictum. The political committee in *CalMed* argued not just that the \$5,000 contribution limit was generally unconstitutional but that it was unconstitutional in a particular way. Even if Congress could limit contributions that the committee would ultimately use for candidate contributions, it argued, Congress could not limit those ultimately used for administrative expenses and possibly for independent expenditures. Brief of Appellants at 34-35 (*CalMed*) ("Like other political committees, CALPAC may make independent expenditures as well as direct contributions to candidates. To the

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<sup>1</sup> This memo was prepared for Democracy 21 and the Campaign Legal Center. It does not necessarily represent the views of the University of Virginia, where I am the John Allan Love Professor of Law and Horace W. Goldsmith Research Professor. My professional affiliation is for purposes of contact and identification only.

extent it makes independent expenditures CALPAC engages in first amendment activity that cannot be limited given the result in *Buckley*.”) Indeed, on the court below, several judges would have invalidated the \$5,000 limit precisely because of its effect on political committees’ independent expenditures. *California Medical Ass’n v. FEC*, 641 F.2d 619, 647 (1980) (Wallace, J., dissenting) (“A limitation on donations to committees restricts not only funds available for contributions by the committees to candidates, but also the funds available for independent expenditures through the committee framework. It is by repeatedly forgetting this incontestable fact that the majority erroneously likens the . . . donation restriction to the contribution limitations upheld in *Buckley*.”).<sup>2</sup>

These other uses, however, did not trouble the Court in *CalMed*. It upheld the \$5,000 limit without regard to how the political committee would ultimately use a contribution—a position flatly inconsistent with Justice Blackmun’s stated misgivings. If Justice Blackmun’s view—that a contribution’s ultimate use determined whether Congress could limit it—had controlled, the Court would necessarily have struck down the \$5,000 limit at least in part. That limit would clearly have been overbroad insofar as it applied to contributions to political committees that would not be used in ways that counted as contributions to candidates. Congress could have addressed any fear of corruption from candidate contributions in a much more limited and focused way—by limiting only those contributions that political committees would use to contribute directly to candidates. That the Court (with Justice Blackmun’s vote) did not strike down the limit on this ground necessarily undercuts Blackmun’s own stated position. Despite his misgivings, he himself actually voted to support a broad limit which covered contributions that could be used for purposes of making independent expenditures.

In *McConnell*, the Supreme Court made clear that this reading—that *CalMed* necessarily upheld limits on contributions to independent expenditure committees—is correct. In rejecting Justice Kennedy’s “crabbed view of corruption,” which held that only concern for traditional *quid pro quo* corruption could support campaign finance regulation, *McConnell* pointed to *CalMed* as precedent for recognizing “more subtle but equally dispiriting forms of corruption.” The Supreme Court made clear first that *CalMed* upheld limits on exactly those contributions that Justice Blackmun had questioned:

[In *CalMed*], we upheld FECA’s \$ 5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA’s \$1,000 limit on individual contributions to candidates. Given FECA’s definition of

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<sup>2</sup> Although Justice Blackmun said he would distinguish between contributions to committees that made direct candidate contributions and those to committees that made only independent expenditures, his distinction was technically dictum. Since the California Medical Association did make direct contributions to candidates, the facts of the case implicated only the first half of his distinction and that part was all that was necessary for the decision. *CalMed* simply did not involve any of the “pure” independent expenditure committees whose coverage Justice Blackmun speculated about. Thus, even if Justice Blackmun’s stated view had represented that of a majority of justices, which it did not, it would technically have had no controlling, precedential effect.

“contribution,” the \$5,000 . . . limi[t] restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, *but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures.*

*Id.* at 152 n. 48 (emphasis added). As the last sentence states unmistakably, *CalMed* held that Congress could limit contributions to entities that would use them solely for independent expenditures. *McConnell* then made clear why: *CalMed* necessarily found that such contributions pose a danger of actual or apparent corruption. As the very next sentence in *McConnell* explains, *CalMed* could not have upheld FECA’s broad limit on contributions to party and multicandidate committees without necessarily deciding this point. With respect to party committees, the type of committee at issue in this portion of *McConnell* itself, the next sentence argues:

If indeed the First Amendment prohibited Congress from regulating contributions to fund [express advocacy and numerous other noncoordinated expenditures], the otherwise-easy-to-remedy exploitation of parties as pass-throughs (*e.g.*, a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation.

In other words, if contributions ultimately used to make independent expenditures had no corruptive potential, the overall limit on contributions to multicandidate committees would have been unsustainable. Congress could have justified the limit only insofar as it remedied so-called “pass-through” corruption and much more narrowly tailored remedies, like “a strict limit on donations that could be used to fund candidate contributions,” could have addressed that. Thus, the overall limit on contributions to multicandidate committees would have been unconstitutionally overbroad if Justice Blackmun’s view had been correct. *CalMed*, then, despite its ambivalent dicta, stands for two propositions: (i) that contributions can corrupt independently of their ultimate use and (ii) that Congress can limit contributions to political committees that the recipients would use to make independent expenditures. Any other reading of *CalMed* supplants its holding with dicta that no one on the *CalMed* court itself followed.

*McConnell*’s own treatment of FECA’s soft money provisions reinforces both these *CalMed* holdings. If contributions that were eventually used as independent expenditures on federal elections posed no corruptive potential—if they were always and necessarily sacrosanct—then the Court would have had to strike down many of the soft money provisions it upheld in *McConnell*, particularly § 323(a), the “core” soft money provision. This provision provides that “national committee[s] of a political party . . . may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of th[e] Act.” It makes all funds that the national party committees solicit, receive, spend, or direct—*regardless of how the committees intend to use them*—subject to FECA’s amount, source, and disclosure



requirements. Contributions that would be spent in coordination with candidates, contributions that would be spent independently on candidates' behalf, and contributions that would be spent on advertisements that do not even mention the party or its candidates are all subject to FECA's requirements.

In themselves, however, these different party activities pose very different threats of corruption. Coordinated expenditures create a significant danger of corruption, (*Colorado II*), independent expenditures create less danger, (*Colorado I*) (opinion of Breyer, J.), and speech on pure issues that does not refer to any candidates still less. Yet, those different threats of corruption made no difference to the Court. No matter how a national party committee would put a soft money contribution to use, Congress could ban it. The contribution's ultimate use did not determine its corruptive potential. Rather, the corruptive potential stemmed from the party's ability to give donors access to and influence over its candidates. In upholding FECA's central soft money provision, then, *McConnell* necessarily found that even though independent party expenditures on behalf of candidates could not directly corrupt, *see Colorado I*, contributions to party political committees for this purpose could. The corruptive potential of the one was a sufficient but not necessary condition for that of the other.

The same analysis applies to *McConnell*'s treatment of FECA's ban on the use of soft money contributions by state and local party committees for federal election activities. . . .

Section 323(b) is premised on the simple "judgment that if a large donation is capable of putting a federal candidate in the debt of the contributor, it poses a threat of corruption or the appearance of corruption." *McConnell*. *McConnell* identified, moreover, precisely which contributions "pose the greatest risk of this kind of corruption: *those contributions . . . that can be used to benefit federal candidates directly.*" *Id.* (emphasis added).

Contributions to 527 IECs pose exactly this same "greatest risk" of corruption. Since these organizations must necessarily have the "major purpose" of nominating or electing candidates for federal office, *Buckley*, contributions to them, even more than those covered by § 323(b), will likely be used "to benefit federal candidates directly." It does not matter how the political committee actually uses them. Contributions used for direct candidate contributions, coordinated expenditures, and independent expenditures all represent "contributions . . . that can be used to benefit federal candidates directly."

This is not to say, of course, that all funds "used to benefit federal candidates directly" necessarily pose this risk. As *McConnell* makes clear, "Congress could not regulate financial contributions to political talk show hosts or newspaper editors *on the sole basis* that their activities conferred a *benefit* on the candidate." *McConnell* n. 51 (first emphasis added). Something more is needed. In the case of political parties, the added risk comes from their "close relationship . . . [to] federal officeholders and candidates."

*Id.* Parties, the Court thought, were “entities uniquely positioned to serve as conduits for corruption.”

527 IECs pose two special dangers long recognized by the Court that make them more like parties than like “political talk show hosts or newspaper editors.” First, just as in the case of § 323(b), it is safe to “ma[k]e a prediction . . . [that] soft-money donors w[ill] react to § 323(a) [and § 323(b)] by scrambling to find another way to purchase influence.” If the law does not cover 527 IECs, they will become the primary means for donors to circumvent FECA’s new soft money provisions. Donors seeking to influence federal officeholders—donors who previously would have contributed large amounts of soft money to party committees for use in independent campaign advertising and other federal election activities—will contribute instead to independent expenditure committees for exactly the same uses. Such circumvention, all members of the Court agree, “is a valid theory of corruption.” *Colorado II*.

It is, moreover, an extremely powerful theory of corruption. In *McConnell*, the Court employed it to uphold § 323(f), which bars state and local candidates and officeholders from spending soft money to fund communications promoting, supporting, attacking, or opposing a clearly identified candidate for federal office. In particular, the Court invoked the theory to dispel the argument that soft-money contributions to state and local candidates for such communications could not corrupt or appear to corrupt federal candidates. At first glance, this argument appears a strong one. Without evidence that contributors to state and local candidates were gaining influence and access to federal candidates and officeholders—of which there was none—how could such contributions corrupt? The Court saw an easy answer, however, in “[t]he proliferation of sham issue ads.” . . .

[T]he record developed in *McConnell* showed that sham issue ads had become such a powerful tool of corruption that contributions for this purpose to *any* entity were necessarily corruptive—even without formal evidence that the contributor expected influence over or access to federal officeholders in return for the contributions. Nothing in the Court’s reasoning mentioned, let alone rested on, any special connection between state and local candidates and their federal counterparts. Indeed, the contribution’s corruptive potential stemmed entirely from its purpose: to fund sham issue ads that would benefit federal candidates. This is, of course, one of the primary purposes for which 527 IECs put their contributions to work.

The circumvention rationale applies with special force to independent expenditure committees that accept money from the general treasuries of corporations and unions. Independent expenditures from these sources have such great corruptive potential that the First Amendment allows them to be banned completely. *Austin*; *but see MCFL* (defining narrow category of ideological corporation not constitutionally subject to expenditure ban). Thus, corporate and union contributions to 527 IECs would represent direct circumvention of the corporate and union expenditure bans and so could clearly be banned in turn. The “independence” of an independent expenditure committee has no power to launder away the contribution’s original source.

Second, 527 IECs share with parties—and not with talk show hosts and editors—a central characteristic that increases the corruptive potential of contributions made to them. As the Supreme Court has explained, political “parties’ capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing . . . spending limits binding on other political players. And some of these players could marshal the same power and sophistication for the same electoral objectives as political parties themselves.” *Colorado II*. 527 IECs, like parties and unlike talk show hosts and wealthy individuals, have this same “capacity to concentrate power to elect.” As the Court recognized in *Colorado II*, by pooling individual resources and monitoring, rewarding, and punishing more effectively than can any individual the behavior of federal candidates and officeholders, 527 IECs can “marshal the same power and sophistication for the same electoral objectives as the political parties themselves.” This ability heightens the risk of corruption inherent in their power to serve as conduits.<sup>4</sup>

To ignore the relevance of this “capacity to concentrate power to elect” would take exactly the “crabbed view of corruption” that *McConnell* rejected. It held instead that factors like a contribution’s “size, the recipient’s relationship to the candidate or officeholder [it would support], [the contribution’s] potential impact on a candidate’s election, its value to the candidate, [and the donor’s] unabashed and explicit intent to purchase influence,” are all relevant to determining a contribution’s corruptive potential. Indeed, according to these *McConnell* factors, contributions to 527 IECs would easily qualify as corruptive. Some contributions are so large that they would certainly be remembered vividly by candidates and cast doubt in the public’s eye that the contributor enjoyed no special influence over or access to them. The sham issue ads and other activities that these contributions generate, moreover, can have a great impact on a candidate’s election—witness the Swift Boat ads in the last presidential campaign—and thus are of inestimable value to candidates. Nothing suggests, in fact, that 527 IEC spending is much less effective than spending by the candidates and parties themselves. It is simply naïve to believe that 527 IEC spending cannot create influence over and access to federal candidates. As George Soros admitted in talking to a reporter, this is the point: “I’ve been trying to exert some influence over our policies and I hope I’ll get a better hearing under Kerry.” . . .

### *Notes and Questions*

1. Should the answer to the constitutional issue considered by Ortiz turn on Justice Blackmun’s opinion in *CalMed*? Should it matter whether Blackmun’s statement is, as Ortiz states, “technically dictum?”

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<sup>4</sup> Although 527 IECs have to be officially independent from the parties and their candidates, the two major parties played a large role in the creation, management and funding of some of the most important of them—as the history of The Media Fund on the Democratic side and Progress For America (PFA) on the Republican side show. . . .

2. Are independent 527s more like political parties or talk show hosts under *McConnell*?

3. Professor Richard Briffault is skeptical of the anticorruption rationale for regulating 527s. He “suggest[s] that there are a range of theories, which increasingly depart from *Buckley*’s approach to campaign finance regulation, that provide support for the constitutionality of limits on donations to committees that make only independent expenditures. The least radical of these would rely on, but stretch, *McConnell*’s anticircumvention rationale and would succeed if there is evidence that the parties or the candidates, not just the donors, are treating 527s as devices for circumventing the soft money limits and establishing a connection between large donors and candidates. The other two would require reconsideration of one or another of the basic components of *Buckley*—the determination that independent spending is not corrupting, or even more fundamentally, that the prevention of corruption is the only constitutionally acceptable rationale for limiting campaign money. [He concludes] by suggesting that a serious reconsideration of *Buckley* is in order, because, as demonstrated by the analysis of how *Buckley* applies to 527s, *Buckley* fails adequately to address some of the most critical considerations implicated by campaign finance and campaign finance regulation.”

Richard Briffault, *The 527 Problem...and the Buckley Problem*, 73 GEORGE WASHINGTON LAW REVIEW 949, 990 (2005). For an even more skeptical view of the permissibility of FEC regulation and constitutionality of limiting 527 fundraising, see Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEORGE WASHINGTON LAW REVIEW 1000 (2005).

4. Under Ortiz’ analysis, would it be permissible for Congress to limit contributions to charitable organizations that are organized under other provisions of the tax code and that engage in little or no election activity if federal candidates and elected officials raise money for these organizations?

