ELECTION LAW

CASES AND MATERIALS

SECOND EDITION

2003 Supplement

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Chapter 1. Introductory Readings

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 24:

No doubt some of the growth of the election law field reflects the attention that the United States Supreme Court has paid to the topic in recent decades. According to one study, from the period 1901-1960, the Court decided an average of 10.3 election law cases per decade with a written opinion. From 1961-2000, that figure jumped to 60 per decade. The trend also appears when one considers the percentage of election law cases on the Supreme Court's docket. In the earlier period, election law cases made up 0.7% of the cases the Court decided by written opinion; in the latter period, that percentage increased seven and one-half times to an average 5.3% of cases. Richard L. Hasen, THE SUPREME COURT AND ELECTION LAW, JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 1 (2003).

Chapter 2. The Right to Vote and Its Exercise

ADD THE FOLLOWING TO THE END OF PART 3 ON PAGE 33:

See also Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 NEW YORK UNIVERSITY LAW REVIEW 1456 (2001).

ADD THE FOLLOWING NOTE AFTER NOTE 3 ON PAGE 58:

4. For an exploration of Latino voter turnout issues, see Benjamin Highton and Arthur L. Burris, *New Perspectives on Latino Voter Turnout in the United States*, 30 AMERICAN POLITICS RESEARCH 285 (2002).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 63:

For a defense of compulsory voting, see Lisa Hill, *On the Reasonableness of Compelling Citizens to 'Vote': the Australian Case*, 50 POLITICAL STUDIES 80 (2002).

Chapter 3. Election Administration: The Case of Florida 2000

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 70:

For a careful consideration of this issue, see Steven J. Mulroy, *Right Without a Remedy? The "Butterfly Ballot" Case and Court-Ordered Federal Election "Revotes,"* 10 GEORGE MASON LAW REVIEW 215 (2001); Steven J. Mulroy, *Substantial Noncompliance and Reasonable Doubt: How the Florida Courts Got it Wrong in the Butterfly Ballot Case*, 14 STANFORD LAW & POLICY REVIEW 203 (2003).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 104:

Posner has expanded his crisis rationale in a book, Richard A. Posner, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001). Posner's crisis rationale is criticized in Richard L. Hasen*, A "Tincture of Justice": Judge Posner's Failed Rehabilitation of* Bush v. Gore, 80 TEXAS LAW REVIEW 137 (2001).

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 104:

For additional explorations of the legitimacy question, see *BUSH V. GORE*: THE QUESTION OF LEGITIMACY (Bruce Ackerman, ed. 2002). For a review of the Ackerman anthology, see Robert J. Pushaw, *Politics, Ideology and the Academic Assault on* Bush v. Gore, 2 ELECTION LAW JOURNAL 97 (2003).

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 104:

Article I, Section 4 of the Constitution says that the "times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof," subject to the power of Congress to alter state regulations. In *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002), a three-judge District Court enjoined the state from using a congressional redistricting plan adopted by a state court after the legislature had failed to adopt a plan following the 2000 census. The federal court instead imposed its own districting plan for election of Mississippi's House members. One basis for the District Court's ruling was that the state court was not authorized by the Mississippi legislature to adopt a districting plan and that therefore the state court's doing so violated Article I, Section 4.[1] (The District Court did not stop to reflect that neither was *it* authorized by the Mississippi legislature to adopt a districting plan. Is the District Court's implicit holding, that Article I, Section 4 prevents state courts but not federal courts from drawing remedial congressional plans, defensible?)

[1] A somewhat similar theory was rejected by the Pennsylvania Supreme Court in *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002). In that case, a congressional districting plan was challenged as violative of the Pennsylvania Constitution. The state defended on the ground that the legislature had plenary power under Article I, Section 4 to draw the district lines for House elections and could not be restricted in its exercise of that power by the state constitution. The court rejected that argument, though it upheld the districting plan on the merits.

In *Branch v. Smith*, 123 S. Ct. 1429 (2003), the Supreme Court decided on other grounds that the District Court was correct to enjoin the state from using the congressional districting plan adopted by the state court. As to the Article I, Section 4 issue, the Supreme Court expressly declined to address the issue and declared: "The District Court's alternative holding is not to be regarded as supporting the injunction we have affirmed on the principal ground, or as binding upon state and federal officials should Mississippi seek in the future to administer a redistricting plan adopted by the Chancery Court." *Id*. at 1437.

The Supreme Court also ducked the Article I, Section 4 issue in a case arising out of the 2002 New Jersey election for United States Senate. When Senator Robert G. Torricelli withdrew as the Democratic candidate for Senator shortly before the election, Democrats sought a court order to require elections officials to place the name of a replacement candidate on the ballot. A New Jersey statute provided for filling such a vacancy that occurred no later than 51 days before the election (see N.J.S.A. 19:13-20), but the Torricelli vacancy occurred fewer than 51 days before the election.

The New Jersey Supreme Court held that the Democrats could nonetheless replace Torricelli's name on the ballot. *New Jersey Democratic Party v. Samson*, 814 A. 2d 1025 (N.J. 2002). The Republican candidate for Senate, Douglas Forrester, sought a stay of the New Jersey court order from the United States Supreme Court, arguing that the New Jersey court order violated Article I, Section 4 of the Constitution by usurping the power of the New Jersey Legislature to set the conditions for elections for United States Senator. The Supreme Court denied the stay without comment, *Forrester v. New Jersey Democratic Party*, 123 S. Ct. 67 (2002), and denied certiorari a few months later, 123 S. Ct. 673 (2002). Frank Lautenberg, a former United States Senator from New Jersey, defeated Forrester in the general election and became a United States Senator once again.

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 104:

Not surprisingly, the academic and non-academic literature on the Florida controversy has grown considerably. One of the most valuable academic sources for varied perspectives on the case is THE VOTE: BUSH, GORE, AND THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds. 2001). The book features articles by Richard Epstein, Elizabeth Garrett, Samuel Issacharoff, Pamela S. Karlan, Michael W. McConnell, Frank I. Michelman, Richard H. Pildes, Richard A. Posner, David A. Strauss, Cass R. Sunstein, and John C. Yoo. Another valuable resource is the symposium in Volume 29, Number 2 of the FLORIDA STATE UNIVERSITY LAW REVIEW (2001), featuring articles by Steve Bickerstaff, Richard Briffault, Luiz Fuentes-Rohwer & Guy-Uriel Charles, Richard D. Friedman, James A. Gardner, Elizabeth Garrett, Heather K. Gerken, Steven G. Gey, Richard L. Hasen, Pamela S. Karlan, Harold J. Krent, Sanford Levinson & Ernest A. Young, William P. Marshall, John O. McGinnis, Spencer Overton, Richard H. Pildes, Richard A. Posner, Robert J. Pushaw, Jr., Robert A. Schapiro, Peter M. Shane, and Hayward H. Smith. A readable survey of the legal issues appears in Howard Gillman,

THE VOTES THAT COUNTED: HOW THE SUPREME COURT DECIDED THE 2000 PRESIDENTIAL ELECTION (2001). Ronald Dworkin recently edited an anthology entitled: A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT AND AMERICAN DEMOCRACY (2003). Bruce Cain reviews the Dworkin anthology in Volume 2, Issue 4 of the *Election Law Journal* (forthcoming October 2003).

Other academic articles that readers may wish to consult include: Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE LAW JOURNAL 1407 (2001); Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME LAW REVIEW 1093 (2001); Michael C. Dorf and Samuel Issacharoff, *Can Process Theory Constrain the Courts*?, 72 UNIVERSITY OF COLORADO LAW REVIEW 923 (2001); Bradley W. Joondeph, Bush v. Gore*, Federalism, and the Distrust of Politics*, 62 OHIO STATE LAW JOURNAL 1781 (2001); Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CALIFORNIA LAW REVIEW 1721 (2001); Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO LAW REVIEW 1219 (2002); Spencer Overton, *Rules, Standards, and* Bush v. Gore*: Form and the Law of Democracy*, 37 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 65 (2002); George Priest, *Reanalyzing* Bush v. Gore*: Democratic Accountability and Judicial Overreaching*, 72 UNIVERSITY OF COLORADO LAW REVIEW 953 (2001); Laurence H. Tribe, Erog v. Hsub *and Its Disguises: Freeing* Bush v. Gore *From Its Hall of Mirrors*, 115 HARVARD LAW REVIEW 170 (2001); and Mark Tushnet, *Renormalizing* Bush v. Gore: *An Anticipatory Intellectual History*, 90 GEORGETOWN LAW JOURNAL 113 (2001). Much of the academic commentary has remained critical of the Court's decision. The leading articles defending the Court's decision (though not necessarily its reasoning) are by Richard Epstein and Michael McConnell (both in THE VOTE) and the Posner book cited above. Lund takes a rare position defending both the opinion's reasoning and its remedy. Of course, most legal academics are Democrats. There appears to be a very strong correlation between partisan preferences and evaluations of *Bush v. Gore* among academics.

For an analysis of the constitutionality of the Electoral Count Act, that provided a basis for the Supreme Court's decision on the remedy in the case, see Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 NORTH CAROLINA LAW REVIEW 1653 (2002).

7. The Florida controversy has created impetus for many states to enact laws reforming their methods for casting votes and conducting recounts. One of the first states to act, unsurprisingly, was Florida. For Governor Jeb Bush's perspective on the Florida election changes, see Jeb Bush, *Election Reform in Florida: Meeting the Challenge*, 1 ELECTION LAW JOURNAL 311 (2002). Volume 1, Number 4 of the ELECTION LAW JOURNAL (September 2002), features additional perspectives from California, Indiana, and Pennsylvania.

After two years of effort, Congress finally passed federal election reform legislation, the "Help America Vote Act of 2002," Public Law 107-252 (Oct. 29, 2002) (text of the Act available at this link: http://www.electionline.org/site/docs/pdf/hr3295.pl107252.final.pdf). The Act, now

commonly known as HAVA, provides certain uniform standards for voting procedures and voting machines, and includes federal money for states to upgrade their voting technology. The website Electionline.org offers a section-by-section analysis of HAVA at this link: http://www.electionline.org/site/docs/pdf/hr3295.final.section.by.section.pdf, and an update on state-by-state implementation of HAVA mandates at this link: http://www.electionline.org/site/docs/pdf/hava_information_central.pdf.

8. Both the states and federal government have relied upon the work of social scientists examining the reliability of various voting methods. Perhaps the most influential study is the July 2001 Report of the Caltech-MIT Voting Technology Project, *Voting – What Is, What Could Be*, available for download at: http://vote.caltech.edu/Reports/july01/July01_VTP_Voting_Report_Entire.pdf. Among many other findings, the authors of the report conclude that hand-counted and optically scanned paper have had the lowest rates of unmarked, uncounted, and spoiled ballots in presidential, Senate and governor elections over the last 12 years. See also Stephen Ansolabehere, *Voting Machines, Race, and Equal Protection*, 1 ELECTION LAW JOURNAL 61 (2002). Links to other reports and studies may be found at the Stanford Law Library's website described on page 104, note 6.

9. Who *really* won the Florida vote? The election results are certainly final, but that has not stopped news organizations from attempting to recount the votes. Relying upon an extensive manual categorization of Florida ballots by the National Organization for Research at the University of Chicago (NORC), news organizations drew their own conclusions. The *Wall Street Journal* reported that Bush would have won Florida by 493 votes if the counting ordered by the Florida Supreme Court had continued, and by 225 votes if hand recounts had been conducted in the four counties picked by Gore. Jackie Calmes and Edward P. Foldessy, *Florida Revisited: In Election Review, Bush Wins Without Supreme Court Help*, WALL STREET JOURNAL, Nov. 12, 2001, at p. A1. The *Washington Post* reported the same conclusion, and added that if Gore had found a way to trigger a statewide recount of all disputed ballots, or if the courts had required it, the election may have gone to Gore by "the narrowest of margins." Dan Keating and Dan Balz, *Florida Recounts Would Have Favored Bush; but Study Finds Gore Might Have Won Statewide Tally of All Uncounted Ballots*, WASHINGTON POST, Nov. 12, 2001, p. A01. The *New York Times* also reached similar conclusions, but noted that the review found statistical support for the claims of many voters, particularly elderly Democrats in Palm Beach County, that the confused ballot design there may have led them to spoil their votes by voting for more than one candidate. Ford Fessenden and John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, NEW YORK TIMES, Nov. 12, 2001, at p. A1.

The *Times* also made reference to an earlier study the newspaper conducted showing that 680 of the late-arriving absentee ballots did not meet Florida's standards yet were still counted. A vast majority of those flawed ballots were accepted in counties that favored Bush. *See* David Barstow and Don Van Natta, Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, NEW YORK TIMES, July 15, 2001, at p. A1.

To perform your own analysis of the data, visit the *Times*' interactive site at: http://www.nytimes.com/images/2001/11/12/politics/recount/index.html. If you want the raw data, go to the NORC website at: http://www.norc.uchicago.edu/fl/index.asp.

Chapter 4. Voting and Representation

ADD THE FOLLOWING AFTER THE SECOND PARAGRAPH IN SECTION II ON PAGE 113:

Baker v. Carr: *A Commemorative Symposium*, 80 NORTH CAROLINA LAW REVIEW 1103 (2002), recently marked the 40th anniversary of the celebrated case. Contributions are by Guy-Uriel E. Charles; Robert L. Pushaw, Jr.; Mark Tushnet; James A. Gardner; Sanford Levinson; Nathaniel A. Persily, Thad Kousser & Patrick Egan; Heather K. Gerken; Luis Fuentes-Rohwer; Richard L. Hasen; and Roy A. Schotland.

ADD THE FOLLOWING TO NOTE 4 ON PAGE 120:

The paper cited in Note 4 is now published. Stephen Ansolabehere, Alan Gerber, & James Snyder, *Equal Votes, Equal Money: Court-Ordered Redistricting and Public Expenditures in the American States*, 96 AMERICAN POLITICAL SCIENCE REVIEW 767 (2002).

ADD THE FOLLOWING TO FOOTNOTE "b" ON PAGE 121:

Some lower courts in the present decade have followed the approach of *Daly v. Hunt*. In *Hulme v. Madison County*, 188 F. Supp. 2d 1041 (S.D. Ill. 2001), the Court found that a county redistricting plan with a maximum deviation of under ten percent had been adopted in an arbitrary and discriminatory manner (the discrimination, apparently, was against Republicans), and for that reason struck down the plan on population grounds. In *Montiel v. Davis*, 215 F. Supp. 2d 1279 (S.D. Ala. 2002), the court applied the same test to a state senate plan with a similar population deviation, but upheld the plan.

ADD THE FOLLOWING AFTER THE SECOND FULL PARAGRAPH ON PAGE 122, IN NOTE 8:

As mentioned in the description of *Karcher v. Daggett* in the Casebook, the Court refused to set a level below which any population inequality in a congressional plan would be regarded as *de minimis*. Does that mean *any* inequality, no matter how trivial, constitutes a prima facie constitutional violation? Apparently so, according to *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672 (M.D. Pa. 2002). In that case, Democrats successfully challenged a Republican-drawn plan, whose maximum population deviation consisted of nineteen people. The largest district had a population of 646,380 while the population of the smallest district was 646,361.[2]

In *Graham v. Thornburgh*, 207 F. Supp. 2d 1280 (D. Kans. 2002), the court upheld a congressional plan with a maximum deviation of 33 people. It was shown that the legislature could have adopted a plan with perfect equality (defined as permitting a deviation of one person, because the number of districts in the state did not divide equally

[2] These figures are taken from an earlier decision in the same litigation, *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 535 (M.D. Pa. 2002). As is described in the following chapter of this Supplement, the *Vieth* litigation will be heard by the Supreme Court during the 2003-04 term.

into the total population), which put the burden on the state to show that the deviation was justifiable. However, the court believed the plan was reasonably designed to meet a set of criteria the legislature had established, especially in light of the small size of the deviation. The existence of alternative plans that achieved perfect equality was not decisive when those plans were not demonstrably superior when measured against the legislature's stated criteria.

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 161:

Lawsuits along the lines of hypothetical "a" challenging punch card voting have been filed in California, Florida, Georgia and Illinois. The Illinois litigation has led to the first district court decision applying *Bush v. Gore*'s equal protection holding to the use of punch card voting machines. In rejecting the state's motion to dismiss a lawsuit challenging the use of punch card voting as violating equal protection under *Bush II*, the Court held:

> That people in different counties have significantly different probabilities of having their votes counted, solely because of the nature of the system used in their jurisdiction is the heart of the problem. Whether the counter is a human being looking for hanging chads in a recount, or a machine trying to read ballots in a first count, the lack of a uniform standard of voting results in voters being treated arbitrarily in the likelihood of their votes being counted. The State, through the selection and allowance of voting systems with greatly varying accuracy rates "value[s] one person's vote over that of another," *Bush II*, even if it does not know the faces of those people whose votes get valued less. This system does not afford the "equal dignity owed to each voter." *Id.* When the allegedly arbitrary system also results in a greater negative impact on groups defined by traditionally suspect criteria, there is cause for serious concern.
>
> The Court is certainly mindful of the limited holding of *Bush II*. However, we believe that situation presented by this case is sufficiently related to the situation presented in *Bush II* that the holding should be the same. This holding is also consistent with the overarching theme of voting rights cases decided by the Supreme Court—that theme being, of course, "one man, one vote." Any voting system that arbitrarily and unnecessarily values some votes over others cannot be constitutional. Even without a suspect classification or invidious discrimination, "[t]he right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*. Therefore, Plaintiffs have sufficiently stated a claim against the Defendants for violation of equal protection.

Black v. McGuffage, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002). The litigation in the four states is tracked at the Stanford Law Library website described on page 104, note 6.

Litigants have also attempted in vain to use *Bush v. Gore* to advance more novel arguments. See *Ways v. City of Lincoln*, 2002 WL 1742664 (D. Neb. 2002) (rejecting argument that *Bush v. Gore* prohibits states from outlawing strip clubs); *People v. Warren*, 2002 WL 307579 (Cal. App. 2002) (rejecting argument that *Bush v. Gore* changes meaning of "reasonable doubt" in criminal cases).

1.5. Rather than looking to *Reynolds* or *Harper* as precedent for the Court's equal protection holding, Pamela Karlan has looked to a very different equal protection case, *Shaw v. Reno*, 509 U.S. 630 (1993). *Shaw* is a controversial case establishing the constitutional injury of a "racial gerrymander," and is discussed in detail in chapter 7. According to Karlan, both cases show the Court moving away from a focus on individual rights and toward a more systemic view of equal protection: "Whatever interest the Supreme Court's opinion [in *Bush v. Gore*] vindicated, it was not the interest of an identifiable individual voter. Rather, it was a perceived systemic interest in having recounts conducted according to a uniform standard or not at all. It was structural equal protection, just as the *Shaw* cases have been." Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 NORTH CAROLINA LAW REVIEW 1345, 1364 (2001). For a further exploration of this idea, see Heather K. Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on* Bush v. Gore, 29 FSU LAW REVIEW 407, 410 (2001) (under the structural view, *Bush* contains "a claim about how to order a well-functioning democracy, not a suit about individual rights.").

Richard L. Hasen, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 138-56 (2003), sees connections between the Supreme Court's "structural equal protection" jurisprudence and the "political markets approach" of Professors Issacharoff and Pildes described on pages 555-56 in the Casebook. Hasen finds both "symptomatic of a belief in unlimited judicial wisdom." Hasen, *supra*, at 155.

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 162:

For a defense of the Supreme Court's decision on federalism grounds, see Bradley W. Joondeph, Bush v. Gore*, Federalism, and the Distrust of Politics*, 62 OHIO STATE LAW JOURNAL 1781 (2001).

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 162:

For an argument that scholars have misapplied (or simply ignored) the due process issues in the case, see Roy Schotland, *In* Bush v. Gore: *Whatever Happened to the Due Process Ground?*, 34 LOYOLA UNIVERSITY OF CHICAGO LAW JOURNAL 211 (2002); see also Leslie Friedman Goldstein, *Between the Tiers: the New(est) Equal Protection and* Bush v. Gore, 4 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 372, 391 (2002) (the per curiam opinion "showed no evidence that it felt any obligation…to delineate why the due process 'remedy' that it chose was

preferable to the state (supreme court) policy it displaced, in terms of due process for the fundamental right to have one's vote fully counted.").

Chapter 5. Legislative Districting

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 173:

In *Smith v. Clark*, 189 F. Supp. 2d 503 (S.D. Miss. 2002), and subsequent orders in the same case reported in the same volume of F. Supp. 2d at pages 529 and 548, a three-judge District Court enjoined the state from implementing a congressional districting plan that had been adopted by a state court after the Mississippi legislature failed to adopt a plan following the 2000 census. The *state* court action had been brought by Democratic plaintiffs, who intervened in the *federal* action that was initiated by Republican plaintiffs. The plan adopted by the state court was drawn by the Democratic plaintiffs in that action. The federal court rejected the plan offered to it by the Republican plaintiffs, but the Republicans did not object to the plan the federal court adopted. The Democrats did object.

The three-judge court gave three reasons for rejecting the state court's plan, notwithstanding the Supreme Court's decisions in *Scott v. Germano* and *Growe v. Emison*. First, the state court plan was adopted by a single judge after being drafted by a partisan group of plaintiffs, and therefore could not be said to reflect state policy. Second, it had not been precleared under Section 5 of the Voting Rights Act. Third, the state court was not authorized to adopt a plan by the Mississippi legislature, which had the exclusive power to redistrict (aside from Congress) under Article I, Section 4 of the Constitution.

In *Branch v. Smith*, 123 S. Ct. 1429 (2003), the Supreme Court, relying on the second of these reasons, affirmed the displacement of the state court's plan with the District Court's plan.[3] Does this decision reflect a retreat from the *Scott-Growe* protection of state autonomy? Recall that plans drawn by a state court in a covered jurisdiction, but not plans drawn by a federal court, are subject to preclearance. For analysis of the issues in *Branch*, written before the Supreme Court ruled, see Jonathan H. Steinberg & Aimee Dudovitz, Branch v. Smith—*Election Law Federalism After* Bush v. Gore*: Are State Courts Unconstitutional Interlopers in Congressional Redistricting?*, 2 ELECTION LAW JOURNAL 91 (2003).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 177:

Another formal criterion that is usually much less controversial than compactness is contiguity. Although some state constitutions call for compact districts, more call for contiguity, which is ordinarily understood to be a requirement whether or not it is specified. "Contiguous" is usually understood to mean, in the words of one dictionary definition, "touching or connected throughout in an unbroken sequence." Questions about contiguity, so understood, typically arise when those drawing a plan choose or are required to cross a body of water. Crossing water is required in the case of an island. It will be accepted without question in many situations, such as crossing a river, which may

[3] The Court ignored the District Court's first reason and pointedly declined to affirm the second. See this Supplement for Chapter 3.

be necessary, for example, to avoid dividing a city. But what about a district that crosses a bay or lake without including the land in between? For example, would a district be contiguous if it included parts of San Francisco and Oakland but excluded the land around the northern and southern ends of San Francisco Bay?

A different conception of contiguity was suggested in *Wilkins v. West*, 571 S.E.2d 100 (Va. 2002). The lower court had invalidated a plan, not simply because the district crossed water, but because there was no publicly available transportation between the parts of the district without going through another district. The Supreme Court of Virginia reversed, explaining its position as follows:

> While ease of travel within a district is a factor to consider when resolving issues of compactness and contiguity, resting the constitutional test of contiguity solely on physical access within the district imposes an artificial requirement which reflects neither the actual need of the residents of the district nor the panoply of factors which must be considered by the General Assembly in the design of a district. Short of an intervening land mass totally severing two sections of an electoral district, there is no *per se* test for the constitutional requirement of contiguity. Each district must be examined separately.

How would you advise the legislative leadership of Virginia regarding the requirement of contiguity in the state constitution?

ADD THE FOLLOWING TO THE THIRD PARAGRAPH OF NOTE 5 ON PAGE 179:

In 2001, the tables turned again and the Democrats won the lottery. Republicans brought a constitutional challenge to the whole system (sour grapes?), but the lottery procedure was upheld against substantive due process and equal protection challenges in *Winters v. Illinois State Board of Elections*, 197 F. Supp. 2d 1110 (N.D. Ill. 2001), *summarily aff'd.* 535 U.S. 967 (2002).

ADD THE FOLLOWING AFTER THE FIRST PARAGRAPH OF NOTE 7 ON PAGE 181:

Following the redistricting around the country in 2001 and 2002, many observers have called this the decade of "incumbent gerrymanders," referring to districting plans in which neither party obtains major gains but the incumbents of both parties have their districts strengthened. This is an easy goal for a legislature to pursue: technically, because exchange of Republican areas for Democratic areas in adjacent districts can benefit the incumbents of both parties, and politically, because incumbents of both parties will find such an arrangement attractive. A good example is California. In the 1980s, when the Democrats controlled the legislature and the governorship, the partisan plans they passed, especially for the House of Representatives, led to a political and legal debate that lasted nearly the entire decade. The Democrats again controlled the legislature and the governorship in 2001-02, but passed a plan that drew wide support from Republican as well as Democratic legislators.

