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CASES AND MATERIALS

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Chapter 2. The Right to Vote

INSERT THE FOLLOWING AFTER THE FIRST PARAGRAPH OF NOTE 2 ON PAGE 40:

The Seventeenth Amendment provides that:

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

In *Judge v. Quinn*, __ F. Supp. 2d __, 2009 WL 1033366 (N.D. Ill. 2009), the court rejected an attempt to compel a special election to fill the U.S. Senate seat vacated by Barack Obama. Illinois law allowed the Governor to fill that vacancy by appointment until the next congressional election, scheduled for 2010 – almost two years away, at the time Governor Rod Blagojevich appointed Roland Burris. Plaintiffs in *Judge* sought to enjoin this appointment, on the ground that the delay until the next election exceeded the “temporary” appointment that the Seventeenth Amendment allows. The district court rejected this claim, concluding that the Constitution gives the states considerable discretion in determining when to schedule an election to fill a senatorial vacancy. The impropriety of which Governor Blagojevich was accused – namely, his allegedly seeking to “sell” Obama’s vacated Senate seat^a – was deemed irrelevant to the Seventeenth Amendment issue.

INSERT THE FOLLOWING TO THE END OF NOTE 7 ON PAGE 54:

In *Johnson v. Bredesen*, 579 F. Supp. 2d 1044 (M.D. Tenn. 2008), the court rejected a constitutional challenge to Tennessee’s law, which conditioned restoration of voting rights upon former felon’s payment of restitution and child support. The court applied rational basis review to uphold these requirements against an equal protection challenge, and it also rejected plaintiffs’ argument that these requirements imposed an impermissible poll tax in violation of the Twenty-Fourth Amendment. Why isn’t a requirement that a former felon pay money in order to have his voting rights restored a de facto poll tax? Does the greater power to deny voting rights entirely to ex-felons necessarily include the lesser power to condition those rights on restitution and child support?

^a For background on the legal claims against Blagojevich, see David Johnston, *Lawyers Question Whether Case Against Blagojevich is Airtight*, N.Y. TIMES, Dec. 16, 2008, available at: <http://www.nytimes.com/2008/12/16/world/americas/16iht-gov.1.18714619.html>.

Chapter 5. Minority Vote Dilution

ON PAGE 143, INSERT THE FOLLOWING TO THE END OF THE LAST PARAGRAPH OF PART II:

The U.S. Supreme Court reversed the district court in the opinion that follows, without ruling on the constitutionality of Section 5.

Northwest Austin Municipal District Number One v. Holder 129 S. Ct. 2504 (2009)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The plaintiff in this case is a small utility district raising a big question — the constitutionality of § 5 of the Voting Rights Act. The district has an elected board, and is required by § 5 to seek preclearance from federal authorities in Washington, D. C., before it can change anything about those elections. This is required even though there has never been any evidence of racial discrimination in voting in the district.

The district filed suit seeking relief from these preclearance obligations under the “bailout” provision of the Voting Rights Act. That provision allows the release of a “political subdivision” from the preclearance requirements if certain rigorous conditions are met. The court below denied relief, concluding that bailout was unavailable to a political subdivision like the utility district that did not register its own voters. The district appealed, arguing that the Act imposes no such limitation on bailout, and that if it does, the preclearance requirements are unconstitutional.

That constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the unnecessary resolution of constitutional questions. We agree that the district is eligible under the Act to seek bailout. We therefore reverse, and do not reach the constitutionality of § 5.

I A

The Fifteenth Amendment promises that the “right of citizens of the United States to vote shall not be denied or abridged ... on account of race, color, or previous condition of servitude.” In addition to that self-executing right, the Amendment also gives Congress the “power to enforce this article by appropriate legislation.” The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure. Early enforcement Acts were inconsistently applied and repealed with the rise of Jim Crow. Another series of enforcement statutes in the 1950s and 1960s depended on individual lawsuits filed by the Department of Justice. But litigation is slow and expensive, and the States were creative in “contriving new

rules” to continue violating the Fifteenth Amendment “in the face of adverse federal court decrees.” *Katzenbach*.

Congress responded with the Voting Rights Act.... Rather than continuing to depend on case-by-case litigation, the Act directly pre-empted the most powerful tools of black disenfranchisement in the covered areas. All literacy tests and similar voting qualifications were abolished by § 4 of the Act. Although such tests may have been facially neutral, they were easily manipulated to keep blacks from voting. The Act also empowered federal examiners to override state determinations about who was eligible to vote.

These two remedies were bolstered by § 5, which suspended all changes in state election procedure until they were submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General. Such preclearance is granted only if the change neither “has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.” We have interpreted the requirements of § 5 to apply not only to the ballot-access rights guaranteed by § 4, but to drawing district lines as well.

To confine these remedies to areas of flagrant disenfranchisement, the Act applied them only to States that had used a forbidden test or device in November 1964, and had less than 50% voter registration or turnout in the 1964 Presidential election. Congress recognized that the coverage formula it had adopted “might bring within its sweep governmental units not guilty of any unlawful discriminatory voting practices.” *Briscoe v. Bell*, 432 U.S. 404, 411 (1977). It therefore “afforded such jurisdictions immediately available protection in the form of ... [a] ‘bailout’ suit.” *Ibid*.

To bail out under the current provision, a jurisdiction must seek a declaratory judgment from a three-judge District Court in Washington, D. C. It must show that for the previous 10 years it has not used any forbidden voting test, has not been subject to any valid objection under § 5, and has not been found liable for other voting rights violations; it must also show that it has “engaged in constructive efforts to eliminate intimidation and harassment” of voters, and similar measures. The Attorney General can consent to entry of judgment in favor of bailout if the evidence warrants it, though other interested parties are allowed to intervene in the declaratory judgment action. There are other restrictions: To bail out, a covered jurisdiction must show that every jurisdiction in its territory has complied with all of these requirements. The District Court also retains continuing jurisdiction over a successful bailout suit for 10 years, and may reinstate coverage if any violation is found.

As enacted, §§ 4 and 5 of the Voting Rights Act were temporary provisions. They were expected to be in effect for only five years. We upheld the temporary Voting Rights Act of 1965 as an appropriate exercise of congressional power in *Katzenbach*, explaining that “[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.” We concluded that the problems Congress faced when it

passed the Act were so dire that “exceptional conditions [could] justify legislative measures not otherwise appropriate.”

Congress reauthorized the Act in 1970 (for 5 years), 1975 (for 7 years), and 1982 (for 25 years). The coverage formula remained the same, based on the use of voting-eligibility tests and the rate of registration and turnout among all voters, but the pertinent dates for assessing these criteria moved from 1964 to include 1968 and eventually 1972. We upheld each of these reauthorizations against constitutional challenges, finding that circumstances continued to justify the provisions. Most recently, in 2006, Congress extended § 5 for yet another 25 years. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577. The 2006 Act retained 1972 as the last baseline year for triggering coverage under § 5. It is that latest extension that is now before us.

B

Northwest Austin Municipal Utility District Number One was created in 1987 to deliver city services to residents of a portion of Travis County, Texas. It is governed by a board of five members, elected to staggered terms of four years. The district does not register voters but is responsible for its own elections; for administrative reasons, those elections are run by Travis County. Because the district is located in Texas, it is subject to the obligations of § 5, although there is no evidence that it has ever discriminated on the basis of race.

The district filed suit in the District Court for the District of Columbia, seeking relief under the statute’s bailout provisions and arguing in the alternative that, if interpreted to render the district ineligible for bailout, § 5 was unconstitutional. The three-judge District Court rejected both claims.... We noted probable jurisdiction, and now reverse.

II

The historic accomplishments of the Voting Rights Act are undeniable. When it was first passed, unconstitutional discrimination was rampant and the “registration of voting-age whites ran roughly 50 percentage points or more ahead” of black registration in many covered States. Today, the registration gap between white and black voters is in single digits in the covered States; in some of those States, blacks now register and vote at higher rates than whites. Similar dramatic improvements have occurred for other racial minorities. “[M]any of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [Voting Rights Act] have been eliminated.” *Katzenbach; Bartlett v. Strickland* [*infra* this Supplement—EDS.]

At the same time, § 5, “which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial ‘federalism costs.’” *Lopez*....

Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law — however innocuous — until they have been precleared by federal authorities in Washington, D.C. The preclearance requirement applies broadly, and in particular to every political subdivision in a covered State, no matter how small.

Some of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.

These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success. Past success alone, however, is not adequate justification to retain the preclearance requirements. It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs.

The Act also differentiates between the States, despite our historic tradition that all the States enjoy “equal sovereignty.” *United States v. Louisiana*, 363 U.S. 1, 16 (1960).... “The doctrine of the equality of States ... does not bar ... remedies for *local* evils which have subsequently appeared.” *Katzenbach* (emphasis added). But a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.

These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another. *See Georgia v. Ashcroft* (Kennedy, J., concurring) (“Race cannot be the predominant factor in redistricting.... Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5”). Additional constitutional concerns are raised in saying that this tension between §§ 2 and 5 must persist in covered jurisdictions and not elsewhere.

The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. For example, the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide. E. Blum & L. Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act* 3-6 (American Enterprise Institute, 2006). Congress heard warnings from supporters of extending § 5 that the evidence in the record did not address “systematic differences between the covered and the non-covered areas of the United States[,] ... and, in fact, the evidence that is in the record suggests that there is more similarity than difference.” *The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary*, 109th Cong., 2d Sess., 10 (2006) (statement of Richard H. Pildes); see also Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 208 (2007) (“The most one can say in defense of the

[coverage] formula is that it is the best of the politically feasible alternatives or that changing the formula would ... disrupt settled expectations”).

The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. The district argues that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end” *City of Boerne*; the Federal Government asserts that it is enough that the legislation be a “‘rational means to effectuate the constitutional prohibition.’” *Katzenbach*. That question has been extensively briefed in this case, but we need not resolve it. The Act’s preclearance requirements and its coverage formula raise serious constitutional questions under either test.

In assessing those questions, we are keenly mindful of our institutional role. We fully appreciate that judging the constitutionality of an Act of Congress is “the gravest and most delicate duty that this Court is called on to perform.” *Blodgett v. Holden*, 275 U.S. 142, 147-148 (1927) (Holmes, J., concurring). “The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States.” *Rostker v. Goldberg*, 453 U.S. 57, 64, (1981). The Fifteenth Amendment empowers “Congress,” not the Court, to determine in the first instance what legislation is needed to enforce it. Congress amassed a sizable record in support of its decision to extend the preclearance requirements, a record the District Court determined “document[ed] contemporary racial discrimination in covered states.” The District Court also found that the record “demonstrat[ed] that section 5 prevents discriminatory voting changes” by “quietly but effectively deterring discriminatory changes.”

We will not shrink from our duty “as the bulwar[k] of a limited constitution against legislative encroachments,” *The Federalist* No. 78, p. 526 (J. Cooke ed. 1961) (A. Hamilton), but “[i]t is a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.” *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984). Here, the district also raises a statutory claim that it is eligible to bail out under §§ 4 and 5....

III

Section 4(b) of the Voting Rights Act authorizes a bailout suit by a “State or political subdivision.” There is no dispute that the district is a political subdivision of the State of Texas in the ordinary sense of the term. The district was created under Texas law with “powers of government” relating to local utilities and natural resources.

The Act, however, also provides a narrower statutory definition in § 14(c)(2): “[P]olitical subdivision’ shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.” The District Court

concluded that this definition applied to the bailout provision in § 4(a), and that the district did not qualify, since it is not a county or parish and does not conduct its own voter registration.

“Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case.” *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949). Were the scope of § 4(a) considered in isolation from the rest of the statute and our prior cases, the District Court’s approach might well be correct. But here specific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns compel a broader reading of the bailout provision.

Importantly, we do not write on a blank slate. Our decisions have already established that the statutory definition in § 14(c)(2) does not apply to every use of the term “political subdivision” in the Act. We have, for example, concluded that the definition does not apply to the preclearance obligation of § 5. According to its text, § 5 applies only “[w]henver a [covered] State or political subdivision” enacts or administers a new voting practice. Yet in *Sheffield Bd. of Comm’rs*, 435 U.S. 110 (1978) we rejected the argument by a Texas city that it was neither a State nor a political subdivision as defined in the Act, and therefore did not need to seek preclearance of a voting change....

We reaffirmed this restricted scope of the statutory definition the next Term in *Dougherty County Bd. of Ed. v. White* 439 U.S. 32 (1978). There, a school board argued that because “it d[id] not meet the definition” of political subdivision in § 14(c)(2), it “d[id] not come within the purview of § 5.” We responded:

This contention is squarely foreclosed by our decision last Term in [*Sheffield*]. There, we expressly rejected the suggestion that the city of Sheffield was beyond the ambit of § 5 because it did not itself register voters and hence was not a political subdivision as the term is defined in § 14(c)(2) of the Act.... [O]nce a State has been designated for coverage, § 14(c)(2)’s definition of political subdivision has no operative significance in determining the reach of § 5.

Dougherty.

According to these decisions, then, the statutory definition of “political subdivision” in § 14(c)(2) does not apply to every use of the term “political subdivision” in the Act.... In light of our holdings that the statutory definition does not constrict the scope of preclearance required by § 5, the district argues, it only stands to reason that the definition should not constrict the availability of bailout from those preclearance requirements either.

The Government responds that any such argument is foreclosed by our interpretation of the statute in *City of Rome*. There, it argues, we made clear that the discussion of political subdivisions in *Sheffield* was dictum, and “specifically held that a ‘city is not a “political subdivision” for purposes of § 4(a) bailout.’” (Brief for Federal Appellee, quoting *City of Rome*).

Even if that is what *City of Rome* held, the premises of its statutory holding did not survive later changes in the law. In *City of Rome* we rejected the city's attempt to bail out from coverage under § 5, concluding that "political units of a covered jurisdiction cannot independently bring a § 4(a) bailout action." We concluded that the statute as then written authorized a bailout suit only by a "State" subject to the coverage formula, or a "political subdivision with respect to which [coverage] determinations have been made as a separate unit." Political subdivisions covered because they were part of a covered State, rather than because of separate coverage determinations, could not separately bail out. As Justice Stevens put it, "[t]he political subdivisions of a covered State" were "not entitled to bail out in a piecemeal fashion." *City of Rome* (concurring opinion).

In 1982, however, Congress expressly repudiated *City of Rome* and instead embraced "piecemeal" bailout. As part of an overhaul of the bailout provision, Congress amended the Voting Rights Act to expressly provide that bailout was also available to "political subdivisions" in a covered State, "though [coverage] determinations were *not* made with respect to such subdivision as a separate unit." In other words, Congress decided that a jurisdiction covered because it was within a covered State need not remain covered for as long as the State did. If the subdivision met the bailout requirements, it could bail out, even if the State could not. In light of these amendments, our logic for denying bailout in *City of Rome* is no longer applicable to the Voting Rights Act — if anything, that logic compels the opposite conclusion.

Bailout and preclearance under § 5 are now governed by a principle of symmetry. "Given the Court's decision in *Sheffield* that all political units in a covered State are to be treated for § 5 purposes as though they were 'political subdivisions' of that State, it follows that they should also be treated as such for purposes of § 4(a)'s bailout provisions." *City of Rome* (STEVENS, J., concurring).

The Government contends that this reading of *Sheffield* is mistaken, and that the district is subject to § 5 under our decision in *Sheffield* not because it is a "political subdivision" but because it is a "State." That would mean it could bail out only if the whole State could bail out.

The assertion that the district is a State is at least counterintuitive. We acknowledge, however, that there has been much confusion over why *Sheffield* held the city in that case to be covered by the text of § 5....