ADD THE FOLLOWING AFTER NOTE 10 ON PAGE 956:

11. *McConnell* called the express advocacy/issue advocacy line constitutionally meaningless. Is that true in all applications? Might a state constitutionally prohibit issue advocacy proximate to the polls on Election Day? For an answer in the negative, see *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004), *cert. denied*, 125 S.Ct. 453 (2004). For an argument that the distinction between express advocacy and issue advocacy is functionally meaningful, see Dorie E. Apollonio and Margaret A. Carne, *Interest Group Advocacy and the Power of “Magic Words,”* 4 ELECTION LAW JOURNAL 178 (2005).

### III. The End of the New Deference

In the summer of 2005, Justice O’Connor announced her retirement from the Supreme Court (effective upon the confirmation of her successor). Soon after the announcement, Chief Justice Rehnquist died. John G. Roberts, Jr., was confirmed as the

new Chief Justice and Samuel Alito was confirmed to replace Justice O'Connor. As noted earlier, the Court's New Deference rulings had become dependent on the crucial fifth vote of Justice O'Connor. Will the replacement of Justice O'Connor with Justice Alito change the Court's campaign finance jurisprudence away from deference? It appears so based upon the first few campaign finance cases decided by the Roberts Court.

### **Randall v. Sorrell**

126 S.Ct. 2479 (2006)

Justice BREYER announced the judgment of the Court, and delivered an opinion in which THE CHIEF JUSTICE joins, and in which Justice ALITO joins except as to Parts II-B-1 and II-B-2.

We here consider the constitutionality of a Vermont campaign finance statute that limits both (1) the amounts that candidates for state office may spend on their campaigns (expenditure limitations) and (2) the amounts that individuals, organizations, and political parties may contribute to those campaigns (contribution limitations). Vt. Stat. Ann., Tit. 17, § 2801 *et seq.* (2002). We hold that both sets of limitations are inconsistent with the First Amendment. Well-established precedent makes clear that the expenditure limits violate the First Amendment. *Buckley*. The contribution limits are unconstitutional because in their specific details (involving low maximum levels and other restrictions) they fail to satisfy the First Amendment's requirement of careful tailoring. That is to say, they impose burdens upon First Amendment interests that (when viewed in light of the statute's legitimate objectives) are disproportionately severe.

#### I A

Prior to 1997, Vermont's campaign finance law imposed no limit upon the amount a candidate for state office could spend. It did, however, impose limits upon the amounts that individuals, corporations, and political committees could contribute to the campaign of such a candidate. Individuals and corporations could contribute no more than \$1,000 to any candidate for state office. Political committees, excluding political parties, could contribute no more than \$3,000. The statute imposed no limit on the amount that political parties could contribute to candidates.

In 1997, Vermont enacted a more stringent campaign finance law, Pub. Act No. 64 (hereinafter Act or Act 64), the statute at issue here. Act 64, which took effect immediately after the 1998 elections, imposes mandatory expenditure limits on the total amount a candidate for state office can spend during a "two-year general election cycle," *i.e.*, the primary plus the general election, in approximately the following amounts: governor, \$300,000; lieutenant governor, \$100,000; other statewide offices, \$45,000; state senator, \$4,000 (plus an additional \$2,500 for each additional seat in the district); state representative (two-member district), \$3,000; and state representative (single member district), \$2,000. These limits are adjusted for inflation in odd-numbered years

based on the Consumer Price Index. Incumbents seeking reelection to statewide office may spend no more than 85% of the above amounts, and incumbents seeking reelection to the State Senate or House may spend no more than 90% of the above amounts. The Act defines “[e]xpenditure” broadly to mean the:

payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates.

With certain minor exceptions, expenditures over \$50 made on a candidate’s behalf by others count against the candidate’s expenditure limit if those expenditures are “intentionally facilitated by, solicited by or approved by” the candidate’s campaign. These provisions apply so as to count against a campaign’s expenditure limit any spending by political parties or committees that is coordinated with the campaign and benefits the candidate. And any party expenditure that “primarily benefits six or fewer candidates who are associated with the political party” is “presumed” to be coordinated with the campaign and therefore to count against the campaign’s expenditure limit.

Act 64 also imposes strict contribution limits. The amount any single individual can contribute to the campaign of a candidate for state office during a “two-year general election cycle” is limited as follows: governor, lieutenant governor, and other statewide offices, \$400; state senator, \$300; and state representative, \$200. Unlike its expenditure limits, Act 64’s contribution limits are not indexed for inflation.

A political committee is subject to these same limits. So is a political party, defined broadly to include “any subsidiary, branch or local unit” of a party, as well as any “national or regional affiliates” of a party (taken separately or together). Thus, for example, the statute treats the local, state, and national affiliates of the Democratic Party as if they were a single entity and limits their total contribution to a single candidate’s campaign for governor (during the primary and the general election together) to \$400.

The Act also imposes a limit of \$2,000 upon the amount any individual can give to a political party during a 2-year general election cycle.

The Act defines “contribution” broadly in approximately the same way it defines “expenditure.” Any expenditure made on a candidate’s behalf counts as a contribution to the candidate if it is “intentionally facilitated by, solicited by or approved by” the candidate. And a party expenditure that “primarily benefits six or fewer candidates who are associated with the” party is “presumed” to count against the party’s contribution limits.

There are a few exceptions. A candidate’s own contributions to the campaign and those of the candidate’s family fall outside the contribution limits. Volunteer services do not count as contributions. Nor does the cost of a meet-the-candidate function, provided that the total cost for the function amounts to \$100 or less.

In addition to these expenditure and contribution limits, the Act sets forth disclosure and reporting requirements and creates a voluntary public financing system for gubernatorial elections. None of these is at issue here. The Act also limits the amount of contributions a candidate, political committee, or political party can receive from out-of-state sources. The lower courts held these out-of-state contribution limits unconstitutional, and the parties do not challenge that holding.

## B

The petitioners are individuals who have run for state office in Vermont, citizens who vote in Vermont elections and contribute to Vermont campaigns, and political parties and committees that participate in Vermont politics. Soon after Act 64 became law, they brought this lawsuit in Federal District Court against the respondents, state officials charged with enforcement of the Act. Several other private groups and individual citizens intervened in the District Court proceedings in support of the Act and are joined here as respondents as well.

The District Court agreed with the petitioners that the Act's expenditure limits violate the First Amendment. See *Buckley*. The court also held unconstitutional the Act's limits on the contributions of political parties to candidates. At the same time, the court found the Act's other contribution limits constitutional. *Landell v. Sorrell*, 118 F.Supp.2d 459 (Vt. 2000).

Both sides appealed. A divided panel of the Court of Appeals for the Second Circuit held that *all* of the Act's contribution limits are constitutional. It also held that the Act's expenditure limits may be constitutional. *Landell v. Sorrell*, 382 F.3d 91 (2004). It found those limits supported by two compelling interests, namely, an interest in preventing corruption or the appearance of corruption and an interest in limiting the amount of time state officials must spend raising campaign funds. The Circuit then remanded the case to the District Court with instructions to determine whether the Act's expenditure limits were narrowly tailored to those interests.

The petitioners and respondents all sought certiorari. They asked us to consider the constitutionality of Act 64's expenditure limits, its contribution limits, and a related definitional provision. We agreed to do so.

## II

We turn first to the Act's expenditure limits. Do those limits violate the First Amendment's free speech guarantees?

## A

In *Buckley* the Court considered the constitutionality of the Federal Election Campaign Act of 1971 (FECA), a statute that, much like the Act before us, imposed both expenditure and contribution limitations on campaigns for public office. The Court, while

upholding FECA’s contribution limitations as constitutional, held that the statute’s expenditure limitations violated the First Amendment.

[The Court summarized *Buckley*’s differing treatment of contribution and expenditure limits.] Over the last 30 years, in considering the constitutionality of a host of different campaign finance statutes, this Court has repeatedly adhered to *Buckley*’s constraints, including those on expenditure limits. See *McConnell*; *Colorado II*; *Shrink Missouri*; *Colorado I*; *MCFL*; *NCPAC*; *CMA*.

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The respondents recognize that, in respect to expenditure limits, *Buckley* appears to be a controlling-and unfavorable-precedent. They seek to overcome that precedent in two ways. First, they ask us in effect to overrule *Buckley*. Post-*Buckley* experience, they believe, has shown that contribution limits (and disclosure requirements) alone cannot effectively deter corruption or its appearance; hence experience has undermined an assumption underlying that case. Indeed, the respondents have devoted several pages of their briefs to attacking *Buckley*’s holding on expenditure limits.

Second, in the alternative, they ask us to limit the scope of *Buckley* significantly by distinguishing *Buckley* from the present case. They advance as a ground for distinction a justification for expenditure limitations that, they say, *Buckley* did not consider, namely that such limits help to protect candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters. We find neither argument persuasive.

2

The Court has often recognized the “fundamental importance” of *stare decisis*, the basic legal principle that commands judicial respect for a court’s earlier decisions and the rules of law they embody. The Court has pointed out that *stare decisis* “‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’” *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires “special justification.” This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time.

We can find here no such special justification that would require us to overrule *Buckley*. Subsequent case law has not made *Buckley* a legal anomaly or otherwise undermined its basic legal principles. We cannot find in the respondents’ claims any demonstration that circumstances have changed so radically as to undermine *Buckley*’s critical factual assumptions. The respondents have not shown, for example, any dramatic

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<sup>q</sup> Recall that in Parts II-B-1 and II-B-2 Justice Breyer writes for himself and Chief Justice Roberts, but not Justice Alito.



increase in corruption or its appearance in Vermont; nor have they shown that expenditure limits are the only way to attack that problem. Cf. *McConnell*. At the same time, *Buckley* has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting campaign finance laws. And, as we have said, this Court has followed *Buckley*, upholding and applying its reasoning in later cases. Overruling *Buckley* now would dramatically undermine this reliance on our settled precedent.

For all these reasons, we find this a case that fits the *stare decisis* norm. And we do not perceive the strong justification that would be necessary to warrant overruling so well established a precedent. We consequently decline the respondents’ invitation to reconsider *Buckley*.

3

The respondents also ask us to distinguish these cases from *Buckley*. But we can find no significant basis for that distinction. Act 64’s expenditure limits are not substantially different from those at issue in *Buckley*. In both instances the limits consist of a dollar cap imposed upon a candidate’s expenditures. Nor is Vermont’s primary justification for imposing its expenditure limits significantly different from Congress’ rationale for the *Buckley* limits: preventing corruption and its appearance.

The sole basis on which the respondents seek to distinguish *Buckley* concerns a further supporting justification. They argue that expenditure limits are necessary in order to reduce the amount of time candidates must spend raising money. Increased campaign costs, together with the fear of a better-funded opponent, mean that, without expenditure limits, a candidate must spend too much time raising money instead of meeting the voters and engaging in public debate. *Buckley*, the respondents add, did not fully consider this justification. Had it done so, they say, the Court would have upheld, not struck down, FECA’s expenditure limits.

In our view, it is highly unlikely that fuller consideration of this time protection rationale would have changed *Buckley*’s result. The *Buckley* Court was aware of the connection between expenditure limits and a reduction in fundraising time. In a section of the opinion dealing with FECA’s public financing provisions, it wrote that Congress was trying to “free candidates from the rigors of fundraising.” The Court of Appeals’ opinion and the briefs filed in this Court pointed out that a natural consequence of higher campaign expenditures was that “candidates were compelled to allow to fund raising increasing and extreme amounts of money and energy.” And, in any event, the connection between high campaign expenditures and increased fundraising demands seems perfectly obvious.

Under these circumstances, the respondents’ argument amounts to no more than an invitation so to limit *Buckley*’s holding as effectively to overrule it. For the reasons set forth above, we decline that invitation as well. And, given *Buckley*’s continued authority, we must conclude that Act 64’s expenditure limits violate the First Amendment.

## III

We turn now to a more complex question, namely the constitutionality of Act 64's contribution limits. The parties, while accepting *Buckley*'s approach, dispute whether, despite *Buckley*'s general approval of statutes that limit campaign contributions, Act 64's contribution limits are so severe that in the circumstances its particular limits violate the First Amendment.

## A

As with the Act's expenditure limits, we begin with *Buckley*. In that case, the Court upheld the \$1,000 contribution limit before it. *Buckley* recognized that contribution limits, like expenditure limits, "implicate fundamental First Amendment interests," namely, the freedoms of "political expression" and "political association." But, unlike expenditure limits (which "necessarily reduc[e] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached"), contribution limits "involv[e] little direct restraint on" the contributor's speech. They do restrict "one aspect of the contributor's freedom of political association," namely, the contributor's ability to support a favored candidate, but they nonetheless "permi[t] the symbolic expression of support evidenced by a contribution," and they do "not in any way infringe the contributor's freedom to discuss candidates and issues."

Consequently, the Court wrote, contribution limitations are permissible as long as the Government demonstrates that the limits are "closely drawn" to match a "sufficiently important interest." It found that the interest advanced in the case, "prevent[ing] corruption" and its "appearance," was "sufficiently important" to justify the statute's contribution limits.

The Court also found that the contribution limits before it were "closely drawn." It recognized that, in determining whether a particular contribution limit was "closely drawn," the amount, or level, of that limit could make a difference. Indeed, it wrote that "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." But the Court added that such "distinctions in degree become significant only when they can be said to amount to differences in kind." Pointing out that it had "no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000," the Court found "no indication" that the \$1,000 contribution limitations imposed by the Act would have "any dramatic adverse effect on the funding of campaigns." It therefore found the limitations constitutional.

Since *Buckley*, the Court has consistently upheld contribution limits in other statutes. *Shrink* (\$1075 limit on contributions to candidates for Missouri state auditor); *CMA* (\$5,000 limit on contributions to multicandidate political committees). The Court has recognized, however, that contribution limits might *sometimes* work more harm to protected First Amendment interests than their anticorruption objectives could justify. See *Shrink*; *Buckley*. And individual Members of the Court have expressed concern lest

too low a limit magnify the “reputation-related or media-related advantages of incumbency and thereby insulat[e] legislators from effective electoral challenge.” *Shrink* (BREYER, J., joined by GINSBURG, J., concurring). In the cases before us, the petitioners challenge Act 64’s contribution limits on that basis.

## B

Following *Buckley*, we must determine whether Act 64’s contribution limits prevent candidates from “amassing the resources necessary for effective [campaign] advocacy,” whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny. In answering these questions, we recognize, as *Buckley* stated, that we have “no scalpel to probe” each possible contribution level. We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute’s legitimate objectives. In practice, the legislature is better equipped to make such empirical judgments, as legislators have “particular expertise” in matters related to the costs and nature of running for office. *McConnell*. Thus ordinarily we have deferred to the legislature’s determination of such matters.