For a provocative exchange on how courts ought to regard incumbent gerrymanders, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARVARD LAW REVIEW 593 (2002); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARVARD LAW REVIEW 649 (2002); Samuel Issacharoff, *Surreply: Why Elections?*, 116 HARVARD LAW REVIEW 684 (2002). A lawyer who has represented the Democrats in numerous redistricting controversies this decade argues that although most states have indeed adopted incumbency oriented plans, four major states—Florida, Michigan, Ohio and Pennsylvania—adopted Republican gerrymanders, with the result that in the nation as a whole, the Republicans start off with a head start in the fierce competition to control the House of Representatives. Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION LAW JOURNAL 179 (2003). Hirsch calls for more aggressive judicial supervision of partisan gerrymanders, a subject considered in the next section of the Casebook. There is irony in such a prominent Democrat taking the position that his Republican counterparts were taking twenty years ago, when the shoe was on the other foot.

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 196:

Additional impetus to the last interpretation was provided, temporarily at least, in *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532 (M.D. Pa. 2002), a case that the Supreme Court has put on its docket for the 2003-04 term. *Vieth v. Jubelirer*, 2003 WL 21133961 (*probable jurisdiction noted* June 27, 2003).[4] The court stated that a plaintiff seeking to show discriminatory effects under *Bandemer* must satisfy two requirements. "First, Plaintiffs must prove an actual or projected history of disproportionate election results. Second, Plaintiffs must prove that 'the electoral system is arranged in a manner that will consistently degrade a voter's, or group of voters', influence on the political process as a whole.'"[5]

In *Vieth*, Democrats challenged a congressional districting plan that was projected to produce 13 Republican House members out of 19 from Pennsylvania, a state that was evenly divided between the parties.[6] The court was willing to assume that plaintiffs could thereby satisfy the first requirement, but dismissed the complaint because the allegations were insufficient to satisfy the second. The court thus rejected the interpretation of *Bandemer* proposed by the *Harvard Law Review*'s Note (see Casebook, Note 3, Page 195), first because the court indicated willingness to find disproportionality

[4] The Pennsylvania litigation went through additional stages before getting to the Supreme Court, and the appeal is from *Vieth v. Pennsylvania*, 241 F. Supp 2d 478 (M.D. Pa. 2003). However, the substance of what the Court will review is set forth in the opinion described in the text.

[5] *O'Lear v. Miller*, 222 F. Supp. 2d 850 (E.D. Mich. 2002), reaches a similar result. *O'Lear* was summarily affirmed by the Supreme Court, 123 S. Ct. 512 (2002), with Justices Stevens and Breyer indicating they would have noted probable jurisdiction and set the case for argument. Since the issues presented in Michigan and Pennsylvania were similar, there is no apparent explanation why the Court affirmed the Michigan case and set the Pennsylvania case for argument.

[6] In fact, the Republicans won 12 of the 19 seats.

based on projected rather than actual elections, and second because a finding of disproportionality was held to be insufficient to establish an equal protection claim.

The court, regarding *Badham's* reasoning as well as its result "entitled to substantial deference," dismissed the partisan gerrymandering claim despite an allegation that the plan "essentially shuts … Democratic voters out of the political process." That allegation was too conclusory, when unaccompanied by more specific allegations "that anyone has ever prevented, or will ever prevent, Plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern.' *See Badham*. [The redistricting plan] simply does not address such issues."

To say the least, it would be the rare case when a major political party could make and substantiate allegations of the sort that the *Vieth* court seems to require.[7] And *Vieth* is in line with other lower court decisions applying *Bandemer*, in this and previous decades. Whether the Supreme Court intends to change this situation or put it in cement should be answered soon.

[7] In *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002), the Supreme Court of Pennsylvania rejected a partisan gerrymandering claim against the same plan, brought under the state constitution. The court ruled that the standards for a partisan gerrymandering claim under the state constitution were identical to those set forth in *Bandemer* interpreting the Equal Protection Clause. Applying these standards, the court reached the same result as the *Vieth* federal court, following an essentially identical analysis.

Chapter 6. Minority Vote Dilution

ADD THE FOLLOWING AFTER THE BUTLER QUOTE IN NOTE 3 ON PAGE 205:

Georgia v. Ashcroft, 195 F. Supp. 2d 25 (D.D.C. 2002), was one of the rare cases in which a state sought preclearance from the D.C. District Court without trying the Justice Department first. Georgia sought preclearance for its congressional, state Senate, and state House plans. Because Georgia went directly to court, the Justice Department had no occasion to take a position on the plans until the action had been filed. Eventually, the Justice Department opposed preclearance on the state Senate plan but not on the other two plans. However, intervenors objected to all three plans. Georgia argued that the court should automatically grant preclearance on the two plans to which DOJ did not object. When a state applies for preclearance to DOJ, the Department's granting of the application is final. Georgia argued that the same principle, that preclearance should be denied only when DOJ finds a plan objectionable, should apply in a court proceeding. The court rejected Georgia's view, holding that once the state elected the judicial avenue to preclearance, the court had the final word. *Id.* at 72. In the end, however, the court granted preclearance on the merits for the congressional and state House plans. In *Georgia v. Ashcroft*, 2003 WL 21467204 (2003), the Supreme Court affirmed the District Court's permitting intervention, without addressing the question whether the intervenors could challenge the plans to which the DOJ did not object. In an opinion reproduced below in this Supplement, the Court overruled the District Court on the merits.

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 217:

In 2001, the Justice Department adopted regulations setting forth, among other things, how it would approach the question of retrogression in preclearance proceedings. 66 Fed.Reg. 5411-14, available at http://www.usdoj.gov/crt/voting/sec_5/fedregvoting.htm. The Department's general approach is described in the regulations as follows:

> A proposed plan is retrogressive under the Section 5 "effect" prong if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" when compared with the benchmark plan [which is usually the plan in effect when the new redistricting plan is adopted]. *See Beer*. The effective exercise of the electoral franchise usually is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice. The presence of racially polarized voting is an important factor considered by the Department of Justice in assessing minority voting strength. A proposed redistricting plan ordinarily will occasion an objection by the Department of Justice if the plan reduces minority voting strength relative to the benchmark plan and a fairly-drawn alternative plan could ameliorate or prevent that retrogression.

In *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002), a three-judge District Court refused to grant preclearance to a state Senate plan adopted by the Georgia legislature. In *Georgia*, the courts were spared the possible problem of competing minority groups described in Note 3 of the Casebook, because the only large minority group in question was African-Americans. The legislature's plan preserved about the same number of majority-minority districts as the previous Georgia Senate plan but reduced the black population of a few of the districts to very close to 50 percent. According to the District Court, the mere fact that the number of majority-minority districts arguably had been maintained or even increased was not sufficient to warrant preclearance, but neither would a finding that the number had been reduced be sufficient reason for denying preclearance.[8]

> While courts have frequently considered the number of "majority-minority" districts as indicative of minority voting strength, the parties in this matter apparently agree that Section 5 is not an absolute mandate for maintenance of such districts. This agreement is entirely proper.

Instead, the court said a fact-intensive inquiry was required, centering on the extent of polarized voting.

The state presented expert testimony that given voting patterns in Georgia, a congressional distinct in which 44.3 percent of the voting age population was black had a 50 percent chance of electing the candidate preferred by black voters. The districts giving rise to contention were districts in which the black voting age population of the district (BVAP) was reduced to about 50 percent, meaning that blacks had more than an even chance of electing the candidate of their choice according to the state's expert. The state argued that so long as the number of such districts is not reduced from the number in the benchmark plan, the plan should be precleared. The court rejected this argument on the ground that the test under Section 5 is not whether a minority group has a sufficient number of "equal opportunity" districts, but whether the new plan reduces the minority group's electoral strength. If the level of racially polarized voting is such that even at 50 percent of BVAP, blacks are less likely to elect the candidate of their choice than at the higher levels of BVAP in the benchmark plan, then preclearance should be denied.

[8] There was some question as to exactly how many majority-minority districts were in the plan. The court regarded black voting age population as a percentage of total voting age population ("BVAP" and "VAP" in the parlance of redistricters) as more relevant than total population figures. But Georgia and the Justice Department offered different figures for BVAP, depending on how one counts individuals who identify themselves as both black and of some other racial or ethnic group on the census form. The court also considered the percentage of blacks among registered voters. There were thus three percentages of blacks that could be considered. These percentages varied by only small margins, but the legislature had drawn some of the districts so close to 50-50 that the different methods led to slightly different results on the total of majority-minority districts. As is explained in the text, the court did not regard the number of majority-minority districts as dispositive. Therefore the court was not called upon to endorse one method over the others.

The court acknowledged that the great majority of blacks in the legislature had voted for the plan. While it conceded that this support was strong evidence that the plan had no retrogressive *intent*, black legislative support was less probative that the plan had no retrogressive *effect*. But why would the blacks in the legislature support a plan that the court found to have a retrogressive effect? The answer is that the plan was intended to strengthen the Democrats' chances of maintaining control of the state Senate. All the black members of the legislature were Democrats, and their committee chairmanships and other leadership positions depended on maintaining their party's majority. They were therefore willing to strengthen Democratic prospects in adjacent districts by moving some black voters into those districts, even at the cost of slightly increasing black legislators' electoral jeopardy in a few instances. The court acknowledged this motivation, but said that "it does not follow that anything that is good for the Democratic Party is good for African-American voters—at least within the context of this court's Section 5 inquiry."

Does application of the Voting Rights Act in this manner promote the Act's purposes? In the following decision, a 5-4 majority on the Supreme Court overruled the District Court on the merits. Is the Supreme Court's approach more in accord with the Act's purposes? (Hint: These are not intended as rhetorical questions.)

Georgia v. Ashcroft

123 S. Ct. 2498 (2003)

Justice O'CONNOR delivered the opinion of the Court.

In this case, we decide whether Georgia's State Senate redistricting plan should have been precleared under § 5 of the Voting Rights Act of 1965…. We therefore must decide whether Georgia's State Senate redistricting plan is retrogressive as compared to its previous, benchmark districting plan.

I

A

[Preclearance problems, litigation, and legislative action caused Georgia to use several different redistricting plans during the 1990s. The final plan for the State Senate was adopted by the legislature in 1997.]

All parties here concede that the 1997 plan is the benchmark plan for this litigation because it was in effect at the time of the 2001 redistricting effort. The 1997 plan drew 56 districts, 11 of them with a total black population of over 50%, and 10 of them with a black voting age population of over 50%. The 2000 census revealed that these numbers had increased so that 13 districts had a black population of at least 50%, with the black voting age population exceeding 50% in 12 of those districts.

After the 2000 census, the Georgia General Assembly began the process of redistricting the Senate once again. No party contests that a substantial majority of black voters in Georgia vote Democratic, or that all elected black representatives in the General Assembly are Democrats. The goal of the Democratic leadership—black and white—was to maintain the number of majority-minority districts and also increase the number of Democratic Senate seats….

The Vice Chairman of the Senate Reapportionment Committee, Senator Robert Brown, also testified about the goals of the redistricting effort. Senator Brown, who is black, chaired the subcommittee that developed the Senate plan at issue here. Senator Brown believed when he designed the Senate plan that as the black voting age population in a district increased beyond what was necessary, it would "pus[h] the whole thing more towards [the] Republican[s]." And "correspondingly," Senator Brown stated, "the more you diminish the power of African-Americans overall."…

The plan as designed by Senator Brown's committee kept true to the dual goals of maintaining at least as many majority-minority districts while also attempting to increase Democratic strength in the Senate. Part of the Democrats' strategy was not only to maintain the number of majority-minority districts, but to increase the number of so-called "influence" districts, where black voters would be able to exert a significant—if not decisive—force in the election process….

The plan as designed by the Senate "unpacked" the most heavily concentrated majority-minority districts in the benchmark plan, and created a number of new influence districts. The new plan drew 13 districts with a majority-black voting age population, 13 additional districts with a black voting age population of between 30% and 50%, and 4 other districts with a black voting age population of between 25% and 30%. According to the 2000 census, as compared to the benchmark plan, the new plan reduced by five the number of districts with a black voting age population in excess of 60%. Yet it increased the number of majority-black voting age population districts by one, and it increased the number of districts with a black voting age population of between 25% and 50% by four. As compared to the benchmark plan enacted in 1997, the difference is even larger. Under the old census figures, Georgia had 10 Senate districts with a majority-black voting age population, and 8 Senate districts with a black voting age population of between 30% and 50%. The new plan thus increased the number of districts with a majority black voting age population by three, and increased the number of districts with a black voting age population of between 30% and 50% by another five.

The Senate adopted its new districting plan on August 10, 2001, by a vote of 29 to 26. Ten of the eleven black Senators voted for the plan. The Georgia House of Representatives passed the Senate plan by a vote of 101 to 71. Thirty-three of the thirty-four black Representatives voted for the plan. No Republican in either the House or the Senate voted for the plan, making the votes of the black legislators necessary for passage. The Governor signed the Senate plan into law on August 24, 2001, and Georgia subsequently sought to obtain preclearance.

B

Pursuant to § 5 of the Voting Rights Act, a covered jurisdiction like Georgia has the option of either seeking administrative preclearance through the Attorney General of the United States or seeking judicial preclearance by instituting an action in the United States District Court for the District of Columbia for a declaratory judgment that the voting change comports with § 5. Georgia chose the latter method, filing suit seeking a declaratory judgment that the State Senate plan does not violate § 5.

Georgia, which bears the burden of proof in this action, see *Pleasant Grove v. United States,* 479 U.S. 462 (1987), attempted to prove that its Senate plan was not retrogressive either in intent or in effect. [The Attorney General opposed preclearance, objecting in particular to Districts 2, 12 and 26. In these districts, the black voting age population (BVAP), dropped respectively from 60.58% to 50.31%, 55.34% to 50.66%, and 62.45% to 50.80%. In each of these districts, the percentage of black registered voters dropped to just under 50%. The three-judge District Court denied preclearance.]

After the District Court refused to preclear the plan, Georgia enacted another plan, largely similar to the one at issue here, except that it added black voters to Districts 2, 12, and 26. The District Court precleared this plan. No party has contested the propriety of the District Court's preclearance of the Senate plan as amended. Georgia asserts that it will use the plan as originally enacted if it receives preclearance.

We noted probable jurisdiction to consider whether the District Court should have precleared the plan as originally enacted by Georgia in 2001 and now vacate the judgment below….

III

A

… Georgia argues that a plan should be precleared under § 5 if the plan would satisfy § 2 of the Voting Rights Act of 1965. We have, however, "consistently understood" § 2 to "combat different evils and, accordingly, to impose very different duties upon the States." *Reno v. Bossier Parish School Bd.,* 520 U.S. 471 (1997) (*Bossier Parish I*).[a] For example, while § 5 is limited to particular covered jurisdictions, § 2 applies to all States….

In *Bossier Parish I,* we specifically held that a violation of § 2 is not an independent reason to deny preclearance under § 5. The reason for this holding was straightforward: "[R]ecognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2."

Georgia here makes the flip side of the argument that failed in *Bossier Parish I*—

[a] The decision that appears at page 220 of the Casebook is *Bossier Parish II*, a later decision in the same litigation.

compliance with § 2 suffices for preclearance under § 5. Yet the argument fails here for the same reasons the argument failed in *Bossier Parish I.* We refuse to equate a § 2 vote dilution inquiry with the § 5 retrogression standard. Georgia's argument, like the argument in *Bossier Parish I,* would "shift the focus of § 5 from nonretrogression to vote dilution, and [would] change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." Instead of showing that the Senate plan is nondilutive under § 2, Georgia must prove that its plan is nonretrogressive under § 5.

B

Georgia argues that even if compliance with § 2 does not automatically result in preclearance under § 5, its State Senate plan should be precleared because it does not lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*.

While we have never determined the meaning of "effective exercise of the electoral franchise," this case requires us to do so in some detail. First, the United States and the District Court correctly acknowledge that in examining whether the new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole. Thus, while the diminution of a minority group's effective exercise of the electoral franchise in one or two districts may be sufficient to show a violation of § 5, it is only sufficient if the covered jurisdiction cannot show that the gains in the plan as a whole offset the loss in a particular district.

Second, any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan. See, *e.g., Johnson v. De Grandy,* 512 U.S. 997 (1994); *Richmond v. United States,* 422 U.S. 358 (1975); *Thornburg v. Gingles,* 478 U.S. 30 (1986) (O'CONNOR, J., concurring in judgment). "No single statistic provides courts with a shortcut to determine whether" a voting change retrogresses from the benchmark. *Johnson v. De Grandy*.

In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice. While this factor is an important one in the § 5 retrogression inquiry, it cannot be dispositive or exclusive. The standard in § 5 is simple—whether the new plan "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*.

The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine. In order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. See *Thornburg* (O'CONNOR, J., concurring in judgment). Alternatively, a State

may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.

Section 5 does not dictate that a State must pick one of these methods of redistricting over another. Either option "will present the minority group with its own array of electoral risks and benefits," and presents "hard choices about what would truly 'maximize' minority electoral success." *Thornburg* (O'CONNOR, J., concurring in judgment). On one hand, a smaller number of safe majority-minority districts may virtually guarantee the election of a minority group's preferred candidate in those districts. Yet even if this concentration of minority voters in a few districts does not constitute the unlawful packing of minority voters, see *Voinovich v. Quilter,* 507 U.S. 146 (1993), such a plan risks isolating minority voters from the rest of the state, and risks narrowing political influence to only a fraction of political districts. And while such districts may result in more "descriptive representation" because the representatives of choice are more likely to mirror the race of the majority of voters in that district, the representation may be limited to fewer areas.

On the other hand, spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice. Such a strategy has the potential to increase "substantive representation" in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group. It also, however, creates the risk that the minority group's preferred candidate may lose. Yet as we stated in *Johnson v. De Grandy*:

> [T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

Section 5 gives States the flexibility to choose one theory of effective representation over the other.

In addition to the comparative ability of a minority group to elect a candidate of its choice, the other highly relevant factor in a retrogression inquiry is the extent to which a new plan changes the minority group's opportunity to participate in the political process….

Thus, a court must examine whether a new plan adds or subtracts "influence districts"—where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process. In assessing the

comparative weight of these influence districts, it is important to consider "the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account." *Thornburg* (O'CONNOR, J., concurring in judgment). In fact, various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts.

Section 5 leaves room for States to use these types of influence and coalitional districts. Indeed, the State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable. The State may choose, consistent with § 5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters.

In addition to influence districts, one other method of assessing the minority group's opportunity to participate in the political process is to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts. A legislator, no less than a voter, is "not immune from the obligation to pull, haul, and trade to find common political ground." *Johnson v. De Grandy.* Indeed, in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. A lawmaker with more legislative influence has more potential to set the agenda, to participate in closed-door meetings, to negotiate from a stronger position, and to shake hands on a deal. Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under § 5.

And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan. The District Court held that the support of legislators from benchmark majority-minority districts may show retrogressive purpose, but it is not relevant in assessing retrogressive effect. But we think this evidence is also relevant for retrogressive effect. As the dissent recognizes, the retrogression inquiry asks how "voters will probably act in the circumstances in which they live." The representatives of districts created to ensure continued minority participation in the political process have some knowledge about how "voters will probably act" and whether the proposed change will decrease minority voters' effective exercise of the electoral franchise.

The dissent maintains that standards for determining nonretrogression under § 5 that we announce today create a situation where "[i]t is very hard to see anything left of" § 5. But the dissent ignores that the ability of a minority group to elect a candidate of choice remains an integral feature in any § 5 analysis. And the dissent agrees that the addition or subtraction of coalitional districts is relevant to the § 5 inquiry. Yet assessing whether a plan with coalitional districts is retrogressive is just as fact-intensive as whether a plan with both influence and coalitional districts is retrogressive. As Justice SOUTER recognized for the Court in the § 2 context, a court or the Department of Justice

should assess the totality of circumstances in determining retrogression under § 5. See *Johnson v. De Grandy*. And it is of course true that evidence of racial polarization is one of many factors relevant in assessing whether a minority group is able to elect a candidate of choice or to exert a significant influence in a particular district.

The dissent nevertheless asserts that it "cannot be right" that the § 5 inquiry goes beyond assessing whether a minority group can elect a candidate of its choice. But except for the general statement of retrogression in *Beer,* the dissent cites no law to support its contention that retrogression should focus solely on the ability of a minority group to elect a candidate of choice. As Justice SOUTER himself, writing for the Court in *Johnson v. De Grandy*, has recognized, the "extent of the opportunities minority voters enjoy to participate in the political processes" is an important factor to consider in assessing a § 2 vote-dilution inquiry. In determining how the new districting plan differs from the benchmark plan, the same standard should apply to § 5.

C

The District Court failed to consider all the relevant factors when it examined whether Georgia's Senate plan resulted in a retrogression of black voters' effective exercise of the electoral franchise. First, while the District Court acknowledged the importance of assessing the statewide plan as a whole, the court focused too narrowly on proposed Senate Districts 2, 12, and 26. It did not examine the increases in the black voting age population that occurred in many of the other districts. Second, the District Court did not explore in any meaningful depth any other factor beyond the comparative ability of black voters in the majority-minority districts to elect a candidate of their choice. In doing so, it paid inadequate attention to the support of legislators representing the benchmark majority-minority districts and the maintenance of the legislative influence of those representatives.

The District Court correctly recognized that the increase in districts with a substantial minority of black voters is an important factor in the retrogression inquiry. Nevertheless, it did not adequately apply this consideration to the facts of this case. The District Court ignored the evidence of numerous other districts showing an increase in black voting age population, as well as the other evidence that Georgia decided that a way to increase black voting strength was to adopt a plan that "unpacked" the high concentration of minority voters in the majority-minority districts…. Like the dissent, we accept the District Court's findings that the reductions in black voting age population in proposed Districts 2, 12, and 26 to just over 50% make it marginally less likely that minority voters can elect a candidate of their choice in those districts, although we note that Georgia introduced evidence showing that approximately one-third of white voters would support a black candidate in those districts and that the United States' own expert admitted that the results of statewide elections in Georgia show that "there would be a 'very good chance' that ... African American candidates would win election in the reconstituted districts." Nevertheless, regardless of any racially polarized voting or diminished opportunity for black voters to elect a candidate of their choice in proposed Districts 2, 12, and 26, the District Court's inquiry was too narrow.

In the face of Georgia's evidence that the Senate plan as a whole is not retrogressive, the United States introduced nothing apart from the evidence that it would be more difficult for minority voters to elect their candidate of choice in Districts 2, 12, and 26. As the District Court stated, the United States did not introduce any evidence to rebut Georgia's evidence that the increase in black voting age population in the other districts offsets any decrease in black voting age population in the three contested districts….

Given the evidence submitted in this case, we find that Georgia likely met its burden of showing nonretrogression. The increase in black voting age population in the other districts likely offsets any marginal decrease in the black voting age population in the three districts that the District Court found retrogressive. Using the overlay of the 2000 census numbers, Georgia's strategy of "unpacking" minority voters in some districts to create more influence and coalitional districts is apparent. Under the 2000 census numbers, the number of majority black voting age population districts in the new plan increases by one, the number of districts with a black voting age population of between 30% and 50% increases by two, and the number of districts with a black voting age population of between 25% and 30% increases by another 2.

Using the census numbers in effect at the time the benchmark plan was enacted to assess the benchmark plan, the difference is even more striking. Under those figures, the new plan increases from 10 to 13 the number of districts with a majority-black voting age population and increases from 8 to 13 the number of districts with a black voting age population of between 30% and 50%. Thus, the new plan creates 8 new districts—out of 56—where black voters as a group can play a substantial or decisive role in the electoral process. Indeed, under the census figures in use at the time Georgia enacted its benchmark plan, the black voting age population in Districts 2, 12, and 26 does not decrease to the extent indicated by the District Court. District 2 drops from 59.27% black voting age population to 50.31%. District 26 drops from 53.45% black voting age population to 50.80%. And District 12 actually *increases,* from 46.50% black voting age population to 50.66%.[2] And regardless of any potential retrogression in some districts, § 5 permits Georgia to offset the decline in those districts with an increase in the black voting age population in other districts. The testimony from those who designed the Senate plan confirms what the statistics suggest—that Georgia's goal was to "unpack" the minority voters from a few districts to increase blacks' effective exercise of the electoral franchise in more districts.