But after the 1982 amendments, the Government's position is untenable. If the district is considered the State, and therefore necessarily subject to preclearance so long as Texas is covered, then the same must be true of all other subdivisions of the State, including counties. That would render even counties unable to seek bailout so long as their State was covered. But that is the very restriction the 1982 amendments overturned. Nobody denies that counties in a covered State can seek bailout, as several of them have. Because such piecemeal bailout is now permitted, it cannot be true that § 5 treats every governmental unit as the State itself.

The Government's contrary interpretation has helped to render the bailout provision all but a nullity. Since 1982, only 17 jurisdictions — out of the more than 12,000 covered political

subdivisions — have successfully bailed out of the Act. It is unlikely that Congress intended the provision to have such limited effect.

We therefore hold that all political subdivisions — not only those described in § 14(c)(2) — are eligible to file a bailout suit.

* * *

More than 40 years ago, this Court concluded that “exceptional conditions” prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. *Katzenbach*. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. We conclude instead that the Voting Rights Act permits all political subdivisions, including the district in this case, to seek relief from its preclearance requirements.

The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

This appeal presents two questions: first, whether appellant is entitled to bail out from coverage under the Voting Rights Act of 1965 (VRA); and second, whether the preclearance requirement of § 5 of the VRA is unconstitutional. Because the Court’s statutory decision does not provide appellant with full relief, I conclude that it is inappropriate to apply the constitutional avoidance doctrine in this case. I would therefore decide the constitutional issue presented and hold that § 5 exceeds Congress’ power to enforce the Fifteenth Amendment.

I

The doctrine of constitutional avoidance factors heavily in the Court’s conclusion that appellant is eligible for bailout as a “political subdivision” under § 4(a) of the VRA. Regardless of the Court’s resolution of the statutory question, I am in full agreement that this case raises serious questions concerning the constitutionality of § 5 of the VRA. But, unlike the Court, I do not believe that the doctrine of constitutional avoidance is applicable here. The ultimate relief sought in this case is not bailout eligibility — it is bailout itself....

[B]ecause the Court is not in a position to award appellant bailout, adjudication of the constitutionality of § 5, in my view, cannot be avoided.... Absent a determination that appellant is not just eligible for bailout, but is entitled to it, this case will not have been entirely disposed of on a nonconstitutional ground. Invocation of the doctrine of constitutional avoidance is therefore inappropriate in this case....

II

The Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional. And, although I respect the Court's careful approach to this weighty issue, I nevertheless believe it is necessary to definitively resolve that important question. For the reasons set forth below, I conclude that the lack of current evidence of intentional discrimination with respect to voting renders § 5 unconstitutional. The provision can no longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment.

A

"The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people." *United States v. Cruikshank*, 92 U.S. 542, 551 (1876). In the specific area of voting rights, this Court has consistently recognized that the Constitution gives the States primary authority over the structuring of electoral systems....

To be sure, state authority over local elections is not absolute under the Constitution. The Fifteenth Amendment guarantees that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," § 1, and it grants Congress the authority to "enforce" these rights "by appropriate legislation," § 2. The Fifteenth Amendment thus renders unconstitutional any federal or state law that would limit a citizen's access to the ballot on one of the three bases enumerated in the Amendment. Nonetheless, because States still retain sovereign authority over their election systems, any measure enacted in furtherance of the Fifteenth Amendment must be closely examined to ensure that its encroachment on state authority in this area is limited to the appropriate enforcement of this ban on discrimination.

... Section 5 "was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory." *Beer*....

The Court had declared many of these "tests and devices" unconstitutional, but case-by-case eradication was woefully inadequate to ensure that the franchise extended to all citizens regardless of race. As a result, enforcement efforts before the enactment of § 5 had rendered the right to vote illusory for blacks in the Jim Crow South. Despite the Civil War's bloody purchase of the Fifteenth Amendment, "the reality remained far from the promise."

Thus, by 1965, Congress had every reason to conclude that States with a history of disenfranchising voters based on race would continue to do all they could to evade the constitutional ban on voting discrimination. By that time, race-based voting discrimination had "infected the electoral process in parts of our country for nearly a century." *Katzenbach*.

Moreover, the massive scale of disenfranchisement efforts made case-by-case enforcement of the Fifteenth Amendment impossible, if not Sisyphean.

It was against this backdrop of “historical experience” that § 5 was first enacted and upheld against a constitutional challenge. As the *Katzenbach* Court explained, § 5, which applied to those States and political subdivisions that had employed discriminatory tests and devices in the previous Presidential election, directly targeted the “insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”

According to the Court, it was appropriate to radically interfere with control over local elections only in those jurisdictions with a history of discriminatory disenfranchisement as those were “the geographic areas where immediate action seemed necessary.” The Court believed it was thus “permissible to impose the new remedies” on the jurisdictions covered under § 4(b) “at least in the absence of proof that they ha[d] been free of substantial voting discrimination in recent years.”

In upholding § 5 in *Katzenbach*, the Court nonetheless noted that the provision was an “uncommon exercise of congressional power” that would not have been “appropriate” absent the “exceptional conditions” and “unique circumstances” present in the targeted jurisdictions at that particular time. In reaching its decision, the Court thus refused to simply accept Congress’ representation that the extreme measure was necessary to enforce the Fifteenth Amendment; rather, it closely reviewed the record compiled by Congress to ensure that § 5 was “appropriate” antievasion legislation. In so doing, the Court highlighted evidence showing that black voter registration rates ran approximately 50 percentage points lower than white voter registration in several States....

The statistical evidence confirmed Congress’ judgment that “the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees” was working and could not be defeated through case-by-case enforcement of the Fifteenth Amendment. This record also clearly supported Congress’ predictive judgment that such “States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.” These stark statistics — in conjunction with the unrelenting use of discriminatory tests and practices that denied blacks the right to vote — constituted sufficient proof of “actual voting discrimination” to uphold the preclearance requirement imposed by § 5 on the covered jurisdictions as an appropriate exercise of congressional power under the Fifteenth Amendment. It was only “[u]nder the compulsion of these unique circumstances [that] Congress responded in a permissibly decisive manner.”

B

Several important principles emerge from *Katzenbach* and the decisions that followed it. First, § 5 prohibits more state voting practices than those necessarily encompassed by the explicit prohibition on intentional discrimination found in the text of the Fifteenth Amendment. The

explicit command of the Fifteenth Amendment is a prohibition on state practices that in fact deny individuals the right to vote “on account of” race, color, or previous servitude. In contrast, § 5 is the quintessential prophylaxis; it “goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law — however innocuous — until they have been precleared by federal authorities in Washington, D. C.” The Court has freely acknowledged that such legislation is preventative, upholding it based on the view that the Reconstruction Amendments give Congress the power “both to remedy and to *deter* violation of rights guaranteed thereunder by prohibiting a *somewhat broader* swath of conduct, including that which is not itself forbidden by the Amendment’s text.” *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (emphasis added).

Second, because it sweeps more broadly than the substantive command of the Fifteenth Amendment, § 5 pushes the outer boundaries of Congress’ Fifteenth Amendment enforcement authority....

Indeed, § 5’s preclearance requirement is “one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a ‘substantial departure ... from ordinary concepts of our federal system’; its encroachment on state sovereignty is significant and undeniable.” *Sheffield* (STEVENS, J., dissenting). This “encroachment is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity.” *City of Rome* (POWELL, J., dissenting). More than 40 years after its enactment, this intrusion has become increasingly difficult to justify.

Third, to accommodate the tension between the constitutional imperatives of the Fifteenth and Tenth Amendments — a balance between allowing the Federal Government to patrol state voting practices for discrimination and preserving the States’ significant interest in self-determination — the constitutionality of § 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible....

C

The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists. Covered jurisdictions are not now engaged in a systematic campaign to deny black citizens access to the ballot through intimidation and violence. And the days of “grandfather clauses, property qualifications, ‘good character’ tests, and the requirement that registrants ‘understand’ or ‘interpret’ certain matter,” are gone. *Katzenbach*. There is thus currently no concerted effort in these jurisdictions to engage in the “unremitting and ingenious defiance of the Constitution,” that served as the constitutional basis for upholding the “uncommon exercise of congressional power” embodied in § 5. *Id.*

The lack of sufficient evidence that the covered jurisdictions currently engage in the type of discrimination that underlay the enactment of § 5 undermines any basis for retaining it. Punishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose. Those supporting § 5’s reenactment

argue that without it these jurisdictions would return to the racially discriminatory practices of 30 and 40 years ago. But there is no evidence that public officials stand ready, if given the chance, to again engage in concerted acts of violence, terror, and subterfuge in order to keep minorities from voting. Without such evidence, the charge can only be premised on outdated assumptions about racial attitudes in the covered jurisdictions. Admitting that a prophylactic law as broad as § 5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory....

This is not to say that voter discrimination is extinct. Indeed, the District Court singled out a handful of examples of allegedly discriminatory voting practices from the record made by Congress. But the existence of discrete and isolated incidents of interference with the right to vote has never been sufficient justification for the imposition of § 5's extraordinary requirements. From its inception, the statute was promoted as a measure needed to neutralize a coordinated and unrelenting campaign to deny an entire race access to the ballot. Perfect compliance with the Fifteenth Amendment's substantive command is not now — nor has it ever been — the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment. The burden remains with Congress to prove that the extreme circumstances warranting § 5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute.

* * *

In 1870, the Fifteenth Amendment was ratified in order to guarantee that no citizen would be denied the right to vote based on race, color, or previous condition of servitude. Congress passed § 5 of the VRA in 1965 because that promise had remained unfulfilled for far too long. But now — more than 40 years later—the violence, intimidation, and subterfuge that led Congress to pass § 5 and this Court to uphold it no longer remains. An acknowledgment of § 5's unconstitutionality represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA.

Notes and Questions

1. The basis for the Court's decision in *NAMUDNO* surprised many observers, who did not believe the utility district's statutory interpretation of the VRA to be plausible. See Heather Gerken, *The Supreme Court Punts on Section 5*, Balkinization, June 22, 2009, <http://balkin.blogspot.com/2009/06/supreme-court-punts-on-section-5.html>. As the Court acknowledges, only a "State or political subdivision" is permitted to bailout under Section 4(b) of the statute. Section 14(c)(2), in turn, defines a political subdivision to mean "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State *which conducts registration for voting*" (emphasis added). *NAMUDNO* was not a county or parish, and it did not conduct voter registration. How then does the Court arrive at the conclusion that the district is entitled to seek bailout? Does the "constitutional avoidance" doctrine—that the Court should avoid a constitutional determination when there is a plausible interpretation of the statute that

allows it to do so—dictate the results in this case?^b Note that eight of the nine justices join this opinion. What is to explain this near-unanimity among justices with markedly different views on voting rights and the propriety of race-conscious government action? Why did Justice Thomas, who raised numerous issues in his partial dissent, not dispute the majority’s statutory interpretation?

2. One commentator has referred to the Court’s opinion as an act of judicial statesmanship. Sam Issacharoff, *On Statesmanship*, Election Law Blog, June 24, 2009, <http://electionlawblog.org/archives/013927.html>. Is this an accurate characterization, insofar as the Court avoided an extremely sensitive constitutional question by interpreting the statute in a way that allows jurisdictions to escape coverage, provided that they have steered clear of voting discrimination? If so, what is to explain this statesmanship? For the view that the approaching confirmation hearings of a new Supreme Court nominee might partly explain the resolution of *NAMUDNO*, see Dahlia Lithwick, *The Supreme Court Breakfast Table: Our Judges with Attitude*, SLATE, June 26, 2009, <http://www.slate.com/id/2220927/entry/2221700/>.

3. Although the Court avoids ruling on the constitutionality of Section 5, Part II of the opinion emphasizes the significant “federalism concerns” surrounding the statute, noting that it “imposes current burdens and must be justified by current needs.” Technically, this is dicta, but is it a signal that the Court may yet strike down Section 5, should an appropriate vehicle arise? In a case decided a few days after *NAMUDNO*, the Court issued a 5-4 decision holding that a municipality had violated Title VII of the Civil Rights Act, by discarding the results of an objective exam for firefighters that had a disparate impact on African Americans. *Ricci v. DeStefano*, 129 S. Ct. 2568 (2009). This decision suggests that there is tension between Title VII’s impact-based test and the Equal Protection Clause, which limits consideration of race in employment decisions. Doesn’t the same tension exist with respect to the VRA? For more on this point, see Rick Pildes, *How Ricci Will Affect the Voting Rights Act*, Balkinization, June 29, 2009, <http://balkin.blogspot.com/2009/06/how-ricci-will-affect-voting-rights-act.html>.

4. Justice Thomas is the only justice to tackle the constitutional question, concluding that there is insufficient evidence of continuing intentional discrimination on the basis of race to justify the extraordinary requirements of Section 5. He is surely correct to note that conditions have changed enormously since the VRA’s enactment. Is he correct that only intentional discrimination with respect to voting rights violates the Constitution? The Court has sometimes struck down practices that infringe on the right to vote without requiring intentional

^b In reaching the contrary conclusion on the statutory question, the district court opinion quoted from the Senate Report accompanying the 1982 Amendments to the VRA (S. Rep. No. 97-417 at 57 n. 192, U.S. Code Cong. & Admin. News 1982, p. 235 no. 192) as follows:

Towns and cities within counties may not bailout separately. This is a logistical limit. As a practical matter, if every political subdivision were eligible to seek separate bailout, we could not expect that the Justice Department or private groups could remotely hope to monitor and to defend the bailout suits. It would be one thing for the Department and outside civil rights litigators to appear in hundreds of bailout suits. It would be quite another for them to have to face many thousands of such actions because each of the smallest political subunits could separately bail out. Few questioned the reasonableness and fairness of this cutoff in the House.

discrimination, as in *Harper v. Virginia*, *supra* Chapter 2 of the Casebook at page 40, which struck down Virginia's \$1.50 poll tax. If one agrees with Justice Thomas' perspective, is Section 5 is unconstitutional on its face? Or only as applied to certain jurisdictions in certain circumstances? For more on the facial/as-applied distinction, see *infra* page 330 of the Casebook and this Supplement's addition to Note 3 following *Crawford v. County Election Board* in Chapter 7.

5. It is possible that the U.S. Department of Justice under President Obama may be more aggressive in the exercise of its preclearance authority, particularly with respect to practices that may impede participation by minority voters. Just before the *NAMUDNO* decision, the Justice Department objected to a Georgia voter registration system that, among other things, checked the citizenship of would-be voters. The objection letter may be found at <http://blogs.ajc.com/political-insider-jim-galloway/files/2009/06/georgia-signed-objection-letter.pdf>. In the George W. Bush administration, it was very uncommon for the Justice Department to deny preclearance of election administration practices. If the Justice Department does object more often to such practices, what relevance might that have for the constitutionality of the statute?

IN FOOTNOTE 12 ON PAGE 148, REPLACE THE LAST SENTENCE OF THE FIRST PARAGRAPH WITH THE FOLLOWING:

In *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009), discussed further in the notes following this case, the Court concluded that racial minorities could not make a claim under Section 2 where they would make up less than 50 percent of the voting-age population in a single-member district.

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 161:

A recent decision suggests that it should not be so unusual after all for Section 2 plaintiffs to lose, even when they satisfy the three *Gingles* factors. In *Gonzalez v. City of Aurora*, 535 F.3d 594 (7th Cir. 2008), the court rejected Latino voters' challenge to aldermanic wards, even though they appeared to meet all three prongs of *Gingles*. Judge Easterbrook wrote for a unanimous court:

Plaintiffs leap from satisfaction of the *Gingles* factors to the proposition that the City must do what is possible to maximize Latino voters' ability to elect Latino candidates (euphemistically "candidates of their choice"). But neither § 2 nor *Gingles* nor any later decision of the Supreme Court speaks of *maximizing* the influence of any racial or ethnic group. . . . Section 2 requires an electoral process "equally open" to all, not a process that favors one group over another. One cannot maximize Latino influence without minimizing some other group's influence. A map drawn to advantage Latino candidates at the expense of black (or white ethnic) candidates violates § 2 as surely as a map drawn to maximize the influence of those groups at the expense of Latinos.