Nonetheless, as *Buckley* acknowledged, we must recognize the existence of some lower bound. At some point the constitutional risks to the democratic electoral process become too great. After all, the interests underlying contribution limits, preventing corruption and the appearance of corruption, “directly implicate the integrity of our electoral process.” *McConnell*. Yet that rationale does not simply mean “the lower the limit, the better.” That is because contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability. Were we to ignore that fact, a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote. Thus, we see no alternative to the exercise of independent judicial judgment as a statute reaches those outer limits. And, where there is strong indication in a particular case, *i.e.*, danger signs, that such risks exist (both present in kind and likely serious in degree), courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute’s “tailoring,” that is, toward assessing the proportionality of the restrictions. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (“[A]n appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression’ ”).

We find those danger signs present here. As compared with the contribution limits upheld by the Court in the past, and with those in force in other States, Act 64’s limits are sufficiently low as to generate suspicion that they are not closely drawn. The Act sets its limits per election cycle, which includes both a primary and a general election. Thus, in a gubernatorial race with both primary and final election contests, the Act’s contribution limit amounts to \$200 per election per candidate (with significantly lower limits for contributions to candidates for State Senate and House of Representatives). These limits apply both to contributions from individuals and to contributions from political parties,

whether made in cash or in expenditures coordinated (or presumed to be coordinated) with the candidate.

These limits are well below the limits this Court upheld in *Buckley*. Indeed, in terms of real dollars (*i.e.*, adjusting for inflation), the Act's \$200 per election limit on individual contributions to a campaign for governor is slightly more than one-twentieth of the limit on contributions to campaigns for federal office before the Court in *Buckley*. Adjusted to reflect its value in 1976 (the year *Buckley* was decided), Vermont's contribution limit on campaigns for statewide office (including governor) amounts to \$113.91 per 2-year election cycle, or roughly \$57 per election, as compared to the \$1,000 per election limit on individual contributions at issue in *Buckley*. (The adjusted value of Act 64's limit on contributions from political parties to candidates for statewide office, again \$200 per candidate per election, is just over one one-hundredth of the comparable limit before the Court in *Buckley*, \$5,000 per election.) Yet Vermont's gubernatorial district-the entire State-is no smaller than the House districts to which *Buckley*'s limits applied. In 1976, the average congressional district contained a population of about 465,000. Indeed, Vermont's population is 621,000-about one-third *larger*.

Moreover, considered as a whole, Vermont's contribution limits are the lowest in the Nation. Act 64 limits contributions to candidates for statewide office (including governor) to \$200 per candidate per election. We have found no State that imposes a lower per election limit. Indeed, we have found only seven States that impose limits on contributions to candidates for statewide office at or below \$500 per election, more than twice Act 64's limit. Cf. Ariz.Rev.Stat. Ann. § 16-905 (\$760 per election cycle, or \$380 per election, adjusted for inflation); Colo. Const., Art. XXVIII, § 3 (\$500 per election, adjusted for inflation); Fla. Stat. § 106.08(1)(a) (2003) (\$500 per election); Me.Rev.Stat. Ann., Tit. 21A, § 1015(1) (1993) (\$500 for governor, \$250 for other statewide office, per election); Mass. Gen. Laws, ch. 55, § 7A (West Supp.2006) (\$500 per year, or \$250 per election); Mont.Code Ann. § 13-37-216(1)(a) (2005) (\$500 for governor, \$250 for other statewide office, per election); S.D. Codified Laws § 12-25-1.1 (2004) (\$1,000 per year, or \$500 per election). We are aware of no State that imposes a limit on contributions from political parties to candidates for statewide office lower than Act 64's \$200 per candidate per election limit. Cf. Me.Rev.Stat. Ann., Tit. 21A, § 1015(1) (1993) (next lowest: \$500 for contribution from party to candidate for governor, \$250 for contribution from party to candidate for other statewide office, both per election). Similarly, we have found only three States that have limits on contributions to candidates for state legislature below Act 64's \$150 and \$100 per election limits. Ariz.Rev.Stat. Ann. § 16-905 (West Cum.Supp.2005) (\$296 per election cycle, or \$148 per election); Mont.Code Ann. § 13-37-216(1)(a) (2005) (\$130 per election); S.D. Codified Laws § 12-25-1.1 (2004) (\$250 per year, or \$125 per election). And we are aware of no State that has a lower limit on contributions from political parties to state legislative candidates. Cf. Me.Rev.Stat. Ann., Tit. 21A, § 1015(1) (1993) (next lowest: \$250 per election).

Finally, Vermont's limit is well below the lowest limit this Court has previously upheld, the limit of \$1,075 per election (adjusted for inflation every two years) for candidates for Missouri state auditor. *Shrink*. The comparable Vermont limit of roughly

\$200 per election, not adjusted for inflation, is less than one-sixth of Missouri's current inflation-adjusted limit (\$1,275).

We recognize that Vermont's population is much smaller than Missouri's. Indeed, Vermont is about one-ninth of the size of Missouri. Thus, *per citizen*, Vermont's limit is slightly more generous. As of 2006, the ratio of the contribution limit to the size of the constituency in Vermont is .00064, while Missouri's ratio is .00044, 31% lower.

But this does not necessarily mean that Vermont's limits are less objectionable than the limit upheld in *Shrink*. A campaign for state auditor is likely to be less costly than a campaign for governor; campaign costs do not automatically increase or decrease in precise proportion to the size of an electoral district. See App. 66 (1998 winning candidate for Vermont state auditor spent about \$60,000; winning candidate for governor spent about \$340,000); Opensecrets.org, The Big Picture, 2004 Cycle: Hot Races, available at <http://www.opensecrets.org/bigpicture/hottraces.asp?cycle=2004> (as visited June 22, 2006, and available in Clerk of Court's case file) (U.S. Senate campaigns identified as competitive spend less per voter than U.S. House campaigns identified as competitive). Moreover, Vermont's limits, unlike Missouri's limits, apply in the same amounts to contributions made by political parties. Mo.Rev.Stat. § 130.032.4 (2000) (enacting limits on contributions from political parties to candidates 10 times higher than limits on contributions from individuals). And, as we have said, Missouri's (current) \$1,275 per election limit, unlike Vermont's \$200 per election limit, is indexed for inflation.

The factors we have mentioned offset any neutralizing force of population differences. At the very least, they make it difficult to treat *Shrink*'s (then) \$1,075 limit as providing affirmative support for the lawfulness of Vermont's far lower levels. Cf. *Shrink* (BREYER, J., concurring) (The *Shrink* "limit . . . is low enough to raise . . . a [significant constitutional] question"). And even were that not so, Vermont's failure to index for inflation means that Vermont's levels would soon be far lower than Missouri's regardless of the method of comparison.

In sum, Act 64's contribution limits are substantially lower than both the limits we have previously upheld and comparable limits in other States. These are danger signs that Act 64's contribution limits may fall outside tolerable First Amendment limits. We consequently must examine the record independently and carefully to determine whether Act 64's contribution limits are "closely drawn" to match the State's interests.

## C

Our examination of the record convinces us that, from a constitutional perspective, Act 64's contribution limits are too restrictive. We reach this conclusion based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections. *Taken together*, Act 64's substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their

candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns show that the Act is not closely drawn to meet its objectives. In particular, five factors together lead us to this decision.

*First*, the record suggests, though it does not conclusively prove, that Act 64's contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns. For one thing, the petitioners' expert, Clark Bensen, conducted a race-by-race analysis of the 1998 legislative elections (the last to take place before Act 64 took effect) and concluded that Act 64's contribution limits would have reduced the funds available in 1998 to Republican challengers in competitive races in amounts ranging from 18% to 53% of their total campaign income.

For another thing, the petitioners' expert witnesses produced evidence and analysis showing that Vermont political parties (particularly the Republican Party) "target" their contributions to candidates in competitive races, that those contributions represent a significant amount of total candidate funding in such races, and that the contribution limits will cut the parties' contributions to competitive races dramatically. [S]ee, e.g., Gierzynski & Breaux, *The Role of Parties in Legislative Campaign Financing*, 15 AM. REV. POLITICS 171 (1994); Thompson, Cassie, & Jewell, *A Sacred Cow or Just a Lot of Bull? Party and PAC Money in State Legislative Elections*, 47 POL. SCI. Q. 223 (1994). Their statistics showed that the party contributions accounted for a significant percentage of the total campaign income in those races. And their studies showed that Act 64's contribution limits would cut the party contributions by between 85% (for the legislature on average) and 99% (for governor).

More specifically, Bensen pointed out that in 1998, the Republican Party made contributions to 19 Senate campaigns in amounts that averaged \$2,001, which on average represented 16% of the recipient campaign's total income. Act 64 would reduce these contributions to \$300 per campaign, an average reduction of about 85%. The party contributed to 50 House campaigns in amounts averaging \$787, which on average represented 28% of the recipient campaign's total income. Act 64 would reduce these contributions to \$200 per campaign, an average reduction of 74.5%. And the party contributed \$40,600 to its gubernatorial candidate, an amount that accounted for about 16% of the candidate's funding. The Act would have reduced that contribution by 99%, to \$400.

Bensen added that 57% of all 1998 Senate campaigns and 30% of all House campaigns exceeded Act 64's expenditure limits, which were enacted along with the statute's contribution limits. Moreover, 27% of all Senate campaigns and 10% of all House campaigns spent more than double those limits.

The respondents did not contest these figures. Rather, they presented evidence that focused, not upon *strongly contested* campaigns, but upon the funding amounts available for the *average* campaign. The respondents' expert, Anthony Gierzynski, concluded, for example, that Act 64 would have a "minimal effect on ... candidates' ability to raise funds." But he rested this conclusion upon his finding that "only a small

proportion of” *all* contributions to *all* campaigns for state office “made during the last three elections would have been affected by the new limits.” The lower courts similarly relied almost exclusively on averages in assessing Act 64’s effect. See 118 F.Supp.2d, at 470 (“Approximately 88% to 96% of the campaign contributions *to recent House races* were under \$200” (emphasis added)); *id.*, at 478 (“Expert testimony revealed that over the last three election cycles the percentage *of all candidates’ contributions* received over the contribution limits was less than 10%” (emphasis added)).

The respondents’ evidence leaves the petitioners’ evidence un rebutted in certain key respects. That is because the critical question concerns not simply the *average* effect of contribution limits on fundraising but, more importantly, the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*. And information about *average* races, rather than *competitive* races, is only distantly related to that question, because competitive races are likely to be far more expensive than the average race. See, *e.g.*, N. Ornstein, T. Mann, & M. Malbin, VITAL STATISTICS ON CONGRESS 2001-2002, pp. 89-98 (2002) (data showing that spending in competitive elections, *i.e.*, where incumbent wins with less than 60% of vote or where incumbent loses, is far greater than in most elections, where incumbent wins with more than 60% of the vote). We concede that the record does contain some anecdotal evidence supporting the respondents’ position, namely, testimony about a post-Act-64 competitive mayoral campaign in Burlington, which suggests that a challenger can “amas[s] the resources necessary for effective advocacy,” *Buckley*. But the facts of that particular election are not described in sufficient detail to offer a convincing refutation of the implication arising from the petitioners’ experts’ studies.

Rather, the petitioners’ studies, taken together with low *average* Vermont campaign expenditures and the typically higher costs that a challenger must bear to overcome the name-recognition advantage enjoyed by an incumbent, raise a reasonable inference that the contribution limits are so low that they may pose a significant obstacle to candidates in competitive elections. Cf. Ornstein, *supra* (In 2000 U.S. House and Senate elections, successful challengers spent far more than the average candidate). Information about average races does not rebut that inference. Consequently, the inference amounts to one factor (among others) that here counts against the constitutional validity of the contribution limits.

*Second*, Act 64’s insistence that political parties abide by *exactly* the same low contribution limits that apply to other contributors threatens harm to a particularly important political right, the right to associate in a political party. See, *e.g.*, *California Democratic Party v. Jones* (describing constitutional importance of associating in political parties to elect candidates); *Timmons*; *Colorado I*; *Norman v. Reed*. Cf. *Buckley* (contribution limits constitute “only a marginal restriction” on First Amendment rights *because* contributor remains free to associate politically, *e.g.*, in a political party, and “assist personally” in the party’s “efforts on behalf of candidates”).

The Act applies its \$200 to \$400 limits—precisely the same limits it applies to an individual—to virtually all affiliates of a political party taken together as if they were a

single contributor. That means, for example, that the Vermont Democratic Party, taken together with all its local affiliates, can make one contribution of at most \$400 to the Democratic gubernatorial candidate, one contribution of at most \$300 to a Democratic candidate for State Senate, and one contribution of at most \$200 to a Democratic candidate for the State House of Representatives. The Act includes within these limits not only direct monetary contributions but also expenditures in kind: stamps, stationery, coffee, doughnuts, gasoline, campaign buttons, and so forth. Indeed, it includes all party expenditures “intended to promote the election of a specific candidate or group of candidates” as long as the candidate’s campaign “facilitate[s],” “solicit [s],” or “approve[s]” them. And a party expenditure that “primarily benefits six or fewer candidates who are associated with the” party is “presumed” to count against the party’s contribution limits.

In addition to the negative effect on “amassing funds” that we have described, the Act would severely limit the ability of a party to assist its candidates’ campaigns by engaging in coordinated spending on advertising, candidate events, voter lists, mass mailings, even yard signs. And, to an unusual degree, it would discourage those who wish to contribute small amounts of money to a party, amounts that easily comply with individual contribution limits. Suppose that many individuals do not know Vermont legislative candidates personally, but wish to contribute, say, \$20 or \$40, to the State Republican Party, with the intent that the party use the money to help elect whichever candidates the party believes would best advance its ideals and interests—the basic object of a political party. Or, to take a more extreme example, imagine that 6,000 Vermont citizens each want to give \$1 to the State Democratic Party because, though unfamiliar with the details of the individual races, they would like to make a small financial contribution to the goal of electing a Democratic state legislature. And further imagine that the party believes control of the legislature will depend on the outcome of three (and only three) House races. The Act forbids the party from giving \$2,000 (of the \$6,000) to each of its candidates in those pivotal races. Indeed, it permits the party to give no more than \$200 to each candidate, thereby thwarting the aims of the 6,000 donors from making a meaningful contribution to state politics by giving a small amount of money to the party they support. Thus, the Act would severely inhibit collective political activity by preventing a political party from using contributions by small donors to provide meaningful assistance to any individual candidate.