Other evidence supports the implausibility of finding retrogression here. An examination of black voters' opportunities to participate in the political process shows, if anything, an increase in the effective exercise of the electoral franchise. It certainly does not indicate retrogression. The 34 districts in the proposed plan with a black voting age

[2] The dissent summarily rejects any inquiry into the benchmark plan using the census numbers in effect at the time the redistricting plan was passed. Yet we think it is relevant to examine how the new plan differs from the benchmark plan as originally enacted by the legislature. The § 5 inquiry, after all, revolves around the change from the previous plan. The 1990 census numbers are far from "irrelevant."…

population of above 20% consist almost entirely of districts that have an overall percentage of Democratic votes of above 50%.... These statistics make it more likely as a matter of fact that black voters will constitute an effective voting bloc, even if they cannot always elect the candidate of their choice. These statistics also buttress the testimony of the designers of the plan such as Senator Brown, who stated that the goal of the plan was to maintain or increase black voting strength and relatedly to increase the prospects of Democratic victory.

The testimony of Congressman John Lewis is not so easily dismissed. Congressman Lewis is not a member of the State Senate and thus has less at stake personally in the outcome of this litigation. Congressman Lewis testified that "giving real power to black voters comes from the kind of redistricting efforts the State of Georgia has made," and that the Senate plan "will give real meaning to voting for African Americans" because "you have a greater chance of putting in office people that are going to be responsive." Section 5 gives States the flexibility to implement the type of plan that Georgia has submitted for preclearance—a plan that increases the number of districts with a majority-black voting age population, even if it means that in some of those districts, minority voters will face a somewhat reduced opportunity to elect a candidate of their choice.

The dissent's analysis presumes that we are deciding that Georgia's Senate plan is not retrogressive. To the contrary, we hold only that the District Court did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts. While the District Court engaged in a thorough analysis of the issue, we must remand the case to the District Court to examine the facts using the standard that we announce today. We leave it for the District Court to determine whether Georgia has indeed met its burden of proof. The dissent justifies its conclusion here on the ground that the District Court did not clearly err in its factual determination. But the dissent does not appear to dispute that if the District Court's legal standard was incorrect, the decision below should be vacated.

The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race….While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life.

IV

The District Court is in a better position to reweigh all the facts in the record in the first instance in light of our explication of retrogression. The judgment of the District Court for the District of Columbia, accordingly, is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[Short concurring opinions by Justices Kennedy and Thomas are omitted.]

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

I

I agree with the Court that reducing the number of majority-minority districts within a State would not necessarily amount to retrogression barring preclearance under § 5 of the Voting Rights Act of 1965. The prudential objective of § 5 is hardly betrayed if a State can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters.

Before a State shifts from majority-minority to coalition districts, however, the State bears the burden of proving that nonminority voters will reliably vote along with the minority. It must show not merely that minority voters in new districts may have some influence, but that minority voters will have effective influence translatable into probable election results comparable to what they enjoyed under the existing district scheme. And to demonstrate this, a State must do more than produce reports of minority voting age percentages; it must show that the probable voting behavior of nonminority voters will make coalitions with minorities a real prospect. If the State's evidence fails to convince a factfinder that high racial polarization in voting is unlikely, or that high white crossover voting is likely, or that other political and demographic facts point to probable minority effectiveness, a reduction in supermajority districts must be treated as potentially and fatally retrogressive, the burden of persuasion always being on the State.

The District Court majority perfectly well understood all this and committed no error. Error enters this case here in this Court, whose majority unmoors § 5 from any practical and administrable conception of minority influence that would rule out retrogression in a transition from majority-minority districts, and mistakes the significance of the evidence supporting the District Court's decision.

II

The Court goes beyond recognizing the possibility of coalition districts as nonretrogressive alternatives to those with majorities of minority voters when it redefines

effective voting power in § 5 analysis without the anchoring reference to electing a candidate of choice. It does this by alternatively suggesting that a potentially retrogressive redistricting plan could satisfy § 5 if a sufficient number of so-called "influence districts," in addition to "coalitio[n] districts" were created, or if the new plan provided minority groups with an opportunity to elect a particularly powerful candidate. On either alternative, the § 5 requirement that voting changes be nonretrogressive is substantially diminished and left practically unadministrable.

A

The Court holds that a State can carry its burden to show a nonretrogressive degree of minority "influence" by demonstrating that "'candidates elected without decisive minority support would be willing to take the minority's interests into account.'"

The history of § 5 demonstrates that it addresses changes in state law intended to perpetuate the exclusion of minority voters from the exercise of political power. When this Court held that a State must show that any change in voting procedure is free of retrogression it meant that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change. "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*. In addressing the burden to show no retrogression, therefore, "influence" must mean an opportunity to exercise power effectively.

The Court, however, says that influence may be adequate to avoid retrogression from majority-minority districts when it consists not of decisive minority voting power but of sentiment on the part of politicians: influence may be sufficient when it reflects a willingness on the part of politicians to consider the interests of minority voters, even when they do not need the minority votes to be elected. The Court holds, in other words, that there would be no retrogression when the power of a voting majority of minority voters is eliminated, so long as elected politicians can be expected to give some consideration to minority interests.

The power to elect a candidate of choice has been forgotten; voting power has been forgotten. It is very hard to see anything left of the standard of nonretrogression….

Indeed, to see the trouble ahead, one need only ask how on the Court's new understanding, state legislators or federal preclearance reviewers under § 5 are supposed to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the § 5 touchstone. Is the test purely *ad hominem,* looking merely to the apparent sentiments of incumbents who might run in the new districts? Would it be enough for a State to show that an incumbent had previously promised to consider minority interests before voting on legislative measures? Whatever one looks to, however, how does one put a value on influence that falls short of decisive influence through coalition? Nondecisive influence is worth less than majority-minority control, but how much less? Would two influence districts offset the loss of one majority-

minority district? Would it take three? Or four? The Court gives no guidance for measuring influence that falls short of the voting strength of a coalition member, let alone a majority of minority voters. Nor do I see how the Court could possibly give any such guidance. The Court's "influence" is simply not functional in the political and judicial worlds.

B

Identical problems of comparability and administrability count at least as much against the Court's further gloss on nonretrogression, in its novel holding that a State may trade off minority voters' ability to elect a candidate of their choice against their ability to exert some undefined degree of influence over a candidate likely to occupy a position of official legislative power. The Court implies that one majority-minority district in which minority voters could elect a legislative leader could replace a larger number of majority-minority districts with ordinary candidates, without retrogression of overall minority voting strength. Under this approach to § 5, a State may value minority votes in a district in which a potential committee chairman might be elected differently from minority votes in a district with ordinary candidates.

It is impossible to believe that Congress could ever have imagined § 5 preclearance actually turning on any such distinctions. In any event, if the Court is going to allow a State to weigh minority votes by the ambitiousness of candidates the votes might be cast for, it is hard to see any stopping point. I suppose the Court would not go so far as to give extra points to an incumbent with the charisma to attract a legislative following, but would it value all committee chairmen equally? (The committee chairmen certainly would not.) And what about a legislator with a network of influence that has made him a proven dealmaker? Thus, again, the problem of measurement: is a shift from 10 majority-minority districts to 8 offset by a good chance that one of the 8 may elect a new Speaker of the House?

I do not fault the Court for having no answers to these questions, for there are no answers of any use under § 5. The fault is more fundamental, and the very fact that the Court's interpretation of nonretrogression under § 5 invites unanswerable questions points to the error of a § 5 preclearance regime that defies reviewable administration. We are left with little hope of determining practically whether a districting shift to one party's overall political advantage can be expected to offset a loss of majority-minority voting power in particular districts; there will simply be greater opportunity to reduce minority voting strength in the guise of obtaining party advantage.

One is left to ask who will suffer most from the Court's new and unquantifiable standard. If it should turn out that an actual, serious burden of persuasion remains on the States, States that rely on the new theory of influence should be guaranteed losers: nonretrogression cannot be demonstrated by districts with minority influence too amorphous for objective comparison. But that outcome is unlikely, and if in subsequent cases the Court allows the State's burden to be satisfied on the pretense that unquantifiable influence can be equated with majority-minority power, § 5 will simply drop out as a safeguard against the "unremitting and ingenious defiance of the

Constitution" that required the procedure of preclearance in the first place. *South Carolina v. Katzenbach*.

III

The District Court never reached the question the Court addresses, of what kind of influence districts (coalition or not) might demonstrate that a decrease in majority-minority districts was not retrogressive. It did not reach this question because it found that the State had not satisfied its burden of persuasion on an issue that should be crucial on any administrable theory: the State had not shown the possibility of actual coalitions in the affected districts that would allow any retreat from majority-minority districts without a retrogressive effect. This central evidentiary finding is invulnerable under the correct standard of review….

A

The District Court began with the acknowledgement (to which we would all assent) that the simple fact of a decrease in black voting age population (BVAP) in some districts is not alone dispositive about whether a proposed plan is retrogressive….

This indisputable recognition, that context determines the effect of decreasing minority numbers for purposes of the § 5 enquiry, points to the nub of this case, and the District Court's decision boils down to a judgment about what the evidence showed about that context. The District Court found that the United States had offered evidence of racial polarization in the contested districts, and it found that Georgia had failed to present anything relevant on that issue….

B

How is it, then, that the majority of this Court speaks of "Georgia's evidence that the Senate plan as a whole is not retrogressive," against which "the United States did not introduce any evidence [in] rebut[tal]"? The answer is that the Court is not engaging in review for clear error. Instead, it is reweighing evidence *de novo,* discovering what it thinks the District Court overlooked, and drawing evidentiary conclusions the District Court supposedly did not see. The Court is mistaken on all points.

1

Implicitly recognizing that evidence of voting behavior by majority voters is crucial to any showing of nonretrogression when minority numbers drop under a proposed plan, the Court tries to find evidence to fill the record's gap. It says, for example, that "Georgia introduced evidence showing that approximately one-third of white voters would support a black candidate in [the contested] districts." In support of this claim, however, the majority focuses on testimony offered by Georgia's expert relating to crossover voting in the pre-existing rather than proposed districts….

2

In another effort to revise the record, the Court faults the District Court, alleging that it "focused too narrowly on proposed Senate Districts 2, 12, and 26." In fact, however, it is Georgia that asked the District Court to consider only the contested

districts and the District Court explicitly refused to limit its review in any such fashion…..

3

In a further try to improve the record, the Court focuses on the testimony of certain lay witnesses, politicians presented by the State to support its claim that the Senate plan is not retrogressive. Georgia, indeed, relied heavily on the near unanimity of minority legislators' support for the plan. But the District Court did not overlook this evidence; it simply found it inadequate to carry the State's burden of showing nonretrogression. The District Court majority explained that the "legislators' support is, in the end, far more probative of a lack of retrogressive *purpose* than of an absence of retrogressive *effect*" (emphasis in original)…. The District Court was clearly within bounds in finding that (1) Georgia's proposed plan decreased BVAP in the relevant districts, (2) the United States offered evidence of significant racial polarization in those districts, and (3) Georgia offered no adequate response to this evidence….

As must be plain, in overturning the District Court's thoughtful consideration of the evidence before it, the majority of this Court is simply rejecting the District Court's evidentiary finding in favor of its own….

4

… Knowing whether the number of majority BVAP districts increases, decreases, or stays the same under a proposed plan does not alone allow any firm conclusion that minorities will have a better, or worse, or unvarying opportunity to elect their candidates of choice. Any such inference must depend not only on trends in BVAP levels, but on evidence of likely voter turnout among minority and majority groups, patterns of racial bloc voting, likelihood of white crossover voting, and so on. Indeed, the core holding of the Court today, with which I agree, that nonretrogression does not necessarily require maintenance of existing super-majority minority districts, turns on this very point; comparing the number of majority-minority districts under existing and proposed plans does not alone reliably indicate whether the new plan is retrogressive.

Lack of contextual evidence is not, however, the only flaw in the Court's numerical arguments. Thus, in its first example, the Court points out that under the proposed plan the number of districts with majority BVAP increases by one over the existing plan, but the Court does not mention that the number of districts with BVAP levels over 55% decreases by four. Similarly, the Court points to an increase of two in districts with BVAP in the 30% to 50% range, along with a further increase of two in the 25% to 30% range. It fails to mention, however, that Georgia's own expert argued that 44.3% was the critical threshold for BVAP levels, and the data on which the Court relies shows [*sic*] the number of districts with BVAP over 40% actually decreasing by one. My point is not that these figures conclusively demonstrate retrogression; I mean to say only that percentages tell us nothing in isolation, and that without contextual evidence the raw facts about population levels fail to get close to indicating that the State carried its burden to show no retrogression. They do not come close to showing clear error.

5

Nor could error, clear or otherwise, be shown by the Court's comparison of the proposed plan with the description of the State and its districts provided by the 1990 census. The 1990 census is irrelevant. We have the 2000 census, and precedent confirms in no uncertain terms that the issue for § 5 purposes in not whether Georgia's proposed plan would have had a retrogressive effect 13 years ago: the question is whether the proposed plan would be retrogressive now. The Court's assumption that a proper § 5 analysis may proceed on the basis of obsolete data from a superseded census is thus as puzzling as it is unprecedented. It is also an invitation to perverse results, for if a State could carry its burden under § 5 merely by showing no retrogression from the state of affairs 13 years ago, it could demand preclearance for a plan flatly diminishing minority voting strength under § 5.

6

The Court's final effort to demonstrate that Georgia's plan is nonretrogressive focuses on statistics about Georgia Democrats. The Court explains that almost all the districts in the proposed plan with a BVAP above 20% have a likely overall Democratic performance above 50%, and from this the Court concludes that "[t]hese statistics make it more likely as a matter of fact that black voters will constitute an effective voting bloc." But this is not so. The degree to which the statistics could support any judgment about the effect of black voting in State Senate elections is doubtful, and even on the Court's assumptions the statistics show no clear error by the District Court.

[E]ven if we assume the data on Democratic voting statewide can tell us something useful about Democratic voting in State Senate districts, the Court's argument does not hold up. It proceeds from the faulty premise that even with a low BVAP, if enough of the district is Democratic, the minority Democrats will necessarily have an effect on which candidates are elected. But if the proportion of nonminority Democrats is high enough, the minority group may well have no impact whatever on which Democratic candidate is selected to run and ultimately elected…. Even in a situation where a Democratic candidate needs a substantial fraction of minority voters to win (say the population is 25% minority and 30% nonminority Democrats), the Democratic candidate may still be able to ignore minority interests if there is such ideological polarization as between the major parties that the Republican candidate is entirely unresponsive to minority interests. In that situation, a minority bloc would presumably still prefer the Democrat, who would not need to adjust any political positions to get the minority vote.

All of this reasoning, of course, carries a whiff of the lamp. I do not know how Georgia's voters will actually behave if the percentage of something is x, or maybe y, any more than the Court does. We are arguing about numerical abstractions, and my sole point is that the Court's abstract arguments do not hold up. Much less do they prove the District Court wrong.

IV

Section 5, after all, was not enacted to address abstractions. It was enacted "to shift the advantage of time and inertia from the perpetrators of the evil to its victim," *Beer*….

Section 5 can only be addressed, and the burden to prove no retrogression can only be carried, with evidence of how particular populations of voters will probably act in the circumstances in which they live. The State has the burden to convince on the basis of such evidence. The District Court considered such evidence: it received testimony, decided what it was worth, and concluded as the trier of fact that the State had failed to carry its burden. There was no error, and I respectfully dissent.

Notes and Questions

1. For a careful study of the interaction of legal and political science issues raised in *Georgia v. Ashcroft*, see Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 NORTH CAROLINA LAW REVIEW 1517 (2002). Both the majority and dissenting opinions cited the Pildes article.

2. The majority in *Georgia v. Ashcroft* writes: "The standard in § 5 is simple—whether the new plan 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" Simple? According to the case, what is a "retrogression" and how does that differ from the standard set forth in *Beer*? In what respects does the Court's conception of retrogression differ from the dissent's?

3. Who benefits from this decision? One beneficiary might be the Democratic party who can spread more reliably Democratic voters across a larger number of districts. The dissenters are concerned that in the longer run, "§ 5 will simply drop out as a safeguard against the 'unremitting and ingenious defiance of the Constitution' that required the procedure of preclearance in the first place." Is the dissenters' concern warranted?

4. The dissent is no doubt right that the majority's new test for non-retrogression will be much harder to administer than a test that simply counts the number of majority-minority districts. The Court said the old test was itself "fact intensive," but of course racially polarized voting is a relatively easy fact to determine through exit polling. The new standards set forth above involve measuring things for which either (1) there are no hard data (e.g., how much influence does a majority-minority member have in a legislature?) or no data at all (e.g., did the state decide to decrease the number of majority-minority districts because it had adopted a particular theory of representation or because it wanted to discriminate against minority voters?).

5. The majority remanded the case to the lower court for further proceedings under the new legal standard. Why did the majority not simply reverse the lower court and order the districting plan upheld on grounds that the lower court's factual findings were clearly erroneous? Perhaps the Court was worried about the burden on the Court itself in future cases. Had the Court reversed for clear error, it would have been the second redistricting case in a row (the first being *Easley v. Cromartie*, discussed in the next chapter) in which the Court would have done so.

6. If Congress disagrees with the Court's interpretation of Section 5, it will have an opportunity to change it in 2007, when the provision comes up for renewal.

ADD THE FOLLOWING AT THE END OF THE *BOSSIER PARISH* CASE ON PAGE 228:

Note

Congress must decide whether to renew the preclearance provisions of Section 5 of the Voting Rights Act in 2007, when the provisions are currently set to expire. Commentators have begun to question whether Congress has the power to renew Section 5's preclearance provisions. Congress may act only pursuant to a power granted to it by the Constitution. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Supreme Court, over the dissent of Justice Black, upheld the original preclearance provisions of Section 5 as a valid exercise of Congressional power to "enforce" the Fifteenth Amendment. A similar enforcement power appears in Section 5 of the Fourteenth Amendment.

In recent years, the Supreme Court has undergone a "federalism revolution." It has read congressional power over the states much more narrowly than it had in cases such as *South Carolina v. Katzenbach*. The most important recent case for our purposes is *City of Boerne v. Flores*, 521 U.S. 507 (1997), where the Court explained that Congress' power under Section 5 of the Fourteenth Amendment is limited: "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." The Court further explained that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

Would a renewed Section 5 be "enforcing" the Fourteenth or Fifteenth Amendments, or would it be impermissibly substantive? Is a preclearance provision applied to a large number of jurisdictions "congruent and proportional" to violations of the Fourteenth or Fifteenth Amendments by the states? For a discussion of these issues, see Richard L. Hasen, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 120-36 (2003); Comment, Victor Andres Rodriguez, *Section 5 of the Voting Rights Act of 1965 After* Boerne*: The Beginning of the End of Preclearance*?, 91 CALIFORNIA LAW REVIEW 769 (2003); Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILLANOVA LAW REVIEW 1179 (2001); and Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WILLIAM AND MARY LAW REVIEW 725 (1998).

The Supreme Court's most recent case on Congressional enforcement power under the Fourteenth Amendment suggests that the Court may be more willing to uphold a Congressional Act when it attempts to prevent discrimination against a suspect class. *See Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003). *Hibbs* appears to make it more likely that the Court would uphold renewed preclearance provisions as a valid exercise of Congressional power.

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 251:

How should the population be counted to determine whether the minority group in question can constitute a majority of a compact district? In *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002), in the context of a Section 5 preclearance case, the court regarded voting age population as more relevant than total population, and also considered voter registration. These numbers did not vary greatly from each other in Georgia, where the minority group in question was African-Americans. In cases in which Latinos are in question, significant percentages are often recent immigrants, so that the Latino percentage of citizens is likely to be substantially below their percentage of the total population or voting age population.[9] For this reason, a three-judge District Court reviewing a Section 2 challenge by Latino voters to a California congressional and state Senate district, regarded citizen voting age population (CVAP, pronounced see-vap by aficionados) as the most relevant figure. *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002).

ADD THE FOLLOWING TO THE END OF NOTE 7 ON PAGE 253:

As a practical matter, polarized voting often presents difficult questions of proof, but in many of the Voting Rights Act cases in previous decades, it probably was strongly present. Now polarized voting may be less pervasive, especially in cases involving plaintiff groups other than blacks. Thus, in *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002), the court granted summary judgment against a Section 2 challenge to California districts brought by Latinos, largely for that reason:

> It is certainly not our view that racial discrimination no longer affects our political institutions or motivates any portion of the electorate of Los Angeles County. Still, the election returns offered by both sets of litigants reveal that in Los Angeles County, whites and other non-Latinos are currently far more willing to support Latino candidates for office than in the past. In short, at the outset of the 21st century, the data in the record before us paints [*sic*] a far more encouraging picture of racial voting attitudes than did the data in [a Los Angeles case from the 1980s].

It is perhaps noteworthy that the three-judge panel in *Cano* was made up of judges all generally regarded as liberal.

ADD THE FOLLOWING TO THE END OF NOTE 8 ON PAGE 256:

The correct citation for the then-forthcoming article cited at the end of Note 8 is Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 NORTH CAROLINA LAW REVIEW 1383 (2001).

[9] The same could also be true if the plaintiff group consisted of Asian-Americans. However, concentrations of Asian-American populations large enough to be a majority in a legislative district are still relatively rare.

In *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002), Latino plaintiffs challenging California congressional and state Senate districts under Section 2 presented expert testimony that the crucial factor determining Latinos' ability to elect candidates of their choice is the percentage of Latino voters in a Democratic primary. Although not reaching the issue, the *Cano* court expressed skepticism of this approach as a means of deciding the first prong of *Gingles*, saying (in footnote 28) that reliance on Democratic Party registration figures is "a measure that is unprecedented in redistricting law and raises difficult analytical questions, particularly in view of the existence of a number of Latino Republican office-holders in California, and of recent efforts by the California Republican Party to increase its share of the Latino vote and registration."

ADD THE FOLLOWING TO THE END OF NOTE 10 ON PAGE 258:

In *Cano*, in addition to their conventional *Gingles* claim, Latino plaintiffs also contended that the California legislature had intentionally limited the Latino population of a congressional and state Senate district in Los Angeles. The plaintiffs thus argued that under *Garza*, they were entitled to relief even if they could not meet the three prongs required by *Gingles*. The court declined to find legally cognizable intentional discrimination:

> Plaintiffs admit that they do not allege that defendants were motivated by racial hostility. Nor do they suggest that there was any desire to effectuate invidious racial discrimination generally. Although we assume, for summary judgment purposes, the truth of plaintiffs' intent evidence, and of their charge that the legislature sought to limit the number of Latino voters in the two districts at issue, given the background and record of California's 2001 redistricting, the evidence does not support an inference that the legislature intended to marginalize a racial group politically through invidious discrimination, or invidiously to maintain a system that perpetuates racial discrimination. Thus the intent appears not to be of the type that the Supreme Court held necessary for an intentional vote dilution claim in *Bolden*, *Rogers*, and *Bandemer*. Leaving aside plaintiffs' proffers, the other evidence as to intent reflects a complex set of legislative motivations that comprehended several goals, including protecting incumbents, ensuring adequate representation for Latinos and other minority groups thorough the establishment of majority-minority districts such as the new CD 38, and advancing partisan interests. Given the facts and circumstances in the record before us, including (1) the use of traditional districting principles to establish the districts in question, (2) the absence of any legal necessity to create another new majority-minority Congressional district in addition to the one being newly created in the redistricting statute, and (3) the high degree of Latino representation and participation in the redistricting process, we strongly doubt that the 2001 redistricting statute was a "purposeful device to further racial discrimination," in whole or in part. *Bolden*.

Despite this conclusion, the *Cano* court did not rest its grant of summary judgment for the defendants on its finding of no intentional discrimination. Rather, it addressed the question, left vague in *Garza*, of what discriminatory effects the plaintiffs must show in a Section 2 case if they are able to show intent to discriminate.

> [T]he effects standard for an intentional vote dilution claim is uncertain, largely because of a dearth of precedent. The cases provide little authority as to the requisite degree of dilutive effect for an intentional discrimination claim under either the constitution or the statute. This is so in part because direct evidence of discriminatory intent is relatively rare....
>
> Plaintiffs urge us to adopt a standard of effects in intentional vote dilution cases, both constitutional and statutory, that is considerably less demanding than that required in traditional § 2 cases. In support of this approach, plaintiffs cite *Garza*, a case that, like this one, included both constitutional and statutory intentional vote dilution claims. *Garza*, however, does not provide the clear direction that the plaintiffs assert it does. In that case, the court stated that a standard "less rigorous" than the § 2 effects standard applies to intentional vote dilution claims....
>
> We agree that, where invidious intent exists in a vote dilution, case, it may be appropriate to relax the first or even second of the *Gingles* pre-conditions, as well as to consider intent in connection with the "totality of circumstances" inquiry. We do not accept defendants' contention that in a case in which plaintiffs allege an intentional violation of the Fourteenth Amendment, proof of discrimination is wholly irrelevant. Nevertheless, plaintiffs in vote dilution cases must still show a practical effect on the minority group's ability to elect representatives of choice, whether or not intent is shown. In *Gingles*, the Court recognized this requirement of a practical effect primarily through the inclusion of pre-condition three—that in order to establish a traditional § 2 claim, a plaintiff must establish that a minority group's preferences are regularly defeated by a non-minority bloc of voters. In our view, the irreducible minimum in intentional vote dilution cases is similar.