The court went on to reject plaintiffs' argument (as characterized by the court) that Latinos were entitled to "proportional representation," finding that several wards had enough Latinos for them to produce substantial influence – if not to elect their candidate a choice. The court relied principally on the text of the statute and avoided the Senate factors, stating: "Because plaintiffs lack any evidence of dilution, there is no point in traipsing through the multiple factors mentioned in the 1982 committee reports." This approach is consistent with Judge Easterbrook's textualist approach to statutory interpretation. Is it consistent with *Gingles*?

Will the Obama administration be more aggressive in seeking to compel the creation of majority-minority districts? If so, are they likely to have much success? Perhaps not. A recent decision of a federal district court rejected the United States' argument that Section 2 required a remedy "that will necessarily result in roughly proportional representation, even if minority turnout is substantially lower than non-minority turnout." *United States v. Euclid City School Board*, Order, No. 08-CV-2832 (N.D. Ohio, June 29, 2009), *available at* <http://electionlawblog.org/archives/euclid-order.pdf>. Although the government and the defendant had stipulated that Section 2 had been violated, the court declined to require the replacement of an at-large system for election a school board with single-member districts.

REPLACE THE LAST PARAGRAPH OF NOTE 5 ON PAGES 163-64 WITH THE FOLLOWING:

If *Georgia v. Ashcroft*, which highlighted the virtues of influence districts, did not support the claim that such districts may be required by Section 2, it might be supposed that Congress' disapproval of *Georgia* in the 2006 amendments would bury influence district claims even deeper. In *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009), the issue was presented in a somewhat unusual manner. The North Carolina Constitution requires that a whole county be contained in a single legislative district if possible, consistent with federal population and voting rights requirements. Pender County contained 61 percent of the population needed for a House district and an adjacent county, New Hanover, contained 39 percent of that population. Thus, it should have been possible to create two districts entirely within New Hanover, with a third district consisting of all of Pender and the remainder of New Hanover. However, in the belief that it was required by Section 2 to create a "crossover" district – in which African Americans were less than 50% of the voting-age population, but could join with white voters to elect the minority's candidate of choice – the North Carolina legislature divided Pender between two districts, each of which also included a portion of New Hanover. The North Carolina Supreme Court ruled that Section 2 does not require a crossover district to be created and therefore found there was no justification for departing from the state constitutional requirement that all of Pender be included within one district.

The Supreme Court affirmed 5-4, with Justice Kennedy writing the controlling opinion for a plurality of three justices. Relying on *Gingles*' requirement that a minority group "demonstrate that it is sufficiently large and geographically compact to constitute a *majority* in a single-member district" (emphasis added), Justice Kennedy wrote:

Recognizing a § 2 claim in this circumstance would grant minority voters "a right to preserve their strength for the purposes of forging an advantageous

political alliance.” *Hall v. Virginia*, 385 F.3d 421, 431 (C.A.4 2004). Nothing in § 2 grants special protection to a minority group's right to form political coalitions. “[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground.” *DeGrandy*....

As the *Gingles* Court explained, “in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters.” Were the Court to adopt petitioners’ theory and dispense with the majority-minority requirement, the ruling would call in question the *Gingles* framework the Court has applied under § 2.

We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. The rule draws clear lines for courts and legislatures alike. The same cannot be said of a less exacting standard that would mandate crossover districts under § 2. Determining whether a § 2 claim would lie — *i.e.*, determining whether potential districts could function as crossover districts — would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions. The judiciary would be directed to make predictions or adopt premises that even experienced polling analysts and political experts could not assess with certainty, particularly over the long term. For example, courts would be required to pursue these inquiries: What percentage of white voters supported minority-preferred candidates in the past? How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters and will they stay the same? Those questions are speculative, and the answers (if they could be supposed) would prove elusive. A requirement to draw election districts on answers to these and like inquiries ought not to be inferred from the text or purpose of § 2. Though courts are capable of making refined and exacting factual inquiries, they “are inherently ill-equipped” to “make decisions based on highly political judgments” of the sort that crossover-district claims would require. *Holder v. Hall* (THOMAS, J., concurring) [*infra* Casebook at page 186 — EDS.] There is an underlying principle of fundamental importance: We must be most cautious before interpreting a statute to require courts to make inquiries based on racial classifications and race-based predictions. The statutory mandate petitioners urge us to find in § 2 raises serious constitutional questions....

Unlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2.

Justice Souter's dissenting opinion, joined by Justices Stevens, Ginsburg, and Breyer, expressed concern about the incentives that the plurality's test would impose:

In the plurality's view, only a district with a minority population making up 50% or more of the citizen voting age population (CVAP) can provide a remedy to minority voters lacking an opportunity "to elect representatives of their choice." This is incorrect as a factual matter if the statutory phrase is given its natural meaning; minority voters in districts with minority populations under 50% routinely "elect representatives of their choice." The effects of the plurality's unwillingness to face this fact are disturbing by any measure and flatly at odds with the obvious purpose of the Act. If districts with minority populations under 50% can never count as minority-opportunity districts to remedy a violation of the States' obligation to provide equal electoral opportunity under § 2, States will be required under the plurality's rule to pack black voters into additional majority-minority districts, contracting the number of districts where racial minorities are having success in transcending racial divisions in securing their preferred representation. The object of the Voting Rights Act will now be promoting racial blocs, and the role of race in districting decisions as a proxy for political identification will be heightened by any measure.

Is the plurality correct to note that it would raise "serious constitutional questions" to allow a minority to make a claim under § 2 when they would constitute less than 50 percent of a single-member district? Is Justice Souter right that the rejection of such a claim will provide an incentive to "pack" minority voters? Does this create a constitutional problem as well?

Chapter 6. Partisan Gerrymandering

ADD THE FOLLOWING ON PAGE 279, AT THE END OF THE CHAPTER:

The question of how courts will handle post-*LULAC* partisan gerrymandering claims may not be hypothetical for long. There may well be a new round of litigation after the reapportionments that follow the 2010 census. In anticipation of such litigation, commentators have tried to come up with a workable standard to govern such claims. For one example, see Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARVARD JOURNAL ON LEGISLATION 243 (2009), which suggests a three-part test under which plaintiffs would have to show: (1) a predominantly partisan purpose; (2) disproportionate electoral results; and (3) the existence of an acceptable alternative plan. For another perspective, see Note, *Political Gerrymandering 2000-2008: "A Self-Limiting Enterprise"?*, 122 HARVARD LAW REVIEW 1467 (2009), which argues that courts have erred in focusing on schemes that give a slight advantage to one of two more-or-less equal parties, rather than bipartisan gerrymanders that lock in incumbents from both major parties.

Chapter 7. Election Administration

ADD THE FOLLOWING TO THE END OF THE FIRST FULL PARAGRAPH ON PAGE 304:

A federal lawsuit by the League of Women Voters alleged systemic failures in Ohio's November 2004 election in the areas of voter registration, absentee ballots, polling place operations, poll workers, provisional voting, and disability access. Relying largely on *Bush v. Gore*, the Sixth Circuit held these allegations sufficient to state equal protection and due process claims. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008). The case subsequently settled. Lawyers Committee for Civil Rights Under Law, *What the LWVO v. Brunner Settlement Means for Ohio Voters*, available at http://www.lawyerscommittee.org/projects/voting_rights/page?id=0046.

ON PAGE 304, ADD THE FOLLOWING AFTER NOTE 9:

9.5. *The 2008 Election*. As in 2004, the presidential election of 2008 did not go into overtime. The federal courts were, however, invited to intervene in controversies involving the eligibility of both major parties' candidates to serve. In the case of Senator McCain, a voter alleged that his birth in the Panama Canal Zone rendered him unqualified under the requirement of Article II that only a "natural born Citizen" is eligible to be President. *Hollander v. McCain*, 566 F. Supp. 2d 63 (D.N.H. 2008). For a debate on the legal issues involving this claim, see *An Online Symposium on Senator John McCain and Natural Born Citizenship*, 107 MICHIGAN LAW REVIEW FIRST IMPRESSIONS, No. 1 (2008), <http://www.michiganlawreview.org/firstimpressions/vol107/mccain.htm>. Another voter alleged that then-Senator Obama was ineligible under the same clause, on the ground that he was really born in Kenya rather than Hawaii as he claims. *Berg v. Obama*, 574 F. Supp. 2d 509 (E.D. Penn. 2008). The issues regarding Obama's eligibility became a subject of particularly intense attention on some blogs and websites. Nevertheless, the cases challenging both candidates' eligibility were dismissed for lack of standing. Were the federal courts right to avoid the merits? For an argument that they were, see Daniel P. Tokaji, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?*, 107 MICHIGAN LAW REVIEW FIRST IMPRESSIONS 31 (2008), <http://www.michiganlawreview.org/firstimpressions/vol107/tokaji.pdf>.

An extremely close race for the U.S. Senate in Minnesota resulted in seven months of legal wrangling after the November 2008 election. Author and Saturday Night Live alumnus Al Franken, the Democratic-Farmer-Labor Party candidate, eventually wound up ahead of incumbent Norm Coleman, the Republican Party candidate, by 312 votes. Coleman challenged the result arguing, among other things, that the non-uniform treatment of absentee ballots violated the Equal Protection Clause as construed in *Bush v. Gore*. The Minnesota Supreme Court rejected this claim:

In *Bush*, the Supreme Court specifically noted that it was not addressing the question of “whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.” Variations in local practices for implementing absentee voting procedures are, at least in part, the question at issue here.... [T]he trial court here found that the disparities in application of the statutory standards on which Coleman relies are the product of local jurisdictions’ use of different methods to ensure compliance with the same statutory standards; that jurisdictions adopted policies they deemed necessary to ensure that absentee voting procedures would be available to their residents, in accordance with statutory requirements, given the resources available to them; and that differences in available resources, personnel, procedures, and technology necessarily affected the procedures used by local election officials in reviewing absentee ballots....

Additionally, the essence of the equal protection problem addressed in *Bush* was that there were no established standards under Florida statutes or provided by the state supreme court for determining voter intent; as a result, in the recount process each county (indeed, each recount location within a county) was left to set its own standards for discerning voter intent. Here, there were clear statutory standards for acceptance or rejection of absentee ballots, about which all election officials received common training.

Finally, the decision to be made by Florida election officials with which the Supreme Court was concerned in *Bush* was voter intent – that is, for whom the ballot was cast – as reflected on ballots already cast in the election. In *Bush*, officials conducting the recount were reviewing the face of the ballot itself, creating opportunities for manipulation of the decision for political purposes. Here, the decision at issue was whether to accept or reject absentee ballot return envelopes before they were opened, meaning that the actual votes on the ballot contained in the return envelope were not known to the election officials applying the standards. In summary, we conclude that *Bush v. Gore* is not applicable and does not support Coleman's equal protection claim.

In re Contest of General Election Held on November 4, 2008, for Purpose of Electing a U.S. Senator from State of Minnesota, ___ N.W.2d ___, 2009 WL 1856379 (Minn. 2009).

Does the Court interpret *Bush v. Gore* correctly? Is this narrow reading of *Bush v. Gore*’s holding an indication of the decision’s “untimely death?” See Hasen, *infra*, Note 11 in the Casebook.

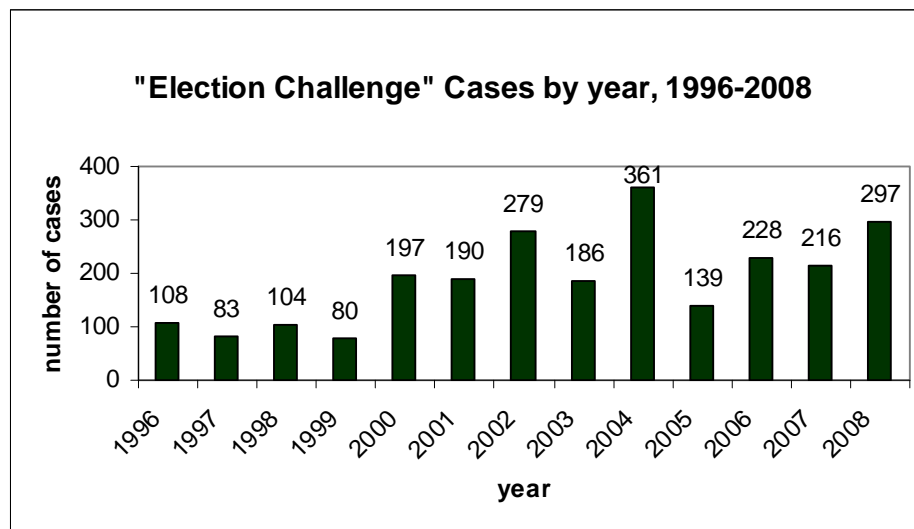
In a number of states, there were continuing allegations of partisanship on the part of election officials in 2008. Among them were Minnesota and Ohio, both of which now have Democratic Secretaries of State. Most states continue to elect their chief election officials on a partisan basis. For a discussion of the problems associated with partisan oversight of elections, see Christian M. Sande, *Where Perception Meets Reality: The Elusive Goal of Impartial Election*

Oversight, 34 WILLIAM MITCHELL LAW REVIEW 729 (2008). For a discussion of the central part played by secretaries of state in overseeing elections, see Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS UNIVERSITY PUBLIC LAW REVIEW 343 (2008).^c Does the fact that most state chief election officials have partisan affiliations warrant closer judicial scrutiny of their decisions?

ON PAGE 304, REPLACE THE SECOND SENTENCE OF NOTE 10 WITH THE FOLLOWING:

Consider Figure 7.2, reprinted with permission from Richard L. Hasen, *The Democracy Canon*, 62 STANFORD LAW REVIEW (forthcoming 2009), *draft available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344476, showing that the number of election-related cases in the pre-2000 period was 94 per year, compared to an average of 237 cases per year from 2000-2008.

ON PAGE 305, REPLACE FIGURE 7.2 WITH THE FOLLOWING:



ON PAGE 314, ADD THE FOLLOWING AT THE END OF NOTE 5:

For commentary on what went wrong in the 2006 election for Florida's 13th Congressional District, see Jessica Ring Amunson & Sam Hirsch, *The Case of the Disappearing Votes: Lessons from the Jennings v. Buchanan Congressional Election Contest*, 17 WILLIAM & MARY BILL OF RIGHTS JOURNAL 397 (2008); Walter R. Mebane, Jr., *Machine Errors and Undervotes in Florida 2006 Revisited*, 17 WILLIAM & MARY BILL OF RIGHTS JOURNAL 375 (2008); Laurin Frisina et al., *Ballot Formats, Touchscreens, and Undervotes: A Study of the 2006*

^c Benson, an election law professor at Wayne State University, is currently running for Michigan Secretary of State.

Midterm Elections in Florida, 7 ELECTION LAW JOURNAL 25 (2008). A postscript: In 2008, Buchanan again defeated Jennings – this time by a wide margin.

ON PAGE 329, ADD THE FOLLOWING AT THE END OF NOTE 1:

See Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WILLIAM & MARY BILL OF RIGHTS JOURNAL 507 (2008), for a discussion of the Court's vacillating approach in *Crawford* and other constitutional election law cases to the level of scrutiny question.