We recognize that we have previously upheld limits on contributions from political parties to candidates, in particular the federal limits on coordinated party spending. *Colorado II*. And we also recognize that any such limit will negatively affect *to some extent* the fund-allocating party function just described. But the contribution limits at issue in *Colorado II* were far less problematic, for they were significantly higher than Act 64’s limits. See *id.* (at least \$67,560 in coordinated spending and \$5,000 in direct cash contributions for U.S. Senate candidates, at least \$33,780 in coordinated spending and \$5,000 in direct cash contributions for U.S. House candidates). And they were much higher than the federal limits on contributions from individuals to candidates, thereby reflecting an effort by Congress to balance (1) the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates with



(2) the need to prevent the use of political parties “to circumvent contribution limits that apply to individuals.” Act 64, by placing identical limits upon contributions to candidates, whether made by an individual or by a political party, gives to the former consideration *no weight at all*.

We consequently agree with the District Court that the Act’s contribution limits “would reduce the voice of political parties” in Vermont to a “whisper.” And we count the special party-related harms that Act 64 threatens as a further factor weighing against the constitutional validity of the contribution limits.

*Third*, the Act’s treatment of volunteer services aggravates the problem. Like its federal statutory counterpart, the Act excludes from its definition of “contribution” all “services provided without compensation by individuals volunteering their time on behalf of a candidate.” But the Act does not exclude the expenses those volunteers incur, such as travel expenses, in the course of campaign activities. The Act’s broad definitions would seem to count those expenses against the volunteer’s contribution limit, at least where the spending was facilitated or approved by campaign officials. And, unlike the Federal Government’s treatment of comparable requirements, the State has not (insofar as we are aware) created an exception excluding such expenses.

The absence of some such exception may matter in the present context, where contribution limits are very low. That combination, low limits and no exceptions, means that a gubernatorial campaign volunteer who makes four or five round trips driving across the State performing volunteer activities coordinated with the campaign can find that he or she is near, or has surpassed, the contribution limit. So too will a volunteer who offers a campaign the use of her house along with coffee and doughnuts for a few dozen neighbors to meet the candidate, say, two or three times during a campaign. Cf. Vt. Stat. Ann., Tit. 17, § 2809(d) (2002) (excluding expenditures for such activities only up to \$100). Such supporters will have to keep careful track of all miles driven, postage supplied (500 stamps equals \$200), pencils and pads used, and so forth. And any carelessness in this respect can prove costly, perhaps generating a headline, “Campaign laws violated,” that works serious harm to the candidate.

These sorts of problems are unlikely to affect the constitutionality of a limit that is reasonably high. But Act 64’s contribution limits are so low, and its definition of “contribution” so broad, that the Act may well impede a campaign’s ability effectively to use volunteers, thereby making it more difficult for individuals to associate in this way. Again, the very low limits at issue help to transform differences in degree into difference in kind. And the likelihood of unjustified interference in the present context is sufficiently great that we must consider the lack of tailoring in the Act’s definition of “contribution” as an added factor counting against the constitutional validity of the contribution limits before us.

*Fourth*, unlike the contribution limits we upheld in *Shrink*, Act 64’s contribution limits are not adjusted for inflation. Its limits decline in real value each year. Indeed, in real dollars the Act’s limits have already declined by about 20% (\$200 in 2006 dollars

has a real value of \$160.66 in 1997 dollars). A failure to index limits means that limits which are already suspiciously low will almost inevitably become too low over time. It means that future legislation will be necessary to stop that almost inevitable decline, and it thereby imposes the burden of preventing the decline upon incumbent legislators who may not diligently police the need for changes in limit levels to assure the adequate financing of electoral challenges.

*Fifth*, we have found nowhere in the record any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems that we have described. Rather, the basic justifications the State has advanced in support of such limits are those present in *Buckley*. The record contains no indication that, for example, corruption (or its appearance) in Vermont is significantly more serious a matter than elsewhere. Indeed, other things being equal, one might reasonably believe that a contribution of say, \$250 (or \$450) to a candidate's campaign was less likely to prove a corruptive force than the far larger contributions at issue in the other campaign finance cases we have considered.

These five sets of considerations, taken together, lead us to conclude that Act 64's contribution limits are not narrowly tailored. Rather, the Act burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers; its contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation. Vermont does not point to a legitimate statutory objective that might justify these special burdens. We understand that many, though not all, campaign finance regulations impose certain of these burdens to some degree. We also understand the legitimate need for constitutional leeway in respect to legislative line-drawing. But our discussion indicates why we conclude that Act 64 in this respect nonetheless goes too far. It disproportionately burdens numerous First Amendment interests, and consequently, in our view, violates the First Amendment.

[Justice Breyer concluded that the constitutional portions of the law could not be severed from the unconstitutional portions of the law.] Given these difficulties, we believe the Vermont Legislature would have intended us to set aside the statute's contribution limits, leaving the legislature free to rewrite those provisions in light of the constitutional difficulties we have identified.

#### IV

We conclude that Act 64's expenditure limits violate the First Amendment as interpreted in *Buckley*. We also conclude that the specific details of Act 64's contribution limits require us to hold that those limits violate the First Amendment, for they burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance. Given our holding, we need not, and do not, examine the constitutionality of the statute's presumption that certain party expenditures are coordinated with a candidate. Accordingly, the judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings.

*It is so ordered.*

Justice ALITO, concurring in part and concurring in the judgment.

I concur in the judgment and join in Justice BREYER's opinion except for Parts II-B-1 and II-B-2. Contrary to the suggestion of those sections, respondents' primary defense of Vermont's expenditure limits is that those limits are consistent with *Buckley*. Only as a backup argument, an afterthought almost, do respondents make a naked plea for us to "revisit *Buckley*." This is fairly incongruous, given that respondents' defense of Vermont's contribution limits rests squarely on *Buckley* and later decisions that built on *Buckley*, and yet respondents fail to explain why it would be appropriate to reexamine only one part of the holding in *Buckley*. More to the point, respondents fail to discuss the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision. Indeed, only once in 99 pages of briefing from respondents do the words "*stare decisis*" appear, and that reference is in connection with *contribution* limits. Such an incomplete presentation is reason enough to refuse respondents' invitation to reexamine *Buckley*. See *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996).

Whether or not a case can be made for reexamining *Buckley* in whole or in part, what matters is that respondents do not do so here, and so I think it unnecessary to reach the issue.

[Justice Kennedy's opinion concurring in the judgment is omitted. Justice Kennedy noted that "The universe of campaign finance regulation is one this Court has in part created and in part permitted by its course of decisions. That new order may cause more problems than it solves. On a routine, operational level the present system requires us to explain why \$200 is too restrictive a limit while \$1,500 is not. Our own experience gives us little basis to make these judgments, and certainly no traditional or well-established body of law exists to offer guidance."]

Justice THOMAS, with whom Justice SCALIA joins, concurring in the judgment.

Although I agree with the plurality that [Act 64] is unconstitutional, I disagree with its rationale for striking down that statute. Invoking *stare decisis*, the plurality rejects the invitation to overrule *Buckley*. It then applies *Buckley* to invalidate the expenditure limitations and, less persuasively, the contribution limitations. I continue to believe that *Buckley* provides insufficient protection to political speech, the core of the First Amendment. The illegitimacy of *Buckley* is further underscored by the continuing inability of the Court (and the plurality here) to apply *Buckley* in a coherent and principled fashion. As a result, *stare decisis* should pose no bar to overruling *Buckley* and replacing it with a standard faithful to the First Amendment. Accordingly, I concur only in the judgment.

I adhere to my view that this Court erred in *Buckley* when it distinguished between contribution and expenditure limits, finding the former to be a less severe infringement on First Amendment rights. . . . Accordingly, I would overrule *Buckley* and subject both the contribution and expenditure restrictions of Act 64 to strict scrutiny, which they would fail.

## II

The plurality opinion, far from making the case for *Buckley* as a rule of law, itself demonstrates that *Buckley*'s limited scrutiny of contribution limits is "insusceptible of principled application," and accordingly is not entitled to *stare decisis* effect. Indeed, "when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Vieth* (plurality opinion). Today's newly minted, multifactor test, particularly when read in combination with the Court's decision in *Shrink, supra*, places this Court in the position of addressing the propriety of regulations of political speech based upon little more than its *impression* of the appropriate limits....

Justice STEVENS, dissenting.

Justice BREYER and Justice SOUTER debate whether the *per curiam* decision in *Buckley* forecloses any constitutional limitations on candidate expenditures. This is plainly an issue on which reasonable minds can disagree. The *Buckley* Court never explicitly addressed whether the pernicious effects of endless fundraising can serve as a compelling state interest that justifies expenditure limits yet its silence, in light of the record before it, suggests that it implicitly treated this proposed interest insufficient. Assuming this to be true, however, I am convinced that *Buckley*'s holding on expenditure limits is wrong, and that the time has come to overrule it....

Justice SOUTER, with whom Justice GINSBURG joins, and with whom Justice STEVENS joins as to Parts II and III, dissenting.

In 1997, the Legislature of Vermont passed Act 64 after a series of public hearings persuaded legislators that rehabilitating the State's political process required campaign finance reform. A majority of the Court today decides that the expenditure and contribution limits enacted are irreconcilable with the Constitution's guarantee of free speech. I would adhere to the Court of Appeals's decision to remand for further enquiry bearing on the limitations on candidates' expenditures, and I think the contribution limits satisfy controlling precedent. I respectfully dissent.

## I

Rejecting Act 64's expenditure limits as directly contravening *Buckley* is at least premature....

## II

Although I would defer judgment on the merits of the expenditure limitations, I

believe the Court of Appeals correctly rejected the challenge to the contribution limits. Low though they are, one cannot say that “the contribution limitation[s are] so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.” *Shrink Missouri*.

The limits set by Vermont are not remarkable departures either from those previously upheld by this Court or from those lately adopted by other States. The plurality concedes that on a per-citizen measurement Vermont’s limit for statewide elections “is slightly more generous” than the one set by the Missouri statute approved by this Court in *Shrink*, *supra*. Not only do those dollar amounts get more generous the smaller the district, they are consistent with limits set by the legislatures of many other States, all of them with populations larger than Vermont’s, some significantly so. See, e.g., *Montana Right to Life Assn. v. Eddleman*, 343 F.3d 1085, 1088 (C.A.9 2003) (approving \$400 limit for candidates filed jointly for Governor and Lieutenant Governor, since increased to \$500); *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445, 452 (C.A.1 2000) (\$500 limit for gubernatorial candidates in Maine); *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1113 (C.A.8 2005) (\$500 limit on contributions to legislative candidates in election years, \$100 in other years); *Florida Right to Life, Inc. v. Mortham*, No. 6:98-770-CV, 2000 WL 33733256, \*3 (M.D. Fla., Mar. 20, 2000) (\$500 limit on contributions to any state candidate). The point is not that this Court is bound by judicial sanctions of those numbers; it is that the consistency in legislative judgment tells us that Vermont is not an eccentric party of one, and that this is a case for the judicial deference that our own precedents say we owe here. See *Shrink* (BREYER, J., concurring) (“Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments”); see also *ante* (plurality opinion) (“[O]rdinarily we have deferred to the legislature’s determination of [matters related to the costs and nature of running for office]”).

To place Vermont’s contribution limits beyond the constitutional pale, therefore, is to forget not only the facts of *Shrink*, but also our self-admonition against second-guessing legislative judgments about the risk of corruption to which contribution limits have to be fitted. And deference here would surely not be overly complaisant. Vermont’s legislators themselves testified at length about the money that gets their special attention, see Act 64, H. 28, Legislative Findings and Intent (finding that “[s]ome candidates and elected officials, particularly when time is limited, respond and give access to contributors who make large contributions in preference to those who make small or no contributions”); 382 F.3d, at 122 (testimony of Elizabeth Ready: “If I have only got an hour at night when I get home to return calls, I am much more likely to return [a donor’s] call than I would [a non-donor’s]. . . . [W]hen you only have a few minutes to talk, there are certain people that get access” (alterations in original)). The record revealed the amount of money the public sees as suspiciously large, see 118 F.Supp.2d, at 479-480 (“The limits set by the legislature . . . accurately reflect the level of contribution considered suspiciously large by the Vermont public. Testimony suggested that amounts greater than the contribution limits are considered large by the Vermont public”). And testimony identified the amounts high enough to pay for effective campaigning in a State

where the cost of running tends to be on the low side, see *id* (“In the context of Vermont politics, \$200, \$300, and \$400 donations are clearly large, as the legislature determined. Small donations are considered to be strong acts of political support in this state. William Meub testified that a contribution of \$1 is meaningful because it represents a commitment by the contributor that is likely to become a vote for the candidate. Gubernatorial candidate Ruth Dwyer values the small contributions of \$5 so much that she personally sends thank you notes to those donors”); *id*. (“In Vermont, many politicians have run effective and winning campaigns with very little money, and some with no money at all. . . . Several candidates, campaign managers, and past and present government officials testified that they will be able to raise enough money to mount effective campaigns in the system of contribution limits established by Act 64”); *id*. (“Spending in Vermont statewide elections is very low. . . . Vermont ranks 49th out of the 50 states in campaign spending. The majority of major party candidates for statewide office in the last three election cycles spent less than what the spending limits of Act 64 would allow. . . . In Vermont legislative races, low-cost methods such as door-to-door campaigning are standard and even expected by the voters”).