Cano, 211 F. Supp. 2d at 1248-1250.

ADD THE FOLLOWING TO THE END OF NOTE 16 ON PAGE 273:

Partisanship provides a useful lens through which to evaluate three of the most-watched districting cases of the 2000s, in California, Georgia, and New Jersey. See *Cano v. Davis*, *supra*; *Georgia v. Ashcroft*, *supra*; *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001).

In each of these states, the districting process was more or less controlled by the Democrats, though with variations from state to state. Democratic control was most

straightforward in Georgia, where Democrats in the legislature enacted the plan over Republican opposition. The Democrats also controlled the legislature and the governorship in California, but the plan was adopted with bipartisan support. The reason was that the Democrats had done so well in congressional and state legislative elections up to and including 2000 that they were content to consolidate their gains, rather than try to take more seats away from the Republicans. For their part, the Republicans supported the plan, in the belief that if they did not do so, the Democrats were likely to enact a plan that would be even worse for the Republicans. In New Jersey, the state legislature was redistricted by a commission, composed of five Democrats and five Republicans. The commission predictably deadlocked along partisan lines, in which event New Jersey law called for an 11th member to be appointed to the commission. The 11th member was Larry Bartels, a political scientist. Bartels sided with the Democrats.

The California plan was challenged by Latino plaintiffs. In Georgia and New Jersey, Republicans stood behind African-American plaintiffs. In each state, what gave rise to the controversy was that the plan reduced the minority population in certain districts, either to make the districts more comfortable for non-minority Democratic incumbents or to strengthen surrounding districts for the Democrats, at the cost of making the election of candidates favored by the minority groups in the challenged districts somewhat less certain than would have been the case if the minority populations had not been reduced.

In California and New Jersey, the plans were upheld. The final result in Georgia was the same, but in the District Court the state Senate plan was rejected. Though differences in the fact situations in each state and differences in the judges may have been part of the reason for the different outcomes in the lower courts, the main reason appears to be a legal one: Of the three states, only Georgia is subject to Section 5 of the Voting Rights Act, while in California and New Jersey, plaintiffs had to rely on Section 2.[10] The District Court in *Georgia v. Ashcroft* held that the reduction in black population constituted retrogression, whereas in California and New Jersey, equally or more consequential reductions in minority population survived attack under the *Gingles* test. Georgia is subject to Section 5 because of a past history of voting discrimination against blacks. Is that a good reason for inconsistent results in these states? In other words, one might believe that "friendly" reduction of minority percentages in selected districts for incumbent-protection or partisan purposes should be permitted, or one might believe it should be prohibited. But is the past discrimination in Georgia a good reason for prohibiting it there and permitting it in California and New Jersey?

Whether such concerns may have influenced the Supreme Court in *Georgia v. Ashcroft* is a matter of speculation. One thing is certain: *Georgia v. Ashcroft* represents a challenge to those who believe Supreme Court results in voting rights cases are driven by partisanship. The five conservative justices upheld a plan adopted by Democrats and

[10] A few counties in California are subject to Section 5, but in the case of a statewide redistricting plan, only the districts affecting the covered counties need to be precleared. The districts in question in *Cano* were in Imperial, Los Angeles, and San Diego Counties, none of which is subject to Section 5.

supported by liberal black politicians. The four liberal justices would have furthered the interests of Republicans by striking down that plan.

For an account of the New Jersey litigation written by one of the lawyers in the case, see Sam Hirsch, *Unpacking* Page v. Bartels: *A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION LAW JOURNAL 7 (2002).

Chapter 7. Racial Gerrymandering

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 306:

For criticism of the racial gerrymandering cases on the ground that they do not fulfill the goals favored by writers such as Blumstein and Butler, see Melissa L. Saunders, *The Dirty Little Secrets of* Shaw, 24 HARVARD JOURNAL OF LAW & PUBLIC POLICY 141 (2000).

ADD THE FOLLOWING TO THE END OF NOTE 8 ON PAGE 312:

Is the standing requirement of *Hays* applicable to plaintiffs bringing a partisan gerrymandering challenge under *Davis v. Bandemer* (Chapter 5)? That is, should the plaintiffs in such an action be required to show that they reside in a district that has been gerrymandered for partisan purposes? See *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 539-40 (M.D. Pa. 2002).

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 332:

In Mississippi, the state legislature failed to adopt a congressional redistricting plan. Democrats initiated litigation in a state court, which adopted a plan. While that plan was under submission to the Justice Department for preclearance, Republicans filed a federal action, in which the Democratic plaintiffs in the state action intervened. The federal three-judge District Court decided that under the circumstances, it would adopt a congressional plan for Mississippi. The Democratic intervenors argued that under *Upham*, the court should defer to state policy and adopt the plan that the state court adopted. In *Smith v. Clark*, 189 F. Supp. 2d 529 (S.D. Miss. 2002), the federal court declined to defer and adopted its own plan, which differed from one the Republican plaintiffs had submitted but to which the plaintiffs did not object. The federal court gave two reasons for declining to defer to the state-court plan. First, it was actually drawn by the Democratic plaintiffs in the state action (and intervenors in the federal action) and was adopted by a single judge. Second, it had not been precleared. The Supreme Court affirmed on the second ground only. See this Supplement, Chapter 5.

ADD THE FOLLOWING AT THE END OF THE CHAPTER, ON PAGE 354:

Notes and Questions

1. While this case was pending before the Supreme Court, North Carolina Governor James Hunt was replaced in office by Mike Easley. The case was nevertheless reported in the *Supreme Court Reporter* advance sheets under the name *Hunt v. Cromartie*, and the editors were informed by the Supreme Court Clerk's Office that the case would be reported in the *U.S. Reports* under that name. However, the case appeared in the *U.S. Reports* as *Easley v. Cromartie*, 532 U.S. 234 (2001), and therefore it should be cited under that name.

For commentary on the decision, see Melissa L. Saunders, *A Cautionary Tale:* Hunt v. Cromartie *and the Next Generation of* Shaw *Litigation*, 1 ELECTION LAW JOURNAL 173 (2002). For a perspective on the case written before the Court's decision, see Guy-Uriel E. Charles and Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium:* Hunt v. Cromartie *as a Case Study*, 58 WASHINGTON AND LEE LAW REVIEW 227 (2001)

2. In *Cano v. Davis*, 211 F. Supp. 2d 1208, (C.D. Cal. 2002), *summarily aff'd.*, 123 S. Ct. 851 (2003), Latino plaintiffs asserted a *Shaw* claim against two California congressional districts represented by white Democrats. The plaintiffs alleged that to protect these incumbents against potential Latino challengers in primaries, the legislature removed sufficient Latino precincts from their districts to assure that the Latino percentage of the population did not exceed a certain amount. The three-judge District Court rejected this claim on a summary judgment motion, stating that a legislatively-imposed ceiling on the percentage of Latino residents in a district might implicate a dilution claim but not the "analytically distinct" claim of racial gerrymandering. In footnote 9 of its opinion the court made clear that it was not holding that only white plaintiffs could bring *Shaw* claims, but went on to explain:

> [T]he rationale underlying *Shaw* is simply inapplicable to the districts at issue here. Plaintiffs' two *Shaw* claims are not addressed to the types of districts ordinarily at issue in the Supreme Court's racial gerrymandering cases. For one, these are not race-based districts that "balkanize us into competing racial factions" or deliberately segregate voters into separate racial enclaves. *Shaw I*. They cannot, under any fair reading, be characterized as "white districts" or "Caucasian districts." Nor are they districts that can only be reasonably understood to "belong" to one ethnic or racial group.
>
> To the contrary, the districts at issue here are diverse and multi-ethnic: each contains a variety of racial and ethnic groups; none unites any single group of individuals within its boundaries for the purpose of permitting that group to exercise hegemony. In fact, Latinos are the largest number of persons in any single racial or ethnic group in each district, and the number of whites in each case is substantially lower.

Chapter 8. Ballot Propositions

ADD THE FOLLOWING TO THE FIRST PARAGRAPH ON PAGE 392:

For an exhaustive analysis of the Florida Supreme Court's activism in its treatment of initiatives, see Thomas Rutherford, *The People Drunk or the People Sober? Direct Democracy Meets the Supreme Court of Florida*, 15 ST. THOMAS LAW REVIEW 61 (2002).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 413:

In *Manduley v. Superior Court*, 27 Cal.4th 537, 117 Cal.Rptr.2d 168, 41 P.3d 3 (Cal. 2002), the California Supreme Court upheld a lengthy initiative that addressed sentencing of repeat criminal offenders (by amending California's "three-strikes" law), gang-related crime, and the juvenile justice system. The common purpose was said to be addressing the problem of juvenile and gang-related crime, but not "simply to reduce crime generally." The court then said that this was a subject or goal that "clearly is not so broad that an unlimited array of provisions could be considered relevant thereto. Indeed,... in previous decisions we have upheld initiatives containing various provisions related to even broader goals in the criminal justice system." The court was willing to overlook the fact that the juvenile procedure provisions applied to juveniles who were not members of gangs, that the majority of gang members affected by the gang provisions were not juveniles, and that changes to the three-strikes law applied equally to adults and juveniles.

Does *Manduley* represent a retreat from *Jones*? Not overtly, but then *Jones* did not overtly represent a departure from *FPPC* and other California cases. It is undoubtedly too early to say, especially in light of the criticism offered by some that aggressive application of the single-subject rule inevitably entails inconsistent and even arbitrary results. One possible clue to the different results in *Jones* and *Manduley* is the court's statement that the provisions in the latter case do not "comprise 'a most fundamental and far-reaching change in the law' that clearly represents a single subject upon which a clear expression of the voters' intent is essential," quoting from *Jones*. If initiatives are more likely to violate the single-subject rule because one or more of their provisions are "fundamental and far-reaching," then the single-subject rule will come to resemble the constitutional revision doctrine, discussed in Note 2 on Page 400 of the Casebook.

MAKE THE FOLLOWING CHANGE IN NOTE 3 ON PAGE 413:

The correct citation for the then-forthcoming article quoted in this paragraph is 1 ELECTION LAW JOURNAL 35 (2002).

ADD THE FOLLOWING TO NOTE 6 BEFORE THE FIRST FULL PARAGRAPH ON PAGE 416:

The Oregon Supreme Court continues to apply the separate vote requirement with rigor. In *Lehman v. Bradbury*, 37 P.3d 989 (Or. 2002), it struck down an initiative that had been approved ten years earlier (!) and purported to impose term limits on executive and legislative elected officials in state government and on members of Congress elected from Oregon. Congressional term limits were later found unconstitutional in *U.S. Term Limits v. Thornton* (see Casebook, p. 649), but the Oregon court regarded that fact as immaterial to whether the initiative put before the voters in 1992 contained more than one amendment to the state constitution. The court rejected a lower court's determination that because a vote for one of the distinct term limits did not "necessarily imply" a vote for the other limits, they should be regarded as violative of the separate vote requirement. However, the court did conclude that changes "in the term limits for state executive officers and the creation of such limits for state legislators and for members of Congress are at least two substantive changes to the constitution."

The court assumed without deciding that term limits for the various state elected officials could be regarded as "closely related" enough to each other to constitute a single amendment, but held that congressional term limits required a separate amendment. The main reason given was that there were existing provisions in the Oregon Constitution regarding the qualifications of state elected officials while qualifications for members of Congress were entirely new. However, after setting forth this point at length, the court acknowledged that "[n]ewness, in and of itself, may be a neutral factor." What, then, was the rationale for the decision? Simply the conclusory statement that congressional term limits "had little or nothing to do with" term limits for state officers?

ADD THE FOLLOWING TO THE END OF NOTE 7 ON PAGE 416:

Washington can probably be added to the list of states whose courts have applied the single-subject rule with a new stringency. In *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762 (Wash. 2000), and *City of Burien v. Kiga*, 31 P.3d 659 (Wash. 2001), the Washington Supreme Court purported to apply a test under which an initiative would be upheld if "a rational unity among the matters addressed in the initiative exists." However, in each case, the court struck down an initiative that combined a provision to deal with an immediate matter and a provision that would have a broader and more permanent effect. In *Amalgamated*, the initiative combined a fixing of annual vehicle license fees at $30 with a general requirement that future tax and fee increases be subject to popular vote. In *Burien*, the initiative combined a nullification of a series of tax increases adopted in the year 1999 with a limitation on future annual increases in property taxes to 2 percent. The court struck down both initiatives while acknowledging that each related to a single "general topic," tax limitation in *Amalgamated* and tax relief in *Burien*.

Chapter 9. Major Political Parties

ADD THE FOLLOWING BEFORE THE FINAL PARAGRAPH OF NOTE 3 ON PAGE 449:

The Australian Democrats, a minor party in that country, have a provision in their constitution requiring that if a party nominee is elected to Parliament and then resigns from the party, he or she must also resign from Parliament. Should such a provision be enforced if the member resigns from the party but seeks to retain the parliamentary seat? If so, by whom? By a court? By the parliamentary chamber? For discussion, see Graeme Orr, *A politician's word: the legal (un)enforceability of political deals*, 5 CONSTITUTIONAL LAW & POLICY REVIEW 1 (2002).

ADD THE FOLLOWING NOTE BEFORE NOTE 1 ON PAGE 476:

0.5. Connecticut law now allows the parties to open their primaries to nonmembers, but the rules of both major parties allow only registered members to vote. See Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUPREME COURT REVIEW 95, 120.

ADD THE FOLLOWING NOTES AFTER NOTE 1 ON PAGE 492:

1.1. Consider Note 8 of the majority opinion in *Jones*, suggesting that blanket primaries might be constitutionally distinct from open primaries, in which voters can ask for the ballot of whichever party they desire but at a given primary can select only one party's ballot. In *Arizona Libertarian Party v. Board of Supervisors of Pima County*, 216 F. Supp. 2d 1007 (D. Ariz. 2002), the District Court granted summary judgment to the Libertarian Party, which objected to an initiative measure that partially opened primaries in Arizona, by allowing independents to vote in primaries.[11] However, the court's rationale apparently depended on the fact that in Arizona, primary voters selected not only nominees for public office but also party officials. The court wrote:

> In this case, Arizona, like California, has important interests in regulating political parties within the state and in increasing voter participation. This Court recognizes as laudable Arizona's efforts to improve voter participation by including independent and other voters in Arizona's primary elections and also recognizes that, under *Jones*, there may be open primary election systems which do not unconstitutionally impair a political party's freedom of association. However, in this case Arizona's system has failed to achieve the critical balance between a state's interests in regulating elections and its political parties' associational rights because Arizona's primary system allows voters who refuse to formally affiliate with a party through voter registration to choose that party's internal leadership.

[11] However, the Ninth Circuit has stayed the District Court's ruling, pending an appeal.

Would the state be able to impose an open primary on a party that preferred a closed primary if the primary were limited to nominating candidates for public office? Would that result be consistent with *Tashjian*?

1.2. Under *Jones*, what are the constitutional limits on the ability of a state to permit nonparty members to affect the nomination processes of a party? Is it unconstitutional to permit nonparty members to initiate a challenge to a candidate's nominating petitions for the primary? Not according to *Queens County Republican Committee v. New York State Board of Elections*, 222 F. Supp. 2d 341 (E.D.N.Y. 2002).

ADD THE FOLLOWING AFTER NOTE 5 ON PAGE 494:

6. You may at this point wish to think in general terms about the pros and cons of judicial oversight of political parties and the laws regulating them. One scholar, at least, has expressed considerable skepticism:

> Not only do political parties adapt to new circumstances, but most other aspects of the political environment also change over time. These changes then further affect political parties. The interactions and feedback effects increase the dynamic complexity facing courts and virtually guarantee that judicial decisions in this arena will have unforeseen consequences for all facets of government. Adjudication is a blunt and often counterproductive tool. Courts do not have the resources to gather reliable information about the political environment or to make accurate predictions about the likely effects of their rulings on parties and other institutions. Courts are presented only with a partial picture and often cannot grasp the entirety of a problem. Moreover, if the system adapts to a particular ruling in unexpected ways, courts do not have the ability to modify the law unless someone brings a case that allows adjustment. In an area of rapidly changing institutions and complex relationships among entities, the ability to revise policy over time, engage in new and expanded fact-finding, and make decisions incrementally can be crucial to success. None of these features plays to the strengths of the courts…

Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUPREME COURT REVIEW 95. Garrett therefore takes the view that judicial review "in political party cases should be limited to only the most extreme cases in which one segment of a party works successfully, perhaps with other party entities, to impose anticompetitive structures." Do you agree? Garrett bases part of her argument on cases involving minor parties, so you may wish to revisit this question after studying Chapter 10.

Chapter 10. Third Parties and Independent Candidates

ADD THE FOLLOWING TO THE END OF THE PARAGRAPH BEFORE THE *MUNRO* DECISION ON PAGE 526:

For an argument that the Court made numerous factual errors in deciding *Jenness* and that the decision has had lasting negative influences on the ballot access cases, see Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of* Jenness v. Fortson, 1 ELECTION LAW JOURNAL 235 (2002).

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 535:

For an exploration of these issues, see Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEORGETOWN LAW JOURNAL 2181 (2001).

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 545:

4.5. New York City conducts its Democratic and Republican primaries using voting machines but requires the use of paper ballots for the Green Party's primary. Does this practice violate equal protection under *Bush v. Gore*'s equal protection holding described in Chapter 4? For an answer in the negative, see *Green Party of New York v. Weiner*, 216 F. Supp.2d 176 (S.D.N.Y. 2002).

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 556:

Pildes and Issacharoff have separately responded to criticisms of their "political markets" approach in ways that suggest the two authors have diverged on how far their approach goes. In Richard H. Pildes, *The Theory of Political Competition*, 85 VIRGINIA LAW REVIEW 1605 (1999), Pildes responds to an argument by Bruce Cain, *Garrett's Temptation*, 85 VIRGINIA LAW REVIEW 1589, 1600 (1999), to the effect that the logical implication of the approach is court-mandated proportional representation. Pildes lists a number of "countervailing values [that] could be marshaled against judicial imposition of proportional representation," including original intent, history, and the importance of public acceptability of judicial decisions.

In Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARVARD LAW REVIEW 593 (2002), Issacharoff calls upon the courts to strike down virtually all legislative districting conducted by partisan officials as unconstitutional, leading to districting conducted solely by nonpartisan commissions or by computer. To Issacharoff, the risk of gerrymandering is that it "constrict[s] the competitive processes by which voters can express choice."

Nathaniel Persily disagrees with Issacharoff on the question whether gerrymandering stifles political competition. Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-*

Protecting Gerrymanders, 116 HARVARD LAW REVIEW 649 (2002). Launching a broader attack on the political markets approach is Richard L. Hasen, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 138-56 (2003). Hasen sees connections between the Supreme Court's "structural equal protection" jurisprudence in *Shaw v. Reno* and *Bush v. Gore* and the "political markets approach," finding both "symptomatic of a belief in unlimited judicial wisdom."

Chapter 11. Campaigns

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 578:

For a case confirming that actual malice is required to sanction candidate speech, see *Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1122 (D. Hawaii 2001). The court rejected the argument that Hawaii's regulation of candidate speech could be justified on grounds of preventing candidates from being discouraged from running for public office.

ADD THE FOLLOWING TO THE END OF NOTE 9 ON PAGE 580:

The Supreme Court took up the issue of judicial campaign speech in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). In *White*, the Court by a 5-4 vote struck down a Minnesota judicial rule that prohibited candidates for judicial election from "announcing" their views on political or legal issues. The state had asserted the ban was necessary to promote judicial impartiality and the appearance of impartiality in the judiciary. Applying strict scrutiny, the Court held the rule violated the First Amendment because it was not narrowly tailored to promote a compelling state interest.

The Court considered three different meanings of "impartiality." It first held that the rule did not serve to further impartiality in the sense of lack of bias for or against particular *parties* likely to come before the judge because the rule targeted *issues*, not parties. As for impartiality as a "lack of preconception in favor or against a particular *legal view*," the Court held the interest was not compelling.

> A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. … Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so…. And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either.

Finally, the Court rejected the idea that the rule was justified to preserve judicial openmindedness:

> The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of openmindedness that respondents now articulate, the

> announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.

Justice O'Connor concurred, but expressed her belief that judicial elections are undesirable. Justice Kennedy filed a concurring opinion as well, in which he, among other things, distanced himself from Justice O'Connor's remarks.

Justice Stevens and Justice Ginsburg filed dissenting opinions, both joined by Justices Breyer and Souter. Justice Stevens wrote: "By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context." Justice Ginsburg wrote: "I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons. Minnesota's choice to elect its judges, I am persuaded, does not preclude the State from installing an election process geared to the judicial office."

The Court majority was careful to note that it was not striking down rules preventing judges from making *explicit promises* in campaigns. Given the logic of *White*, are such rules constitutional under the First Amendment? If the state can no longer forbid a candidate from saying "I think it is constitutional for the legislature to prohibit same-sex marriages," what interest is served by a state law that prevents the candidate from saying, "If elected, I promise to rule that it is constitutional for the legislature to prohibit same-sex marriages"? In discussing campaign promises, Justice Scalia remarked: "one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment." If so, by what logic may they be banned?

New York's judicial conduct rules have been subject to conflicting judicial analysis after *White*. *Compare Spargo v. New York State Commission of Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y 2003) (striking down provisions of New York judicial code prohibiting certain partisan political activity by judges) *with In re Raab*, ___ N.E.2d ___ [2003 WL 21321183] (N.Y. Jun. 10, 2003) (upholding provisions of New York judicial code prohibiting certain partisan political activity by judges) *and In re Watson*, ___ N.E.2d ___ [2003 WL 21321435] (N.Y. Jun. 10, 2003) (upholding provisions of New York judicial code prohibiting judicial candidates from making campaign promises). The *Spargo* opinion is currently on appeal to the United States Court of Appeals for the Second Circuit.

Chapter 12. Incumbency

ADD THE FOLLOWING TO THE END OF SECTION 2 OF THE NOTE ON "INCUMBENCY AND ELECTORAL COMPETITION" ON PAGE 615:

A recent study considered the incumbency advantage in state executive and legislative elections as well as congressional elections from 1942-2000. The authors concluded that changes in the incumbency advantage tended to come at about the same times in all the types of elections they studied. This is potentially an important finding, because it casts considerable doubt on all assertions that the increases in the incumbency advantage in elections for the House of Representatives are caused by factors specific to the House or to Congress or to national elections generally. See Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. House Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELECTION LAW JOURNAL 315 (2002).

Chapter 14. Introductory Readings on Campaign Finance

ADD THE FOLLOWING TO END OF THE FIRST FULL PARAGRAPH ON PAGE 706:

According to Candice J. Nelson, *Spending in the 2000 Election*, in FINANCING THE 2000 ELECTION 22-24 (David B. Magleby, ed. 2002), the total amount spent in 1999-2000 on all election activity was just under $4 billion, well below the preliminary figure of $5.5 billion and below the adjusted $4.6 billion figure for the 1995-1996 cycle.

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 744:

2.5. Claiming that "[l]egal academics who call for campaign finance reform…have overlooked the significance of race," Spencer Overton argues in an important new article that a focus on race significantly bolsters the equality argument for such regulation. Spencer Overton, *But Some are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEXAS LAW REVIEW 987 (2002). According to Overton, "[e]xisting frameworks fail to acknowledge that past state-mandated discrimination against racial minorities has shaped the current distribution of property, which in turn hinders the ability of many people of color to participate fully in a privately financed political system….By using the First Amendment to undermine legislative restrictions on the use of political money, courts effectively enshrine the existing distribution of property as a baseline for political advantage." *Id*.

See also Terry Smith, *Race and Money in Politics*, 79 NORTH CAROLINA LAW REVIEW 1469 (2001). The Smith article is part of a symposium, *Democracy in a New America*, and includes commentaries on the article by Samuel Issacharoff, Daniel H. Lowenstein, and Spencer Overton.

Chapter 15. Contribution and Expenditure Limits, Round 1

ADD THE FOLLOWING TO THE END OF THE CARRYOVER PARAGRAPH AT THE TOP OF PAGE 748:

A recent article explores the drafting history of *Buckley* in detail. It turns out that the opinion was drafted by a committee of Justices. See Richard L. Hasen, *The Untold History of* Buckley v. Valeo, 2 ELECTION LAW JOURNAL 241 (2003).

Chapter 16. Money and Ballot Propositions

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 800:

Has the Supreme Court changed its views regarding the First Amendment rights of corporations to engage in electoral activities? Consider *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200 (2003), reprinted in this Supplement to Chapter 17. In particular, consider the relevance, if any, of *Beaumont*'s footnote 8:

> Within the realm of contributions generally, corporate contributions are furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members, see*, e.g., NAACP v. Alabama*, and of the public in receiving information, see, *e.g., Bellotti.* A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions and deprives the public of little or no material information.