ON PAGE 330, ADD THE FOLLOWING AT THE END OF NOTE 3:

For analysis of the Court's reluctance to entertain facial challenges in election law cases, see Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINNESOTA LAW REVIEW 1644 (2009), and Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA LAW REVIEW (forthcoming 2009), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1370766.

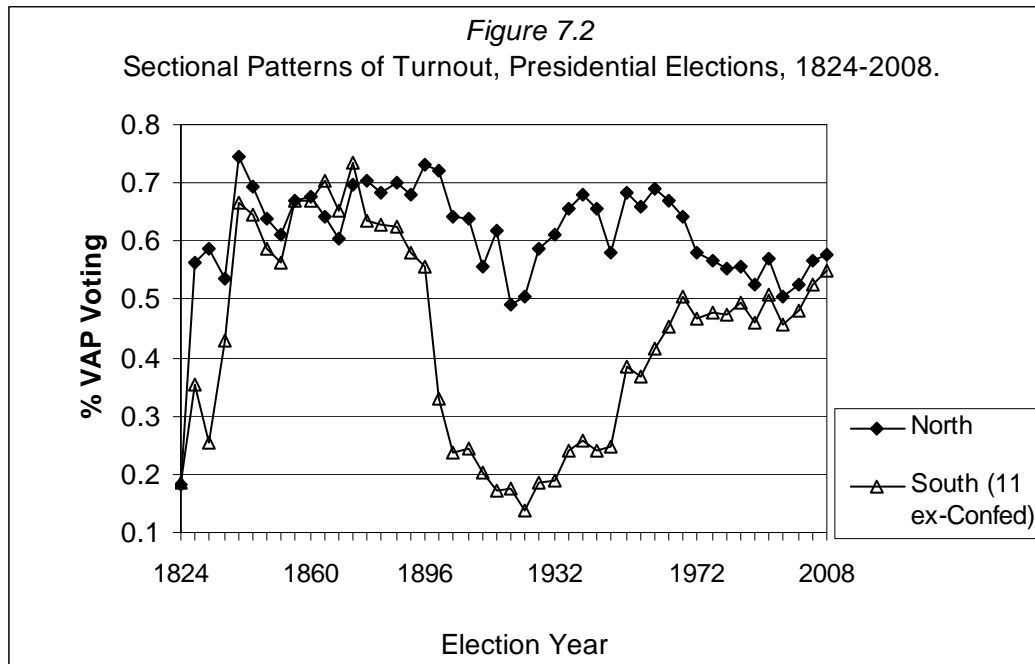
ON PAGE 331, ADD THE FOLLOWING AT THE END OF NOTE 4:

There have been some recent efforts to measure the benefits and burdens associated with voter identification laws. One study found no evidence to support the claims of ID supporters that fears of electoral fraud cause voters to become disengaged or that ID laws bolster voter confidence. Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARVARD LAW REVIEW 1737 (2008). What about ID opponents' claim that such laws will suppress participation? Here too, the empirical case is thin. A recent study of Indiana's provisional ballots found that only 399 voters were forced to cast them in Indiana's 2008 primary because they lacked ID. Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls through an Examination of Provisional Balloting*, 24 JOURNAL OF LAW & POLITICS 475 (2008). This was a tiny share of the overall vote total, though it is possible that there are other voters who were discouraged from coming to the polls at all due to the Indiana's ID law and therefore did not cast a provisional ballot. The difficulty in measuring this type of effect may be impossible to surmount. A recent article on the subject concludes that: "We should be wary of claims – from all sides of the controversy – regarding turnout effects from voter ID laws.... [T]he data are not up to the task of making a compelling statistical argument." Robert S. Erickson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification-Voter Turnout Debate*, 8 ELECTION LAW JOURNAL 85 (2009).

ON PAGE 332, NOTE 6 SHOULD BE RENUMBERED 7, NOTE 7 RENUMBERED 8, AND THE FOLLOWING ADDED TO THE END OF THAT NOTE:

Section 5 of the VRA may also come into play, in cases involving administrative rules. The Obama administration has already objected to a new Georgia voter registration system on the ground that it could be expected to have a negative impact on minority voters. See *supra*, Chapter 5 in this Supplement, Note 5 following *NAMUDNO*.

ON PAGE 334, REPLACE FIGURE 7.3 WITH THE FOLLOWING CHART:^d



ON PAGE 341, ADD THE FOLLOWING AT THE END OF SUBSECTION 1 (“*The Language Assistance Provisions of the Voting Rights Act*”):

May English-speaking voters challenge a Spanish-only election system? One court has found that they may. In *Diffenderfer v. Gomez-Colon*, 587 F. Supp. 2d 338 (D.P.R. 2008), the court found Puerto Rico in violation of the Voting Rights Act, the Equal Protection Clause, and the First Amendment for failing to provide English-language ballots. The Court’s holding on the Section 2 issue is particularly interesting since the VRA defines a “language minority” as encompassing “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.” 42 U.S.C. §19731(c)(3). Is this a plausible interpretation of the statute? Is it necessary to avoid an unconstitutional result?

^d The authors gratefully acknowledge the assistance of Professor J. Morgan Kousser, who has compiled this chart for this Supplement.

ON PAGE 343, ADD THE FOLLOWING AT THE END OF SUBSECTION 3 (“*The Help America Vote Act*”):

In the 2008 election, issues surrounding the maintenance of voter registration lists became the focus of intense attention and litigation. HAVA mandates that every state have in place a statewide voter registration database and that information in these databases be “matched” against other records. Specifically, it requires that:

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

42 U.S.C. § 15483(a)(5)(B)(i). Concerns about the accuracy of state registration lists arose during the 2008 election season, after canvassers from ACORN, a not-for-profit voter registration group, submitted registration forms on behalf of nonexistent voters. For discussion of these and other registration-related controversies, see Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WILLIAM & MARY BILL OF RIGHTS JOURNAL 453 (2008), and Daniel P. Tokaji, *Voter Registration and Institutional Reform: Lessons from a Historic Election*, 3 HARVARD LAW & POLICY REVIEW (Online) (2009), http://www.hlpronline.com/Tokaji_HLPR_012209.pdf.

One of the cases involving the voter registration lists found its way to the U.S. Supreme Court. In a case brought by the Ohio Republican Party, a federal district court issued a temporary restraining order against Ohio’s Secretary of State for failing to comply with HAVA’s matching requirement, and the Sixth Circuit affirmed. The Supreme Court reversed in a unanimous *per curiam* opinion, which concluded that Congress had not authorized federal courts to enforce the above-quoted provision of HAVA in suits brought by private parties. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008). Private litigants are thus unable to bring actions alleging a failure to comply with this language. In addition, there is no administrative agency authorized to promulgate regulations to clarify HAVA. Thus, the only apparent way of obtaining a definitive interpretation of this provision would be for the U.S. government to bring suit against a state that is allegedly failing to comply. Is this a desirable outcome? It will certainly cut down on litigation, but at what cost? It remains unclear whether private parties may sue to enforce other parts of HAVA.

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 347:

Are there alternative approaches by which the federal government might improve the administration of elections, without the creation of a new agency or the imposition of statutory mandates? Heather Gerken has proposed one possible solution. She suggests a “Democracy Index” that would measure the performance of the states in registering voters, allowing them to cast their ballots, and counting their votes properly. See Heather K. Gerken, *THE DEMOCRACY*

INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT (2009). The idea is to create a healthy competition among the states, providing an incentive for them to improve their relative performance. She analogizes her proposal to the *U.S. News and World Report* rankings of colleges and professional schools, which has had a significant (though not uniformly positive) impact on higher education. Will Gerken's proposal work? Is it possible to measure the key aspects of a strong election system? And if so, will states be motivated to respond in the manner Gerken expects?

Chapter 8. Ballot Propositions

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 379:

The issue of amendment versus revision of the California Constitution arose in a very high profile case involving the question of a ban on gay marriage. In 2008, the California Supreme Court held that the state's voter initiated statutory ban on same-sex marriage violated various provisions of the California Constitution. *In re Marriage Cases*, 43 Cal.4th 757, 183 P.3d 384 (2008). In response, voters passed Proposition 8, an initiated constitutional amendment changing the state Constitution to provide that "Only marriage between a man and a woman is valid or recognized in California." Opponents of Proposition 8 then challenged the measure in the state Supreme Court as an unconstitutional revision of the state constitution.

In *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), the California Supreme Court rejected the argument that Proposition 8 was an impermissible revision of the Constitution:

Proposition 8 adds a single section—section 7.5—to article I of the California Constitution, a section that provides, in its entirety, that "Only marriage between a man and a woman is valid or recognized in California." Pursuant to the analysis prescribed in our past decisions, we examine "both the quantitative and qualitative effects of the measure on our constitutional scheme." *Raven*.

From a quantitative standpoint, it is obvious that Proposition 8 does not amount to a constitutional revision. The measure adds one 14-word section—a section that affects two other sections of article I (§§ 1, 7) by creating an exception to the privacy, due process, and equal protection clauses contained in those two sections as interpreted in the majority opinion in the *Marriage Cases*. Quantitatively, Proposition 8 unquestionably has much less of an effect on the preexisting state constitutional scheme than virtually any of the previous constitutional changes that our past decisions have found to constitute amendments rather than revisions. Indeed, petitioners do not even advance the argument that Proposition 8 constitutes a revision under the quantitative prong of the amendment/revision analysis.

Instead, petitioners rest their claim that Proposition 8 constitutes a constitutional revision solely upon the qualitative prong of the amendment/revision analysis. The constitutional change embodied in Proposition 8, however, differs fundamentally from those that our past cases have identified as the kind of qualitative change that may amount to a revision of the California Constitution.

As we have seen, the numerous past decisions of this court that have addressed this issue all have indicated that the type of measure that may constitute a revision of the California Constitution is one that makes "far reaching changes in the nature of our basic governmental plan" (*Amador*), or, stated in slightly

different terms, that “substantially alter[s] *the basic governmental framework set forth in our Constitution.*” *Legislature v. Eu*, italics added. Thus, for example, our decision in *Amador*, in providing an example of the type of “relatively simple enactment” that may constitute a revision, posed a hypothetical enactment “which purported to vest *all judicial power in the Legislature.*” (*Amador*, italics added.) Similarly, in *Raven*—the *only* case to find that a measure constituted a revision of the California Constitution because of the qualitative nature of the proposed change—the court relied upon the circumstance that the provision there at issue “would substantially alter the substance and integrity of the state Constitution as a document of independent force and effect” (*Raven*) by implementing “a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution.” (*Id.*)...

Proposition 8 works no such fundamental change in the *basic governmental plan or framework* established by the preexisting provisions of the California Constitution—that is, “in [the government's] fundamental structure or the foundational powers of its branches.” (*Legislature v. Eu*.) Instead, Proposition 8 simply changes the substantive content of a state constitutional rule in one specific subject area—the rule relating to access to the designation of “marriage.” Contrary to petitioners’ contention, the measure does not transform or undermine the judicial function: California courts will continue to exercise their basic and historic responsibility to enforce *all* of the provisions of the California Constitution, which now include the new section added by the voters’ approval of Proposition 8.

Petitioners contend, however, that even if Proposition 8 does not make a fundamental change in the *basic governmental plan or framework* established by the Constitution, the measure nonetheless should be found to constitute a revision because it allegedly “strike[s] directly at the foundational constitutional principle of equal protection ... by establishing that an unpopular group may be selectively stripped of fundamental rights by a simple majority of voters.” Petitioners’ argument rests, initially, on the premise that a measure that abrogates a so-called *foundational constitutional principle of law*, no less than a measure that makes a fundamental change in the basic governmental structure or in the foundational power of its branches as established by the state Constitution, should be viewed as a constitutional revision rather than as a constitutional amendment. Petitioners suggest that their position is not inconsistent with our past amendment/revision decisions, on the theory that none of those decisions *explicitly* held that *only* a measure that makes a fundamental change in the state’s governmental plan or framework can constitute a constitutional revision....

In our view, a fair and full reading of this court’s past amendment/revision decisions demonstrates that those cases stand for the proposition that in deciding whether or not a constitutional change constitutes a qualitative revision, a court must determine whether the change effects a substantial change in the

governmental plan or structure established by the Constitution. As we have seen, a number of our past amendment/revision decisions have involved initiative measures that made very important substantive changes in fundamental state constitutional principles such as the right not to be subjected to cruel or unusual punishment and the right to be protected against unlawful searches and seizures—initiative measures that, like the current Proposition 8, cut back on the greater level of protection afforded by preceding court decisions and were challenged as constitutional revisions on the ground that the constitutional changes they effected deprived individuals of important state constitutional protections they previously enjoyed and left courts unable to fully protect such rights. Nonetheless, in each case this court did not undertake an evaluation of the relative importance of the constitutional right at issue or the degree to which the protection of that right had been diminished, but instead held that the measure did not amount to a qualitative revision *because it did not make a fundamental change in the nature of the governmental plan or framework established by the Constitution....*

Although petitioners seize upon isolated passages in a few decisions as assertedly supporting their position that a change other than a modification in the governmental plan or framework may constitute a revision,²² a Fair Reading of those decisions in their entirety discloses that they do not provide such support but instead affirmatively reiterate and apply the established rule that, in order to constitute a qualitative revision, a constitutional measure must make a far reaching change in the fundamental governmental structure or the foundational power of its branches as set forth in the Constitution. Under this standard, which has been applied repeatedly and uniformly in the precedents that govern this court's jurisprudence, it is evident that because Proposition 8 works no change of that nature in the California Constitution, it does not constitute a constitutional revision....

Furthermore, even if, as petitioners urge, our past decisions were to be interpreted as not precluding the possibility that a constitutional change other than

²² Thus, for example, petitioners rely upon the circumstance that at one point the opinion in *Legislature v. Eu* states that “[a]s indicated in *Raven*, a qualitative revision *includes* one that involves a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational powers of its branches.” (Italics added.) Petitioners suggest that this use of the word “includes”—instead of “is”—signifies that the decision contemplated that other types of changes could constitute a qualitative revision. (Justice Werdegarr’s concurring opinion advances a similar argument.) Read as a whole, however, it is clear that *Legislature v. Eu* provides no support for this proposition, and instead expressly follows the holdings of past decisions in concluding that “to find such a revision, it must necessarily or inevitably appear from the face of the challenged provision that the measure *will substantially alter the basic governmental framework set forth in our Constitution.*” (italics added and omitted.)

Similarly, petitioners point to a passage in *Raven* in which the court noted that Proposition 115’s proposed modification of article I, section 24 “directly contradicts [a] well-established jurisprudential principle,” as ostensibly supporting the conclusion that a proposed change to the California Constitution can amount to a constitutional revision whenever it contradicts a “well-established jurisprudential principle.” In context, however, the passage in question does not support petitioners’ reading....

a change in the governmental plan or framework could, under some circumstances, constitute a constitutional revision rather than a constitutional amendment, petitioners' contention that Proposition 8 represents a constitutional revision still would lack merit. As is revealed by the foregoing history of the amendment/revision distinction, and as our past cases demonstrate in applying that distinction, a change in the California Constitution properly is viewed as a constitutional revision only if it embodies a change of such *far reaching scope* that is fairly comparable to the example set forth in the *Amador* decision, namely, a change that "vests all judicial power in the Legislature." It is only a qualitative change of *that kind of far reaching scope* that the framers of the 1849 and 1879 Constitutions plausibly intended to be proposed *only by a new constitutional convention*, and *not* through the ordinary amendment process. As we shall explain, the constitutional change embodied in Proposition 8—although without question of great importance to the affected individuals—by no means makes such a far reaching change in the California Constitution as to amount to a constitutional revision.

Whatever one thinks of the merits of the court's ruling in *Strauss*, it stands as a clearer (and apparently stricter) view of the meaning of constitutional revisions than has been expressed in some earlier California cases. The upshot is that revision challenges to initiated constitutional amendments in California will be harder to win.