Still, our cases do not say deference should be absolute. We can all imagine dollar limits that would be laughable, and per capita comparisons that would be meaningless because aggregated donations simply could not sustain effective campaigns. The plurality thinks that point has been reached in Vermont, and in particular that the low contribution limits threaten the ability of challengers to run effective races against incumbents. Thus, the plurality’s limit of deference is substantially a function of suspicion that political incumbents in the legislature set low contribution limits because their public recognition and easy access to free publicity will effectively augment their own spending power beyond anything a challenger can muster. The suspicion is, in other words, that incumbents cannot be trusted to set fair limits, because facially neutral limits do not in fact give challengers an even break. But this received suspicion is itself a proper subject of suspicion. The petitioners offered, and the plurality invokes, no evidence that the risk of a pro-incumbent advantage has been realized; in fact, the record evidence runs the other way, as the plurality concedes. I would not discount such evidence that these low limits are fair to challengers, for the experience of the Burlington race is confirmed by recent empirical studies addressing this issue of incumbent’s advantage. See, e.g., Eom & Gross, *Contribution Limits and Disparity in Contributions Between Gubernatorial Candidates*, 59 POL. RESEARCH Q. 99, 99 (2006) (“Analyses of both the number of contributors and the dollar amount of contributions [to gubernatorial candidates] suggest no support for an increased bias in favor of incumbents resulting from the presence of campaign contribution limits. If anything, contribution limits can work to reduce the bias that traditionally works in favor of incumbents. Also, contribution limits do not seem to increase disparities between gubernatorial candidates in general” (emphasis deleted)); Bardwell, *Money and Challenger Emergence in Gubernatorial Primaries*, 55 POL. RESEARCH Q. 653 (2002) (finding that contribution limits favor neither incumbents nor challengers); Hogan, *The Costs of Representation in State Legislatures: Explaining Variations in Campaign Spending*, 81 SOC. SCI. Q. 941, 952 (2000) (finding that contribution limits reduce incumbent spending but have no effect on challenger or open-seat candidate spending). The Legislature of Vermont evidently tried to account for the

realities of campaigning in Vermont, and I see no evidence of constitutional miscalculation sufficient to dispense with respect for its judgments....

IV

Because I would not pass upon the constitutionality of Vermont's expenditure limits prior to further enquiry into their fit with the problem of fundraising demands on candidates, and because I do not see the contribution limits as depressed to the level of political inaudibility, I respectfully dissent.

*Notes and Questions*

1. Both Justice Thomas and Justice Souter argue that the plurality opinion written by Justice Breyer (joined by Justice Alito and Chief Justice Roberts) is inconsistent with the Court's approach in *Shrink Missouri*. Is that a fair criticism? If so, what explains the Court's shift from *Shrink Missouri* to *Randall*? For an argument that the shift is explained by Justice Breyer's desire to keep the two newest Justices from joining the position of Justices Thomas and Scalia, see Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law after Randall v. Sorrell*, 68 OHIO STATE LAW JOURNAL 775 (2007).

2. The plurality opinion notes that seven states "impose limits on contributions to candidates for statewide office at or below \$500 per election." Are these statutes in danger of being struck down as unconstitutional? How should lower courts following *Randall* assess the constitutionality of these laws?

3. Justice Souter agrees that some contribution limit may be so laughably low as to be unconstitutional. How would he determine when that limit has been reached? Is a "danger signs" test better than a "laughability" test?

4. Does *Randall* signal a shift towards the "political markets"/competition approach to election law of Professors Issacharoff and Pildes (see casebook, page 567)? For an argument in the negative, see Hasen, *supra*.

5. What is the significance of Justice Alito's concurrence? Has he committed himself to upholding *any* campaign contribution limits in the future? Has Chief Justice Roberts? More generally, how is the Court's jurisprudence likely to shift in the campaign finance area? Toward or away from deference? Reconsider these questions after reading the next case.

**Federal Election Commission v. Wisconsin Right to Life, Inc.**  
127 S.Ct. 2652 (2007)

CHIEF JUSTICE ROBERTS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Parts III and IV, in which JUSTICE ALITO joins.

Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) makes it a federal crime for any corporation to broadcast, shortly before an election, any communication that names a federal candidate for elected office and is targeted to the electorate. In *McConnell v. Federal Election Comm’n*, this Court considered whether §203 was facially overbroad under the First Amendment because it captured within its reach not only campaign speech, or “express advocacy,” but also speech about public issues more generally, or “issue advocacy,” that mentions a candidate for federal office. The Court concluded that there was no overbreadth concern to the extent the speech in question was the “functional equivalent” of express campaign speech. On the other hand, the Court “assume[d]” that the interests it had found to “justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.” The Court nonetheless determined that §203 was not facially overbroad. Even assuming §203 “inhibit[ed] some constitutionally protected corporate and union speech,” the Court concluded that those challenging the law on its face had failed to carry their “heavy burden” of establishing that *all* enforcement of the law should therefore be prohibited.

Last Term, we reversed a lower court ruling, arising in the same litigation before us now, that our decision in *McConnell* left “no room” for as-applied challenges to §203. We held on the contrary that “[i]n upholding §203 against a facial challenge, we did not purport to resolve future as-applied challenges.” *Wisconsin Right to Life, Inc. v. Federal Election Comm’n*, 546 U.S. 410, 411-412 (2006) (*per curiam*) (*WRTL I*).

We now confront such an as-applied challenge. Resolving it requires us first to determine whether the speech at issue is the “functional equivalent” of speech expressly advocating the election or defeat of a candidate for federal office, or instead a “genuine issue a[d].” *McConnell*. We have long recognized that the distinction between campaign advocacy and issue advocacy “may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.” *Buckley*. Our development of the law in this area requires us, however, to draw such a line, because we have recognized that the interests held to justify the regulation of campaign speech and its “functional equivalent” “might not apply” to the regulation of issue advocacy. *McConnell*.

In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. We conclude that the speech at issue in this as-applied challenge is not the “functional equivalent” of express campaign speech. We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy, and



accordingly we hold that BCRA §203 is unconstitutional as applied to the advertisements at issue in these cases.

I

Prior to BCRA, corporations were free under federal law to use independent expenditures to engage in political speech so long as that speech did not expressly advocate the election or defeat of a clearly identified federal candidate. See *MCFL*; *Buckley*; 2 U.S.C. §441b(a), (b)(2).

BCRA significantly cut back on corporations' ability to engage in political speech. BCRA §203, at issue in these cases, makes it a crime for any labor union or incorporated entity - whether the United Steelworkers, the American Civil Liberties Union, or General Motors - to use its general treasury funds to pay for any "electioneering communication." BCRA's definition of "electioneering communication" is clear and expansive. It encompasses any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office.

Appellee Wisconsin Right to Life, Inc. (WRTL), is a nonprofit, nonstock, ideological advocacy corporation recognized by the Internal Revenue Service as tax exempt under §501(c)(4) of the Internal Revenue Code. On July 26, 2004, as part of what it calls a "grassroots lobbying campaign," WRTL began broadcasting a radio advertisement entitled "Wedding." The transcript of "Wedding" reads as follows:

"PASTOR: And who gives this woman to be married to this man?"

"BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up ...

"VOICE-OVER: Sometimes it's just not fair to delay an important decision.

"But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve.

"It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

"Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

"Visit: BeFair.org

"Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee."

On the same day, WRTL aired a similar radio ad entitled "Loan." It had also invested treasury funds in producing a television ad entitled "Waiting," which is similar in substance and format to "Wedding" and "Loan."

WRTL planned on running “Wedding,” “Waiting,” and “Loan” throughout August 2004 and financing the ads with funds from its general treasury. It recognized, however, that as of August 15, 30 days prior to the Wisconsin primary, the ads would be illegal “electioneering communication[s]” under BCRA §203.

Believing that it nonetheless possessed a First Amendment right to broadcast these ads, WRTL filed suit against the Federal Election Commission (FEC) on July 28, 2004, seeking declaratory and injunctive relief before a three-judge District Court. WRTL alleged that BCRA’s prohibition on the use of corporate treasury funds for “electioneering communication[s]” as defined in the Act is unconstitutional as applied to “Wedding,” “Loan,” and “Waiting,” as well as any materially similar ads it might seek to run in the future.

Just before the BCRA blackout period was to begin, the District Court denied a preliminary injunction, concluding that “the reasoning of the *McConnell* Court leaves no room for the kind of ‘as applied’ challenge WRTL propounds before us.” In response to this ruling, WRTL did not run its ads during the blackout period. The District Court subsequently dismissed WRTL’s complaint. On appeal, we vacated the District Court’s judgment, holding that *McConnell* “did not purport to resolve future as-applied challenges” to BCRA §203, and remanded “for the District Court to consider the merits of WRTL’s as-applied challenge in the first instance.” *WRTL I*.

On remand...[after holding the case not moot], the court began by noting that under *McConnell*, BCRA could constitutionally proscribe “express advocacy—defined as ads that expressly advocate the election or defeat of a candidate for federal office—and the “functional equivalent” of such advocacy. Stating that it was limiting its inquiry to “language within the four corners” of the ads, the District Court concluded that the ads were *not* express advocacy or its functional equivalent, but instead “genuine issue ads.” Then, reaching a question “left open in *McConnell*,” the court held that no compelling interest justified BCRA’s regulation of genuine issue ads such as those WRTL sought to run.

One judge dissented, contending that the majority’s “plain facial analysis of the text in WRTL’s 2004 advertisements” ignored “the context in which the text was developed.” In that judge’s view, a contextual analysis of the ads revealed “deep factual rifts between the parties concerning the purpose and intended effects of the ads” such that neither side was entitled to summary judgment.

The FEC and intervenors filed separate notices of appeal and jurisdictional statements. We consolidated the two appeals and set the matter for briefing and argument, postponing further consideration of jurisdiction to the hearing on the merits.

## II

[The Court held the case is not moot.]

### III

WRTL rightly concedes that its ads are prohibited by BCRA §203. Each ad clearly identifies Senator Feingold, who was running (unopposed) in the Wisconsin Democratic primary on September 14, 2004, and each ad would have been “targeted to the relevant electorate” during the BCRA blackout period. WRTL further concedes that its ads do not fit under any of BCRA’s exceptions to the term “electioneering communication.” The only question, then, is whether it is consistent with the First Amendment for BCRA §203 to prohibit WRTL from running these three ads.

#### A

Appellants contend that WRTL should be required to demonstrate that BCRA is unconstitutional as applied to the ads. After all, appellants reason, *McConnell* already held that BCRA §203 was facially valid. These cases, however, present the separate question whether §203 may constitutionally be applied to these specific ads. Because BCRA §203 burdens political speech, it is subject to strict scrutiny. See *McConnell*; *Austin*; *MCFL* (plurality opinion); *Bellotti*; *Buckley*. Under strict scrutiny, the *Government* must prove that applying BCRA to WRTL’s ads furthers a compelling interest and is narrowly tailored to achieve that interest. See *Bellotti*.

The strict scrutiny analysis is, of course, informed by our precedents. This Court has already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent. *McConnell*. So to the extent the ads in these cases fit this description, the FEC’s burden is not onerous; all it need do is point to *McConnell* and explain why it applies here. If, on the other hand, WRTL’s ads are *not* express advocacy or its equivalent, the Government’s task is more formidable. It must then demonstrate that banning such ads during the blackout periods is narrowly tailored to serve a compelling interest. No precedent of this Court has yet reached that conclusion.

#### B

The FEC, intervenors, and the dissent below contend that *McConnell* already established the constitutional test for determining if an ad is the functional equivalent of express advocacy: whether the ad is intended to influence elections and has that effect. Here is the relevant portion of our opinion in *McConnell*:

[P]laintiffs argue that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications.

This argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are

intended to influence the voters' decisions and have that effect.

WRTL and the District Court majority, on the other hand, claim that *McConnell* did not adopt any test as the standard for future as-applied challenges. We agree. *McConnell*'s analysis was grounded in the evidentiary record before the Court. Two key studies in the *McConnell* record constituted "the central piece of evidence marshaled by defenders of BCRA's electioneering communication provisions in support of their constitutional validity." *McConnell v. FEC*, 251 F.Supp.2d 176, 307, 308 (DC 2003) (opinion of Henderson, J.) (internal quotation marks and brackets omitted). Those studies asked "student coders" to separate ads based on whether the students thought the "purpose" of the ad was "to provide information about or urge action on a bill or issue," or "to generate support or opposition for a particular candidate." *Id.* The studies concluded "'that BCRA's definition of Electioneering Communications accurately captures those ads that *have the purpose or effect of supporting candidates for election to office.*" *Ibid.* (emphasis in original).

When the *McConnell* Court considered the possible facial overbreadth of §203, it looked to the studies in the record analyzing ads broadcast during the blackout periods, and those studies had classified the ads in terms of intent and effect. The Court's assessment was accordingly phrased in the same terms, which the Court regarded as sufficient to conclude, on the record before it, that the plaintiffs had not "carried their heavy burden of proving" that §203 was facially overbroad and could not be enforced in *any* circumstances. The Court did not explain that it was adopting a particular test for determining what constituted the "functional equivalent" of express advocacy. The fact that the student coders who helped develop the evidentiary record before the Court in *McConnell* looked to intent and effect in doing so, and that the Court dealt with the record on that basis in deciding the facial overbreadth claim, neither compels nor warrants accepting that same standard as the constitutional test for separating, in an as-applied challenge, political speech protected under the First Amendment from that which may be banned.<sup>4</sup>

More importantly, this Court in *Buckley* had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates. After noting the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other, the *Buckley* Court explained that analyzing the question in terms "'of intent and of effect'" would afford "'no security for free discussion.'" It therefore rejected such an approach, and *McConnell* did not purport to overrule *Buckley* on this point-or even address what *Buckley* had to say on the subject.

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<sup>4</sup> This is particularly true given that the methodology, data, and conclusions of the two studies were the subject of serious dispute among the District Court judges. Compare *McConnell v. FEC* (opinion of Henderson, J.) (stating that the studies were flawed and of limited evidentiary value), with *id.*, at 585, 583-588 (opinion of Kollar-Kotelly, J.) (finding the studies generally credible, but stating that "I am troubled by the fact that coders in both studies were asked questions regarding their own perceptions of the advertisements' purposes, and that [some of] these perceptions were later recoded" by study supervisors). Nothing in this Court's opinion in *McConnell* suggests it was resolving the sharp disagreements about the evidentiary record in this respect.

For the reasons regarded as sufficient in *Buckley*, we decline to adopt a test for as-applied challenges turning on the speaker’s intent to affect an election. The test to distinguish constitutionally protected political speech from speech that BCRA may proscribe should provide a safe harbor for those who wish to exercise First Amendment rights. The test should also “reflec[t] our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’” *Buckley*. A test turning on the intent of the speaker does not remotely fit the bill.

Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of §203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard “blankets with uncertainty whatever may be said,” and “offers no security for free discussion.” *Buckley*. The FEC does not disagree. In its brief filed in the first appeal in this litigation, it argued that a “constitutional standard that turned on the subjective sincerity of a speaker’s message would likely be incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation.”<sup>5</sup> F

A test focused on the speaker’s intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another. See M. Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy* 91 (2001) (“[U]nder well-accepted First Amendment doctrine, a speaker’s motivation is entirely irrelevant to the question of constitutional protection”). “First Amendment freedoms need breathing space to survive.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). An intent test provides none.

*Buckley* also explains the flaws of a test based on the actual effect speech will have on an election or on a particular segment of the target audience. Such a test “‘puts the speaker ... wholly at the mercy of the varied understanding of his hearers.’” 424 U.S., at 43. It would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech.