Might a ban on corporate *expenditures* be said to "leave individual members of corporations free to make their own contributions [and expenditures] and deprive[] the public of little or no material information"? If so, what is left of *Bellotti*? If not, what is the difference between corporate contributions and expenditures under *Beaumont*'s view of the First Amendment?

ADD THE FOLLOWING TO NOTE 2 ON PAGE 813:

In recent years, Congress has inserted a provision known as the Barr Amendment into the District of Columbia appropriation law. The Barr Amendment prohibits the District from spending money "to enact or carry out" any law legalizing or reducing penalties associated with certain controlled substances, including marijuana. In *Marijuana Policy Project v. District of Columbia Board of Elections and Ethics*, 191 F. Supp. 2d 196 (D.D.C. 2002), plaintiffs sought to circulate an initiative petition that would legalize marijuana under some circumstances. The D.C. Board of Elections and Ethics refused to certify the petition for circulation because the attendant expenses would violate the Barr Amendment. The court acknowledged that Congress had power to prevent the carrying out of the proposed initiative, but relied on *Meyer v. Grant* to require the Board to permit plaintiffs to seek to qualify their measure for the ballot. Were plaintiffs' speech rights infringed? The District Court thought so: "Circulation of a Board-approved petition necessarily involves expressive interaction with the public." But the D.C. Circuit disagreed in *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002): The Barr Amendment "restricts no speech; to the contrary, medical marijuana advocates remain free to lobby, petition, or engage in other First Amendment-protected activities to reduce marijuana penalties. The Barr Amendment merely requires that, in order to have legal effect, their efforts must be directed to Congress rather than to the D.C. legislative process." Is the Court of Appeals' reasoning consistent with *Meyer*?

Chapter 17. Targeted Regulations

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 868:

To take advantage of the *MCFL* exception, must a not-for-profit organization have an official policy not to accept corporate contributions? See *Federal Election Commission v. National Rifle Association*, 254 F.3d 173 (D.C. Cir. 2001).

ADD THE FOLLOWING AFTER NOTE 11 ON PAGE 870:

12. One question left open after *MCFL* was whether it is permissible for the government to limit campaign *contributions* by corporations entitled to an *MCFL* exemption from the ban on direct corporate expenditures. In the following case, the Supreme Court held it was permissible to ban such contributions. As you read the opinion, consider also how the current Court views the *Austin* case.

Federal Election Commission v. Beaumont
123 S. Ct. 2200 (2003)

Justice SOUTER delivered the opinion of the Court.

Since 1907, federal law has barred corporations from contributing directly to candidates for federal office. We hold that applying the prohibition to nonprofit advocacy corporations is consistent with the First Amendment.

I

The current statute makes it "unlawful ... for any corporation whatever ... to make a contribution or expenditure in connection with" certain federal elections, 2 U. S. C. §441b(a), "contribution or expenditure" each being defined to include "anything of value." The prohibition does not, however, forbid "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes." Such a PAC (so called after the political action committee that runs it) may be wholly controlled by the sponsoring corporation, whose employees and stockholders or members generally may be solicited for contributions. *NRWC.* While federal law requires PACs to register and disclose their activities, the law leaves them free to make contributions as well as other expenditures in connection with federal elections,

Respondents are a corporation known as North Carolina Right to Life, Inc., three of its officers, and a North Carolina voter (here, together, NCRL), who have sued the Federal Election Commission… NCRL challenges the constitutionality of §441b and the FEC's regulations implementing that section, 11 CFR §§114.2(b), 114.10 (2003), but only so far as they apply to NCRL. The corporation is organized under the laws of North Carolina to provide counseling to pregnant women and to urge alternatives to abortion, and as a nonprofit advocacy corporation it is exempted from federal taxation by §501(c)(4) of the Internal Revenue Code. It has no shareholders and, although it receives some donations from traditional business corporations, it is "overwhelmingly funded by

private contributions from individuals." NCRL has made contributions and expenditures in connection with state elections, but not federal, owing to 2 U. S. C. §441b. Instead, it has established a PAC, the North Carolina Right to Life, Inc., Political Action Committee, which has contributed to federal candidates. See *North Carolina Right to Life, Inc.* v. *Bartlett* [reprinted in part in the Casebook at page 875].

[The District Court and Court of Appeals both struck down the ban on contributions by NCRL, relying on *MCFL*.]

II

A

Any attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations' potentially "deleterious influences on federal elections," which we have canvassed a number of times before. *United States* v. *Automobile Workers*; see also *NRWC*; *Pipefitters* v. *United States*; *United States* v. *CIO*. The current law grew out of a "popular feeling" in the late 19th century "that aggregated capital unduly influenced politics, an influence not stopping short of corruption." *Automobile Workers*. A demand for congressional action gathered force in the campaign of 1904, which made a national issue of the political leverage exerted through corporate contributions, and after the election and new revelations of corporate political overreaching, President Theodore Roosevelt made banning corporate political contributions a legislative priority. Although some congressional proposals would have "prohibited political contributions by [only] certain classes of corporations," the momentum was "for elections 'free from the power of money,'" and Congress acted on the President's call for an outright ban, not with half measures, but with the Tillman Act. This "first federal campaign finance law" banned "any corporation whatever" from making "a money contribution in connection with" federal elections.

Since 1907, there has been continual congressional attention to corporate political activity, sometimes resulting in refinement of the law, sometimes in overhaul.[3] One feature, however, has stayed intact throughout this "careful legislative adjustment of the federal electoral laws," *NRWC*, and much of the periodic amendment was meant to strengthen the original, core prohibition on direct corporate contributions. The Foreign Corrupt Practices Act of 1925, for example, broadened the ban on contributions to include "anything of value," and criminalized the act of receiving a contribution to match the criminality of making one. So, in another instance, the 1947 Labor Management Relations Act drew labor unions permanently within the law's reach and invigorated the earlier prohibition to include "expenditure[s]" as well.

[3] [In this footnote, the Court cited a number of Acts of Congress, concluding with the Bipartisan Campaign Reform Act of 2002, discussed in detail in this Supplement to Chapter 18.—EDS.]

Today, as in 1907, the law focuses on the "special characteristics of the corporate structure" that threaten the integrity of the political process. *NRWC*; see also *Austin*; *MCFL; NCPAC*. As we explained it in *Austin*,

> State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.' (quoting *MCFL*).

Hence, the public interest in "restrict[ing] the influence of political war chests funneled through the corporate form." *NCPAC*; see *NRWC* ("[S]ubstantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators").

As these excerpts from recent opinions show, not only has the original ban on direct corporate contributions endured, but so have the original rationales for the law. In barring corporate earnings from conversion into political "war chests," the ban was and is intended to "preven[t] corruption or the appearance of corruption." *NCPAC*; see also *Bellotti* ("The importance of the governmental interest in preventing [corruption] has never been doubted"). But the ban has always done further duty in protecting "the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NRWC*; see CIO; see also *Austin* (Brennan, J., concurring).

Quite aside from war-chest corruption and the interests of contributors and owners, however, another reason for regulating corporate electoral involvement has emerged with restrictions on individual contributions, and recent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for "circumvention of [valid] contribution limits." *Colorado Republican II* [in the Casebook, chapter 18—EDS.]; see *Austin*. To the degree that a corporation could contribute to political candidates, the individuals "who created it, who own it, or whom it employs," *Cedric Kushner Promotions, Ltd.* v. *King,* 533 U. S. 158, 163 (2001), could exceed the bounds imposed on their own contributions by diverting money through the corporation, cf. *Colorado Republican II*. As we said on the subject of limiting coordinated expenditures by political parties, experience "demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced."

In sum, our cases on campaign finance regulation represent respect for the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *NRWC.* And we have understood that such deference to legislative choice is warranted particularly when Congress regulates campaign

contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages. See, *e.g.*, *Buckley* v. *Valeo*. As we said in *Colorado Republican II*, "limits on contributions are more clearly justified by a link to political corruption than limits on other kinds of ... political spending are (corruption being understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence)."

B

That historical prologue would discourage any broadside attack on corporate campaign finance regulation or regulation of corporate contributions, and NCRL accordingly questions §441b only to the extent the law places nonprofit advocacy corporations like itself under the general ban on direct contributions. But not even this more focused challenge can claim a blank slate, for Judge Gregory [of the Fourth Circuit] rightly said in his dissent that our explanation in *NRWC* all but decided the issue against NCRL's position.

NRWC addressed the provision of §441b restricting a nonstock corporation to its membership when soliciting contributions to its PAC, and we considered whether a nonprofit advocacy corporation without members of the usual sort could be held to violate the law by soliciting a donation to its PAC from any individual who had at one time contributed to the corporation. We sustained the FEC's position that a fund drive as broad as this went beyond the solicitation of "members" permitted by §441b, and we invoked the history distilled above in holding that the statutory restriction was no infringement on those First Amendment associational rights closely akin to speech. We concluded that the congressional judgment to regulate corporate political involvement "warrants considerable deference" and "reflects a permissible assessment of the dangers posed by [corporations] to the electoral process."

It would be hard to read our conclusion in *NRWC*, that the PAC solicitation restrictions were constitutional, except on the practical understanding that the corporation's capacity to make contributions was legitimately limited to indirect donations within the scope allowed to PACs. In fact, we specifically rejected the argument made here, that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations. In the same breath, we remarked on the broad applicability of §441b to "corporations and labor unions without great financial resources, as well as those more fortunately situated," and made a point of refusing to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."

Later cases have repeatedly acknowledged, without questioning, the reading of *NRWC* as generally approving the §441b prohibition on direct contributions, even by nonprofit corporations "without great financial resources."…

But *NRWC* does not stand alone in its bearing on the issue here, and equal significance must be accorded to *MCFL*, the very case upon which NCRL and the Court

of Appeals have placed principal reliance. There, we held the prohibition on independent expenditures under §441b unconstitutional as applied to a nonprofit advocacy corporation. While the majority explained generally that the "potential for unfair deployment of wealth for political purposes" fell short of justifying a ban on expenditures by groups like Massachusetts Citizens for Life that "do not pose that danger of corruption," the majority's response to the dissent pointed to a different resolution of the present case. The CHIEF JUSTICE's dissenting opinion noted that Massachusetts Citizens for Life "was not unlike" the corporation at issue in *NRWC*, which he read as supporting the ban on independent expenditures. Without disagreeing about the similarity of the two organizations, the majority nonetheless distinguished *NRWC* on the ground of its addressing regulation of contributions, not expenditures. ("[R]estrictions on contributions require less compelling justification than restrictions on independent spending"). "In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule [against contributions] was thus sufficient in *[NRWC]*." *Id.*

C

The upshot is that, although we have never squarely held against NCRL's position here, we could not hold for it without recasting our understanding of the risks of harm posed by corporate political contributions, of the expressive significance of contributions, and of the consequent deference owed to legislative judgments on what to do about them. NCRL's efforts, however, fail to unsettle existing law on any of these points.

First, NCRL argues that on a class-wide basis "[*Massachusetts Citizens for Life*]-type corporations pose no potential of threat to the political system," so that the governmental interest in combating corruption is as weak as the Court held it to be in relation to the particular corporation considered in *Massachusetts Citizens for Life*. But this generalization does not hold up. For present purposes, we will assume advocacy corporations are generally different from traditional business corporations in the improbability that contributions they might make would end up supporting causes that some of their members would not approve.[5] But concern about the corrupting potential underlying the corporate ban may indeed be implicated by advocacy corporations. They, like their for-profit counterparts, benefit from significant "state-created advantages," *Austin*, and may well be able to amass substantial "political 'war chests,'" *NRWC*. Not all corporations that qualify for favorable tax treatment under §501(c)(4) of the Internal Revenue Code lack substantial resources, and the category covers some of the Nation's most politically powerful organizations, including the AARP, the National Rifle Association, and the Sierra Club.[6] Nonprofit advocacy corporations are, moreover, no

[5] That said, this concern is not wholly inapplicable to advocacy corporations, as "persons may desire that an organization use their contributions to further a certain cause, but may not want the organization to use their money to urge support for or opposition to political candidates solely on the basis of that cause." *MCFL*. In any event, we have never intimated that the risk of corruption alone is insufficient to support regulation of political contributions. See, *e.g.*, *Austin*; *NRWC*; *Shrink Missouri*.

[6] … These examples answer NCRL's argument that the *Massachusetts Citizens for Life* exception is "self-limiting." The nonprofit advocacy corporations mentioned (one of which has, in fact, been granted "[*Massachusetts Citizens for Life*]-type" status by a Court of Appeals, see, *e.g.*, *FEC* v. *National Rifle*

less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals. Cf. *Austin* (noting that a nonprofit corporation is capable of "serv[ing] as a conduit for corporate political spending").

Second, NCRL argues that application of the ban on its contributions should be subject to a strict level of scrutiny, on the ground that §441b does not merely limit contributions, but bans them on the basis of their source. This argument, however, overlooks the basic premise we have followed in setting First Amendment standards for reviewing political financial restrictions: the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association. *MCFL*; see *Colorado Republican II*; *Shrink Missouri*. Going back to *Buckley*, restrictions on political contributions have been treated as merely "marginal" speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression.[8] "While contributions may result in political expression if spent by a candidate or an association ... , the transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley*. This is the reason that instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, "a contribution limit involving 'significant interference' with associational rights" passes muster if it satisfies the lesser demand of being "'closely drawn' to match a 'sufficiently important interest.'" *Shrink Missouri* (quoting *Buckley*); cf. *Austin*; *Buckley*.[9]

Indeed, this recognition that degree of scrutiny turns on the nature of the activity regulated is the only practical way to square two leading cases: *NRWC* approved strict solicitation limits on a PAC organized to make contributions, whereas *MCFL* applied a compelling interest test to invalidate the ban on an advocacy corporation's expenditures in light of PAC regulatory burdens. Each case involved §441b, after all, and the same "ban" on the same corporate "sources" of political activity applied in both cases.

It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself. But even when NCRL urges precisely that, and asserts that §441b is not sufficiently "closely drawn," the claim still rests on a false premise, for NCRL is simply wrong in characterizing §441b as a complete ban. As we have said before, the section "permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of [PACs]." *NRWC*; see also *Austin*; *MCFL*. The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite

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Assn., 254 F. 3d 173, 192 (D.C. Cir. 2001)) show that "political 'war chests'" may be amassed simply from members' contributions.

[8] Within the realm of contributions generally, corporate contributions are furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members, see*, e.g., NAACP v. Alabama*, and of the public in receiving information, see, *e.g., Bellotti.* A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions and deprives the public of little or no material information.

[9] Judicial deference is particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of "careful legislative adjustment."

possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure, without jeopardizing the associational rights of advocacy organizations' members, see *NAACP* v. *Alabama* (holding that "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs" may violate the First Amendment).

NCRL cannot prevail, then, simply by arguing that a ban on an advocacy corporation's direct contributions is bad tailoring. NCRL would have to demonstrate that the law violated the First Amendment in allowing contributions to be made only through its PAC and subject to a PAC's administrative burdens. But a unanimous Court in *NRWC* did not think the regulatory burdens on PACs, including restrictions on their ability to solicit funds, rendered a PAC unconstitutional as an advocacy corporation's sole avenue for making political contributions. There is no reason to think the burden on advocacy corporations is any greater today, or to reach a different conclusion here.

III

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice KENNEDY, concurring in the judgment.

My position, expressed in dissenting opinions in previous cases, has been that the Court erred in sustaining certain state and federal restrictions on political speech in the campaign finance context and misapprehended basic First Amendment principles in doing so. See *Shrink Missouri* (*Kennedy,* J., dissenting); *Austin* (*Kennedy,* J., dissenting); *Colorado Republican II* (*Kennedy,* J., concurring in judgment and dissenting in part). I adhere to this view, and so can give no weight to those authorities in the instant case.

That said, it must be acknowledged that *MCFL* contains language supporting the Court's holding here that corporate contributions can be regulated more closely than corporate expenditures. The language upon which the Court relies tends to reconcile the tension between the approach in *MCFL* and the Court's earlier decision in *NRWC*.

Were we presented with a case in which the distinction between contributions and expenditures under the whole scheme of campaign finance regulation were under review, I might join Justice THOMAS' opinion. The Court does not undertake that comprehensive examination here, however. And since there is language in *MCFL* that supports today's holding, I concur in the judgment.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

I continue to believe that campaign finance laws are subject to strict scrutiny. *Colorado Republican II* (*Thomas*, J., dissenting); *Colorado Republican I* (*Thomas*, J.,

concurring in judgment and dissenting in part). See also *Shrink Missouri* (*Thomas*, J., dissenting). As in *Colorado Republican II*, the Government does not argue here that 2 U. S. C. §441b survives review under that rigorous standard. Indeed, it could not. "[U]nder traditional strict scrutiny, broad prophylactic caps on ... giving in the political process ... are unconstitutional," *Colorado Republican I*, because, as I have explained before, they are not narrowly tailored to meet any relevant compelling state interest, *id.; Nixon*. See also *Colorado Republican II*. Accordingly, I would affirm the judgment of the Court of Appeals and respectfully dissent from the Court's contrary disposition.

Notes and Questions

1. The Court notes that NCRL "questions §441b only to the extent the law places nonprofit advocacy corporations like itself under the general ban on direct contributions." Why then did the Court include the "historical prologue" discussing broader rationales for limits on corporate activity in the electoral process? Note that at the time the Court decided *Beaumont*, it had just set an oral argument date in *McConnell v. Federal Election Commission*, the case challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 (discussed in detail in the supplement to the next chapter). Reconsider *Beaumont* after reviewing the material in the next chapter.

2. *Beaumont*'s result is not surprising given *MCFL* and *NRWC*. Perhaps of greater interest is the Court's discussion of the rationales in the *Austin* case. Note how cautiously the opinion sets out *Austin*'s rationales. Are these the same interests identified in *Austin*? Justice O'Connor, like Justice Kennedy, concurred in *MCFL* and then dissented in *Austin*. Here they part company. Why didn't Justice O'Connor sign Justice Kennedy's reluctant concurrence in *Beaumont*? Might the *Beaumont* Court's characterization of *Austin*'s rationales have been intended to keep Justice O'Connor's vote?

3. *The "war chest" rationale for limits on advocacy corporation contributions.* In *Beaumont*, the Court mentioned the AARP, the National Rifle Association, and the Sierra Club and explained that "[t]he nonprofit advocacy corporations mentioned (one of which has, in fact, been granted '[*MCFL*]-type' status by a Court of Appeals) show that 'political "war chests"' may be amassed simply from members' contributions." Do these advocacy groups all amass wealth in the same way? Typically, people give to advocacy organizations such as the NCRL, the Sierra Club, and the NRA because they believe in the organization's political ideas. In contrast, some people join the AARP to obtain economic benefits, such as discount cards. Should that matter? Is there something special about the corporate form that assists these groups in building political "war chests?" If not, is a ban on corporate contributions to advocacy corporations underinclusive in meeting Congress's goal in limiting war chests? Could Congress constitutionally require non-incorporated associations to create PACs for giving to federal candidates so as to avoid the war chest problem?

Does the "war chest" rationale provided in the case strengthen or weaken the argument for limits on contributions or expenditures by *labor unions*? Note also the Court's reaffirmation of protecting shareholders of corporations and union members. What of *Beck* and *Abood* (casebook at 858)?

5. Contrast the discussion of the burdens of the separate segregated fund requirement in *MCFL* and *Beaumont*. Is the difference here really the standard of review (expenditures versus contributions), or does this signal a change in the Court's view of whether the administrative requirements for setting up a PAC are too onerous?

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 880:

In 2000, the California Legislature proposed and the voters approved a new campaign finance regulation including a ban on contributions by lobbyists, modified just as the last paragraph of Note 2 suggests. That is, the first two objections in *FPPC v. Superior Court* were obviated by a provision limiting the prohibition to lobbyists who were registered to lobby before the official's or candidate's agency, such as the legislature or the Attorney General's office. In addition, administrative regulations adopted since *FPPC v. Superior Court* was decided had narrowed the definition of lobbyist in some respects. But the new prohibition, like the old one, was an absolute ban, with no exceptions for small contributions or contributions made when the legislature was out of session. Is the new prohibition constitutional? See *Institute of Governmental Advocates v. Fair Political Practices Commission*, 164 F. Supp. 2d 1183 (E.D. Cal. 2001).

ADD THE FOLLOWING TO THE END OF THE FIRST PARAGRAPH OF NOTE 3 ON PAGE 880:

In *Casino Association of Louisiana v. State*, 820 So.2d 494 (La. 2002), cert. denied *sub nom. Casino Association of Louisiana v. Louisiana*, 123 S. Ct. 1252 (2003), the Louisiana Supreme Court upheld a law barring campaign contributions by casinos. The court both distinguished and questioned the reasoning of its earlier *Penn* decision.

Chapter 18. Parties, Soft Money, and Issue Advocacy

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 913:

Two courts have followed Smith's reasoning in striking down bans on soft money. *Jacobus v. State of Alaska*, 182 F. Supp.2d 881 (D. Alaska 2001) and *Washington State Republican Party v. Washington State Public Disclosure Commission*, 4 P.3d 808 (Wash. 2000). Both cases predate *Colorado Republican II*. For an argument that their reasoning does not survive *Colorado Republican II*, see Richard L. Hasen, *The Constitutionality of a Soft Money Ban After* Colorado Republican II, 1 ELECTION LAW JOURNAL 195 (2002). *Jacobus* is currently on appeal to the United States Court of Appeals for the Ninth Circuit.

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 921:

The FEC's coordination rules came in for strong criticism in James Bopp, Jr. and Heidi K. Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?*, 1 ELECTION LAW JOURNAL 209 (2002). Bopp and Abegg believe the new FEC regulations went too far. Congress apparently believed they did not go far enough. As part of recently passed campaign finance legislation (see this Supplement below describing The Bipartisan Campaign Reform Act of 2002), Congress ordered the repeal of the regulations and the promulgation of new regulations that "shall not require agreement or former collaboration to require coordination." BCRA, § 214(b)-(c). For a response to Bopp and Abegg, see Grant Davis-Denny, *The Constitutionality of Regulating Coordinated Issue Advocacy: A Reply to James Bopp, Jr. and Heidi K. Abegg's* The Developing Constitutional Standards for 'Coordinated Expenditures,' 2 ELECTION LAW JOURNAL 367 (2003).

ADD THE FOLLOWING TO THE END OF PAGE 922:

IV. The Bipartisan Campaign Reform Act of 2002

Background on Passage of the Act and Its Major Provisions

After six years of failed attempts, and with impetus from the scandal involving the Enron corporation, Congress passed the most significant campaign finance changes since 1974. The campaign finance bills had been known as the "McCain-Feingold" or "Shays-Meehan" bills before passage (named for their primary sponsors in the Senate and House, respectively), but campaign finance practitioners now refer to the law under its official title, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81, or "BCRA." The entire text of the act may be found at: http://www.law.stanford.edu/library/campaignfinance/107.155.pdf.

The law is quite complex and a whole book could be devoted to constitutional and statutory questions related to it. See Robert Bauer**,** SOFT MONEY, HARD LAW: A GUIDE TO THE NEW CAMPAIGN FINANCE LAW (2002) (offering, with good humor, some statutory interpretation). We focus here only on the major provisions, which took effect after the November 2002 elections (more detailed descriptions of the major provisions appear in the discussion of the district court's opinions below):

- A *soft money ban* applicable to the national committees of political parties and a ban on solicitation of soft money by "any officer or agent acting on behalf of such a national committee." § 323(a).

- *A requirement that state and local parties generally pay for "Federal election activity" with money raised under federal limits* (hard money). § 323(b). A provision known commonly as the "Levin Amendment" (named for the Senator who proposed it) allows state and local parties (subject to state law requirements) to raise up to $10,000 in contributions from "persons" to partially fund certain campaign activity that might be considered "Federal election activity." Among other requirements, the activity funded with Levin money cannot refer to clearly identified candidates for federal office.

- A *redefinition of the line between express advocacy and issue advocacy* so as to require *disclosure* of "electioneering communications" meeting certain dollar thresholds. The statute defines "electioneering communications as "any broadcast, cable, or satellite communication" which "refers to a clearly identified candidate for federal office" made within 60 days of a general election or 30 days before a primary, and, in the case of candidates other than for President or Vice-President, is "targeted to the relevant electorate." § 201(a). If the provision is struck down as unconstitutional, the backup definition of "electioneering communications" in the Act applies to "any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office, (regardless of whether the communication expressly advocates a vote for or against a candidate) and which is also suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

- A *prohibition* on corporate or labor union "electioneering communications" as defined above except through *separate segregated funds*. § 203. The definition appears to include non-profit, ideologically oriented tax-exempt corporations like the Massachusetts Citizens for Life.