ADD THE FOLLOWING TO THE END OF THE FIRST FULL PARAGRAPH ON PAGE 394:

Over a dissent, the Oregon Supreme Court reversed the Oregon intermediate appellate court in *Meyer v. Bradbury*, 142 P.3d 1031, 1038 (Or. 2006):

[The challenged initiative] does not change different constitutional provisions that confer different fundamental rights on different groups of persons. See *Armatta* (changes to constitutional provisions involving separate constitutional rights granted to different persons not closely related for separate-vote requirement); see also *Lehman* (when separate constitutional provisions conferring separate rights on different groups are affected by proposed amendment, it is "strong indication" that provisions not closely related for separate-vote requirement).

Second, [the challenged initiative] is not a complicated measure. If adopted, [it] will do essentially two things: (1) create a general authority for both the people and the legislature to enact laws regulating campaign finances; but (2) condition the legislature's ability in that regard through a supermajority procedural requirement. The supermajority requirement that [the measure] would place on the legislature both carries out and limits the general authority to enact contribution and expenditure laws that the measure would create. In other words, the supermajority requirement is a procedural condition on which the right to exercise substantive authority is predicated. Viewed in that manner, the

constitutional changes proposed by [the challenged initiative] are “closely related” and therefore do not offend the Article XVII, section 1, separate-vote requirement.

Is this a weakening of the Oregon separate-vote rule?

ADD THE FOLLOWING TO THE END OF THE FIRST FULL PARAGRAPH ON PAGE 399:

For a defense of the New Jersey Supreme Court’s opinion in *Samson*, and for a broader look at a longstanding canon of statutory interpretation in state courts to construe election statutes to favor voters and their ability to vote in competitive elections, see Richard L. Hasen, *The Democracy Canon*, 62 STANFORD LAW REVIEW (forthcoming 2009), *draft available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344476.

ADD THE FOLLOWING TO THE END OF NOTE 9 ON PAGE 413:

The Supreme Court denied cert. in *Deters sub nom. Ohio v. Citizens for Tax Reform*, 129 S. Ct. 596 (2008).

ADD THE FOLLOWING TO THE END OF THE THIRD LINE ON PAGE 414:

Disagreeing with *Jaeger*, the Ninth Circuit held that residency requirements for petition circulators are unconstitutional. *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008), *cert. denied* 129 S. Ct. 1580 (2009). The court held that fraud prevention could be achieved through the narrower means of a petition circulator consenting to jurisdiction in the state in the event of a fraud claim against the circulator.

Chapter 9. Major Political Parties

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 456:

Though the casebook told you to “Stay tuned to the annual supplements to this volume!” for details of changes to the presidential nominating rules of the major political parties, so far there has not been much change. After the election, the issue faded into the background. There is no current push for legislation, and the parties are internally deciding on the rules to use in 2012. Perhaps the 2010 Supplement will report more momentous news. In the meantime, readers will have to satisfy their insatiable appetite for this subject by reading Daniel H. Lowenstein, *Presidential Nomination Reform: Legal Restraints and Procedural Possibilities*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS 173 (Steven S. Smith & Melanie J. Springer eds., 2009).

ADD THE FOLLOWING TO THE FIRST FULL PARAGRAPH ON PAGE 458:

The full citation for the Hendricks article is 7 ELECTION LAW JOURNAL 218 (2008). The Muller response is at 7 ELECTION LAW JOURNAL 227 (2008).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 466:

In “[*Too Plain for Argument?*”](#) [*The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*](#), 102 NORTHWESTERN UNIVERSITY LAW REVIEW 2009 (2008), Hasen, relying on dicta in a number of Supreme Court cases including *Lopez Torres* (*infra*, page 477 in the Casebook), argues that Congress could well have the constitutional power to require states to use primaries rather than caucuses or conventions to choose party presidential nominees. In *Alaskan Independence Party v. State of Alaska*, 545 F.3d 1173 (9th Cir. 2008), the Ninth Circuit, relying on the same dicta, held that a minor party in Alaska could be required to use a primary rather than a convention to choose its party nominees for state offices.

Chapter 10. Third Parties and Independent Candidates

ADD THE FOLLOWING AT THE END OF NOTE 2 ON PAGE 514:

In 2008, two circuit courts struck down state restrictions on Nader's attempt to get on the ballot. The Sixth Circuit held that Ohio's voter registration and residency requirements for petition gatherers violate the First Amendment, although the Ohio Secretary of State enjoyed qualified immunity from a damages suit. *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008). The Ninth Circuit struck down Arizona laws requiring that petition circulators be qualified to register to vote and that nomination petitions to be filed at least 90 days before the primary election. *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008). For an analysis of the effect of partisan affiliation on judicial decisions in Nader's 2004 ballot access lawsuits, see Kyle C. Kopko, *Partisanship Suppressed: Judicial Decision-Making in Ralph Nader's 2004 Ballot Access Litigation*, 7 ELECTION LAW JOURNAL 301 (2008).

Chapter 11. Campaigns

ADD THE FOLLOWING AFTER NOTE 5 ON PAGE 565:

5.5. In *Mowles v. Commission on Governmental Ethics and Election Practices*, 958 A.2d 897 (Me. 2008), the Maine Supreme Court unanimously struck down as a violation of the First Amendment a state statute requiring a candidate to obtain and recite, in any political advertisement, the explicit authorization received from an endorser in order to use that person's endorsement. Applying strict scrutiny, the court held the law served no compelling interest: "When the government undertakes to tell politicians what they can and cannot say in the course of an election, we must all be cautious. The government may restrict the speech of political candidates only when it can clearly advance a compelling reason for the restriction. Avoiding substantive confusion among the voters regarding political issues simply does not present such a compelling interest."

The court also held that the law was not narrowly tailored to prevent fraud. "Because [the statute] captures far more speech within its grasp than it can legitimately hold as a fraud-preventing measure, it cannot be sustained by the State's special interest in preventing false statements in an election where time does not allow for such statements to be counterbalanced by the truth. Thus, even if the State's concern regarding fraud were supported by any fact in this record, the statute is not narrowly tailored to address that interest." *Id.*

ADD THE FOLLOWING AT THE END OF NOTE 9 ON PAGE 567:

For a more sanguine view of the constitutionality of many of the judicial canons in light of *White*, see Kathleen M. Sullivan, *Republican Party of Minnesota v. White: What Are the Alternatives?*, 21 GEORGETOWN JOURNAL OF LEGAL ETHICS 1327 (2008). For a colloquy on the use of public funding of judicial elections to solve some potential conflict of interest problems, see Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEORGETOWN JOURNAL OF LEGAL ETHICS 1229 (2008).

9.5. With judicial speech codes of uncertain constitutionality, and with limits on judicial campaign spending likely foreclosed by the First Amendment (for reasons made clear in later chapters), critics of judicial elections have argued for stronger recusal rules. They received support for this position in this case decided by the Supreme Court.

Caperton v. Massey 129 S. Ct. 2252 (2009)

JUSTICE KENNEDY delivered the opinion of the Court.

In this case the Supreme Court of Appeals of West Virginia reversed a trial court

judgment, which had entered a jury verdict of \$50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion. The basis for the motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages.

Under our precedents there are objective standards that require recusal when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Withlow v. Larkin*, 421 U.S. 35, 45 (1975). Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal.

I

In August 2002 a West Virginia jury returned a verdict that found respondents A.T. Massey Coal Co. and its affiliates (hereinafter Massey) liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations. The jury awarded petitioners Hugh Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales (hereinafter Caperton) the sum of \$50 million in compensatory and punitive damages.

In June 2004 the state trial court denied Massey’s post-trial motions challenging the verdict and the damages award, finding that Massey “intentionally acted in utter disregard of [Caperton’s] rights and ultimately destroyed [Caperton’s] businesses because, after conducting cost-benefit analyses, [Massey] concluded it was in its financial interest to do so.” In March 2005 the trial court denied Massey’s motion for judgment as a matter of law.

Don Blankenship is Massey’s chairman, chief executive officer, and president. After the verdict but before the appeal, West Virginia held its 2004 judicial elections. Knowing the Supreme Court of Appeals of West Virginia would consider the appeal in the case, Blankenship decided to support an attorney who sought to replace Justice McGraw. Justice McGraw was a candidate for reelection to that court. The attorney who sought to replace him was Brent Benjamin.

In addition to contributing the \$1,000 statutory maximum to Benjamin’s campaign committee, Blankenship donated almost \$2.5 million to “And For The Sake Of The Kids,” a political organization formed under 2 U.S.C. § 527.^e The § 527 organization opposed McGraw and supported Benjamin. Blankenship’s donations accounted for more than two-thirds of the total funds it raised. This was not all. Blankenship spent, in addition, just over \$500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as television and newspaper advertisements—“to support ... Brent Benjamin.” (quoting Blankenship’s state campaign financial disclosure filings).

To provide some perspective, Blankenship’s \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by

^e Chapter 15, Part III.B, considers section 527 organizations’ role in contemporary campaign financing.—EDS.

Benjamin's own committee. Caperton contends that Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.

Benjamin won. He received 382,036 votes (53.3%), and McGraw received 334,301 votes (46.7%).

In October 2005, before Massey filed its petition for appeal in West Virginia's highest court, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct, based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion in April 2006. He indicated that he "carefully considered the bases and accompanying exhibits proffered by the movants." But he found "no objective information ... to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial." In December 2006 Massey filed its petition for appeal to challenge the adverse jury verdict. The West Virginia Supreme Court of Appeals granted review.

In November 2007 that court reversed the \$50 million verdict against Massey. The majority opinion, authored by then-Chief Justice Davis and joined by Justices Benjamin and Maynard, found that "Massey's conduct warranted the type of judgment rendered in this case." It reversed, nevertheless, based on two independent grounds—first, that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and, second, that *res judicata* barred the suit due to an out-of-state judgment to which Massey was not a party. Justice Starcher dissented, stating that the "majority's opinion is morally and legally wrong." Justice Albright also dissented, accusing the majority of "misapplying the law and introducing sweeping 'new law' into our jurisprudence that may well come back to haunt us."

Caperton sought rehearing, and the parties moved for disqualification of three of the five justices who decided the appeal. Photos had surfaced of Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending. Justice Maynard granted Caperton's recusal motion. On the other side Justice Starcher granted Massey's recusal motion, apparently based on his public criticism of Blankenship's role in the 2004 elections. In his recusal memorandum Justice Starcher urged Justice Benjamin to recuse himself as well. He noted that "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court." Justice Benjamin declined Justice Starcher's suggestion and denied Caperton's recusal motion.

The court granted rehearing. Justice Benjamin, now in the capacity of acting chief justice, selected Judges Cookman and Fox to replace the recused justices. Caperton moved a third time for disqualification, arguing that Justice Benjamin had failed to apply the correct standard under West Virginia law—*i.e.*, whether "a reasonable and prudent person, knowing these objective facts, would harbor doubts about Justice Benjamin's ability to be fair and impartial." Caperton also included the results of a public opinion poll, which indicated that over 67% of West Virginians doubted Justice Benjamin would be fair and impartial. Justice Benjamin again refused to withdraw, noting that the "push poll" was "neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification."

In April 2008 a divided court again reversed the jury verdict, and again it was a 3-to-2 decision. Justice Davis filed a modified version of his prior opinion, repeating the two earlier holdings. She was joined by Justice Benjamin and Judge Fox. Justice Albright, joined by Judge Cookman, dissented: “Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority.” The dissent also noted “genuine due process implications arising under federal law” with respect to Justice Benjamin’s failure to recuse himself.

Four months later—a month after the petition for writ of certiorari was filed in this Court—Justice Benjamin filed a concurring opinion. He defended the merits of the majority opinion as well as his decision not to recuse. He rejected Caperton’s challenge to his participation in the case under both the Due Process Clause and West Virginia law. Justice Benjamin reiterated that he had no “‘direct, personal, substantial, pecuniary interest’ in this case.” Adopting “a standard merely of ‘appearances,’” he concluded, “seems little more than an invitation to subject West Virginia’s justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.”

We granted certiorari.

II

[Justice Kennedy reviewed existing Supreme Court precedent on when the constitutional guarantee of due process mandates judicial recusal. “The early and leading case on the subject is *Tumey v. Ohio*, 237 U.S. 510 (1927). . . . The *Tumey* Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has ‘a direct, personal, substantial, pecuniary interest’ in a case. This rule reflects the maxim that ‘[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.’ The Federalist No. 10, p. 59 (J. Cooke ed.1961) (J. Madison); see Frank, Disqualification of Judges, 56 Yale L.J. 605, 611-612 (1947) (same).” Justice Kennedy then reviewed cases in which the Court held there was a due process problem created by judges (or others charged with a judicial-function) with a financial interest, either personal or for the benefit of a local government, in the outcome of the litigation. He also described criminal contempt recusal cases in which “a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding. . . . This Court set aside the convictions [of those moving for judicial recusal] on grounds that the judge had a conflict of interest at the trial stage because of his earlier participation followed by his decision to charge them.”]

III

Based on the principles described in these cases we turn to the issue before us. This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.

Caperton contends that Blankenship's pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias. Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected. That temptation, Caperton claims, is as strong and inherent in human nature as was the conflict the Court confronted in [the earlier recusal cases in which] a mayor-judge (or the city) benefited financially from a defendant's conviction, as well as the conflict... when a judge was the object of a defendant's contempt.

Justice Benjamin was careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order. In four separate opinions issued during the course of the appeal, he explained why no actual bias had been established. He found no basis for recusal because Caperton failed to provide "objective evidence" or "objective information," but merely "subjective belief" of bias. Nor could anyone "point to any actual conduct or activity on [his] part which could be termed 'improper.'" In other words, based on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.

Following accepted principles of our legal tradition respecting the proper performance of judicial functions, judges often inquire into their subjective motives and purposes in the ordinary course of deciding a case. This does not mean the inquiry is a simple one. "The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth." B. Cardozo, *The Nature of the Judicial Process* 9 (1921).

The judge inquires into reasons that seem to be leading to a particular result. Precedent and *stare decisis* and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work. To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings. There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work. If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case.

The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of

the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*.

We turn to the influence at issue in this case. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case. Blankenship contributed some \$3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. Caperton claims Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.

Massey responds that Blankenship's support, while significant, did not cause Benjamin's victory. In the end the people of West Virginia elected him, and they did so based on many reasons other than Blankenship's efforts. Massey points out that every major state newspaper, but one, endorsed Benjamin. It also contends that then-Justice McGraw cost himself the election by giving a speech during the campaign, a speech the opposition seized upon for its own advantage.

Justice Benjamin raised similar arguments....

Whether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry. Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion. This is particularly true where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias. Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances "would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." *Tumey*. Blankenship's campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the electoral outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be

adequately implemented.” *Withdraw*.

The temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice. The \$50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor’s company \$50 million. Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship’s extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin’s recusal.

Justice Benjamin did undertake an extensive search for actual bias. But, as we have indicated, that is just one step in the judicial process; objective standards may also require recusal whether or not actual bias exists or can be proved. Due process “may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” *In re Murchison*, 349 U.S. 133, 136 (1955). The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process. We find that Blankenship’s significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—“offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.” [quoting cases quoting *Tumey*]. On these extreme facts the probability of actual bias rises to an unconstitutional level.

IV

Our decision today addresses an extraordinary situation where the Constitution requires recusal. Massey and its *amici* predict that various adverse consequences will follow from recognizing a constitutional violation here-ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree. The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.

It is true that extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong. But it is also true that extreme cases are more likely to cross constitutional limits, requiring this Court’s intervention and formulation of objective standards. This is particularly true when due process is violated....