## C

“The freedom of speech ... guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without

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<sup>5</sup> Consider what happened in these cases. The District Court permitted extensive discovery on the assumption that WRTL’s intent was relevant. As a result, the defendants deposed WRTL’s executive director, its legislative director, its political action committee director, its lead communications consultant, and one of its fundraisers. WRTL also had to turn over many documents related to its operations, plans, and finances. Such litigation constitutes a severe burden on political speech.

previous restraint or fear of subsequent punishment.” *Bellotti*. See *Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N. Y.*, 447 U.S. 530, 534 (1980). To safeguard this liberty, the proper standard for an as-applied challenge to BCRA §203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. See *Buckley, supra*, at 43-44, 96 S.Ct. 612. It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. See *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). And it must eschew “the open-ended rough-and-tumble of factors,” which “invit[es] complex argument in a trial court and a virtually inevitable appeal.” *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). In short, it must give the benefit of any doubt to protecting rather than stifling speech. See *New York Times Co. v. Sullivan, supra*, at 269-270, 84 S.Ct. 710.

In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, WRTL’s three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.

Despite these characteristics, appellants assert that the content of WRTL’s ads alone betrays their electioneering nature. Indeed, the FEC suggests that *any* ad covered by §203 that includes “an appeal to citizens to contact their elected representative” is the “functional equivalent” of an ad saying defeat or elect that candidate. We do not agree. To take just one example, during a blackout period the House considered the proposed Universal National Service Act. There would be no reason to regard an ad supporting or opposing that Act, and urging citizens to contact their Representative about it, as the equivalent of an ad saying vote for or against the Representative. Issue advocacy conveys information and educates. An issue ad’s impact on an election, if it exists at all, will come only after the voters hear the information and choose-uninvited by the ad-to factor it into their voting decisions.<sup>6</sup>

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<sup>6</sup> For these reasons, we cannot agree with JUSTICE SOUTER’s assertion that “anyone who heard the Feingold ads ... would know that WRTL’s message was to vote against Feingold.” The dissent supports this assertion by likening WRTL’s ads to the “Jane Doe” example identified in *McConnell*. But that ad “condemned Jane Doe’s record on a particular issue.” WRTL’s ads do not do so; they instead take a position on the filibuster issue and exhort constituents to contact Senators Feingold and Kohl to advance that position. Indeed, one would not even know from the ads whether Senator Feingold supported or opposed filibusters. JUSTICE SOUTER is confident Wisconsin independently knew Senator Feingold’s position on filibusters, but we think that confidence misplaced. A prominent study found, for example, that during the 2000 election cycle, 85 percent of respondents to a survey were not even able to name at least one candidate for the House of Representatives in their own district. See Inter-university Consortium for Political and Social Research, American National Election Study, 2000: Pre- and Post-Election Survey 243 (N. Burns et al. eds.2002) online at <http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/03131.xml>.

The FEC and intervenors try to turn this difference to their advantage, citing *McConnell*'s statements "that the most effective campaign ads, like the most effective commercials for products ... avoid the [*Buckley*] magic words [expressly advocating the election or defeat of a candidate]," and that advertisers "would seldom choose to use such words even if permitted," *id.* An expert for the FEC in these cases relied on those observations to argue that WRTL's ads are especially effective electioneering ads because they are "subtl[e]," focusing on issues rather than simply exhorting the electorate to vote against Senator Feingold. Rephrased a bit, the argument perversely maintains that the *less* an issue ad resembles express advocacy, the more likely it is to be the functional equivalent of express advocacy. This "heads I win, tails you lose" approach cannot be correct. It would effectively eliminate First Amendment protection for genuine issue ads, contrary to our conclusion in *WRTL I* that as-applied challenges to § 203 are available, and our assumption in *McConnell* that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." Under appellants' view, there can be no such thing as a genuine issue ad during the blackout period—it is simply a very effective electioneering ad.

Looking beyond the content of WRTL's ads, the FEC and intervenors argue that several "contextual" factors prove that the ads are the equivalent of express advocacy. First, appellants cite evidence that during the same election cycle, WRTL and its Political Action Committee (PAC) actively opposed Senator Feingold's reelection and identified filibusters as a campaign issue. This evidence goes to WRTL's subjective intent in running the ads, and we have already explained that WRTL's intent is irrelevant in an as-applied challenge. Evidence of this sort is therefore beside the point, as it should be—WRTL does not forfeit its right to speak on issues simply because in other aspects of its work it also opposes candidates who are involved with those issues.

Next, the FEC and intervenors seize on the timing of WRTL's ads. They observe that the ads were to be aired near elections but not near actual Senate votes on judicial nominees, and that WRTL did not run the ads after the elections. To the extent this evidence goes to WRTL's subjective intent, it is again irrelevant. To the extent it nonetheless suggests that the ads should be interpreted as express advocacy, it falls short. That the ads were run close to an election is unremarkable in a challenge like this. *Every* ad covered by BCRA §203 will by definition air just before a primary or general election. If this were enough to prove that an ad is the functional equivalent of express advocacy, then BCRA would be constitutional in all of its applications. This Court unanimously rejected this contention in *WRTL I*.

That the ads were run shortly after the Senate had recessed is likewise unpersuasive. Members of Congress often return to their districts during recess, precisely to determine the views of their constituents; an ad run at that time may succeed in getting more constituents to contact the Representative while he or she is back home. In any event, a group can certainly choose to run an issue ad to coincide with public interest rather than a floor vote. Finally, WRTL did not resume running its ads after the BCRA blackout period because, as it explains, the debate had changed. The focus of the Senate

was on whether a majority would vote to change the Senate rules to eliminate the filibuster-not whether individual Senators would continue filibustering. Given this change, WRTL's decision not to continue running its ads after the blackout period does not support an inference that the ads were the functional equivalent of electioneering.

The last piece of contextual evidence the FEC and intervenors highlight is the ads' "specific and repeated cross-reference" to a website. In the middle of the website's homepage, in large type, were the addresses, phone numbers, fax numbers, and email addresses of Senators Feingold and Kohl. Wisconsinites who viewed "Wedding," "Loan," or "Waiting" and wished to contact their Senators-as the ads requested-would be able to obtain the pertinent contact information immediately upon visiting the website. This is fully consistent with viewing WRTL's ads as genuine issue ads. The website also stated both Wisconsin Senators' positions on judicial filibusters, and allowed visitors to sign up for "e-alerts," some of which contained exhortations to vote against Senator Feingold. These details lend the electioneering interpretation of the ads more credence, but again, WRTL's participation in express advocacy in other aspects of its work is not a justification for censoring its issue-related speech. Any express advocacy on the website, already one step removed from the text of the ads themselves, certainly does not render an interpretation of the ads as genuine issue ads unreasonable.

Given the standard we have adopted for determining whether an ad is the "functional equivalent" of express advocacy, contextual factors of the sort invoked by appellants should seldom play a significant role in the inquiry. Courts need not ignore basic background information that may be necessary to put an ad in context-such as whether an ad "describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future," but the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns.

At best, appellants have shown what we have acknowledged at least since *Buckley*: that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." 424 U.S., at 42, 96 S.Ct. 612. Under the test set forth above, that is not enough to establish that the ads can only reasonably be viewed as advocating or opposing a candidate in a federal election. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.<sup>7</sup>

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<sup>7</sup> JUSTICE SCALIA thinks our test impermissibly vague. As should be evident, we agree with JUSTICE SCALIA on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of "contextual" factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech. And keep in mind this test is only



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Because WRTL’s ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy, and therefore fall outside the scope of *McConnell*’s holding.<sup>8</sup>

#### IV

BCRA §203 can be constitutionally applied to WRTL’s ads only if it is narrowly tailored to further a compelling interest. *McConnell*; *Bellotti*; *Buckley*. This Court has never recognized a compelling interest in regulating ads, like WRTL’s, that are neither express advocacy nor its functional equivalent. The District Court below considered interests that might justify regulating WRTL’s ads here, and found none sufficiently compelling. We reach the same conclusion.<sup>9</sup>

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triggered if the speech meets the brightline requirements of BCRA § 203 in the first place. JUSTICE SCALIA’s criticism of our test is all the more confusing because he accepts WRTL’s proposed three-prong test as “clear.” We do not think our test any vaguer than WRTL’s, and it is more protective of political speech....

<sup>8</sup> Nothing in *McConnell*’s statement that the “vast majority” of issue ads broadcast in the periods preceding federal elections had an “electioneering purpose” forecloses this conclusion. Courts do not resolve unspecified as-applied challenges in the course of resolving a facial attack, so *McConnell* could not have settled the issue we address today. Indeed, *WRTL I* confirmed as much. By the same token, in deciding this as-applied challenge, we have no occasion to revisit *McConnell*’s conclusion that the statute is not facially overbroad.

The “vast majority” language, moreover, is beside the point. The *McConnell* Court did not find that a “vast majority” of the issue ads considered were the functional equivalent of direct advocacy. Rather, it found that such ads had an “electioneering purpose.” For the reasons we have explained, “purpose” is not the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express campaign advocacy.. In addition, the “vast majority” statement was not necessary to the Court’s facial holding in *McConnell*. The standard required for a statute to survive an overbreadth challenge is not that the “vast majority” of a statute’s applications be legitimate. “[B]road language ... unnecessary to the Court’s decision ... cannot be considered binding authority.” *Kastigar v. United States*, 406 U.S. 441 (1972).

<sup>9</sup> The dissent stresses a number of points that, while not central to our decision, nevertheless merit a response. First, the dissent overstates its case when it asserts that the “PAC alternative” gives corporations a constitutionally sufficient outlet to speak. PACs impose well-documented and onerous burdens, particularly on small nonprofits. See *MCFL* (plurality opinion). *McConnell* did conclude that segregated funds “provid[e] corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy” and its functional equivalent, but that holding did not extend beyond functional equivalents-and if it did, the PAC option would justify regulation of all corporate speech, a proposition we have rejected, see *Bellotti*. [Did *Bellotti* so hold?—EDS.] Second, the response that a speaker should just take out a newspaper ad, or use a website, rather than complain that it cannot speak through a broadcast communication is too glib. Even assuming for the sake of argument that the possibility of using a different medium of communication has relevance in determining the permissibility of a limitation on speech, newspaper ads and websites are not reasonable alternatives to broadcast speech in terms of impact and effectiveness. Third, we disagree with the dissent’s view that corporations can still speak by changing what they say to avoid mentioning candidates. That argument is akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says “I disagree with the draft,” cf. *Cohen v. California*, 403 U.S. 15 (1971), or telling 44 Liquormart that it can advertise so long as it avoids mentioning prices, cf. 44

At the outset, we reject the contention that issue advocacy may be regulated because express election advocacy may be, and “the speech involved in so-called issue advocacy is [not] any more core political speech than are words of express advocacy.” *McConnell*. This greater-includes-the-lesser approach is not how strict scrutiny works. A corporate ad expressing support for the local football team could not be regulated on the ground that such speech is less “core” than corporate speech about an election, which we have held may be restricted. A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech. That a compelling interest justifies restrictions on express advocacy tells us little about whether a compelling interest justifies restrictions on issue advocacy; the *McConnell* Court itself made just that point. Such a greater-includes-the-lesser argument would dictate that virtually *all* corporate speech can be suppressed, since few kinds of speech can lay claim to being as central to the First Amendment as campaign speech. That conclusion is clearly foreclosed by our precedent. See, e.g., *Bellotti*.

This Court has long recognized “the governmental interest in preventing corruption and the appearance of corruption” in election campaigns. *Buckley*. This interest has been invoked as a reason for upholding *contribution* limits. As *Buckley* explained, “[t]o 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.” We have suggested that this interest might also justify limits on electioneering *expenditures* because it may be that, in some circumstances, “large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.” *Id.*

*McConnell* arguably applied this interest—which this Court had only assumed could justify regulation of express advocacy—to ads that were the “functional equivalent” of express advocacy. See 540 U.S., at 204–206, 124 S.Ct. 619. But to justify regulation of WRTL’s ads, this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy. Enough is enough. Issue ads like WRTL’s are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them. To equate WRTL’s ads with contributions is to ignore their value as political speech.

Appellants argue that an expansive definition of “functional equivalent” is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions. Cf. *McConnell*. But such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny. “[T]he desire for a bright-line rule ... hardly constitutes the *compelling* state interest necessary to justify any infringement on First

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*Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Such notions run afoul of “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995).

Amendment freedom.” *MCFL*.

A second possible compelling interest recognized by this Court lies in addressing 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.” *Austin*. *Austin* invoked this interest to uphold a state statute making it a felony for corporations to use treasury funds for independent expenditures on express election advocacy. *Id.* *McConnell* also relied on this interest in upholding regulation not just of express advocacy, but also its “functional equivalent.”

These cases did not suggest, however, that the interest in combating “a different type of corruption” extended beyond campaign speech. Quite the contrary. Two of the Justices who joined the 6-to-3 majority in *Austin* relied, in upholding the constitutionality of the ban on campaign speech, on the fact that corporations retained freedom to speak on issues as distinct from election campaigns. See (Brennan, J., concurring) (describing fact that campaign speech ban “does not regulate corporate expenditures in referenda or other corporate expression” as “reflect [ing] the requirements of our decisions”); (STEVENS, J., concurring) (“[T]here is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other”). The *McConnell* Court similarly was willing to “assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.” And our decision in *WRTL I* reinforced the validity of that assumption by holding that BCRA §203 is susceptible to as-applied challenges.

Accepting the notion that a ban on campaign speech could also embrace issue advocacy would call into question our holding in *Bellotti* that the corporate identity of a speaker does not strip corporations of all free speech rights. It would be a constitutional “bait and switch” to conclude that corporate campaign speech may be banned in part *because* corporate issue advocacy is not, and then assert that corporate issue advocacy may be banned as well, pursuant to the same asserted compelling interest, through a broad conception of what constitutes the functional equivalent of campaign speech, or by relying on the inability to distinguish campaign speech from issue advocacy.

