

**ELECTION LAW**  
**CASES AND MATERIALS**  
THIRD EDITION

**2005 Supplement**

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

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

Voting by felons and former felons continues to be an absorbing subject for litigants, scholars, and a variety of activists. The Supreme Court has denied *certiorari* in the *Farrakhan* and *Muntaquim* cases. *Locke v. Farrakhan*, 125 S.Ct. 477 (2004); *Muntaqim v. Coombe*, 125 S.Ct. 480 (2004). That leaves a split in the circuits. Additional proceedings in both cases are underway, as are additional cases in other circuits. See, e.g., *Johnson v. Governor of Florida*, \_\_\_ F.3d \_\_\_ [2005 WL 832217] (11th Cir., Apr. 12, 2005) (en banc) (rejecting constitutional and VRA claims against Florida's felon disenfranchisement law). It seems likely the Supreme Court will need to address the merits of the issue sooner or later, though the Court might try to wait to see if Congress acts in 2007.

A listing of the policies of each state on voting by felons may be found in Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSPECTIVES ON POLITICS 491, 494 (2004).

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

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

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

Controversies surrounding the use of DRE machines continue to grow. For a detailed history and recommendations, see Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM LAW REVIEW 1711 (2005). Professor Tokaji also has a blog, Equal Vote, devoted to issues of election administration reform. You may find it at <http://www.moritzlaw.osu.edu/blogs/tokaji/>. He keeps track of, among other things, pending legislation related to DRE machines.

### Chapter 3. Voting and Representation

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

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

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

A federal district court in Ohio reached a contrary conclusion in a challenge to Ohio's use of punch cards in *Stewart v. Blackwell*, 356 F.Supp.2d 791 (N.D. Ohio 2004). The court held that rational basis review applied to the state's decision to use punch cards, and that the use of punch cards met the rational basis standard because of the cost effectiveness of punch card tabulation and potential security concerns with alternative electronic voting machinery.

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

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

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

Scholarship on Florida 2000 continues to grow. For a look at the Florida 2000 litigation surrounding the counting of military and other overseas ballots, see Diane H. Mazur, *The Bullying of America: A Cautionary Tale about Military Voting and Civil-Military Relations*, 4 ELECTION LAW JOURNAL 105 (2005). JULIAN M. PLEASANTS, HANGING CHADS: THE INSIDE STORY OF THE 2000 PRESIDENTIAL RECOUNT IN FLORIDA (2004) contains interviews with many of the major participants in the Florida controversy, including Florida Supreme Court Justice Major Harding, and Judges Nikki Ann Clark and Terry P. Lewis.

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

The battle was most intense in the state of Ohio. There, Democrats and their allies were involved in litigation before Election Day over numerous issues, some stemming from discretionary decisions made by Ohio's Secretary of State, Kenneth Blackwell. Blackwell, a Republican elected to the office of Secretary of State, co-chaired President Bush's reelection campaign committee in Ohio and was viewed by many Democrats with

distrust. In his capacity as the state's Chief Elections Officer, he had decided, among other things, that provisional votes cast by a voter in the "wrong precinct" would not be counted and that voter registration forms printed on paper not of sufficient weight were to be rejected (a decision he later reversed).

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

Though the presidential race was in fact closer in other states, such as Iowa (where Bush won by a little over 10,000 votes) and Wisconsin (where Kerry won by a little over 11,000), the focus on Ohio turned out to be correct because the election results hinged on Ohio's 20 electoral votes. Preliminary results from Ohio that night showed incumbent President George W. Bush with an approximate 136,000-vote lead over Democratic candidate Senator John Kerry, out of approximately 5.5 million votes cast, with approximately 153,000 provisional ballots yet to be considered for inclusion in the totals.

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

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

For more information on the Ohio litigation and related controversies, see Richard L. Hasen, *Beyond the Margin of Litigation, Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASHINGTON & LEE LAW REVIEW (forthcoming 2005)

(draft available at <http://ssrn.com/abstract=698201>); Adam Liptak, *In Making His Decision in Ohio, Kerry Did the Math*, N.Y. TIMES, Nov. 4, 2004, at A10; Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement and the Help America Vote Act*, 73 GEORGE WASHINGTON LAW REVIEW (forthcoming 2005).