This Court’s recusal cases are illustrative.... In this case we do nothing more than what the Court has done before....

One must also take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality. Almost every State—West Virginia included—has adopted the American Bar Association’s objective standard: “A judge shall avoid impropriety and the appearance of impropriety.” ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004). The ABA Model Code’s test for appearance of impropriety is “whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.” Canon 2A, Commentary.

The West Virginia Code of Judicial Conduct also requires a judge to “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Canon 3E(1); see also 28 U.S.C. § 455(a) (“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned”)....

These codes of conduct serve to maintain the integrity of the judiciary and the rule of law. The Conference of the Chief Justices has underscored that the codes are “[t]he principal safeguard against judicial campaign abuses” that threaten to imperil “public confidence in the fairness and integrity of the nation’s elected judges.” Brief for Conference of Chief Justices as *Amicus Curiae*. This is a vital state interest:

“Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.” *White* (KENNEDY, J., concurring).

It is for this reason that States may choose to “adopt recusal standards more rigorous than due process requires.” *Id.* see also *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (distinguishing the “constitutional floor” from the ceiling set “by common law, statute, or the professional standards of the bench and bar”).

“The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.” *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986). Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.

* * *

The judgment of the Supreme Court of Appeals of West Virginia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice ROBERTS, with whom Justice SCALIA, Justice THOMAS, and Justice ALITO join, dissenting.

I, of course, share the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such. But I fear that the Court's decision will undermine rather than promote these values.

Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules.

Today, however, the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a "probability of bias." Unlike the established grounds for disqualification, a "probability of bias" cannot be defined in any limited way. The Court's new "rule" provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case....

II

In departing from this clear line between when recusal is constitutionally required and when it is not, the majority repeatedly emphasizes the need for an "objective" standard. The majority's analysis is "objective" in that it does not inquire into Justice Benjamin's motives or decisionmaking process. But the standard the majority articulates—"probability of bias"—fails to provide clear, workable guidance for future cases. At the most basic level, it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.

But there are other fundamental questions as well. With little help from the majority, courts will now have to determine:

1. How much money is too much money? What level of contribution or expenditure gives rise to a "probability of bias"?
2. How do we determine whether a given expenditure is "disproportionate"?
Disproportionate *to what*?
3. Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?

4. Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections?

5. Does the amount at issue in the case matter? What if this case were an employment dispute with only \$10,000 at stake? What if the plaintiffs only sought non-monetary relief such as an injunction or declaratory judgment?

6. Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court, or state supreme court?

7. How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection?

8. What if the “disproportionately” large expenditure is made by an industry association, trade union, physicians’ group, or the plaintiffs’ bar? Must the judge recuse in all cases that affect the association’s interests? Must the judge recuse in all cases in which a party or lawyer is a member of that group? Does it matter how much the litigant contributed to the association?

9. What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received “disproportionate” support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are “tough on crime,” must the judge recuse in all criminal cases?

10. What if the candidate draws “disproportionate” support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group?

11. What if the supporter is not a party to the pending or imminent case, but his interests will be affected by the decision? Does the Court’s analysis apply if the supporter “chooses the judge” not in *his* case, but in someone else’s?

12. What if the case implicates a regulatory issue that is of great importance to the party making the expenditures, even though he has no direct financial interest in the outcome (*e.g.*, a facial challenge to an agency rulemaking or a suit seeking to limit an agency’s jurisdiction)?

13. Must the judge’s vote be outcome determinative in order for his non-recusal to constitute a due process violation?

14. Does the due process analysis consider the underlying merits of the suit? Does it matter whether the decision is clearly right (or wrong) as a matter of state law?

15. What if a lower court decision in favor of the supporter is affirmed on the merits on

appeal, by a panel with no “debt of gratitude” to the supporter? Does that “moot” the due process claim?

16. What if the judge voted against the supporter in many other cases?

17. What if the judge disagrees with the supporter’s message or tactics? What if the judge expressly *disclaims* the support of this person?

18. Should we assume that elected judges feel a “debt of hostility” towards major *opponents* of their candidacies? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him?

19. If there is independent review of a judge’s recusal decision, *e.g.*, by a panel of other judges, does this completely foreclose a due process claim?

20. Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How would we measure whether such support is disproportionate?

21. Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?

22. Does it matter whether the campaign expenditures come from a party or the party’s attorney? If from a lawyer, must the judge recuse in every case involving that attorney?

23. Does what is unconstitutional vary from State to State? What if particular States have a history of expensive judicial elections?

24. Under the majority’s “objective” test, do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge?

25. What role does causation play in this analysis? The Court sends conflicting signals on this point. The majority asserts that “[w]hether Blankenship’s campaign contributions were a necessary and sufficient cause of Benjamin’s victory is not the proper inquiry.” But elsewhere in the opinion, the majority considers “the apparent effect such contribution had on the outcome of the election,” and whether the litigant has been able to “choos[e] the judge in his own cause.” If causation is a pertinent factor, how do we know whether the contribution or expenditure had any effect on the outcome of the election? What if the judge won in a landslide? What if the judge won primarily because of his opponent’s missteps?

26. Is the due process analysis less probing for incumbent judges—who typically have a great advantage in elections—than for challengers?

27. How final must the pending case be with respect to the contributor’s interest? What if, for example, the only issue on appeal is whether the court should certify a class of plaintiffs?

Is recusal required just as if the issue in the pending case were ultimate liability?

28. Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election?

29. When do we impute a probability of bias from one party to another? Does a contribution from a corporation get imputed to its executives, and vice-versa? Does a contribution or expenditure by one family member get imputed to other family members?

30. What if the election is nonpartisan? What if the election is just a yes-or-no vote about whether to retain an incumbent?

31. What type of support is disqualifying? What if the supporter's expenditures are used to fund voter registration or get-out-the-vote efforts rather than television advertisements?

32. Are contributions or expenditures in connection with a primary aggregated with those in the general election? What if the contributor supported a different candidate in the primary? Does that dilute the debt of gratitude?

33. What procedures must be followed to challenge a state judge's failure to recuse? May *Caperton* claims only be raised on direct review? Or may such claims also be brought in federal district court under 42 U.S.C. § 1983, which allows a person deprived of a federal right by a state official to sue for damages? If § 1983 claims are available, who are the proper defendants? The judge? The whole court? The clerk of court?

34. What about state-court cases that are already closed? Can the losing parties in those cases now seek collateral relief in federal district court under § 1983? What statutes of limitation should be applied to such suits?

35. What is the proper remedy? After a successful *Caperton* motion, must the parties start from scratch before the lower courts? Is any part of the lower court judgment retained?

36. Does a litigant waive his due process claim if he waits until after decision to raise it? Or would the claim only be ripe after decision, when the judge's actions or vote suggest a probability of bias?

37. Are the parties entitled to discovery with respect to the judge's recusal decision?

38. If a judge erroneously fails to recuse, do we apply harmless-error review?

39. Does the *judge* get to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case?

40. What if the parties settle a *Caperton* claim as part of a broader settlement of the

case? Does that leave the judge with no way to salvage his reputation?

These are only a few uncertainties that quickly come to mind. Judges and litigants will surely encounter others when they are forced to, or wish to, apply the majority's decision in different circumstances. Today's opinion requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?).

The Court's inability to formulate a "judicially discernible and manageable standard" strongly counsels against the recognition of a novel constitutional right. See *Veith* (plurality opinion) (holding political gerrymandering claims nonjusticiable based on the lack of workable standards); *id.* (KENNEDY, J., concurring in judgment) ("The failings of the many proposed standards for measuring the burden a gerrymander imposes ... make our intervention improper"). The need to consider these and countless other questions helps explain why the common law and this Court's constitutional jurisprudence have never required disqualification on such vague grounds as "probability" or "appearance" of bias.

III A

To its credit, the Court seems to recognize that the inherently boundless nature of its new rule poses a problem. But the majority's only answer is that the present case is an "extreme" one, so there is no need to worry about other cases. The Court repeats this point over and over....

But this is just so much whistling past the graveyard. Claims that have little chance of success are nonetheless frequently filed. The success rate for certiorari petitions before this Court is approximately 1.1%, and yet the previous Term some 8,241 were filed. Every one of the "*Caperton* motions" or appeals or § 1983 actions will claim that the judge is biased, or probably biased, bringing the judge and the judicial system into disrepute. And all future litigants will assert that their case is *really* the most extreme thus far.

Extreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: "Hard cases make bad law."...

B

And why is the Court so convinced that this is an extreme case? It is true that Don Blankenship spent a large amount of money in connection with this election. But this point cannot be emphasized strongly enough: Other than a \$1,000 direct contribution from Blankenship, *Justice Benjamin and his campaign had no control over how this money was spent*. Campaigns go to great lengths to develop precise messages and strategies. An insensitive or ham-handed ad campaign by an independent third party might distort the campaign's message or cause a backlash against the candidate, even though the candidate was not responsible for the

ads. See *Buckley v. Valeo* [*infra*, Chapter 14—EDS.] (“Unlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive”); see also Brief for Conference of Chief Justices as Amicus Curiae (citing examples of judicial elections in which independent expenditures backfired and hurt the candidate’s campaign). The majority repeatedly characterizes Blankenship’s spending as “contributions” or “campaign contributions,” but it is more accurate to refer to them as “independent expenditures.” Blankenship only “contributed” \$1,000 to the Benjamin campaign.

Moreover, Blankenship’s independent expenditures do not appear “grossly disproportionate” compared to other such expenditures in this very election. “And for the Sake of the Kids”—an independent group that received approximately two-thirds of its funding from Blankenship—spent \$3,623,500 in connection with the election. But large independent expenditures were also made in support of Justice Benjamin’s opponent. “Consumers for Justice”—an independent group that received large contributions from the plaintiffs’ bar—spent approximately \$2 million in this race. And Blankenship has made large expenditures in connection with several previous West Virginia elections, which undercuts any notion that his involvement in this election was “intended to influence the outcome” of particular pending litigation.

It is also far from clear that Blankenship’s expenditures affected the outcome of this election. Justice Benjamin won by a comfortable 7-point margin (53.3% to 46.7%). Many observers believed that Justice Benjamin’s opponent doomed his candidacy by giving a well-publicized speech that made several curious allegations; this speech was described in the local media as “deeply disturbing” and worse. Justice Benjamin’s opponent also refused to give interviews or participate in debates. All but one of the major West Virginia newspapers endorsed Justice Benjamin. Justice Benjamin just might have won because the voters of West Virginia thought he would be a better judge than his opponent. Unlike the majority, I cannot say with any degree of certainty that Blankenship “cho[se] the judge in his own cause.” I would give the voters of West Virginia more credit than that.

* * *

It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a “probability of bias” should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous “probability of bias,” will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.

I respectfully dissent.

[Justice Scalia’s dissenting opinion is omitted.]

Notes and Questions

1. Chief Justice Roberts asks so many questions in his dissent (let a thousand law review notes bloom!) that it does not seem fair to pile on with even more. But we cannot resist a few points.

2. Are the standards Justice Kennedy articulated in *Caperton* any more or less justiciable than the standards the dissenters raised in *Vieth* (Chapter 6) for partisan gerrymandering claims? If not, what explains Justice Kennedy's willingness in this case, but not *Veith*, to embrace a murky standard? Is it the relative extremity of the cases? The likely number of similar cases that will be filed in courts below?

3. In Chapters 15 and 16, we will see that Justice Kennedy has consistently voted against the constitutionality of spending limits in campaigns, and has been skeptical of other campaign finance regulation as well. No doubt his writings in *Caperton* will be cited by those supporting the constitutionality of other campaign finance laws. To Justice Kennedy, what role does large campaign money play in (judicial) elections? To what extent does large campaign spending influence the elected official? Does the potential for such influence justify more campaign finance limits? Finally, as the Chief Justice points out in the dissent, almost all of the money spent by Mr. Blankenship came in the form of contributions to a group making independent expenditures, and did not go to Justice Benjamin. Why then does Justice Kennedy in the *Caperton* introduction refer to this as a case in which Justice Benjamin "had received campaign contributions in an extraordinary amount from, and through the efforts of" Mr. Blankenship?

4. Does *Caperton* change anything in *White*? Will *Caperton* change the nature of judicial campaigns in those states with competitive and expensive judicial elections?

Chapter 13. Bribery

ADD THE FOLLOWING ON PAGE 657, IMMEDIATELY BEFORE *MCCORMICK V. UNITED STATES*:

What does 18 U.S.C. § 1346 mean, in referring to “a scheme or artifice to deprive another of the intangible right of honest services”? Circuit courts have had a difficult time answering this question. The matter is currently before the U.S. Supreme Court in a case involving *private* defendants convicted of violating the statute by failing to render honest services to the company of which they were officers. *Black v. United States*, 129 S. Ct. 2379 (2009) (granting petition for certiorari).

In dissenting from the denial of certiorari in a previous case, Justice Scalia expressed grave concerns about the scope of Section 1346:

Though it consists of only 28 words, the statute has been invoked to impose criminal penalties upon a staggeringly broad swath of behavior, including misconduct not only by public officials and employees but also by private employees and corporate fiduciaries. Courts have upheld convictions of a local housing official who failed to disclose a conflict of interest, a businessman who attempted to pay a state legislator to exercise “informal and behind-the-scenes influence on legislation,” students who schemed with their professors to turn in plagiarized work, lawyers who made side-payments to insurance adjusters in exchange for the expedited processing of their clients’ pending claims, and, in the decision we are asked to review here, city employees who engaged in political-patronage hiring for local civil-service jobs.

If the “honest services” theory – broadly stated, that officeholders and employees owe a duty to act only in the best interests of their constituents and employers – is taken seriously and carried to its logical conclusion, presumably the statute also renders criminal a state legislator’s decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; a mayor’s attempt to use the prestige of his office to obtain a restaurant table without a reservation; a public employee’s recommendation of his incompetent friend for a public contract; and any self-dealing by a corporate officer. Indeed, it would seemingly cover a salaried employee’s phoning in *sick to go to a ball game* [emphasis added]....

[T]his Court has long recognized the “basic principle that a criminal statute must give fair warning of the conduct that it makes a crime.” There is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct. But “the notion of a common-law crime is utterly anathema today,” and for good reason. It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail. “How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know,

or must make it up as they go along?” *United States v. Rybicki*, 354 F.3d 124, 160 (C.A.2 2003) (Jacobs, J., dissenting).

It may be true that petitioners here, like the defendants in other “honest services” cases, have acted improperly. But “[b]ad men, like good men, are entitled to be tried and sentenced in accordance with law.” *Green v. United States*, 365 U.S. 301 (1961) (Black, J., dissenting).

Sorich v. United States, 129 S. Ct. 1308 (2009) (Scalia, J., dissenting from denial of certiorari). What should “the intangible right to honest services” be read to encompass? Is there any way of cabining its scope and apprising public and private actors of what exactly is prohibited? Should Section 1346 be struck down on its face as hopelessly vague, leaving Congress – as it did after *McNally* – a chance to try again, by writing a clearer statute this time around?

Chapter 14. The *Buckley* Framework

ADD THE FOLLOWING TO THE END OF THE CARRYOVER PARAGRAPH AT THE TOP OF PAGE 678:

The Federal Election Commission reported that “[f]inancial activity of 2008 presidential candidates and national party convention committees increased 80% in receipts over the 2004 presidential election, totaling more than \$1.8 billion.” FEC Press Release, “2008 Presidential Campaign Financial Activity Summarized: Receipts Nearly Double 2004 Total,” June 8, 2009, available at <http://www.fec.gov/press/press2009/20090608PresStat.shtml>. Fuller figures for the 2008 are not yet available. The amount of fundraising conducted over the internet, especially by then-candidate Barack Obama, was unprecedented. That activity is considered in more detail in this Supplement, Chapter 17.