The FEC and intervenors do not argue that the *Austin* interest justifies regulating genuine issue ads. Instead, they focus on establishing that WRTL’s ads are the functional equivalent of express advocacy—a contention we have already rejected. We hold that the interest recognized in *Austin* as justifying regulation of corporate campaign speech and extended in *McConnell* to the functional equivalent of such speech has no application to issue advocacy of the sort engaged in by WRTL.<sup>10</sup>

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<sup>10</sup> The interest recognized in *Austin* stems from a concern that “[t]he resources in the treasury of a business corporation ... are not an indication of popular support for the corporation’s political ideas.” *Austin*. Some of WRTL’s *amici* contend that this interest is not implicated here because of WRTL’s status as a nonprofit advocacy organization. They assert that “[s]peech by nonprofit advocacy groups on behalf of their members does not ‘corrupt’ candidates or ‘distort’ the political marketplace,” and that “[n]onprofit advocacy groups funded by individuals are readily distinguished from for-profit corporations funded by

Because WRTL’s ads are not express advocacy or its functional equivalent, and because appellants identify no interest sufficiently compelling to justify burdening WRTL’s speech, we hold that BCRA §203 is unconstitutional as applied to WRTL’s “Wedding,” “Loan,” and “Waiting” ads.

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These cases are about political speech. The importance of the cases to speech and debate on public policy issues is reflected in the number of diverse organizations that have joined in supporting WRTL before this Court: the American Civil Liberties Union, the National Rifle Association, the American Federation of Labor and Congress of Industrial Organizations, the Chamber of Commerce of the United States of America, Focus on the Family, the Coalition of Public Charities, the Cato Institute, and many others.

Yet, as is often the case in this Court’s First Amendment opinions, we have gotten this far in the analysis without quoting the Amendment itself: “Congress shall make no law ... abridging the freedom of speech.” The Framers’ actual words put these cases in proper perspective. Our jurisprudence over the past 216 years has rejected an absolutist interpretation of those words, but when it comes to drawing difficult lines in the area of pure political speech-between what is protected and what the Government may ban-it is worth recalling the language we are applying. *McConnell* held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. We have no occasion to revisit that determination today. But when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban-the issue we *do* have to decide-we give the benefit of the doubt to speech, not censorship. The First Amendment’s command that “Congress shall make no law ... abridging the freedom of speech” demands at least that.

The judgment of the United States District Court for the District of Columbia is affirmed.

*It is so ordered.*

JUSTICE ALITO, concurring.

I join the principal opinion because I conclude (a) that §203, as applied, cannot constitutionally ban any advertisement that may reasonably be interpreted as anything other than an appeal to vote for or against a candidate, (b) that the ads at issue here may reasonably be interpreted as something other than such an appeal, and (c) that because §203 is unconstitutional as applied to the advertisements before us, it is unnecessary to go further and decide whether § 203 is unconstitutional on its face. If it turns out that the

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general treasuries.” We do not pass on this argument in this as-applied challenge because WRTL’s funds for its ads were not derived solely from individual contributions.

implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, see (SCALIA, J., joined by KENNEDY, and THOMAS, JJ., concurring in part and concurring in judgment), we will presumably be asked in a future case to reconsider the holding in *McConnell*, that § 203 is facially constitutional.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in part and concurring in the judgment....

*Austin* was a significant departure from ancient First Amendment principles. In my view, it was wrongly decided. The flawed rationale upon which it is based is examined at length elsewhere, including in a dissenting opinion in *Austin* that a Member of the 5-to-4 *McConnell* majority had joined. But at least *Austin* was limited to express advocacy, and *nonexpress* advocacy was presumed to remain protected under *Buckley* and *Bellotti*, even when engaged in by corporations.

Three Terms ago the Court extended *Austin*'s flawed rationale to cover an even broader class of speech. In *McConnell*, the Court rejected a facial overbreadth challenge to BCRA §203's restrictions on corporate and union advertising, which were not limited to express advocacy but covered vast amounts of nonexpress advocacy (embraced within the term "electioneering communications")....

### III

The question is whether WRTL meets the standard for prevailing in an as-applied challenge to BCRA §203. Answering that question obviously requires the Court to articulate the standard. The most obvious one, and the one suggested by the Federal Election Commission (FEC) and intervenors, is the standard set forth in *McConnell* itself: whether the advertisement is the "functional equivalent of express advocacy."

*McConnell*. Intervenors flesh out the standard somewhat further: "[C]ourts should ask whether the ad's audience would reasonably understand the ad, in the context of the campaign, to promote or attack the candidate." The District Court instead articulated a five-factor test that looks to whether the ad under review "(1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate." The backup definition of "electioneering communications" contained in BCRA itself, see n. 2, *supra*, offers another possibility. It covers any communication that "promotes or supports a candidate for that office ... (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." And the principal opinion in this case offers a variation of its own (one bearing a strong likeness to BCRA's backup definition): whether "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

There is a fundamental and inescapable problem with all of these various tests. Each of them (and every other test that is tied to the public perception, or a court's perception, of the import, the intent, or the effect of the ad) is impermissibly vague and thus ineffective to vindicate the fundamental First Amendment rights of the large segment of society to which §203 applies. Consider the application of these tests to WRTL's ads: There is not the slightest doubt that these ads had an issue-advocacy component. They explicitly urged lobbying on the pending legislative issue of appellate-judge filibusters. The question before us is whether something about them caused them to be the "functional equivalent" of express advocacy, and thus constitutionally subject to BCRA's criminal penalty. Does any of the tests suggested above answer this question with the degree of clarity necessary to avoid the chilling of fundamental political discourse? I think not.

The "functional equivalent" test does nothing more than restate the question (and make clear that the electoral advocacy need not be express). The test which asks how the ad's audience "would reasonably understand the ad" provides ample room for debate and uncertainty. The District Court's five-factor test does not (and could not possibly) specify how much weight is to be given to each factor-and includes the inherently vague factor of whether the ad "promotes, attacks, supports, or opposes the named candidate." (Does attacking the king's position attack the king?) The tests which look to whether the ad is "susceptible of no plausible meaning" or "susceptible of no reasonable interpretation" other than an exhortation to vote for or against a specific candidate seem tighter. They ultimately depend, however, upon a judicial judgment (or is it-worse still-a jury judgment?) concerning "reasonable" or "plausible" import that is far from certain, that rests upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decisionmaker's subjective evaluation of the importance or unimportance of the challenged speech. In this critical area of political discourse, the speaker cannot be compelled to risk felony prosecution with no more assurance of impunity than his prediction that what he says will be found susceptible of some "reasonable interpretation other than as an appeal to vote for or against a specific candidate." Under these circumstances, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech-harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*.

It will not do to say that this burden must be accepted-that WRTL's antifilibustering, constitutionally protected speech can be constrained-in the necessary pursuit of electoral "corruption."...

*Buckley* itself compels the conclusion that these tests fall short of the clarity that the First Amendment demands....

If a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it. Especially since a consequence of the express-advocacy interpretation

was the invalidation of the entire limitation on independent expenditures, in part because the statute (as thus narrowed) could not be an effective limitation on expenditures for electoral advocacy. (It would be “naiv[e],” *Buckley* said, to pretend that persons and groups would have difficulty “devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate’s campaign.” Why did *Buckley* employ such a “highly strained” reading of the statute, *McConnell* (opinion of THOMAS, J.), when broader readings, more faithful to the text, were available that might not have resulted in such underinclusiveness? In particular, after going to the trouble of narrowing the statute to cover “advocacy of [the] election or defeat of a candidat[e],” why not do what the principal opinion in these cases does, which is essentially to preface that phrase with the phrase “susceptible of no reasonable interpretation other than as”? There is only one plausible explanation: The Court eschewed narrowing constructions that would have been more faithful to the text and more effective at capturing campaign speech *because those tests were all too vague*. We cannot now adopt a standard held to be facially vague on the theory that it is somehow clear enough for constitutional as-applied challenges. If *Buckley* foreclosed such vagueness in a statutory test, it also must foreclose such vagueness in an as-applied test.

Though the principal opinion purports to recognize the “imperative for clarity” in this area of First Amendment law, its attempt to distinguish its test from the test found to be vague in *Buckley* falls far short. It claims to be “not so sure” that *Buckley* rejected its test because *Buckley*’s holding did not concern “what the constitutional standard was in the abstract, divorced from specific statutory language.” Forget about abstractions: The specific statutory language at issue in *Buckley* was interpreted to mean “‘advocating the election or defeat of a candidate,’” and that is materially identical to the operative language in the principal opinion’s test. The principal opinion’s protestation that *Buckley*’s vagueness holding “d[id] not dictate a constitutional test,” is utterly compromised by the fact that the principal opinion itself relies on the very same vagueness holding to reject an intent-and-effect test in this case. It is the *same* vagueness holding, and the principal opinion cannot invoke it on page 13 of its opinion and disclaim it on page 22....<sup>5</sup>

What, then, is to be done? We could adopt WRTL’s proposed test, under which §203 may not be applied to any ad (1) that “focuses on a current legislative branch matter, takes a position on the matter, and urges the public to ask a legislator to take a particular position or action with respect to the matter,” and (2) that “does not mention any election, candidacy, political party, or challenger, or the official’s character, qualifications, or fitness for office,” (3) whether or not it “say[s] that the public official is wrong or right on the issue,” so long as it does not expressly say he is “wrong for [the] office.” Brief for Appellee 56-57 (footnote omitted). Or we could of course adopt the

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<sup>5</sup> Justice ALITO’s concurrence at least hints that the principal opinion’s test *may* impermissibly chill speech, and offers to reconsider *McConnell*’s holding “[i]f it turns out that the implementation of the as-applied standard set out in the [principal opinion] impermissibly chills political speech.” The wait-and-see approach makes no sense and finds no support in our cases. How will we know that would-be speakers have been chilled and have not spoken? If a tree *does not* fall in the forest, can we hear the sound it would have made had it fallen? Our normal practice is to assess *ex ante* the risk that a standard will have an impermissible chilling effect on First Amendment protected speech...

*Buckley* test of express advocacy. The problem is that, although these tests are clear, they are incompatible with *McConnell*'s holding that §203 is facially constitutional, which was premised on the finding that a vast majority of ads proscribed by §203 are "sham issue ads" that fall outside the First Amendment's protection. Indeed, *any* clear rule that would protect all genuine issue ads would cover such a substantial number of ads prohibited by §203 that §203 would be rendered substantially overbroad. The Government claims that even the amorphous test adopted by the District Court "call[s] into question a substantial percentage of the statute's applications,"<sup>7</sup> and that *any* test providing relief to WRTL is incompatible with *McConnell*'s facial holding because WRTL's ads are in the "heartland" of what Congress meant to prohibit. If that is so, then *McConnell* cannot be sustained.

Like the *Buckley* Court and the parties to these cases, I recognize the practical reality that corporations can evade the express-advocacy standard. I share the instinct that "[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." See *McConnell*. But the way to indulge that instinct consistently with the First Amendment is either to eliminate restrictions on independent expenditures altogether or to *confine* them to one side of the *traditional* line—the express-advocacy line, set in concrete on a calm day by *Buckley*, several decades ago. Section 203's line is bright, but it bans vast amounts of political advocacy indistinguishable from hitherto protected speech.

The foregoing analysis shows that *McConnell* was mistaken in its belief that as-applied challenges could eliminate the unconstitutional applications of §203. They can do so only if a test is adopted which contradicts the holding of *McConnell*—that §203 is facially valid because the vast majority of pre-election issue ads can constitutionally be proscribed. In light of the weakness in *Austin*'s rationale, and in light of the longstanding acceptance of the clarity of *Buckley*'s express-advocacy line, it was adventurous for *McConnell* to extend *Austin* beyond corporate speech constituting express advocacy. Today's cases make it apparent that the adventure is a flop, and that *McConnell*'s holding concerning § 203 was wrong.

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<sup>7</sup> The same must be said, I think, of the test proposed by the principal opinion. While its coverage is not entirely clear, it would apparently protect even *McConnell*'s paradigmatic example of the functional equivalent of express advocacy—the so-called "Jane Doe ad," which "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think,'" Indeed, it at least arguably protects the most "striking" example of a so-called sham issue ad in the *McConnell* record, the notorious "Yellowtail ad," which accused Bill Yellowtail of striking his wife and then urged listeners to call him and "[t]ell him to support family values." The claim that §203 on its face does not reach a substantial amount of speech protected under the principal opinion's test—and that the test is therefore compatible with *McConnell*—seems to me indefensible. Indeed, the principal opinion's attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. This faux judicial restraint is judicial obfuscation.



## IV

Which brings me to the question of *stare decisis*. “*Stare decisis* is not an inexorable command” or “a mechanical formula of adherence to the latest decision.” *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). It is instead “a principle of policy,” *Payne*, and this Court has a “considered practice” not to apply that principle of policy “as rigidly in constitutional as in nonconstitutional cases.” *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962)...

Of particular relevance to the *stare decisis* question in these cases is the impracticability of the regime created by *McConnell*. *Stare decisis* considerations carry little weight when an erroneous “governing decisio[n]” has created an “unworkable” legal regime. *Payne*. As described above, the *McConnell* regime is unworkable because of the inability of any acceptable as-applied test to validate the facial constitutionality of §203—that is, its inability to sustain proscription of the vast majority of issue ads. We could render the regime workable only by effectively overruling *McConnell* without saying so—adopting a clear as-applied rule protective of speech in the “heartland” of what Congress prohibited. The promise of an administrable as-applied rule that is both effective in the vindication of First Amendment rights and consistent with *McConnell*’s holding is illusory....

I would overrule that part of the Court’s decision in *McConnell* upholding § 203(a) of BCRA. Accordingly, I join Parts I and II of today’s principal opinion and otherwise concur only in the judgment.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The significance and effect of today’s judgment, from which I respectfully dissent, turn on three things: the demand for campaign money in huge amounts from large contributors, whose power has produced a cynical electorate; the congressional recognition of the ensuing threat to democratic integrity as reflected in a century of legislation restricting the electoral leverage of concentrations of money in corporate and union treasuries; and *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), declaring the facial validity of the most recent Act of Congress in that tradition, a decision that is effectively, and unjustifiably, overruled today. ...

In sum, Congress in 1907 prohibited corporate contributions to candidates and in 1943 applied the same ban to unions. In 1947, Congress extended the complete ban from contributions to expenditures “in connection with” an election, a phrase so vague that in 1986 we held it must be confined to instances of express advocacy using magic words. Congress determined, in 2002, that corporate and union expenditures for fake issue ads devoid of magic words should be regulated using a narrow definition of “electioneering communication” to reach only broadcast ads that were the practical equivalents of express advocacy. In 2003, this Court found the provision free from vagueness and

justified by the concern that drove its enactment.