- A *possible prohibition* on electioneering communications by *unincorporated* tax-exempt organizations who take labor or union funding. The BCRA is especially convoluted on this point. Section 203 prevents "any other person using funds donated by" a labor union or corporation from making electioneering communications. (The statute does not specify whether the

person "using" such funds must "use" them for electioneering communications to come within the ambit of the statute.) Although section 203 contains an exception for tax-exempt organizations that fund such communications solely out of individual contributions from American citizens or permanent residents, section 204 removes the exception,[12] meaning no entity that takes labor union or corporate money may make "electioneering communications." Bauer, *supra* at 61, calls the exception in section 203 "fool's gold."

- *An increase in individual contribution limits* from $1,000 to $2,000, now indexed to inflation, and an increase in the aggregate limit on campaign contributions for federal campaigns. § 307. These limits rise for contributions to a candidate who faces an opponent spending a large amount of his personal funds. § 304 (Senate); § 319 (House). These latter provisions have been referred to as "the Millionaire's Amendments."

Status of the Current Litigation

President Bush signed the BCRA into law despite reservations about the constitutionality of several of its provisions (see his statement on signing at http://www.whitehouse.gov/news/releases/2002/03/20020327.html). Immediately upon the BCRA's passage, it was challenged in federal court, first by the National Rifle Association and then by a varied collection of groups and individuals including Senator Mitch McConnell, a leading opponent of campaign finance regulation. The cases were consolidated under the name *McConnell v. Federal Election Commission,* and heard, under expedited procedures set forth in the Act, by a three-judge district court in Washington D.C. with direct appeal to the Supreme Court.

The three-judge court heard oral argument on December 4 and 5, 2002. Most outside observers expected the Court to issue a ruling by late January or early February 2003, based upon comments made by one of the judges on the panel. Those dates passed without an opinion issuing and without explanation from the court.

The Court finally issued its ruling in the case on May 2, 2003, *McConnell v. Federal Election Commission*, 251 F. Supp. 2d 176 (D.D.C. 2003) (per curiam) (an opinion dated May 1, 2003). The three judges on the panel issued four opinions totaling an astounding 1,638 typescript pages. The first (171 page) opinion was a per curiam opinion by Judges Colleen Kollar-Kotelly and Richard Leon dealing with general issues and the some of the law's disclosure provisions. Judge Kollar-Kotelly issued her own (706 page) opinion and Judge Leon issued his own (347 page) opinion concurring in part

[12] One might wonder why Congress created an exception in Section 203 only to take it away in Section 204. The answer is the politics of the debate over passage of the BCRA in the Senate. Section 204 began as an amendment proposed by Senator Paul Wellstone, a liberal Democrat. The "Wellstone Amendment" passed, despite opposition by the bill's sponsors, Senators McCain and Feingold, through support from Senators who ultimately voted against the legislation, including the leading opponent of the legislation, Senator Mitch McConnell. Why do you suppose Wellstone proposed the amendment? Why do you suppose McConnell supported it?

and dissenting in part from the per curiam opinion. Judge Karen LeCraft Henderson, who did not join the per curiam opinion, issued her own (345 page) opinion concurring in the judgment in part and dissenting in part.

In the opinions, the judges disagreed not only on the merits of the case (discussed in detail below) but also on whether the ruling was unreasonably delayed. Judge Henderson began with a long footnote in which she expressed the view that "[t]he panel's subsequent delay in resolving these actions has not only defied the statute's expedition mandate but, regrettably, has ill-served the strong public interest in election law." 251 F. Supp. 2d at 266 n.1 (Henderson opinion). Judge Henderson suggested a panel of appellate Judges would have acted more expeditiously. Judges Kollar-Kotelly and Leon defended the speed with which they issued their ruling, noting that "given the vast record developed through the six months of discovery in this case, it is not surprising that this Court required a few more months than the *Buckley* court to arrive at a decision after the arguments—for only careful consideration of the record before us could reduce the risk of committing clear error in our findings." *Id.* at 207 n.36 (per curiam); see also *id*. at 209 n.41 (disputing Judge Henderson's statement that there was consensus that the Supreme Court had to receive the case by early February). In response to the majority's point about clear error, Judge Henderson stated: "The majority's view of the factual record—not to mention the record's legal significance—is quite different from mine, leaving me 'with the definite and firm conviction that a mistake has been committed' with respect to several of its findings." *Id*. at 297 n.55.

On the merits, the rulings themselves were quite fractured, leading the majority to include a chart in an attempt to summarize the key rulings in the case. *Id*. at 187-88. Without reading the opinions themselves, the chart was undecipherable. Some of the parties moved for a stay of at least part of the lower court opinion. On May 19, 2003, over the dissent of Judge Leon, the court issued an order staying its entire ruling, including those provisions of the law struck down by all three judges. A memorandum opinion accompanying the stay order explained:

> [T]he Court is satisfied that a stay should be granted pending final disposition of these eleven actions in the Supreme Court of the United States. This Court's desire to prevent the litigants from facing potentially three different regulatory regimes in a very short time span, and the Court's recognition of the divisions among the panel about the constitutionality of the challenged provisions of BCRA, counsel in favor of granting a stay of this case. Pursuant to Federal Rule of Civil Procedure 52(a), the Court deems no further discussion necessary to resolve these motions.

One set of plaintiffs then applied to Chief Justice Rehnquist of the Supreme Court, sitting in his capacity as Circuit Justice for the District of Columbia Circuit, for an order to vacate the stay and, assuming that order was granted, to enjoin certain provisions of the BCRA. On May 23, 2003, the Chief Justice denied the request, and wrote on the application that "an act of Congress is presumed to be constitutional, see *Bowen v. Kendrick*, 483 U.S. 1304 (1987), and *the Bipartisan Campaign Reform Act should remain*

in effect until the disposition of this case by the Supreme Court." (Emphasis added.) The upshot of the Chief Justice's statement is that the BCRA appears likely to remain in effect until the Supreme Court decides the case on the merits.

The Court has set a special oral argument date of September 8, 2003 for a four-hour oral argument (rather than the usual one hour period). The argument will take place a full month before the Court officially returns from its summer recess for the start of the October 2003 term. It has set up a special page for posting briefs, opinions, and orders in the case: http://www.supremecourtus.gov/bcra/bcra.html.

We turn now to how the lower court judges viewed the constitutionality of the major provisions of BCRA.

Soft Money

The per curiam opinion offered this description of the soft money provisions, contained in BCRA's Title I.

> 1. **Title I: Reduction of Special Interest Influence**
>
> a. The National Party Soft Money Ban: Section 323(a)
>
> The first provision of Title I involves the addition of a new section to FECA, section 323, entitled "Soft Money Of Political Parties." Section 323(a) states that national party committees (including national congressional campaign committees) "may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." The law applies to "any . . . national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee." The clear import of this provision is that national party committees are banned from any involvement with nonfederal money.
>
> b. The State and Local Party Soft Money Ban: Section 323(b)
>
> … In general, section 323(b)(1) prohibits state and local political parties from spending any money not raised in accordance with FECA on "Federal election activity." BCRA. Federal election activity is defined by the Act as:
>
> > (i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election; (ii) voter identification, get-out-the-vote activity, or generic campaign

> activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot); (iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or (iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

Federal election activity does not include:

> (i) public communication that refers solely to a clearly identified state or local candidate (unless the communication otherwise qualifies as Federal election activity, for instance, as GOTV [get-out-the-vote—EDS]); (ii) a contribution to a state or local candidate (unless designated to pay for some other kind of Federal election activity); (iii) a state or local political convention; or (iv) grassroots campaign materials (stickers, buttons, etc.) that name only a state or local candidate.

1) *The Levin Amendment*

Section 323(b)(2)–commonly referred to as the "Levin Amendment"–carves out an exception to the general rule in section 323(b)(1). Section 323(b)(2) permits state and local parties to use an allocation of nonfederal money ("Levin money" or "Levin funds") for voter registration, voter identification, and GOTV activities provided that certain specified conditions are met. First, the permitted activities may not refer to a clearly identified federal candidate. Second, those activities may not involve any broadcast communication except one that refers solely to a clearly identified state or local candidate. Third, no single donor may donate more than $10,000 to a state or local party annually for those activities. Finally, all money (federal and Levin money alike) spent on such activities must be "homegrown"–i.e., raised solely by the spending state or local party–and may not be transferred from or raised in conjunction with any national party committee, federal officeholder or candidate, or other state or local party.

c. Fundraising Costs: Section 323(c)

Section 323(c) requires national, state, and local parties to use federally-regulated funds to raise any money that will be used on "federal election activities," as defined in the statute.

d. Tax Exempt Organization Soft Money Ban: Section 323(d)

Section 323(d) prohibits any political party committee–national, state, or local–or its agents from "solicit[ing]" funds for or "mak[ing] or direct[ing]" any donations to either: (i) any tax-exempt section 501 organization, *see* 26 U.S.C. § 501(c), that spends any money "in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (ii) any section 527 organization, *see* 26 U.S.C. § 527, (other than a state or local party or the authorized campaign committee of a candidate for state or local office). A section 501(c) organization is an organization that is tax exempt as described in that section of the tax code–a good example of which is a charity. A section 527 organization is a political committee that is exempt from taxation…

e. Federal Officeholder and Candidate Soft Money Ban: Section 323(e)

Section 323(e) generally prohibits federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending any soft money[42] (i) in connection with a federal election or (ii) in connection with a state or local election. There are, however, several exceptions to the general prohibition in section 323(e). First, a federal officeholder or candidate may solicit money for state and local candidates from sources and in amounts that would be allowed by Federal law. Second, the federal officeholder or candidate ban on nonfederal funds does not apply to the solicitation, receipt, or spending of funds by an individual who is also a candidate for state or local office solely in connection with such election. Third, a federal officeholder or candidate may attend or speak at a fundraising event for a state or local political party. Fourth, a federal officeholder or candidate may solicit such funds on behalf of any tax-exempt section 501 organization that spends money in connection with federal elections in either of two instances: (i) he or she may solicit unlimited funds for a section 501 organization whose "principal purpose" is not voter registration, voter identification, or GOTV activity, so long as the solicitation does not specify how the funds will be spent; and (ii) he or she may solicit up to $20,000 per person per year

[42] If the federal candidate or officeholder is soliciting, receiving, directing, transferring, or spending funds in connection with an election for federal office, the funds must "be subject to the limitations, prohibitions, and reporting requirements of this Act." However, if the candidate is doing so in connection with a state or local election, then the funds must be "not in excess of the amounts permitted with respect to contributions to candidates and political committees" and "not from sources prohibited by the Act from making contributions in connection with an election for Federal office."

> specifically for voter registration, voter identification, or GOTV activity, or for an organization whose "principal purpose" is to conduct any or all of those activities.
>
> f. State Candidate Soft Money Ban: Section 323(f)
>
> Lastly, Section 323(f) generally prohibits state officeholders or candidates from spending soft money (that is, money not raised pursuant to FECA's regulations) on any public communication that "refers" to a clearly identified candidate for federal office and "promotes," "supports," "attacks," or "opposes" a candidate for that office.

251 F. Supp. 2d at 209-212.

Judge Kollar-Kotelly took the position that all the soft money provisions of Title I passed constitutional muster:

> For well over two decades, the [Federal Election] Commission has sought to regulate the use of nonfederal funds by permitting the national, state, and local political party committees to allocate expenses on "nonfederal" activities between their federal and nonfederal accounts. The vast record in this case demonstrates that this system–a cobbled-together aggregation of FEC regulations and advisory opinions–is in utter disarray with all of the different political party units spending nonfederal money to influence *federal* elections. Congress was correct in finding that in many instances, the allocation regime was a failure. The only way to return the system to the original design of FECA was to prevent the national party committees from raising money outside of the restrictions in FECA and to restrict the use of nonfederal funds by the state and local party committees for "Federal election activity." Seen from this perspective, Title I is not a draconian realignment of the role of political parties. Rather, Title I operates as a fundraising restriction aimed at restructuring the failed allocation regime that has produced a campaign finance system so riddled with loopholes as to be rendered ineffective. Concomitantly, BCRA restores in large measure, the federal campaign finance structure that had functioned effectively prior to the rise of seductive "soft money."
>
> In other words, Congress created Title I of BCRA to fix the contribution limitations of FECA that have fallen into severe disrepair, largely as a result of these aforementioned regulations and advisory opinions. Title I accomplishes this goal by requiring the national committees of the political parties to fund their operations with federally regulated money. Equally important, the law also compels the state and local committees of the national political parties to fund their Federal election activities with money raised in compliance with federal law. Other provisions in Title I are designed to ensure the integrity of Title I,

> by including restrictions on the ability of the committees of the national parties and their agents to raise money for certain tax-exempt organizations and by placing limitations on federal and state candidates in regard to certain campaign and fundraising activities. At the same time, BCRA raises the limitations on "hard money" contributions to the national, state, and local party committees to facilitate raising funds within this new statutory framework. When stripped of Plaintiffs' gloss, it becomes evident that Title I basically operates as a contribution limitation on political party fundraising, amply supported by prior Supreme Court caselaw and the immense record in this case. Given the sufficiently important governmental interests long identified by the Supreme Court to support the contribution restrictions like those at issue in Title I, Congress rightfully concluded that the only way to combat the problems related to the abusive use of nonfederal funds was to: (a) limit the funding of national committees of the political parties to money regulated by the federal government, and (b) enact a series of limited, ancillary, prophylactic measures involving state and local committees and candidates to ensure the integrity of the national committee nonfederal funds prohibition. In my judgment, Title I is constitutional.

251 F. Supp. 2d at 651-52.

In contrast, Judge Henderson took the position that all of Title I, except for the provision limiting the solicitation of nonfederal funds by federal officeholders, was unconstitutional. After a detailed explanation of her view that the provisions must be reviewed under strict scrutiny, Judge Henderson held that section 323(a)'s

> national party ban does not serve the government's interest in preventing actual or apparent corruption; and … even if the ban did alleviate corruption, it would sweep too broadly to be sustained in any event….
>
> The defendants refer us to a mountain of discovery—mostly anecdotal in nature—gathered to support the Congress's judgment that "soft money has been used to evade the law and, in actuality and appearance, corrupts the political process." I note at the outset, however, that they have identified not a single discrete instance of *quid pro quo* corruption attributable to the donation of non-federal funds to the national party committees. Although the defendants point to certain notorious incidents they believe underscore the corrupting effect of non-federal funds, *see, e.g.*, Intervenors Br. at 11 & n.33 (noting Enron "gave over $400,000 to each political party" but not asserting funds affected any federal official's decision-making); *id*. at 29 (noting Roger Tamraz "made enormous soft money contributions" to DNC and was granted six meetings with President Clinton to obtain backing for pipeline project but "never received the backing he sought"), they have not identified any empirical link between large non-federal contributions and legislative

voting behavior. Given the Supreme Court's working definition of corruption—i.e., "a subversion of the political process" that occurs when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain," *NCPAC*—I would need to see far more powerful evidence to accept the defendants' claim that non-federal donations corrupt or appear to corrupt federal candidates.

Likewise, the defendants have not established a convincing correlation between the "explosion" of non-federal funds on the one hand and an intensified public sense—i.e., appearance—of corruption on the other...*see also, e.g.*, *The Constitution and Campaign Reform: Hearings on S.522 Before the Comm. on Rules and Admin.*, 106th Cong. (2000) (sharpest decline in voter turnout, from 60.84 per cent to 50.11 per cent, occurred between 1968 and 1988, when non-federal funds were mostly *absent* from party fundraising). Nor have they persuasively rebutted evidence indicating that, to the extent the voting public *does* perceive corruption, that perception has been fueled not only by non-federal donations but also by lobbying efforts, federal contributions, and the mass media's "populist demonologies" of politics in general….

Even were I to infer from the record that the use of non-federal funds has to some extent promoted actual or apparent corruption of federal candidates—and I do not—the defendants have offered only scant and contradictory support for the proposition that the national party ban "will in fact alleviate these harms in a direct and material way." Although the statute aims explicitly at the "reduction of special interest influence," much evidence in the record indicates that the ban will in fact *magnify* that influence.

First, while prohibiting national political party committees from raising or spending non-federal funds for issue advocacy—whenever the advocacy occurs, whether or not it refers to a federal candidate and whether or not it is broadcast—BCRA continues to permit other groups to raise and spend non-federal funds at any time for non-broadcast, candidate focused issue advertising. To the extent that *any* candidate-focused issue ad is corrupting—as the defendants would have us believe—single-issue ads sponsored by interest groups are no less likely (and perhaps more likely) to buy political influence than are more broad-based party-sponsored ads.

Second, both the record and common sense suggest that if BCRA section 101 passes constitutional muster, the supply of non-federal funds currently flowing to the political parties will be channeled to interest groups.

Third, the record indicates as well that non-federal funds made available to interest groups will be used for a wide range of election-

> related activities, including grassroots and get-out-the-vote activities, voter registration and fundraising events with federal officeholders. To the extent that any one or any combination of these activities is corrupting when sponsored by the national party committees—although, in light of *Colorado Republican I*, I do not presume that they are—they are no less corrupting when sponsored by interest groups….
>
> Even were I convinced that new FECA section 323(a) materially served to prevent actual or apparent corruption, I am not persuaded that it would do so narrowly enough to comport with the First Amendment's guarantees….
>
> New FECA section 323(a)'s ban on national party use of non-federal funds fails to serve the government's interest in preventing actual or apparent corruption of federal candidates and, worse, it indiscriminately restricts independent expenditures disbursed for protected issue advocacy and non-corrupting party-building activities. In my opinion, the ban is substantially overbroad and represents an impermissible burden on the expressive associational rights of the national political party committees and their donors. Accordingly, I would hold that it is unconstitutional on its face.

251 F. Supp. 2d at 395-402.

Judge Henderson went on to hold that "[u]nder strict scrutiny, sections 301(20) and 323(b)—which restrict state and local party spending of non-federal funds for 'Federal election activity'—likewise fall far short of passing constitutional muster. I conclude below that (1) the state and local party restrictions do not serve the government's interest in preventing actual or apparent corruption of *federal* candidates; and (2) even if the restrictions did retard corruption, they are not narrowly tailored." 251 F. Supp. 2d at 402. Judge Henderson held sections 323(c) and (f) were inseverable from section 301(20) and struck those provisions down as well.

Turning to section 323(d), Judge Henderson wrote:

> Section 323(d) prohibits any political party committee or its agents from donating even *federal* funds to a tax-exempt 501(c) organization making expenditures "in connection with" a federal election, or to a section 527 organization *whether or not* the organizations spends the funds "in connection with" a federal election….
>
> Consider once again a concrete example from the State of California. In any given election, California voters consider a large number of state and local ballot measures pertaining to any number of legislative matters. Recently, such issues as affirmative action, education of immigrant children, welfare reform, restrictions on union membership

> and term limits have been the subject of ballot initiatives. Significantly, most committees formed to support or oppose ballot measures in California are tax-exempt 501(c)(4) organizations. Under section 323(d), the [California Democratic Party] is prohibited from giving *any* funds (federal or non-federal) to a 501(c)(4) ballot-measure organization that purchases a radio ad like the one urging the California electorate to vote against Proposition 209, a ballot measure that would eliminate affirmative action in the State. But by barring the CDP from donating non-federal funds to the ballot-measure organization, section 323(d) stifles such speech; it "automatically affects" the organization's expenditures, *CARC*, which are "in connection with an election for Federal office" only because a federal candidate appears on the same ballot as the state initiative. The defendants argue that the provision's broad restraint on the trade of political ideas is justified as a means to "prevent the parties from collecting soft money and laundering it through other organizations engaged in federal electioneering." Under settled First Amendment jurisprudence, however, section 323(d) cannot be justified on this ground or any other.

251 F. Supp. 2d at 413-14.

Judge Henderson did, however, vote with Judge Kollar-Kotelly to uphold one of the soft money provisions, section 323(e)'s prohibitions on solicitations of soft money by federal officeholders. She offered two reasons for finding the provision satisfied strict scrutiny: "*First*, it is hardly a novel or implausible proposition that a federal candidate's solicitation of large donations from wealthy individuals, corporations and labor organizations—whether or not the funds are used "for the purpose of influencing" a federal election—can raise an *appearance* of corruption of the candidate…. *Second*, if BCRA's "key purpose" is indeed to prevent "the use of soft money as a means of buying influence [over] federal officials," "section 323(e) may be the least restrictive means of meeting the objective." 251 F. Supp. 2d at 420-21.

Judge Leon took a third view of the constitutionality of the soft money provisions in Title I of BCRA:

> I agree with Judge Henderson's conclusion, although for different reasons, that Congress, in essence, is constitutionally prohibited from regulating a national party's ability to solicit, receive, or use nonfederal funds (i.e., soft money) for nonfederal and mixed purposes. To the extent that Section 323(a) seeks to regulate donations to national parties that are used for purposes that at the most *indirectly* affect federal elections (i.e., nonfederal or mixed purposes), the defendants have failed to demonstrate that Section 323(a) serves an important government interest, or even if they had, that it is sufficiently tailored to serve that interest.
>
> However, I find that Congress can restrict a national party's use of nonfederal money to directly affect federal elections through

> communications that support or oppose specifically identified federal candidates. Therefore, like Judge Kollar-Kotelly, I find constitutional Congress's ban on the use of nonfederal funds by national parties for Section 301(20)(A)(iii) communications. As a result, I concur in part in, and dissent in part from, Judge Henderson's judgment and reasoning regarding Section 323(a).

251 F. Supp. 2d at 758-759.

Applying the "closely-drawn standard of review applied to contribution limitations in *Buckley* and ensuing campaign finance cases," Judge Leon upheld the ability of Congress in section 323(a) to restrict "donations to political parties based upon their *use to directly affect federal elections*."

> As sure as the evidence, legal precedent, and common sense support Congress's power to regulate the use of nonfederal funds for federal purposes, they do *not* support Congress's effort to regulate nonfederal funds used for nonfederal and mixed purposes. National parties need to raise and use nonfederal funds for a variety of purposes. Sometimes they raise and use nonfederal funds for the nonfederal purpose of contributing to state and local candidates in "off-year" elections when there are no federal candidates on the ballot. Other times they need to raise and use funds for mixed purposes that only *indirectly* affect the election of federal candidates, such as generic voter mobilization efforts and genuine issue advertisements. The defendants do not deny that the national parties use nonfederal funds for both nonfederal and mixed purposes that at the most indirectly affect federal elections. They contend, nonetheless, that nonfederal donations to national parties—*regardless of their use*—create actual or apparent corruption. To support that expansion of Congress's power in contravention of the First Amendment rights of the donors and national parties, the defendants would have to demonstrate that using nonfederal funds for either nonfederal or mixed purposes gives rise to either corruption or an appearance of corruption, such that the blanket restriction on nonfederal funds is not overbroad. For the following reasons, they have not done so.
>
> First, the suggestion that the appearance of corruption, let alone actual corruption, exists regardless of any perceived, or actual, benefit to a federal candidate does not comport with the conventional legal understanding of corruption and apparent corruption. The Supreme Court has defined corruption as something more than a quid pro quo arrangement in which a legislator sells his vote for one or more contributions to his campaign, *see, e.g.*, *Colorado Republican II*, as well as "improper influence" or conduct by a donor that results in a legislator who is "too compliant" with the donor, *Shrink Missouri*. Of course, the Supreme Court has also recognized that Congress has an equally

compelling government interest in preventing the appearance of corruption in the public's mind…. Without financial gain to themselves or money into their campaigns, why would candidates elect to act contrary to their obligations? In short, since donations cannot logically foster corruption, or its appearance, unless the candidate benefits or appears to benefit in some way, donations to a party with no prospect that they will be used to directly affect the candidate's election, cannot, absent substantial evidence to the contrary, give rise to either actual or apparent corruption.

Second, the defendants' contention, in essence, that Congress can regulate the use of soft money donations by national parties for either nonfederal, or mixed, purposes is equally unsupportable by the record and common sense. If a national party uses nonfederal funds to support generic voter registration, or to conduct training seminars for state parties on get-out-the vote activities, the benefit to the federal candidate, assuming his election is even being contested, is attenuated at best, *Colorado Republican I*, because it is generic in nature and diluted among a far greater number of state and local candidates. No credible evidence has been submitted by the defendants that demonstrates that federal candidates either are, or are perceived to be, indebted to donors as a result of such mixed-purpose party activities. Moreover, donations used for generic issue advertisements that may be helpful to both state and federal candidates, another example of a mixed-purpose activity by a party that indirectly affects federal elections in a way unlinked to any particular candidate's election or re-election, also do not foster actual or apparent corruption….

Third and finally, the defendants' contention that candidates, who raise soft money donations for their national parties, regardless of their subsequent use, are indebted to the donors due to "internal party benefits" they subsequently receive for raising the nonfederal donations, is equally tenuous from both a theoretical and an evidentiary standpoint, and, in any event, Section 323(a) remains insufficiently tailored based on that justification to pass constitutional muster….