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 731:

For an important egalitarian argument rejecting the premises of deliberative democracy, see Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 UNIVERSITY OF ILLINOIS LAW REVIEW 599. Pasquale concludes:

Trying to argue for effective campaign finance regulation within the confines of leading Supreme Court cases is like trying to compose an epic in a sestina: the form itself defeats the meaning one would give it. About twenty-five years ago, Skelly Wright realized that “[w]ithin the confines of *Buckley* and *Bellotti*, only limited reforms are permissible. More effective measures will be possible only if the Court reconsiders these unfortunate precedents.” But to the extent the Court has done so, it has edged toward a First Amendment absolutism that many thought had died with Justice Black.

A new egalitarianism in campaign reform advocacy has to focus on facts that have changed since *Buckley*, not on futile efforts to recharacterize spending limits as “neutral” with respect to rich and poor citizens. Significant empirical research has called into question the cognitive content of campaign advertising. The function of fundraising is less to inform the public than to signal wealth and power to donors, potential rivals, and media outlets. Campaign contribution and expenditure limits can help to alleviate the strategic importance of the “dollar primary” by compressing the range of situations where money can critically alter the balance of power.

The *Buckley* Court’s hostility to egalitarianism is increasingly inappropriate in an America riven by economic inequality, and its romantic view of campaign spending becomes ever more naïve as techniques for manipulating public opinion flourish. Nevertheless, a durable majority of justices appear to support *Buckley* to this day. Rather than engage in the Sisyphean task of

convincing a hostile Court of the validity of reform in deliberativist terms, reformers would be wiser to advance the egalitarian vision that ultimately animates reform. A constitutional amendment overturning *Buckley* is a prerequisite for unifying the political philosophy and constitutional theory of campaign finance reform.

Id. at 659-60. How would the other writers on this question respond to Pasquale?

Chapter 15. Contribution Limits after *Buckley*

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 769:

The issue of campaign financing of judicial elections reached the Supreme Court in a judicial recusal case, *Caperton v. Massey*, discussed in this Supplement, Chapter 11. It remains to be seen whether *Caperton* will affect spending on judicial elections.

ADD THE FOLLOWING TO THE END OF PART III.A ON PAGE 795:

For more on *Davis* and the equality rationale, see this Supplement to Chapter 16.

The Republican National Committee has filed what it terms an “as applied” challenge to BCRA’s soft money regulations. The complaint is available at this link: <http://www.campaignlegalcenter.org/attachment.html/Complaint%2C+11-13-08.pdf?id=1963>. As with *McConnell* and *WRTL II* (described in Chapter 16), under BCRA’s jurisdictional provision, the case has been assigned to a three-judge court in Washington D.C., with direct appeal to the Supreme Court. Oral argument is scheduled before the three-judge court for late August 2009. Whether or not the case is properly conceived of as an “as applied” challenge (more on such challenges in Chapter 16’s discussion of *WRTL II*), the case may give the Roberts Court a chance to rethink or narrow the soft money holdings of *McConnell*. For links to the trial court documents, see: <http://www.campaignlegalcenter.org/cases-453.html>. The RNC has also filed a case challenging the coordinated spending limits. That case is being heard in a Louisiana district court.

ADD THE FOLLOWING TO THE END OF THE PENULTIMATE PARAGRAPH ON PAGE 797:

The last sentence is incorrect. There was no appeal of this ruling.

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 805:

For an updated analysis of this issue, see Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organizations Political Activity Regulation*, 45 HARVARD JOURNAL ON LEGISLATION 471 (2008).

ADD THE FOLLOWING AFTER NOTE 4 ON PAGE 805:

5. Though BCRA was passed in 2002, some of the implementing regulations continue to be litigated. In *EMILY’s List v. Federal Election Commission*, 569 F.Supp.2d 18 (D.D.C. 2008), a PAC challenged Federal Election Commission regulations dealing with, among other things, the allocation of contributions for federal and non-federal election activities. The court upheld the regulations, and the case is currently on appeal before the D.C. Circuit.

In *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008), the court struck down yet again some FEC rules related to coordination between official campaigns and outside groups. The court summarized the tortured procedural history:

Congress passed the McCain-Feingold Act ... in an effort to rid American politics of two perceived evils: the corrupting influence of large, unregulated donations called “soft money,” and the use of “issue ads” purportedly aimed at influencing people's policy views but actually directed at swaying their views of candidates. The Federal Election Commission promulgated regulations implementing the Act, but in *Shays v. FEC*, 414 F.3d 76 (D.C.Cir.2005) (“*Shays II*”), we rejected several of them as either contrary to the Act or arbitrary and capricious, concluding that the Commission had largely disregarded the Act in an effort to preserve the pre-BCRA status quo. Now the FEC has revised the regulations we earlier rejected and issued several new ones, three of which are before us here: (1) a “coordinated communication” standard, the original version of which we rejected in *Shays II*; (2) definitions of “get-out-the-vote activity” and “voter registration activity”; and (3) a rule allowing federal candidates to solicit soft money at state party fundraisers. Although we uphold one part of the coordinated communication standard known as the “firewall safe harbor,” we reject the balance of the regulations as either contrary to the Act or arbitrary and capricious. We remand these regulations in the hope that, as the nation enters the thick of the fourth election cycle since BCRA's passage, the Commission will issue regulations consistent with the Act's text and purpose.

The FEC is now working on new rules, including a portion of the coordinated contribution rules. But controversy and deadlock along party lines at the FEC may be delaying the new rules. See Eliza Newlin Carney, *FEC Shakeup Long Overdue*, NATIONAL JOURNAL, May 11, 2009, available at http://www.nationaljournal.com/njonline/no_20090508_9163.php (“In case after case, the six-member FEC, which is evenly divided between Republicans and Democrats, has split 3-3 along party lines. Since the FEC may take no action without a majority, a long list of complaints have been effectively thrown out.”); Donald F. McGahn, *Reject the FEC's Activist Overreach*, POLITICO, July 14, 2009, available at <http://www.politico.com/news/stories/0709/24874.html> (“One choice is for commissioners to reject this activist approach, regardless of how the resulting ‘deadlock’ is portrayed. I have done just that.”).

Chapter 16. Spending Limits after *Buckley*

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 845:

The citation to Professor Winkler's article is incomplete. It begins on page 133.

ADD THE FOLLOWING TO THE END OF NOTE 13 ON PAGE 850:

For an examination of the constitutionality of limits on lobbyist campaign finance activity, see Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STANFORD LAW AND POLICY REVIEW 105 (2008).

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 872:

1.5 The Federal Election Commission has a regulation offering definitions of “express advocacy.” One of the definitions of express advocacy, contained in 11 C.F.R. § 100.22(b), reads as follows:

Expressly advocating means any communication that—...

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

In *Real Truth About Obama v. Federal Election Commission*, 2008 WL 4416282 (E.D. Va. 2008), a 527 organization sought a preliminary injunction barring the FEC from applying section 100.22(b) against it. The court rejected a challenge to this regulation.

In the present case, RTAO's first assertion of unconstitutionality is that section 100.22(b) is unconstitutional because it gives an alternative method of finding express advocacy not supported by Supreme Court precedent. However, the test in section 100.22(b) is the same analysis as was enumerated in *WRTL*. *WRTL* required that the ad be deemed express advocacy “only if the ad is susceptible to no reasonable interpretation other than an appeal to vote for or against a specific candidate.” Section 100.22(b) states that express advocacy can be found if “reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s).” Because section

100.22(b) is virtually the same test stated by Chief Justice Roberts in the majority opinion of *WRTL*, and that decision supercedes [an earlier opinion of this court], the test enumerated in section 100.22(b) to determine express advocacy is constitutional.

RTAO's second assertion of unconstitutionality is that the test is vague because it permits considerations of context[:] however the Supreme Court has clearly permitted such considerations. *WRTL* (holding that 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.'").

Does section 100.22(b) allow the FEC to take more context into account than the *WRTL* standard?

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 873:

The Casebook at page 795 briefly describes the facts of *Davis*. Here is a relevant excerpt from the majority opinion taking issue with the equality-like rationale offered by the government for the provision of BCRA increasing candidate contribution limits when candidates face self-financed opponents:

The Government maintains that § 319(a)'s asymmetrical limits are justified because they "level electoral opportunities for candidates of different personal wealth." "Congress enacted Section 319," the Government writes, "to reduce *the natural advantage* that wealthy individuals possess in campaigns for federal office." (emphasis added). Our prior decisions, however, provide no support for the proposition that this is a legitimate government objective. See *Shrink Missouri* (THOMAS, J., dissenting) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances" (quoting *NCPAC*); *Randall* (THOMAS, J., concurring in judgment) (noting "the interests the Court has recognized as compelling, *i.e.*, the prevention of corruption or the appearance thereof"). On the contrary, in *Buckley* we held that "[t]he interest in equalizing the financial resources of candidates" did not provide a "justification for restricting" candidates' overall campaign expenditures, particularly where equalization "might serve ... to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." We have similarly held that the interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections" cannot support a cap on expenditures for "express advocacy of the election or defeat of candidates," as "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." see also *McConnell* (noting, in assessing standing, that there is no legal right to

have the same resources to influence the electoral process). Cf. *Austin* (KENNEDY, J., dissenting) (rejecting as “antithetical to the First Amendment” “the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections”).

The argument that a candidate’s speech may be restricted in order to “level electoral opportunities” has ominous implications because it would permit Congress to arrogate the voters’ authority to evaluate the strengths of candidates competing for office. See *Bellotti* (“[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments” and “may consider, in making their judgment, the source and credibility of the advocate”). Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters’ choices. See *Bellotti* (The “[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves”).

Davis, 128 S. Ct. at 2773-74.

Justice Stevens, speaking for the four dissenters, wrote the following in response:

[W]e have long recognized the strength of an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results. In case after case, we have held that statutes designed to protect against the undue influence of aggregations of wealth on the political process—where such statutes are responsive to the identified evil—do not contravene the First Amendment. See, e.g., *Austin* (upholding statute designed to combat “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”); *MCFL* (“Th[e] concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.... Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace”); cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (upholding constitutionality of several components of the FCC’s “fair coverage” requirements, and explaining that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market”).

Although the focus of our cases has been on aggregations of corporate rather than individual wealth, there is no reason that their logic—specifically, their concerns about the corrosive and distorting effects of wealth on our political process—is not equally applicable in the context of individual wealth. For, as we explained in *McConnell*, “Congress’ historical concern with the ‘political potentialities of wealth’ and their ‘untoward consequences for the democratic process’... has long reached beyond corporate money.”

Minimizing the effect of concentrated wealth on our political process, and the concomitant interest in addressing the dangers that attend the perception that political power can be purchased, are, therefore, sufficiently weighty objectives to justify significant congressional action. And, not only was Congress motivated by proper and weighty goals in crafting the Millionaire’s Amendment, the details of the scheme it devised are genuinely responsive to the problems it identified. The statute’s “Opposition Personal Funds Amount” formula permits a self-funding candidate to spend as much money as he wishes, while taking into account fundraising by the relevant campaigns; it thereby ensures that a candidate who happens to enjoy a significant fundraising advantage against a self-funding opponent does not reap a windfall as a result of the enhanced contribution limits. Rather, the self-funder’s opponent may avail himself of the enhanced contribution limits only until parity is achieved, at which point he becomes again ineligible for contributions above the normal maximum.

It seems uncontroversial that “there is no good reason to allow disparities in wealth to be translated into disparities in political power. A well-functioning democracy distinguishes between market processes of purchase and sale on the one hand and political processes of voting and reason-giving on the other.” Sunstein, *Political Equality and Unintended Consequences*, 94 Colum. L.Rev. 1390 (1994). In light of that clear truth, Congress’ carefully crafted attempt to reduce the distinct advantages enjoyed by wealthy candidates for congressional office does not offend the First Amendment.

Davis, 128 S. Ct. at 2780-82.

ADD THE FOLLOWING AFTER NOTE 6 ON PAGE 874:

7. *Citizens United: A Major Development*. The Supreme Court will directly consider whether to overrule *Austin* and that part of *McConnell* upholding BCRA section 203 in *Citizens United v. Federal Election Commission*, probable jurisdiction noted, 129 S. Ct. 594 (2008). *Citizens United* produced an anti-Hillary Clinton documentary. The group wanted to air the documentary during the 2008 presidential primary season through a cable television “video on demand” service and to advertise for it on television. In exchange for a \$1.2 million fee, a cable television operator consortium would have made the documentary available to cable subscribers to download free “on demand,” as part of an “Election 08” series. *Citizens United* is an

ideological corporation (like MCFL), but it takes for-profit corporate funding. The FEC took the position that the movie, if broadcast on television, would meet BCRA's definition of an electioneering communication, and therefore Citizens United, which accepts for-profit corporate funding, could not pay for its broadcast with general treasury funds. Citizens United argued against BCRA section 203's application to its documentary, filing a case before a special three-judge court under BCRA's special jurisdictional provisions. (It also raised an argument against disclosures related to its advertising for the film. Those issues are discussed in this Supplement to Chapter 18.)

The three-judge court denied Citizens United's request for a preliminary injunction barring FEC enforcement of section 203. 530 F.Supp.2d 274 (D.D.C. 2008). On Citizens United's facial challenge to the law, the court held that it was without power to overrule *McConnell*, as it was bound by Supreme Court precedent. On its as-applied challenge, it concluded that the documentary was the "functional equivalent of express advocacy" and therefore the group was not entitled to a *WRTL* exemption:

The Movie does not focus on legislative issues. *The Movie* references the election and Senator Clinton's candidacy, and it takes a position on her character, qualifications, and fitness for office. Dick Morris, one political commentator featured in *The Movie*, has described the film as really "giv[ing] people the flavor and an understanding of why she should not be President." After viewing *The Movie* and examining the 73-page script at length, the court finds Mr. Morris's description to be accurate. *The Movie* is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her.¹² *The Movie* is thus the functional equivalent of

¹² A selection of excerpts from the movie are indicative of the film's message as a whole and serve to demonstrate the difficulty that this court had in its ultimately unsuccessful attempt to find a reasonable interpretation of *The Movie* that would take it out of the *WRTL* "functional equivalent to express advocacy" classification.

Excerpts include statements by the film's narrator, one of several political commentators or another interviewee stating:

"She's driven by the power. She's driven to get the power. That is the driving force in her life."

"She is the expert at not saying what she believes-she will run on attacking Republicans, and being the first woman president-oh isn't that amazing, she's a woman she can walk and talk."

"She is steeped in controversy, steeped in sleaze, that's why they don't want us to look at her record."

"Over the past 16 years Hillary Clinton has undoubtedly become one of the most divisive figures in America. How this makes her suited to unite the country as the next president is troubling to many."

"I mean think of what it says about Hillary Clinton that she was willing to put up with his open philandering, with anything in a skirt who wanders before his eyesight-all for the power-at least with Bill Clinton he was just good time Charlie. Hillary's got an agenda and she's willing to put up with that to be [P]resident of the [U]nited [S]tates, she's got a to do list when she gets to the White House."

express advocacy. See *WRTL* (setting out the “functional equivalent” standard). As such, it falls within the holding of *McConnell* sustaining, as against the First Amendment, § 203 insofar as it bars corporations from funding electioneering communications that constitute the functional equivalent of express advocacy. There is no substantial likelihood that Citizens will prevail on its as-applied challenge with respect to *The Movie*.