This century-long tradition of legislation and judicial precedent rests on facing undeniable facts and testifies to an equally undeniable value. Campaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries, with no redolence of “grassroots” about them. Neither Congress’s decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete *quid pro quo*; campaign finance reform has instead consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions. From early in the 20th century through the decision in *McConnell*, we have acknowledged that the value of democratic integrity justifies a realistic response when corporations and labor organizations commit the concentrated moneys in their treasuries to electioneering.

#### IV...

Throughout the 2004 senatorial campaign, WRTL made no secret of its views about who should win the election and explicitly tied its position to the filibuster issue. Its PAC issued at least two press releases saying that its “Top Election Priorities” were to “Re-elect George W. Bush” and “Send Feingold Packing!” *Id.*, at 78-80, 82-84. In one of these, the Chair of WRTL’s PAC was quoted as saying, ““We do not want Russ Feingold to continue to have the ability to thwart President Bush’s judicial nominees.”” The Spring 2004 issue of the WRTL PAC’s quarterly magazine ran an article headlined “Radically Pro-Abortion Feingold Must Go!”, which reported that “Feingold has been active in his opposition to Bush’s judicial nominees” and said that “the defeat of Feingold must be uppermost in the minds of Wisconsin’s pro-life community in the 2004 elections.”

It was under these circumstances that WRTL ran the three television and radio ads in question. The bills for them were not paid by WRTL’s PAC, but out of the general treasury with its substantial proportion of corporate contributions; in fact, corporations earmarked more than \$50,000 specifically to pay for the ads. Each one criticized an unnamed “group of Senators” for “using the filibuster delay tactic to block federal judicial nominees from a simple ‘yes’ or ‘no’ vote,” and described the Senators’ actions as “politics at work, causing gridlock and backing up some of our courts to a state of emergency.” They exhorted viewers and listeners to “[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster,” but instead of providing a phone number or e-mail address, they told the audience to go to BeFair.org, a website set up by WRTL. A visit to this website would erase any doubt a listener or viewer might have as to whether Senators Feingold and Kohl were part of the “group” condemned in the ads: it displayed a document that criticized the two Senators for voting to filibuster “16 out of 16 times” and accused them of “putting politics into the court system, creating gridlock, and costing taxpayers money.”

WRTL's planned airing of the ads had no apparent relation to any Senate filibuster vote but was keyed to the timing of the senatorial election. WRTL began broadcasting the ads on July 26, 2004, four days after the Senate recessed for the summer, and although the filibuster controversy raged on through 2005, WRTL did not resume running the ads after the election. *Id.*, at 29, 32. During the campaign period that the ads did cover, Senator Feingold's support of the filibusters was a prominent issue. His position was well known, and his Republican opponents, who vocally opposed the filibusters, made the issue a major talking point in their campaigns against him.

In sum, any Wisconsin voter who paid attention would have known that Democratic Senator Feingold supported filibusters against Republican presidential judicial nominees, that the propriety of the filibusters was a major issue in the senatorial campaign, and that WRTL along with the Senator's Republican challengers opposed his reelection because of his position on filibusters. Any alert voters who heard or saw WRTL's ads would have understood that WRTL was telling them that the Senator's position on the filibusters should be grounds to vote against him.

Given these facts, it is beyond all reasonable debate that the ads are constitutionally subject to regulation under *McConnell*. There, we noted that BCRA was meant to remedy the problem of "[s]o-called issue ads" being used "to advocate the election or defeat of clearly identified federal candidates." We then gave a paradigmatic example of these electioneering ads subject to regulation, saying that "[l]ittle difference existed ... between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.*, at 126-127, 124 S.Ct. 619.

The WRTL ads were indistinguishable from the Jane Doe ad; they "condemned [Senator Feingold's] record on a particular issue" and exhorted the public to contact him and "tell [him] what you think." And just as anyone who heard the Jane Doe ad would understand that the point was to defeat Doe, anyone who heard the Feingold ads (let alone anyone who went to the website they named) would know that WRTL's message was to vote against Feingold. If it is now unconstitutional to restrict WRTL's Feingold ads, then it follows that §203 can no longer be applied constitutionally to *McConnell*'s Jane Doe paradigm.

*McConnell*'s holding that §203 is facially constitutional is overruled. By what steps does the principal opinion reach this unacknowledged result less than four years after *McConnell* was decided?

A

First, it lays down a new test to identify a severely limited class of ads that may constitutionally be regulated as electioneering communications, a test that is flatly contrary to *McConnell*. An ad is the equivalent of express advocacy and subject to regulation, the opinion says, only if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Since the Feingold ads

could, in isolation, be read as at least including calls to communicate views on filibusters to the two Senators, those ads cannot be treated as the functional equivalent of express advocacy to elect or defeat anyone, and therefore may not constitutionally be regulated at all.

But the same could have been said of the hypothetical Jane Doe ad. Its spoken message ended with the instruction to tell Doe what the voter thinks. The same could also have been said of the actual Yellowtail ad. Yet in *McConnell*, we gave the Jane Doe ad as the paradigm of a broadcast message that could be constitutionally regulated as election conduct, and we explicitly described the Yellowtail ad as a “striking example” of one that was “clearly intended to influence the election,” *McConnell*.

The principal opinion, in other words, simply inverts what we said in *McConnell*. While we left open the possibility of a “genuine” or “pure” issue ad that might not be open to regulation under §203, *id.*, at 206-207, and n. 88, 124 S.Ct. 619, we meant that an issue ad without campaign advocacy could escape the restriction. The implication of the adjectives “genuine” and “pure” is unmistakable: if an ad is reasonably understood as going beyond a discussion of issues (that is, if it can be understood as electoral advocacy), then by definition it is not “genuine” or “pure.” But the principal opinion inexplicably wrings the opposite conclusion from those words: if an ad is susceptible to any “reasonable interpretation other than as an appeal to vote for or against a specific candidate,” then it must be a “pure” or “genuine” issue ad. This stands *McConnell* on its head, and on this reasoning it is possible that even some ads with magic words could not be regulated.

## B

Second, the principal opinion seems to defend this inversion of *McConnell* as a necessary alternative to an unadministrable subjective test for the equivalence of express (and regulable) electioneering advocacy. The principal opinion acknowledges, of course, that in *McConnell* we said that “[t]he justifications for the regulation of express advocacy apply equally to ads aired during [the period shortly before an election] if the ads are intended to influence the voters’ decisions and have that effect.” But THE CHIEF JUSTICE says that statement in *McConnell* cannot be accepted at face value because we could not, consistent with precedent, have focused our First Amendment enquiry on whether “the speaker actually intended to affect an election.” THE CHIEF JUSTICE suggests it is more likely that the *McConnell* opinion inadvertently borrowed the language of “intended ... effect[s],” from academic studies in the record of viewers’ perceptions of the ads’ purposes.

If THE CHIEF JUSTICE were correct that *McConnell* made the constitutional application of § 203 contingent on whether a corporation’s “motives were pure,” or its issue advocacy “subjective[ly] sincer[e],” then I, too, might be inclined to reconsider *McConnell*’s language. But *McConnell* did not do that. It did not purport to draw constitutional lines based on the subjective motivations of corporations (or their principals) sponsoring political ads, but merely described our test for equivalence to

express advocacy as resting on the ads' "electioneering purpose," which will be objectively apparent from those ads' content and context (as these cases and the examples cited in *McConnell* readily show). We therefore held that §203 was not substantially overbroad because "the vast majority of ads clearly had such a purpose," and consequently could be regulated consistent with the First Amendment.

For that matter, if the studies to which THE CHIEF JUSTICE refers were now to inform our reading of *McConnell*, they would merely underscore the objective character of the proper way to determine whether §203 is constitutional as applied to a given ad. The authors of those studies did not conduct discovery of the "actua[l] inten[tions]," behind any ads; nor, to my knowledge, were the sponsors of campaign ads summoned before researchers to explain their motivations. The studies merely confirmed that "reasonable people are ... able to discern between ads whose primary purpose is to support a candidate and those intended to provide information about a policy issue." J. Krasno & D. Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* 9 (2000). To be clear, I am not endorsing the precise methodology of those studies (and THE CHIEF JUSTICE is correct that we did not do so in *McConnell*); the point is only that the studies relied on a "reasonable" person's understanding of the ads' apparent purpose, and thus were no less objective than THE CHIEF JUSTICE's own approach.

A similarly mistaken fear of an unadministrable and speech-chilling subjective regime seems to underlie THE CHIEF JUSTICE's unwillingness to acknowledge the part that consideration of an ad's context necessarily plays in any realistic assessment of its meaning. A reasonable Wisconsinite watching or listening to WRTL's ads would likely ask and answer some obvious questions about their circumstances. Is the group that sponsors these ads the same one publicly campaigning against Senator Feingold's reelection? THE CHIEF JUSTICE says that this information is "beside the point," because WRTL's history of overt electioneering only "goes to [its] subjective intent." Did these "issue" ads begin appearing on the air during the election season, rather than at the time the filibuster "issue" was in fact being debated in the Senate? This, too, is said to be irrelevant. . And does the website to which WRTL's ads direct viewers contain material expressly advocating Senator Feingold's defeat? This enquiry is dismissed as being "one step removed from the text of the ads themselves." But these questions are central to the meaning of the ads, and any reasonable person would take account of circumstances in coming to understand the object of WRTL's ad. And why not? Each of the contextual facts here can be established by an objective look at a public record; none requires a voter (or a litigant) to engage in discovery of evidence about WRTL's operations or internal communications, and none goes to a hidden state of mind....

## D

In sum, *McConnell* does not graft a subjective standard onto campaign regulation, the context of campaign advertising cannot sensibly be ignored, and §203 is not a ban on speech. What cannot be gainsaid, in any event, is that in treating these subjects as it does, the operative opinion produces the result of overruling *McConnell*'s holding on §203,

less than four years in the Reports....

After today, the ban on contributions by corporations and unions and the limitation on their corrosive spending when they enter the political arena are open to easy circumvention, and the possibilities for regulating corporate and union campaign money are unclear. The ban on contributions will mean nothing much, now that companies and unions can save candidates the expense of advertising directly, simply by running “issue ads” without express advocacy, or by funneling the money through an independent corporation like WRTL.

But the understanding of the voters and the Congress that this kind of corporate and union spending seriously jeopardizes the integrity of democratic government will remain. The facts are too powerful to be ignored, and further efforts at campaign finance reform will come. It is only the legal landscape that now is altered, and it may be that today’s departure from precedent will drive further reexamination of the constitutional analysis: of the distinction between contributions and expenditures, or the relation between spending and speech, which have given structure to our thinking since *Buckley* itself was decided.

I cannot tell what the future will force upon us, but I respectfully dissent from this judgment today.

### *Notes and Questions*

1. Chief Justice Roberts’ opinion (joined in its significant parts only by Justice Alito) is the controlling opinion because it is narrower than the opinion of Justice Scalia (joined by Justices Thomas and Kennedy). What is the holding of the case? Under the “no reasonable interpretation” test of the controlling opinion, how is a court to determine when an advertisement funded by a corporation or union is subject to section 203? What evidence may a court consider?

As you ponder this question, ask yourself whether you believe the “Jane Doe” advertisement or the “Bill Yellowtail” advertisement would be subject to section 203’s PAC requirement under the controlling opinion. What if the “Bill Yellowtail” ad attacked Yellowtail for his stand on tax cuts, rather than on the question whether he beat his wife? Would WRTL’s own ads be subject to the section 203 if the ads mentioned the upcoming election?

2. *Faux judicial restraint?* According to footnote 7 of Justice Scalia’s concurring opinion, seven Justices on the Supreme Court believe that the effect of the controlling opinion and Justice Scalia’s concurring opinion is to overrule *McConnell*’s upholding of section 203. Do you agree? If so, why did Chief Justice Roberts not say so? If you disagree, can you state clearly what remains of section 203?

3. *“Enough is Enough.”* As important as the holding of WRTL is, it is perhaps equally significant for its tone. Gone is the deferential language of the New Deference

cases to be replaced by language much more sympathetic with the First Amendment arguments. Notice the talk of section 203 as a “ban” on speech and the focus on criminal penalties, rather than the reference to 203 as a “PAC requirement.” What does the tone of the controlling opinion, along with the position of the three concurring Justices, say about how the Court is likely to treat other campaign finance laws that are challenged? Note how Justice Alito concurred separately to invite facial attacks on existing Supreme Court precedents in both *Randall* and *WRTL*.

4. *Bellotti Lives, Austin Dies?* Note how favorably the controlling opinion treats *Bellotti*’s holding on corporate First Amendment rights. Does the opinion deal with the tension between *Austin* and *Bellotti*? Is *Austin* still good law? If you were a lower court judge deciding a First Amendment challenge to a state law requiring barring spending of corporate treasury funds on *express advocacy* in candidate elections, how would you rule?

## Chapter 18. Public Financing

ADD THE FOLLOWING AFTER NOTE 4 ON PAGE 973:

5. Candidates who opt into Arizona's campaign financing system and then spend over the amount they promise to spend face the sanction of removal from office. The Arizona Supreme Court upheld that sanction against a candidate who spent 17 percent more than permitted by Arizona's election law. *Smith v. Arizona Citizens Clean Elections Comm'n*, 132 P.3d 1187 (Ariz. 2006).



## Chapter 19. Campaign Finance Disclosure

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 1024:

The post-*McConnell* questions over *McIntyre* continue unabated. In *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004), the Ninth Circuit struck down a Nevada statute requiring certain groups or entities publishing material or information related to an election candidate or any question on a ballot to reveal on the publication the names and addresses of the publication's sponsors. Part of the court's decision striking down the statute depended upon a right to engage in anonymous speech recognized in *McIntyre*, and part depended upon problems specific to the Nevada statutory scheme. Despite the holding, the court noted that "[a]n on-publication identification requirement carefully tailored to further a state's campaign finance laws, or to prevent corruption of public officials, could well pass constitutional muster." However, the Ninth Circuit upheld Alaska's campaign finance regulations, including regulations requiring disclosure of "electioneering communications" modeled after BCRA. *Alaska Right to Life v. Miles*, 441 F.3d 773 (9th Cir. 2006).

For Part One of a symposium on campaign finance disclosure issues, see Volume 4, Number 4 (2005) of the ELECTION LAW JOURNAL. Part Two appeared in Volume 6, No. 1 (2007). Particularly noteworthy is the contribution by Democratic campaign lawyer Robert F. Bauer, who argues against campaign finance disclosure on grounds that it is a "gateway" for expanded regulation. Robert F. Bauer, *Not Just a Private Matter: The Purposes of Disclosure in an Expanded Regulatory System*, 6 ELECTION LAW JOURNAL 38 (2007).