In sum, conduct which only indirectly affects a federal election requires a greater degree of evidence of corruption, or appearance thereof, to warrant congressional regulation. Thus, in the absence of sufficient proof to warrant expanding FECA in this direction, Congress may only prohibit the national parties from using nonfederal money for federal purposes such as those defined in Section 301(20)(A)(iii), which are clearly designed to directly affect federal elections. The use of nonfederal funds for nonfederal or mixed purposes, which at the most indirectly affect federal elections, is simply not regulable by Congress because it does not give rise to corruption or the appearance of corruption. Thus Section 323(a)'s complete ban on the use of nonfederal funds is not closely drawn to serve the designated government interest.

251 F. Supp. 2d at 768-773. Judge Leon then found that "Section 323(a)'s implicit prohibition on national parties to use nonfederal money to fund communications of the kind defined in Section 301(20)(A)(iii) is constitutionally severable from its remaining unconstitutional applications." Section 301(20)(A)(iii) communications are those "that refer to a clearly identified candidate for Federal office…and that promote[] or support[] a candidate for that office, or attack[] or oppose[] a candidate for that office." So limited, Judge Leon voted to uphold section 323(a). Using similar reasoning, Judge Leon voted to strike down Title I provisions limiting the use of soft money by state and local political parties except as to purely federal purposes as defined in Section 301(20)(A)(iii).

Judge Leon then concurred with Judge Henderson that section 323(d) is unconstitutional.

> Section 323(d) is not closely drawn as to Section 501(c) organizations because it prohibits solicitation for and donations to those organizations merely because they have made, in effect, expenditures for federal purposes in the past, and *regardless* of whether those donations will be used again for that very purpose. By not specifying the purpose for which the money will be put, Congress, in effect, is prohibiting solicitation for and donations to these Section 501(c) organizations that might in turn be used for *nonfederal or mixed* purposes. Congress, of course, can only do this if it could show that a sufficient government interest was being served by doing so. It has not. As discussed at length earlier, the only restrictions on uses of nonfederal funds that can be constitutionally regulated are uses that *directly affect a federal election.* Any other use of the donation is too tangential to give rise to the risk of corruption, or appearance of corruption, that is necessary to warrant this congressional infringement on First Amendment rights.

251 F. Supp. 2d at 790-791. Judge Leon made a similar point about section 527 organizations.

Judge Leon dissented in part from the decision of Judges Henderson and Kollar-Kotelly to uphold the anti-solicitation rules of section 323(e). Judge Leon wrote that federal officeholders have a constitutional right to solicit funds for the benefit of their national parties to be used for nonfederal purposes such as party building, newsletters, genuine issue advocacy, and generic voter mobilization. Finally, Judge Leon concurred with Judge Kollar-Kotelly in upholding section 323(f), prohibiting state candidates from spending soft money on communications that directly affect federal elections.

Notes and Questions

1. Putting together the three opinions, would you say that the court mostly upheld or mostly struck down soft money provisions of BCRA? If you are confused, you are not alone. The day after the opinion issued, Californians could choose from one of the following two headlines: David G. Savage and Nick Anderson, '*Soft Money' Ad Ban*

Upheld, LOS ANGELES TIMES, May 3, 2003, at A1; Zachary Coile, *Court Kills Ban on 'Soft Money,'* SAN FRANCISCO CHRONICLE, May 3, 2003, at A1.

2. Had these rulings gone into effect, federal, state, and local parties would have been barred from raising funds for purely federal activities, and federal officeholders would have barred from soliciting soft money for parties. How much of a difference would that have made compared to pre-BCRA rules? Would the law as it emerged from the three-judge court have alleviated concerns over corruption and the appearance of corruption that provided Congress' stated justification in passing the law?

3. To what extent does the difference in positions among the judges turn on a difference about relevant Supreme Court precedent? On the belief that the soft money provisions are necessary to prevent circumvention of valid contribution limits? To what extent are the judges disagreeing over the facts?

4. To the extent that facts matter on the soft money question or any other question, how is the Supreme Court to decide among conflicting factfinding by the judges? What if there is no majority opinion on the facts on a particular question? *See Wright v. Rockefeller*, 376 U.S. 52 (1964).

Regulating Issue Advocacy

The per curiam opinion offered this description of the major provisions of BCRA extending the reach of regulation beyond express advocacy:

> 2. **Title II: Noncandidate Campaign Expenditures**
>
> a. Definition of Electioneering Communication: Section 201
>
> Section 201 of BCRA amends section 304 of FECA by adding the following definition of an "electioneering communication":
>
> > (i) The term "electioneering communication" means any broadcast, cable, or satellite communication which–
> > (I) refers to a clearly identified candidate for Federal office;
> > (II) is made within–
> > (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> > (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> > (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.
>
> Under this definition, in order to constitute an electioneering communication, therefore, the communication (a) must be disseminated by

cable, broadcast, or satellite, (b) must refer to a clearly identified Federal candidate, (c) must be distributed within certain time periods before an election, and (d) must be targeted to the relevant electorate. The fact that the communication must be "targeted to the relevant electorate," means that, in the case of House and Senate races, the communication will not constitute an "electioneering communication" unless 50,000 or more individuals in the relevant congressional district or state that the candidate for the House or Senate are seeking to represent can receive the communication. For example, if a broadcast advertisement refers to a federal House candidate within 60 days of the general election, but can only be received by 30,000 individuals, it is not an electioneering communication and permissibly could be made with funds from the general treasury of a corporation or labor union.

In the event that a court of competent jurisdiction finds the definition of electioneering communication to be constitutionally infirm, the statute provides a backup definition:

> (ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

With the exception of the final clause, the fallback definition essentially tracks the language found in section 301(20)(A)(iii) of FECA which addresses one of the four activities which fall within the definition of the term Federal Election Activity.

b. Prohibition of Corporate and Labor Union General Treasury Fund Disbursements for Electioneering Communications: Section 203 Rules Relating to Certain Targeted Electioneering Communications: Section 204

Section 203 of BCRA extends the prohibition on corporate and labor union general treasury funds being used in connection with a federal election to cover electioneering communications. The prohibition on electioneering communications only applies to the general treasury funds of national banks, corporations**,** and labor unions, or any other person using funds donated by these entities.

Like the original prohibition in section 441b, Section 203 of BCRA, is not an absolute ban on corporate and labor union spending on

"electioneering communication." FECA expressly permits corporations and labor unions to create "separate segregated fund[s] to be utilized for political purposes." These segregated funds are known as political committees under the Act (or PACs)…. These segregated accounts are subject to the source and amount limitations contained in FECA. *See, e.g.*, 2 U.S.C. § 441a(a)(1)(C) (providing that no person shall make contributions "to any other political committee in any calendar year which, in the aggregate, exceed $5,000"). To fund the segregated account, a corporation is permitted to solicit contributions from "its stockholders and their families and its executive or administrative personnel and their families. Likewise, in establishing their segregated funds, labor unions are allowed to solicit contributions to the fund from their members and their families. From these accounts, corporations and labor unions are permitted to make contributions to federal candidates and spend unlimited amounts of segregated funds on electioneering communications and independent expenditures, provided that federal funds are used to pay for these activities.

Snowe-Jeffords Provision

BCRA Section 203 provides an exception to certain types of nonprofit corporations from the requirement that corporations, labor unions, and national banks must use separately segregated funds — and not general treasury funds — to pay for electioneering communications... However, this exception, commonly known as the "Snowe-Jeffords Provision" after its sponsors, was later, in effect, withdrawn by Section 204, known as the "Wellstone Amendment."…

While a nonprofit corporation under Snowe-Jeffords is permitted to use general treasury funds for electioneering communications, it is important to note that these corporations are not permitted to use funds donated by a corporation, labor union, or national bank to purchase them. Under Snowe-Jeffords, a nonprofit corporation may only use funds donated by individuals to pay for electioneering communications. If a nonprofit corporation, for example, has accepted corporate contributions and mixed those contributions with general treasury funds that contained individual donations, the nonprofit corporation would not be permitted to use their general treasury funds to engage in electioneering communications.

The Wellstone Amendment

Despite drafting and including the Snowe-Jeffords' provision in the Act, an amendment offered by Senator Paul Wellstone and adopted by the Senate effectively eviscerates the Snowe-Jeffords' Provision from the Act….The direct consequence of the Wellstone Amendment is that

> organizations organized under section 501(c)(4) and section 527(e)(1) of the Internal Revenue Code, or those entities who have received funds from corporations, are not permitted to use their general treasury funds for electioneering communications.
>
> The Wellstone Amendment was codified in a separate section of BCRA in order to preserve severability: hence, if the Court finds the inclusion of section 501(c)(4) organizations and section 527 organizations within the ban on electioneering communications to be unconstitutional, the Wellstone Amendment can be cleanly struck from the law and the original Snowe-Jeffords exception for these groups will be restored.

251 F. Supp. 2d at 212-215.

As with the soft money provisions, the three lower court judges split three ways on the constitutionality of the electioneering communications provisions as applied to the separate segregated fund requirement for corporations and unions. Judge Kollar-Kotelly voted to uphold the statute under the "primary definition" of electioneering communications. Judge Leon voted to strike down the "primary definition" as unconstitutional but voted to uphold the "backup definition" as modified by him to remove a vagueness problem he identified with the definition. Judge Kollar-Kotelly concurred—in the alternative and without elaboration—in Judge Leon's determination that the backup definition as he modified it was constitutional, thereby creating a majority of judges voting to uphold the backup definition. Judge Henderson voted to strike down both definitions as unconstitutional.

A major basis for the disagreement among the judges over the constitutionality of the primary definition turned on the question whether the primary definition was constitutionally overbroad. See the Casebook, page 922, note 7, for an introduction to the overbreadth issue. Much of the judges' debate about the overbreadth question turned on the validity and relevance of two studies of broadcast advertisements run in the 1998 and 2000 election season conducted by the Brennan Center for Justice, "Buying Time" studies that were cited by BCRA's proponents in the Senate. Among other things, the studies took the position that a test like the primary definition would capture little "genuine" issue advocacy. The judges devoted hundreds of pages to discussion of the studies, and the controversy spilled into the press after the lower court opinions issued. Compare George F. Will, *1,600 Pages of Confusion*, WASHINGTON POST, May 8, 2003, at A31, with Thomas E. Mann, *No Merit in Brennan Center Smear Campaign*, ROLL CALL, May 22, 2003.

The following are excerpts from the lower court opinions on the question of the constitutionality of the primary and backup definitions of electioneering communications, as well as on the "Snowe-Jeffords" and "Wellstone" amendments. We begin again with Judge Kollar-Kotelly:

> For close to one hundred years the political branches have made the choice, consistent with the Constitution, that individual voters have a right to select their federal officials in elections that are free from the direct influence of aggregated corporate treasury wealth and–for over fifty years–free from the direct influence of aggregated labor union treasury wealth. The rationale for the prohibition is simple, persuasive, and longstanding. First, such a restriction "ensure[s] that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions." *NRWC*. Second, such a prohibition "protect[s] the individuals[,] who have paid money into a corporation or union for purposes other than the support of candidates[,] from having that money used to support political candidates to whom they may be opposed." *Id.* In other words, when corporations and labor unions spend their general treasury funds to influence federal elections, our coordinate branches have stated that they must use segregated funds voluntarily and deliberately committed by individual citizens for that purpose.
>
> Since 1996, this longstanding prohibition has become a fiction, with abuse so overt to openly mock the intent of the law. The record persuasively demonstrates that corporations and unions routinely seek to influence the outcome of federal elections with general treasury funds by running broadcast advertisements that skirt the prohibition contained in section 441b by simply avoiding *Buckley*'s "magic words" of express advocacy. In enacting Title II, Congress responded to this problem by tightly focusing on the main abuse: broadcast advertisements aired in close proximity to a federal election that clearly identify a federal candidate and are targeted to that candidate's electorate. In devising Title II, Congress has returned to a regime where corporations and labor unions must use federal money from a separate segregated fund explicitly designated for federal election purposes when seeking to influence federal elections.
>
> Indeed, the record conclusively establishes that the "magic words" of express advocacy identified in *Buckley* are rarely used in any form of electioneering advertisements in the modern political campaign. The perverse consequence of this situation is that advertisements that avoid express advocacy are not only the type of advertisements that political consultants generally employ for their candidate clients, they are also precisely the advertisements that corporations and labor unions, prior to BCRA, were permitted to run. Accordingly, as the record demonstrates, corporations and labor unions, with minimal effort, were able to influence federal elections with their general treasury funds; a practice long prohibited by Congress and contrary to that enforced by the judiciary.

251 F. Supp. 2d at 591-592.

Judge Kollar-Kotelly then determined that strict scrutiny should apply to the overbreadth analysis, that the express advocacy test in *Buckley* was not a constitutional requirement or substantive rule of constitutional law, and that the primary definition of electioneering communications in BCRA was not unconstitutionally vague. Then, giving a detailed history of the rise of issue advocacy by corporations and unions intended to influence elections but lacking any express words of advocacy, the judge concluded that the primary definition was narrowly tailored to serve the government's interests in preventing corruption and its appearance. "The Findings conclusively demonstrate that genuine issue advocacy is empirically distinguishable from issue advertisements seeking to influence a federal election. The vast majority of issue advertisements designed to influence a federal election identify a federal candidate, are run sixty days prior to a general election, or thirty days before a primary election, and are run in states or congressional districts with close races." *Id*. at 628.

In response to Judge Leon's concern that the bright line test could capture as much as 17 percent of "genuine" issue advocacy, Judge Kollar-Kotelly wrote:

> This [17 percent] figure is one of the reasons that Judge Leon finds the primary definition of electioneering communication to be substantially overbroad. I cannot agree with Judge Leon. First, I find these debates over "actual" percentages of genuine issue advocacy illustrative of why the Supreme Court in *Buckley* found that regulations relating to the subjective intent of the listener to be flawed. Trying to discern whether an advertisement is electioneering or issue advocacy is very difficult and open to debate. Second, this number is the outermost number of "genuine" issue advertisements that would be covered under BCRA; strong arguments can be made that the number should be reduced. Given the evidence in this case that broadcast advertisements aired in close proximity to a federal election, that mention the name of a candidate, and that are targeted to the candidate's electorate directly influence federal elections, I find that Congress was correct to establish an objective test for determining what constitutes electioneering. In other words, even if I were to accept the 17 percent figure as a valid metric for determining overbreadth, I find that … any such impact of BCRA is substantially counterbalanced by the record in this case and the objective empirical determinants related to these advertisements. For these reasons, I do not find Dr. Goldstein's conservative estimate of 17 percent to deem BCRA's primary definition of electioneering communication substantially overbroad.

251 F. Supp. 2d at 636.

Finally, Judge Kollar-Kotelly voted to uphold the Wellstone amendment, subject to the understanding that the FEC was crafting regulations to ensure that *MCFL*-type corporations would not be covered by the rule, and subject to the ability of a corporation to challenge the Commission's regulations defining *MCFL*-type status as too narrow.

Judge Leon joined in that portion of Judge Kollar-Kotelly's opinion expressing the view that the express advocacy test of *Buckley* is not a substantive principle of constitutional law. He further agreed that Congress had the power to regulate the source of funds used for uncoordinated advocacy that directly affects federal elections even in the absence of express advocacy. But Judge Leon disagreed on the constitutionality of the primary definition, finding it substantially overbroad:

> The crux of the problem with the primary definition is that, unlike the backup definition, it does not depend on the effect of the communication's message on a candidate's election. As such, many genuine issue ads…will be treated the same as the sham "issue" ads Congress supposedly was intending to regulate. It is the absence of a link between the advocacy of an issue and a candidate's fitness, or lack thereof, for election that renders congressional intervention with respect to genuine issue ads of this type unconstitutional. Notwithstanding the absence of this link, defendants contend, and Judge Kollar-Kotelly agrees, that the evidence sufficiently demonstrates that even though some genuine issue advertisements that run in the months leading up to an election will be swept in under this definition, it is too insufficient a number to render the primary definition constitutionally defective. I disagree.
>
> The plaintiffs have met their burden in this facial challenge because they have shown that BCRA's primary definition "reaches a *substantial amount* of constitutionally protected conduct." *City of Houston v. Hill*, 482 U.S. 451, 458 (1987)…
>
> The evidentiary basis of both the plaintiffs' and defendants' arguments concerning the primary definition's overbreadth is the *Buying Time 1998* and *Buying Time 2000* studies. While the defendants correctly contend that plaintiffs carry the burden to show that BCRA is substantially overbroad, the studies defendants rely upon to show that it is narrowly tailored are, in essence, a highly controversial "survey" of the ads run in the months leading up to the 1998 and 2000 elections. Judge Henderson correctly notes in her opinion that the parties "quarrel at length" regarding the significance of the *Buying Time* studies and, in particular, its conclusions regarding the percentage of genuine issue advocacy that would be improperly regulated by Section 201 of BCRA. Unlike Judge Henderson, I believe that the *Buying Time* studies are entitled to some evidentiary weight.
>
> However, I do not believe that the studies' statistical conclusions are the last word in this Court's analysis of whether or not the primary definition is overbroad. With the respect to the percentage of protected, political speech that is, or will be, regulated by BCRA, it is, of course, impossible to quantify the exact percentage with absolute certainty. Thus,

it is important not to overstate the significance of the *Buying Time* studies when using them as the basis of a finding of unconstitutional overbreadth. After all, the studies did not analyze every advertisement that ran in every market during the 1998 and 2000 elections. Instead, they analyzed the top 75 media markets, encompassing eighty percent of the advertisements runs during those elections. I do not state this fact to suggest that every ad had to be reviewed before the studies could be deemed credible, rather, that the percentages produced by the studies may, in fact, be an overstatement, or understatement, of the statute's overbreadth. In addition, I would note that the *Buying Time 2000* study did not analyze advertisements run in the 30 days preceding a primary or preference election, even though such ads aired during that period are entirely regulable by BCRA's primary definition.

Furthermore, this Court, in my judgment, cannot rely upon the results of the two, *Buying Time* studies without analyzing, to some extent, the parties' dispute regarding the formulas used to produce those results. The defendants favor the formula used in the 1998 study, which compares the total number of genuine issue ads regulated by BCRA to the total number of genuine issue ads run in a calendar year. The result is the percentage of all genuine issue advocacy that would have been regulated by BCRA in the course of that year. The plaintiffs, however, contend that the 1998 formula misstates BCRA's impact because it includes ads that were run *outside* the 60-day period preceding a general election, and therefore would not have been subject to regulation under the primary definition. According to the plaintiffs, the formula applied in the *Buying Time 2000* study more accurately reflects BCRA's impact by focusing on the exact period of time regulated by BCRA: the 60 days preceding a general election.

Looking at ads aired only during that 60-day period, the 2000 formula compares the number of genuine issue ads to the total number of ads, thereby calculating the percentage of all ads that would have been regulated by BCRA that were genuine issue ads. As the Supreme Court in *Broadrick v. Oklahoma* stated that a statute's overbreadth must be "judged in relation to the statute's plainly legitimate sweep," I find that the 2000 formula more accurately measures BCRA's impact. The results produced by the 1998 formula do not assist this Court in comparing BCRA's overbreadth to its "plainly legitimate sweep," because it measures ads that never would have been regulated by BCRA. While the 1998 formula shows BCRA's impact on all genuine issue advocacy over the course of a calendar year, that information is of limited value when BCRA's primary definition applies only in the 30 days preceding a primary election and the 60 days before a general election.

Applying the 2000 formula to the data collected during the 1998 and 2000 studies shows that the primary definition's overbreadth is neither

> speculative nor hypothetical, but real and substantial. In 1998, of the ads that met BCRA's primary definition and were aired in the 60 days preceding a general election, 14.7 percent were genuine issue advocacy. As to 2000, however, the *Buying Time 2000* study concluded that figure was only 2.33 percent. That percentage, however, was later increased by Professor Goldstein, who compiled the data base that served as the foundation of the *Buying Time* studies. Professor Goldstein testified on cross examination that he had reevaluated the results of the study for the purposes of this litigation and concluded that, in fact, 17 percent of the ads that met BCRA's primary definition and were aired in the 60 days preceding the 2000 general election were genuine issue advocacy. Percentage discrepancies aside, I find that 14.7 percent and 17 percent of the ads run in the months leading up to the 1998 and 2000 elections, respectively, represents a "substantial amount" of protected speech and renders the primary definition defective as constitutionally overbroad.
>
> But these statistics, alone, do not present the full picture of BCRA's impact on genuine issue advocacy in the 60 days preceding a general election. Indeed, determining whether BCRA's primary definition reaches a substantial amount of constitutionally protected issue advocacy is not simply a function of calculating the percentage of pure issue ads that would have been captured by that definition during the 60-day period preceding the 1998 and 2000 federal elections. Because the total amount of issue advocacy likely to be generated in any given election year is a function of both the quantity and nature of the issues Congress chooses to address in that pre-election period, those numbers should not be viewed in a legislative vacuum. Ideally, this court should additionally assess whether the legislative agendas in 1998 and 2000 were unusually active, controversial or both. Regrettably, however, the record does not lend itself to such an analysis. Obviously, the more active and/or controversial the legislative schedule, the greater (or lesser) the amount of issue advocacy one would expect it to have generated. Simply put, the amount of pure issue advocacy captured in a particularly contentious, or active, legislative period, is likely to be higher than that captured in a slow, or routine, legislative period. Furthermore, restricting 14.7 percent of genuine issue advocacy in 1998 would have restricted otherwise protected speech that would have been seen in 30 million American homes, a number that brings into sharp relief the effect BCRA will have on the amount of information available to voters. Accordingly, for the reasons stated previously, there is reason to believe that the amount of issue advocacy likely to be generated in future election cycles will be at least as substantial as it was during those years.

251 F. Supp. 2d at 795-799.

Judge Leon then held that the backup definition, as modified by him, was constitutional:

Plaintiffs raise a number of arguments as to why the backup definition of electioneering communications is "impermissibly vague." First, they claim that "reasonable people can, and emphatically do, disagree about whether virtually any particular advertisement meets the criteria of BCRA's fallback definition." …While BCRA's sponsors may disagree about the purpose and effect of an ad, that fact alone does not demonstrate unconstitutional vagueness. Perfect clarity, of course, is not required when a law regulates speech. …[T]he Supreme Court has held that a statute's vagueness exceeds constitutional bounds only when "its deterrent effect on legitimate expression is . . . both '*real and substantial*' and . . . the statute is [not] readily subject to a narrowing construction by state courts." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975)) (emphasis added). Moreover, if a statute "gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited," it is not void for vagueness.

Next, plaintiffs contend that the definition's use of the words "promote," "support," "attack," and "oppose" to define the sponsor's message causes it to be unconstitutionally vague. I disagree. The backup definition's language, specifically those words, is not void for vagueness because a person of ordinary intelligence would understand what is prohibited. Indeed, one need only conclude, in effect, that the ad is *not* neutral as to both candidates for it to have satisfied the backup definition, and thereby have satisfied the objective First Amendment standard that a reasonable person considering the context and nature of the expression at issue is able to evaluate the speech….

However, while I do not believe that the words used to define the message are vague, I do believe that the backup definition's final clause, which requires the message to be "suggestive of no plausible meaning other than an exhortation to vote," is unconstitutionally vague. In my judgment, it is extremely difficult, if not impossible, for a speaker to determine with any certainty *prior to* airing an ad that it meets that requirement. Whether an ad is suggestive of no plausible meaning other than an exhortation to vote depends on a number of variables such as the context of the campaign, the issues that are the centerpiece of the campaign, the timing of the ad, and the issues with which the candidates are identified. The "uncertain meaning[]" of this phrase in the backup definition will, as the Supreme Court stated in *Grayned*, "inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas are clearly marked." 408 U.S. at 109. The chilling effect of this language does not doom the backup definition as unconstitutionally vague, however, because it is susceptible to a saving construction.

> The backup definition's susceptibility to a saving construction is a function of how it is written. Because the offending phrase is simply appended to the end of the definition, it can be excised without rewriting the entire definition. By so construing the backup definition to avoid vagueness, the definition assures that there will be no real, let alone substantial, deterrent effect on political discourse *unrelated* to federal elections. Genuine issue advocacy thereby remains exempt from both the backup definition and its attendant disclosure requirements and source restrictions. Similarly, genuine issue advocacy, specifically of the legislation-centered type, that mentions a federal candidate's name in the context of urging viewers to inform their representatives or senators how to vote on an upcoming bill will not be regulated by the backup definition because it does not promote, support, attack, or oppose the election of that candidate.
>
> Indeed, the backup definition of electioneering communications with its final clause severed is very similar to the type of "public communication" defined by BCRA's Section 301(20)(A)(iii) as "federal election activity." While the arguments against vagueness applicable to Section 301(20)(A)(iii) are generally applicable to the backup definition, one distinction is important to note: the sophistication in electioneering communications of the parties being regulated is not equally applicable to the backup definition. That said, however, I do not believe it is necessary to make a similar finding here in regard to the comparative sophistication of corporations, labor unions, interest groups, and other participants in political speech. Additionally, whatever chilling effect, if any, the definitions of "public communications" and "electioneering communications" may have are minimized in two, substantial ways: (1) corporations, labor unions, national banks, individuals, and other entities can avoid regulation simply by not mentioning a candidate for federal office in its ad, and (2) those groups may seek an advisory opinion from the FEC to determine whether a communication is regulated by BCRA.