Citizens United appealed the denial of the preliminary injunction to the Supreme Court, which dismissed the appeal. 128 S. Ct. 1732. The three-judge court then granted summary judgment for the FEC, in a single paragraph opinion concluding: “Based on the reasoning of our prior opinion, we find that the Federal Election Commission is entitled to judgment as a matter of law.” 2008 WL 2788753 (D.D.C. July 18, 2008). The Supreme Court agreed to hear an appeal of the summary judgment decision, 129 S. Ct. 594 (2008).

On appeal to the Supreme Court, Citizens United raised a variety of issues, including the argument that “video-on-demand” should not count as an electioneering communication for

“I think the American people have a right to as much of a public record as possible about Hillary Clinton. Those records should be released before the 2008 elections so that we can learn a lot more about exactly how much influence she had in the White House, what her positions were in the White House, and how she acted in the White House.”

“Finally, before America decides on our next president, voters should need no reminders of [] what’s at stake—the well being and prosperity of our nation.”

“It[']s been said and I agree with it that this is the most personal political choice that Americans make. They want, they—their personality traits, their—will they consider a person that they could trust, that they would like, that they were comfortable with, and that’s [where] I think Hillary Clinton as a candidate has great defects.”

“If she reverts to form, Hillary Clinton will likely be in the future what she has been in the past, which is a person, a woman, a politician of the left, and I don’t think that’s going to [be] good for the security of the United States.”

“I think we are at a very critical time in this country. I can tell you beyond a shadow of a doubt that uh, the Hillary Clinton that I know is not equipped, not qualified to be our commander in chief.”

“[T]his vote comes down to one thing: liberty. Do you believe in liberty or don’t you? Economic liberty, free speech, protecting our borders, protecting our country from terrorism—the issue is liberty.”

“[W]e must not ever underestimate this woman. We must not ever understate her chances of winning. We mustn’t be lulled into a state of security and complacency by the new found moderation that she likes to talk about. And we must never forget the fundamental danger that this woman [poses] to every value that we hold dear.”

In sum, plaintiff’s counsel’s representation at oral argument that the movie did not exhort viewers to vote against Senator Clinton, is simply untrue.

purposes of BCRA. But the group also argued more boldly that *Austin* should be overruled. The Court heard arguments in the case in March 2009, and an opinion was expected by summer. On the last day of the Court's regular term, however, the Court surprisingly set the case for reargument on September 9, 2009, and asked the parties to file supplemental briefs on the following question: "For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b?"

Does the Court's recent ruling in *Davis* (see excerpts from the case earlier in the Supplement for this Chapter) shed light on what the Court is likely to do? For early commentary, see Richard L. Hasen, *The Supreme Court Gets Ready to Turn on the Corporate Fundraising Spigot*, SLATE, June 29, 2009, available at <http://www.slate.com/id/2221753/>.

Chapter 17. Public Financing

ADD THE FOLLOWING TO THE END OF PAGE 892:

There is no question that 2008 marked the demise of the current public financing system for financing presidential primaries, and perhaps for the general election as well.

By 2008, it was clear that the public financing system, with its relatively paltry spending limits, was a luxury no serious candidate could afford, at least in the primary season. Indeed, in 2008, the only candidates opting for public financing were the weak ones who could not raise funds well on their own. John Edwards agreed to take public financing as his personal fundraising collapsed and John McCain agreed to take it when he too was written off as having no chance at securing the Republican nomination. Once McCain became the front-runner, he backed out of his commitment to take public financing in the primary election season.

During the primary season (up to each party's national convention), eventual Democratic Party nominee Barack Obama raised \$414.2 million through private contributions, and eventual Republican party nominee John McCain raised \$216.3 million, without taking any public financing. In one month alone, July 2008, Obama raised \$50 million and spent \$55 million, spending more in one month than he would have been able to spend *for the entire primary campaign season* had he opted for public financing and its accompanying \$52 million spending cap.

Richard L. Hasen, *The Changing Nature of Campaign Financing for Presidential Primary Candidates*, in *EVOLUTION AND REVOLUTION IN THE NOMINATIONS PROCESS* (Jack Citrin and David Karol eds., forthcoming 2009). Obama's unprecedented fundraising relied upon "micro-donations" (donations under \$200), collected primarily via the Internet, and the extensive use of campaign finance "bundlers." Obama raised \$117.7 million from donors giving less than \$200 in the aggregate. *Id.* at 33. He reported over 2 million individual donors during both election periods. *Id.* at 45 n.13. Does fundraising from small donations and small donors achieve the same goals as the primary campaign finance system, as the Obama campaign claimed during the election? Senator McCain's fundraising relied much more heavily on bundling than on Internet-based small donations. McCain raised 31 percent of his primary funds (over \$62 million) in small donations, while Obama raised 53 percent of his primary funds in this way. *Id.* at 32.

In the general election, Senator McCain, the Republican party nominee, opted into the public financing system, entitling him to \$84.1 million in public funds (plus an additional \$46 million in funds for legal and accounting expenses). Senator Obama opted out, and continued to raise unprecedented sums privately, much through Internet micro-donations and bundling. Much of the disparity between the candidates, however, was made up by the Republican National Committee fundraising, some of that as part of a joint fundraising program with the McCain campaign. "In the general election, during September Senator Obama raised \$150 million and the DNC raised another \$42 million. Senator McCain in the same period received his \$84.1

million in public financing, while the RNC raised a little over \$67 million.” Richard L. Hasen, *Senator Obama's \$150-Million September and \$600-Million Campaign: Signs that Our Campaign Finance Laws are Broken or Working?*, FINDLAW, Oct. 28, 2008, http://writ.news.findlaw.com/commentary/20081028_hasen.html.

It is hard to imagine any Republican candidate running against President Obama (assuming he runs in 2012) opting in to the current public financing system. As of July 2009, President Obama had not yet proposed any legislation to fix the public financing system, something he had promised to do as a presidential candidate.

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 905:

One of the red flags for supporters of public financing plans with variable contribution limits is the *Davis* Court’s approving citation to an Eighth Circuit opinion, *Day v. Holahan*, striking down the variable contribution limits of a public financing plan:

Buckley’s emphasis on the fundamental nature of the right to spend personal funds for campaign speech is instructive. While BCRA does not impose a cap on a candidate’s expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right. Section 319(a) requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations. Many candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite § 319(a), but they must shoulder a special and potentially significant burden if they make that choice. See *Day v. Holahan*, 34 F.3d 1356, 1359-1360 (C.A.8 1994) (concluding that a Minnesota law that increased a candidate’s expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures).

Davis, 128 S. Ct. at 2771-72. For an argument that *Davis*’s dicta does not undermine the viability of variable contribution limits post-*Davis*, see the relevant portion of the *Harvard Law Review* 2008 Supreme Court Developments Issue at 122 HARVARD LAW REVIEW 375-85 (2008).

Chapter 18. Campaign Finance Disclosure

ADD THE FOLLOWING TO THE END OF NOTE 10 ON PAGE 939:

The dangers of disclosure in the Internet era came into sharp relief in the context of a hotly disputed ballot measure in California. As described in more detail in this Supplement to Chapter 8, in 2008, the California Supreme Court held that the state's voter initiated statutory ban on same-sex marriage violated various provisions of the California Constitution. *In re Marriage Cases*, 43 Cal.4th 757, 183 P.3d 384 (2008). In response, opponents of gay marriage qualified Proposition 8 for the ballot, an initiated constitutional amendment changing the state Constitution to provide that "Only marriage between a man and a woman is valid or recognized in California." The measure eventually passed, and the state Supreme Court upheld it against a challenge it impermissibly "revised" the California Constitution. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

Some donors supporting Proposition 8 faced death threats, boycotted businesses, and other harassment, much of which was blamed on a website, eightmaps.com.

The site takes the names and ZIP codes of people who donated to the ballot measure — information that California collects and makes public under state campaign finance disclosure laws — and overlays the data on a Google map.

Visitors can see markers indicating a contributor's name, approximate location, amount donated and, if the donor listed it, employer. That is often enough information for interested parties to find the rest — like an e-mail or home address. The identity of the site's creators, meanwhile, is unknown; they have maintained their anonymity.

Brad Stone, *Slipstream: Prop 8 Donor Website Shows Disclosure is 2-Edged Sword*, N.Y. TIMES, Feb. 7, 2009, available at: <http://www.nytimes.com/2009/02/08/business/08stream.html>.

In response to these threats, one of the groups supporting an initiative sought a preliminary injunction barring the post-election release of additional contributor data due to the FPPC. The court denied the injunction, holding that contribution information served the public's important information interest. *ProtectMarriage.com v. Bowen*, 599 F.supp.2d 1197 (E.D. Cal., 2009). Rejecting the analogy to exemption from disclosure in *Brown*, the court declared:

Plaintiffs do not, indeed cannot, allege that the movement to recognize marriage in California as existing only between a man and a woman is vulnerable to the same threats as were socialist and communist groups, or, for that matter, the NAACP. Proposition 8 supporters promoted a concept entirely devoid of governmental hostility. Plaintiffs' belief in the traditional concept of marriage, to

disagreement, have not historically invited animosity. The Court is at a loss to find any principled analogy between two such greatly diverging sets of circumstances.

Finally, Plaintiffs' exemption argument appears to be premised, in large part, on the concept that individuals should be free from even legal consequences of their speech. That is simply not the nature of their right. Just as contributors to Proposition 8 are free to speak in favor of the initiative, so are opponents free to express their disagreement through proper legal means.

While the Court is cognizant of the deplorable nature of many of acts alleged by Plaintiffs, the Court also must reiterate that the legality or morality of any specific acts is not before it. Thus, as much as the Court strongly condemns the behavior of those who resort to violence, and/or other illegal behavior, the Court need not, indeed cannot, evaluate the proper legal consequences of those actions today.

By the same token, nothing in the Court's decision immunizes or excuses those who have engaged in illegal acts from the consequences of their conduct. Those responsible for threatening the lives of supporters of Proposition 8 are subject to criminal liability. See Troupis Decl., Exh. C (noting that the Fresno chief of police stated the department was "close to making an arrest" in the case of the death threats delivered to the mayor and a local pastor.) Those choosing to vandalize the property of individuals or the public are likewise liable. Those mailing white powder to organizations are subject to federal prosecution. In each case, there are appropriate legal channels through which to rectify and deter the reoccurrence of such reprehensible behavior.

As much as those channels are available today, it is unlikely that groups previously successful in seeking exemptions were privy to the same opportunities. Again, Plaintiffs have shown no societal or governmental hostility to their cause. Contrary to groups such as the SWP, Plaintiffs can seek adequate relief from law enforcement and the legal system. Such was not the case for those thought to be supporting the SWP or communist groups, those subject to actual criminal liability based on their beliefs and their associations.

Moreover, the Court simply cannot ignore the fact that numerous of the acts about which Plaintiffs' complain are mechanisms relied upon, both historically and lawfully, to voice dissent. The decision and ability to patronize a particular establishment or business is an inherent right of the American people, and the public has historically remained free to choose where to, or not to, allocate its economic resources. As such, individuals have repeatedly resorted to boycotts as a form of civil protest intended to convey a powerful message without resort to non-violent means. The Supreme Court has acknowledged these rights on many an occasion...

Id. at 1217-18. The court also rejected the argument that a \$100 reporting threshold was too low.

Even if not constitutionally mandated, should reporting thresholds be changed? Should campaign finance enforcement agencies be instructed to collect contributor data, but not post data for small donors on the agency website?

Lack of reporting has its costs too. Federal law does not require campaigns to file contributor data on contributors who give less than \$200 to the campaign (in the aggregate). In the 2008 election, the Republican National Committee filed a complaint “questioning the legitimacy of the more than \$220 million in small donations to Mr. Obama’s campaign.” Michael Luo & Griff Palmer, *Fictitious Donors Found in Obama Campaign Finance Records*, NEW YORK TIMES, Oct. 9, 2008, available at: <http://www.nytimes.com/2008/10/10/us/politics/10donate.html>; see also Matthew Mosk, *Obama Accepting Untraceable Donations: Contributions Reviewed After Deposits*, WASHINGTON POST, Oct. 29, 2008, at A2, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/28/AR2008102803413.html>. Does fear of fraud through undisclosed small donations, whether rational or not, justify lowering the reporting threshold for donors giving less than \$200 to federal candidates?

ADD THE FOLLOWING AFTER NOTE 5 ON PAGE 947:

6. *Disclosure* and *WRTL*. Does the “as-applied” exemption to the corporate spending limits recognized in *WRTL* (Casebook at page 853) apply to disclosure rules as well? The Supreme Court will consider this issue in *Citizens United v. Federal Election Commission*, probable jurisdiction noted, 129 S. Ct. 594 (2008). (This Supplement to Chapter 16 sets out some of the facts of *Citizens United*). The disclosure challenge relates to 10- and 30-second advertisements for an anti-Hillary Clinton movie that were to be broadcast before the 2008 presidential primaries.

Here is an excerpt from the three-judge court opinion on the disclosure issue,

Citizens’ proposed advertisements present a different picture. The FEC agrees that Citizens may broadcast the advertisements because they fall within the safe harbor of the FEC’s prohibition regulations implementing *WRTL*. They did not advocate Senator Clinton’s election or defeat; instead, they proposed a commercial transaction—buy the DVD of *The Movie*. Although Citizens may therefore run the advertisements, it complains that requirements of § 201 and § 311 of BCRA, impose on it burdens that violate the First Amendment.

Section 201 is a disclosure provision requiring that any corporation spending more than \$10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC that includes - among other things - the names and addresses of anyone who contributed \$1,000 or more in

aggregate to the corporation for the purpose of furthering electioneering communications. Section 311 is a disclaimer provision. For advertisements not authorized by a candidate or her political committee, the statement “_____ is responsible for the content of this advertising” must be spoken during the advertisement and must appear in text on-screen for at least four seconds during the advertisement. In addition, such advertisements are required to include the name, address, and phone number or web address of the organization behind the advertisement.

Citizens thinks that § 201 and § 311 are unconstitutional because its advertisements do not constitute express advocacy or the functional equivalent of express advocacy. The argument is that the Supreme Court’s *WRTL* decision narrowed the constitutionally permissible scope of what could be considered an electioneering communication. Under Citizens’ reading of *WRTL*, anything that is not express advocacy or not “susceptible of [a] reasonable interpretation other than as an appeal to vote for or against a specific candidate” cannot be constitutionally regulated by Congress under BCRA.

We do not believe *WRTL* went so far. The only issue in the case was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period. Although *McConnell* upheld the § 203 prohibition on its face, the Court left open the issue that was presented in, reserving it for decision on an as-applied basis. In contrast, when the *McConnell* Court sustained the disclosure provision of § 201 and the disclaimer provision of § 311, it did so for the “entire range of electioneering communications” set forth in the statute. *McConnell*. Citizens’s advertisements obviously are within that range.

Although Citizens styles its argument as an as-applied challenge, it offers only one distinction between its advertisements and the mine-run of speech that constitutes electioneering communication under BCRA. The distinction, so goes the argument, is that Citizens’ speech is constitutionally protected, as *WRTL* holds. We know that the Supreme Court has not adopted that line as a ground for holding the disclosure and disclaimer provisions unconstitutional, and it is not for us to do so today. And we know as well that in the past the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment. See *MCFL* (striking down a prohibition, and noting that the disclosure provisions will apply to the newly permitted speech); *CARC* (same); *Bellotti* (discussing how disclosure provisions can help offset the coercive aspects of corporate speech).

Citizens United v. Federal Election Commission, 530 F.Supp.2d 274, 280-281 (D.D.C. 2008). Will a majority of the Court support a *WRTL*-style exemption in *Citizens United*? If the Court strikes down the corporate spending limit in the same case, does that make it more likely or less likely that the Court will support a broader disclosure exemption?