Ohio had the potential to be the next Florida, but the anticipated meltdown did not occur. In a handful of state and local races, however, the 2004 election did go into overtime. Puerto Rico and Washington state saw extensive litigation over exceedingly close gubernatorial elections—following a statewide hand recount, the top two candidates in Washington’s race were separated by 133 votes out of six million votes cast. The intensity of the Washington controversy was no doubt stimulated by the fact that the Republican candidate was the winner on the first count but the Democrat pulled ahead in the final recount, after some previously uncounted ballots were discovered in Democratic Seattle. The city of San Diego saw a very close mayor’s race, where a write-in candidate came close to winning but was unsuccessful because of many of her supporters’ failure to properly complete write-in ballots. Significantly, in each race losing candidates tried to use *Bush v. Gore* to create an equal protection issue in the courts. The Washington and San Diego cases went to trial, and the Puerto Rico case made it all the way to the United States Court of Appeals for the First Circuit. Ultimately, none of the courts overturned the election results as declared by election officials at the end of the recounts. For background on the cases, see David Postman, *Rossi Loses in Court; Won’t Appeal Ruling*, SEATTLE TIMES, Jun. 7, 2005, available at: <[http://seattletimes.nwsourc.com/html/localnews/2002319850\\_chelan07m.html](http://seattletimes.nwsourc.com/html/localnews/2002319850_chelan07m.html)> ; Istra Pacheco, *Anibal Acevedo Vila Officially Declared New Governor of Puerto Rico*, AP Newstream, Dec. 29, 2004 [available on Westlaw at: 12/29/04 APDATASTREAM 01:03:08]; Greg Moran, *Court Case on Behalf of Frye Votes is Dropped*, SAN DIEGO UNION-TRIBUNE, May 13, 2005, available at: <<http://www.signonsandiego.com/news/metro/20050513-9999-1n13bubbles.html>>.

## Chapter 4. Districting Criteria

ADD THE FOLLOWING NOTE AFTER NOTE 1 ON PAGE 150:

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

## Chapter 5. Minority Vote Dilution

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 183:

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

For a recent analysis of Republican gains in state and local elections throughout the South, see David Lublin, *THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE* (2004). For a defense of the Supreme Court's approach in *Georgia v. Ashcroft*, see Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 *HARVARD LAW REVIEW* 28 (2004).

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 212:

In *Georgia v. Ashcroft* the Court recognized the possible advantages to minorities of inter-racial coalitions. Does it follow that Section 2 should now be construed to require the creation of influence districts when possible? This argument and other arguments in favor of mandatory influence districts were rejected in *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004).

## Chapter 7. Partisan Gerrymandering

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

The location of the article by Hasen cited in the text is 3 ELECTION LAW JOURNAL 626 (2004). Considerable commentary on *Vieth* is emerging. Noteworthy contributions published to date include Mitchell N. Berman, *Managing Gerrymandering*, 83 TEXAS LAW REVIEW 781 (2005); Michael A. Carvin & Louis K. Fisher, “*A Legislative Task*”: *Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION LAW JOURNAL 2, 3-12 (2005); Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUPREME COURT REVIEW 409; James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION LAW JOURNAL 643 (2004); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 503 (2004); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 541 (2004).

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

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

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

and other arguments, reaffirming the constitutionality of the Texas plan. See *Henderson v. Perry*, No. 2:03-CV-354 (E.D.Tex. June 9, 2005) (available at <<http://www.oag.state.tx.us/newspubs/releases/2005/060905redistricting.pdf>>). The plaintiffs are seeking Supreme Court review.

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

## Chapter 8. Ballot Propositions

ADD THE FOLLOWING NOTE AFTER NOTE 1 ON PAGE 434:

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

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 434:

Initiatives may generally be used to amend the Massachusetts Constitution, but in order to amend certain provisions within the Constitution, other methods must be used. One of these provisions, known as the Anti-Aid amendment, was enacted in the nineteenth century as part of a national anti-Catholic campaign. It prevents public financial assistance to private religious primary and secondary schools. In addition, amendments relating to "religious institutions" may not be enacted by initiative. Supporters of school vouchers, finding themselves blocked from using the initiative to permit their proposals, challenged the limits on the use of the initiative, arguing in part that the restriction violates the First Amendment as interpreted in *Meyer v. Grant*. Is their challenge well-grounded? See *Wirzburger v. Galvin*, \_\_\_ F.3d \_\_\_, 2005 WL 1491476 (1st Cir. 2005).