251 F. Supp. 2d at 801-803.

Finally, Judge Leon joined Judge Henderson in holding the Wellstone amendment unconstitutional as applied to *MCFL* corporations, but he disagreed that it was unconstitutional as to those nonprofit corporations that do not qualify for *MCFL* status.

Judge Henderson took the position that both the primary and backup definitions of electioneering communications were unconstitutional. On the overbreadth question concerning the primary definition, Judge Henderson wrote:

> The parties quarrel at length over what percentage of "genuine" issue ads—ads not intended to influence the outcome of a federal election—BCRA's electioneering provisions would prohibit. Two studies

> upon which the defendants and the statute's sponsors place considerable weight suggest that BCRA would have prohibited between one per cent and seven per cent of any "genuine" issue ads aired during the 1998 and 2000 elections. Yet neither study has any significant evidentiary weight. Moreover, like the *McConnell* plaintiffs, I reject the studies' distinction between "genuine" issue advocacy and "sham" issue advocacy because it is "subjective, immune to empirical proof, and totally antithetical to *Buckley*." Finally, even if I accepted the distinction, the record as a whole suggests that BCRA would prohibit too much protected expression — anywhere from 11.38 per cent to 50.5 per cent of (what even the defendants characterize as) "genuine" issue ads broadcast during the 60 days before an election in a typical election year.

251 F. Supp. 2d at 372 n.149.

Judge Henderson rejected the primary and backup definitions for other reasons as well. First, the judge held that the express advocacy test was constitutionally required:

> The defendants contend that "*Buckley* does not prohibit Congress from enacting narrowly tailored anti-corruption measures simply because they are not limited to communications containing express advocacy." Several courts of appeals have held, however, that the express advocacy test is not simply the Supreme Court's interpretation of FECA but an irreducible constitutional minimum that no campaign finance restriction can diminish.
>
> In the conspicuous absence of contrary precedent, I would be loath to hold that the Congress was free to reject the express advocacy test in enacting Title II, even if I agreed with the defendants—and I do not—that the test "ha[s] become all but meaningless."… Even if the defendants' assertion is accurate—and on this record I am not convinced that it is— it is beside the point. The Court in *Buckley* was well aware that the express advocacy test would permit loophole-seekers to influence elections: "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Buckley*. Nonetheless, the Court held that the express advocacy construction of FECA was constitutionally necessary to ensure that protected issue advocacy had the requisite "breathing space."

251 F. Supp. 2d at 363-364. Judge Henderson applied the same reasoning to the backup definition: "BCRA's alternate definition of 'electioneering communication' is constitutionally flawed as well; it states explicitly that it includes any broadcast communication (not merely one broadcast near election time) that 'supports or opposes' a candidate but does not expressly advocate 'a vote for or against [the] candidate.' For

reasons I have already stated, the First Amendment will not tolerate regulation of independent issue advocacy, even if (or, perhaps, especially if) intended to influence a federal election." *Id*. at 369.

Judge Henderson also found the primary definition unconstitutionally vague:

> Because a knowing violation of BCRA can result in substantial fines and/or prison time, any careful corporation or labor union will want to know what "refers to" [in section 201] means before it expends money to broadcast *any* political communication within two months of an election. But BCRA does not define "refers to" or otherwise describe the communications that are covered.
>
> On its face, then, the term "electioneering communication" can include any near-election communication that merely *mentions* a clearly identified candidate (whether by name or not). Indeed, under one common dictionary definition of "refer," BCRA prohibits near-election disbursements for broadcast communications "relative to" a given candidate. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1907 (1993) (including "relate" as synonym of "refer"). But "[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech." *Buckley*, The synonym "refers to," then, suffers from the same flaw. And just like the $1,000 expenditure limit at issue in *Buckley*, BCRA section 203 would appear to prohibit (through BCRA section 201) near-election corporate and union broadcasting of both express advocacy *and* issue advocacy, an overbroad regulation that the First Amendment will not tolerate….

251 F. Supp. 2d at 367.

Finally, Judge Henderson held that even if the express advocacy test was not constitutionally required, the separate segregated fund requirement failed strict scrutiny because "it prohibits too much political speech and not enough corruption." She found the provision underinclusive because it did not regulate print, direct mail, or internet advertisement, and because

> the same ads ….will *still* be aired on television and radio; the only difference is that they will be sponsored by a smaller (and less diverse) class of speakers. BCRA does not prohibit wealthy individuals, PACs or unincorporated associations from making disbursements for electioneering communications. Nor does it prohibit media corporations from endorsing specific candidates by name, at any time, expressly or through "sham" editorializing. "This means that the Disney Corporation may through its subsidiary ABC (or General Electric through NBC) broadcast the very same 'electioneering communications' that Congress has forbidden the NRA from funding." NRA Brief.

251 F. Supp. 2d at 371. Moreover, Judge Henderson found insufficient evidence that the separate segregated fund requirement would prevent actual or apparent corruption in a narrow enough way.

Notes and Questions

1. Again, Judge Leon's middle position controlled. But unlike the court's decision on soft money ban, the decision on electioneering communications was relatively clear from the start: Under Judge Leon's view, Congress could require corporations, unions, and others using corporate or union money not to "promote," "support," "attack," or "oppose" a candidate for federal office without using a separate segregated fund, unless the entity qualified for an *MCFL* exemption. Judge Leon's construction did not include any time limitation, such as the primary definition's 60-day period. The Democrats filed the complaint with the Federal Election Commission against a group called the Club for Growth for advertisements alleged to have "attacked" Senator Daschle, a candidate for reelection to the Senate, some 18 months before the election. The issue was mooted by the lower court stay.

2. Did Judge Leon's construction solve vagueness problems or did it create new ones? Would the original backup definition or Judge Leon's construction regulate more advertisements? Would Congress have enacted the backup definition as construed by Judge Leon?

3. Why did Judge Kollar-Kotelly vote in the alternative to uphold the backup definition as construed by Judge Leon? What would the newspaper headline have been if she did not? Should public perceptions of the ruling be relevant?

4. Is there a distinction between "genuine" issue advocacy and real electioneering? What did the three judges think? If Judge Kollar-Kotelly rejected the Buying Time studies on this point, how does *she* know that there is a distinction? Is it that judges know genuine issue advocacy when they see it?

5. Judge Henderson rejected the "distinction between 'genuine' issue advocacy and 'sham' issue advocacy because it is 'subjective, immune to empirical proof, and totally antithetical to *Buckley*.'" Does Judge Henderson mean that there is no distinction in fact, or that the distinction is impossible to constitutionally regulate?

6. Evaluate Judge Henderson's underinclusiveness argument. Is there a difference in kind between broadcast advertisements and other advertisements? Assuming that there is, is the statute still underinclusive because other political actors may run the same broadcast advertisements?

7. The district court in *Wisconsin Realtors' Association v. Ponto*, 233 F. Supp. 2d 1078 (W.D. Wis. 2002) considered a similar overbreadth question, this time in the context of a state campaign finance law using a test similar to the primary definition. The

court refused to grant judgment on the pleadings to the challengers of the law: "Without considering any evidence of the state's recent experience in conducting elections and the character of ads featuring candidates that appear in the 60 days before an election, I cannot conclude as a matter of law that the state's regulatory scheme would reach a substantial number of communications so attenuated from elections as to render all regulation constitutionally impermissible." *Id*. at 1088. The judge invited the parties to submit evidence on the question.

Disclosure

The same section of BCRA defining "electioneering communications," section 201, also includes some of BCRA's disclosure provisions. As summarized by the per curiam opinion:

> Section 201's disclosure requirements mandate the reporting of "disbursements" for the "direct costs of producing and airing electioneering communications" aggregating more than $10,000 during any calendar year. The reports must be made to the Commission within 24 hours of each "disclosure date." The statute defines "disclosure date" as the first time during the calendar year a person's electioneering communication disbursements exceed $10,000, and each subsequent aggregation of $10,000 in electioneering communication disbursements made in the same calendar year. "Disbursements" under Section 201 include executed contracts to make disbursements for electioneering communications.
>
> The section requires the reports, made under penalty of perjury, to include the following information:
> • the identities of the person making the disbursement, any person sharing or exercising direction or control over that person, and the custodian of the books and accounts of the person making the disbursement;
> • the person's principal place of business, if not an individual;
> • the amount of each disbursement over $200 during the statement's period and the identity of the person who received the disbursement;
> • the elections to which the electioneering communications pertain and the names of the candidates identified in the communications, if known;
> • if the disbursements are made from a segregated account funded solely by direct contributions by individuals for the purpose of making electioneering communication disbursements, the names and addresses of all persons who contributed over $1,000 to the account during the calendar year; and
> • if the disbursements are made from a different source, the names and addresses of all contributors to that source who contributed over $1,000 during the calendar year.

251 F. Supp. 2d at 215-16.

Judges Kollar-Kotelly and Leon, in the per curiam opinion, upheld the disclosure provisions of section 201 with one exception:

> With one exception, the Court...finds the disclosure provisions relating to "electioneering communications" constitutional. The factual record demonstrates that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public. BCRA's disclosure provisions require these organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. Plaintiffs challenge BCRA's restrictions on electioneering communications on the premise that they should be permitted to spend corporate and labor union general treasury funds in the sixty days before the federal elections on broadcast advertisements, which refer to federal candidates, because speech needs to be "uninhibited, robust, and wide-open." McConnell Br. (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Curiously, plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: "The Coalition–Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry), "Republicans for Clean Air" (funded by brothers Charles and Sam Wyly). Given these tactics, Plaintiffs never satisfactorily answer the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace. As a result, the Court finds Section 201 facially constitutional, with the exception of one subsection which the Court determines to be broader than necessary to achieve the legitimate governmental interest at stake.

251 F. Supp. 3d at 237.

The one subsection struck down by the court required disclosure not only of disbursements related to "electioneering communications" (presumably as defined by Judge Leon's backup definition) but also *contracts* to make such disbursements. The court found that this provision was not supported by the interest in providing additional information to voters: "Information concerning contracts that have not been performed, and may never be performed may lead to confusion and an unclear record upon which the public will evaluate the forces operating in the political marketplace. By limiting

disclosures to expenditures actually made, the government's legitimate interest is served without the constitutional and practical shortcomings implicated by requiring prior disclosures." *Id*. at 241. These same two judges voted to uphold section 311 of the law, related to the identification of sponsors of advertisements. They voted to strike down section 504, however, which required disclosure of broadcasting records. "These disclosure requirements for purchasers in Section 201 mirror many of the provisions for broadcast licensees in Section 504, and the defendants have provided no evidence that such a belt-and-suspender approach is necessary."

Judge Henderson voted to strike down the disclosure provisions of section 201, along with sections 311 and 504:

> BCRA's disclosure and reporting provisions...are far more intrusive than the requirements upheld in *Buckley*. Sections 201, 311 and 504 require disclosure and reporting not of expenditures and contributions "made for the purpose of influencing" a federal election but of disbursements for "electioneering communications" and of requests to broadcast communications "relating to any political matter of national importance." My belief that *Buckley*'s express advocacy test is constitutionally required leads me to conclude that these provisions impermissibly abridge protected speech by inhibiting in an overbroad fashion the airing of near-election broadcasts containing only issue advocacy. Furthermore, I do not believe that the provisions serve any of the three interests discussed in *Buckley*; I would hold, therefore, that they cannot survive "exacting scrutiny" in any event.

251 F. Supp. 2d at 375.

On the "exacting scrutiny" point, Judge Henderson offered the following analysis:

> The provisions make no distinction between independent issue advocacy and advocacy coordinated with a candidate. To the extent that a corporation, union or individual *independently* disburses funds for an electioneering communication, the government's interest in preventing corruption is lacking because the requisite arrangement of, or even opportunity for, a *quid pro quo* is lacking. *See Buckley* (independent disbursements and ads "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive"); *see also Colorado Republican I* (plurality opinion) ("[T]he absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." (quoting *Buckley*)...
>
> Similarly absent in the independent electioneering context is the government's interest in informing the electorate about how political funds are spent by the candidate, because the funds disbursed are not

> given to, coordinated with or spent by the candidate himself. Also attenuated is the government's interest in informing the electorate by "alert[ing] the voter to the interests to which a candidate is most likely to be responsive." The bare fact that an individual or organization disburses funds to broadcast an advertisement "referring to" a particular candidate does not, without more, lead a voter to a confident conclusion that the candidate (or his opponent) will be "responsive" to the interests of that individual or organization.

251 F. Supp. 2d at 378-79.

Notes and Questions

1. Judge Henderson states that the government's interest in disclosure in the independent electioneering context is "absent" because the funds are "not given to, coordinated with, or spent by the candidate himself." Might the public care if the Sierra Club, AFL-CIO, or National Rifle Association were running broadcast advertisements supporting or opposing a candidate? Is the government's interest in disclosure "absent" whenever there is no possibility of a *quid pro quo* with a candidate?

2. Are the disclosure requirements more onerous than the requirements upheld in *Buckley*? Less onerous than the requirements struck down in *McIntyre* (see chapter 19)?

3. In *Wisconsin Realtors' Association v. Ponto*, 233 F. Supp. 2d 1078, 1091-92 (W.D. Wis. 2002), the court struck down a statute similar to the disclosure provision of BCRA requiring disclosure of *contracts* to make electioneering communications. The Wisconsin statute required advanced disclosure of a campaign communication referring to a candidate within 30 days before an election.

Other BCRA provisions

The BCRA contains a number of other challenged provisions as well.

- Judges Kollar-Kotelly and Leon voted to uphold section 202, treating coordinated "electioneering communications" as contributions, and parts of section 214, involving the definition of coordinated expenditures. Judge Henderson dissented.

- Section 212 added disclosure requirements for independent expenditures. Judge Henderson voted to strike down the provision as unconstitutional. The other judges held the issue was not justiciable because a challenge was not yet ripe. A majority of judges also held nonjusticiable challenges to BCRA's increased individual contribution limits and the indexing of limits (section 307), and to five other provisions as well.

- All three judges held unconstitutional section 213, which compels political party committees, at the time a party's candidate is nominated, to make a binding

choice between disbursing either independent or coordinated disbursements in support of the candidate. The judges also unanimously voted to strike down the prohibition of campaign contributions by minors (section 318).

Notes

1. Two symposia in the *Election Law Journal*, published before the district court decision issued, explore constitutional issues with BCRA. Volume 1, Number 3 (2001) of the journal featured a symposium co-sponsored by the Brennan Center for Justice, including articles by E. Joshua Rosenkranz, Richard Briffault, Thomas Joo, Frank Askin, and Glenn Moramarco, and a commentary by Nathaniel Persily. Volume 2, Number 1 (2002) of the journal features a symposium co-sponsored by the James Madison Center for Free Speech including articles by James Bopp, Jr. and Raeanna S. Moore, Herbert E. Alexander, Joel M. Gora, Gerald M. Pomper, and Ronald Rotunda. That same issue features an article by Edward B. Foley, not part of the symposium, also bearing on the constitutionality of BCRA. Foley has written an additional BCRA-related article, *"Narrow Tailoring" Is Not the Opposite of "Overbreadth": Defending BCRA's Definition Of "Electioneering Communications,"* that will appear in Volume 2, Number 4 (2003) of the *Election Law Journal*. The article will remain posted at http://www.liebertpub.com/elj/Foley1.pdf until it appears in print.

2. In addition to the constitutional questions, BCRA raises a number of difficult statutory questions. For the many statutory questions arising out of the anti-solicitation provisions of section 323, see Robert F. Bauer, *In the Line of Fire: Liability of Federal Candidates and Officeholders Under the Bipartisan Campaign Reform Act of 2002*, 1 ELECTION LAW JOURNAL 531 (2002).

3. Scholars have also begun exploring the consequences of BCRA for politics. For some thoughts about how the BCRA will affect interest group politics, see Michael J. Malbin, Cylde Wilcox, Mark Rozell, and Richard Skinner, *New Interest Group Strategies: A Preview of Post McCain-Feingold Politics?*, 1 ELECTION LAW JOURNAL 541 (2002). The early thinking is that the law will benefit Republicans over Democrats. *See* Seth Gittell, *The Democratic Party Suicide Bill*, ATLANTIC MONTHLY, July/August 2003, at 106.

Chapter 19. Contribution and Expenditure Limits, Round 2

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 947:

Following *Shrink Missouri*, the Sixth Circuit upheld Akron, Ohio's campaign contributions limits as low as $100 in some races. "[W]e hold that the contribution limits in the [Akron ordinance] are not 'so radical in effect to render political association ineffective' or 'contributions pointless,' and therefore do not violate the First Amendment right of association." *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002), cert. denied *sub nom. City of Akron v. Kilby*, 123 S. Ct. 968 (2003). One judge, dissenting in part, criticized the majority for failing to provide any limiting principle: "Under the majority's rationale, there apparently would be no constitutionally significant difference between a law imposing a $1,000 contribution limit and one imposing a $1 limit." The judge urged the majority to examine some of the pre-*Shrink Missouri* cases regulating the *amount* of contribution limits. Do these cases, described on pages 923-24 in the Casebook, survive the Court's *Shrink Missouri* opinion?

Does the standard of review in *Shrink Missouri* affect the constitutionality of BCRA? See Bruce La Pierre, *The Bipartisan Campaign Reform Act, Political Parties, and the First Amendment: Lessons from Missouri*, 80 WASHINGTON UNIVERSITY LAW QUARTERLY 1101 (2002).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 951:

The issue of campaign finance in judicial campaigns has received increased attention as judicial races have become nastier and more expensive. For a summary of the recent issues, see Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 LAW REVIEW OF MICHIGAN STATE UNIVERSITY DETROIT COLLEGE OF LAW 849. Schotland also edited a symposium that will interest readers interested in judicial campaign finance in particular or judicial elections generally. See *Symposium, National Summit on Improving Judicial Selection: Call to Action*, 34 LOYOLA OF LOS ANGELES LAW REVIEW 1353 (2001).

Chapter 20. Public Financing

ADD THE FOLLOWING TO THE END OF THE FIRST PARAGRAPH ON PAGE 966:

Ever since voters enacted the Massachusetts public financing scheme, the Massachusetts legislature has sought to end it. It began when the legislature refused to allocate funding for the program, leading a state supreme court justice to issue a court order allowing a candidate to seize state property to pay for his election campaign. For an opinion of the Supreme Judicial Court of Massachusetts on the funding issue, see *Bates v. Director of the Office of Campaign and Political Finance*, 763 N.E.2d 6 (Mass. 2002). The legislature then voted to repeal the program. See *Massachusetts Legislature Repeals Clean Elections Law*, NEW YORK TIMES, June 21, 2003, at A16.

Arizona's public financing system, enacted by initiative in 1998, is partially funded by a 10% surcharge on criminal and civil fines. A fined motorist challenged the surcharge on First Amendment and other grounds. The Arizona Supreme Court rejected the challenge in *May v. McNally*, 55 P.3d 768 (Ariz. 2002).

Pursuant to BCRA, the General Accounting Office issued a study of Arizona and Maine's public financing systems. The report, entitled *Campaign Finance Reform: Early Experiences of Two States That Provide Full Public Funding for Political Candidates*, GAO-03-453, May 9, 2003, is available at this link: http://www.gao.gov/new.items/d03453.pdf

The report found it too early to fully assess the success of the programs in reaching their goals, though the report was generally seen as being skeptical about the programs. PubliCampaign, an organization that was instrumental in passing the laws in Arizona and Maine, criticized the report as too "cautious." A press release with some criticisms is available at this link: http://www.publicampaign.org/pressroom/pressreleases/release2003/release05-21-03.htm.

ADD THE FOLLOWING BEFORE THE FIRST FULL PARAGRAPH ON PAGE 985:

President Bush has decided to decline public financing in the Republican primaries leading to the 2004 election. He has set a target of raising $170 million during this period, which will be spent on advertisements attacking the Democrats; Bush is expected to have no serious opposition in the Republican primary.

Chapter 21. Campaign Finance Disclosure

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 1010:

For a case upholding the ability of the state to require disclosure of express advocacy in ballot measure elections, see *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003).

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 1010:

McConnell v. Federal Election Commission, currently before the Supreme Court, may give everyone a better understanding of constitutional disclosure issues. See the Supplement to Chapter 18 above for discussion of the case and the disclosure issues.

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 1011:

A highest criminal court in Texas struck down as violating *McIntyre* a state statute requiring one who has contracted to print or publish a political advertisement—in this case, as in *Griset*, a bulk mailing opposing a candidate in a candidate election—to identify himself in the advertisement. *Doe v. State*, --- S.W.3d --- [2003 WL 21077961] (Tex. Crim. App. 2003). The dissenting judge believed the case was closer to *Buckley* than *McIntyre*.

The U.S. Supreme Court decided another case on the right to anonymity, *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002). The Court struck down on First Amendment grounds a local village's law requiring anyone who wished to go door-to-door to advocate for a political cause to first obtain a permit and display that permit to a resident on demand. The case had important implications for campaign finance disclosure laws because the petitioners relied upon *McIntyre* and *ACLF* in arguing for the law's unconstitutionality.

The Court in *Watchtower* characterized *McIntyre* as a case "involving distribution of unsigned handbills." It stated in dicta that a government "may well be justified" in requiring the identity of persons canvassing door-to-door based on "the special state interest in protecting the integrity of a ballot-initiative process." *Watchtower*, 536 U.S. at 167. What is the "special state interest" in this context? Is it the informational interest that *McIntyre* appeared to downplay or some other interest?

5.5 Does government-required disclosure of information on the face of documents (or through spoken words on radio or superimposed words on television broadcasts) violate government prohibitions against compelled speech? California passed a campaign finance initiative with a provision requiring publishers of "slate mailers" advocating the election or defeat of certain candidates or ballot measures to include certain information on the mailers. For example, the statute required that three dollar signs accompany the publication of a statement supporting or opposing a candidate when someone paid the publisher to take that position. Relying upon *McIntyre*'s statement that

the state's information interest did "not justify a requirement that a writer make statements or disclosures she would otherwise omit," a federal district judge struck down the California law. *California Prolife Council Political Action Committee v. Scully*, No. Civ. S-96-1965 LKK/DAD (E.D. Ca. Mar. 1, 2001). (The unpublished opinion may be downloaded from http://www.law.ucla.edu/faculty/bios/lowenste/slatemailorder.pdf.) If the government cannot require disclosure on the face of slate mailers, can it require that a radio or television communication governed by federal campaign law include "in a clearly spoken manner, the following audio statement: '_____ is responsible for the content of this advertising.' (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor.)"? See BCRA, § 311, upheld by a majority of the lower court judges hearing the BCRA challenge described in the Supplement to Chapter 18.

ADD THE FOLLOWING TO THE END OF THE FIRST PARAGRAPH OF NOTE 8 ON PAGE 1012:

For a further examination of the intersection of tax and campaign finance law, see Daniel L. Simmons, *An Essay on Federal Income Taxation and Campaign Finance Reform*, 54 FLORIDA LAW REVIEW 1 (2002).

Chapter 22. Academic Perspectives on the Future of Campaign Finance Regulation

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 1036:

For reviews of Smith's book, see Joel M. Gora, *"No Law . . . Abridging,"* 24 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 841 (2001) and J. Clark Kelso, *Mr. Smith Goes to Washington*, 1 ELECTION LAW JOURNAL 75 (2001).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 1071:

Ayres and Bruce Ackerman, one of the proponents of a voucher system for campaign finance (see page 1067, note 1), have written a book combining their two ideas. See Bruce Ackerman and Ian Ayres, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002). The book has received an extraordinary amount of scholarly commentary, including two symposia and a number of other reviews. Volume 91, Issue 3 (May 2003) of the CALIFORNIA LAW REVIEW features commentaries on the book by Richard Briffault, John Ferejohn, Pamela S. Karlan, and David Strauss (with a rejoinder by Ackerman and Ayres). Volume 37, Number 4 (May 2003) of the UNIVERSITY OF RICHMOND LAW REVIEW features commentaries on the book by Kathryn Abrams, Bruce E. Cain, Daniel A. Farber, Elizabeth Garrett, Richard L. Hasen, Kenneth R. Mayer, and Fred Wertheimer & Alexandra T.V. Edsall (with a response by Ackerman and Ayres). See also Lillian Bevier, *What Ails Us?* (Book Review), 112 YALE LAW JOURNAL 1135 (2003); Guy-Uriel E. Charles, *Mixing Metaphors: Voting, Dollars and Campaign Finance Reform* (Book Review), 2 ELECTION LAW JOURNAL 271 (2003); and Daniel H. Lowenstein, *Voting with Votes* (Book Review), 116 HARVARD LAW REVIEW 1971 (2003).