ADD THE FOLLOWING TO THE END OF NOTE 8 ON PAGE 437:

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

## Chapter 9. Major Political Parties

ADD THE FOLLOWING NOTES AFTER NOTE 6 ON PAGE 505:

6.1 Oklahoma uses a semiclosed primary. Only members of a party may vote in its primaries, unless the party permits independent voters to participate. In *CLINGMAN v. BEAVER*, 125 S.Ct. 2029 (2005), the Court rejected a challenge to these rules brought by the Libertarian Party, which wanted to allow any voters, including those who were members of other parties, to vote in its primaries.<sup>a</sup>

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

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

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

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

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

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

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

themselves by party affiliations. Removing the connection between affiliation and voting in primaries could disrupt that system.

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

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

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

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

## Chapter 10. Third Parties and Independent Candidates

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

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

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

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

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

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

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

So there have to be hurdles to getting on the ballot and the requirement of submitting a minimum number of nominating petitions is a standard one. In a state the size of Illinois—the population exceeds 12 million, of whom more than 7 million are registered voters—requiring a third-party candidate to obtain 25,000 signed nominating petitions cannot be thought excessive. *Jenness* upheld a Georgia law that required petitions from 5 percent of the registered voters--in Illinois that would mean 350,000 petitions! Equally stringent requirements have been upheld in other cases. And especially in a state as notorious for election fraud as Illinois, the fact that the nominating petitions that a candidate submits have actually been signed by registered voters has to be verified. If the petition were not required to contain any identifying information (such as date of birth, mother's maiden name, or, the identifier that Illinois has chosen, the address at which the petitioner is registered to vote), there would be no practical impediment to a person's signing the name of anyone he knew to be a registered voter.

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

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

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

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

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

## Chapter 12. Incumbency

ADD THE FOLLOWING AFTER NOTE 3 ON PAGE 637:

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

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

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

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

## Chapter 13. Bribery

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 699:

In July, 2005, a jury convicted two members of the San Diego City Council, Ralph Inzunza and Michael Zucchet, of federal bribery-type offenses for accepting campaign contributions from the owner of strip-clubs who was seeking an ordinance loosening the regulation of strip-dancers in San Diego. The prosecution was based primarily on a large number of taped conversations between the contributor's agent and the Council members, none of which contained an explicit agreement by Inzunza or Zucchet to try to change the law in exchange for contributions. The judge instructed the jury that they could convict if they could infer an agreement between the contributor and the Council members. Was the judge's instruction to the jury correct? Should the conviction be upheld, assuming (as is likely) that it is appealed? See Tony Perry & Richard Marosi, "2 San Diego Officials Guilty in Strip-Club Graft Scandal," LOS ANGELES TIMES, July 19, 2005, at A1, A15.

## Chapter 14. Introductory Readings on Campaign Finance

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

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

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

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

## Chapter 15. The *Buckley* Framework

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

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

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

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

The question of what happens to the media exemption in the Internet era landed at the Federal Election Commission in 2005. Following the passage of the Bipartisan Campaign Reform Act (BCRA) (discussed in detail in the next chapter), the FEC passed a series of implementing regulations, including a regulation that exempted communications over the Internet from coverage under the “public communications” portions of BCRA. 11 C.F.R. § 100.26. Congressional sponsors of BCRA brought suit challenging a number of the FEC’s regulations implementing BCRA, including the Internet exemption. A federal district court struck down the exemption as inconsistent with Congressional intent and ordered the FEC to write new regulations. *Shays v. FEC*, 337 F.Supp.2d 28, 65-70 (D.D.C. 2004).

Although the FEC appealed five of the district court’s rulings in *Shays*, it did not appeal the ruling on the Internet regulations. It began a new rulemaking, see 70 FEDERAL REGISTER 16967 (April 4, 2005), which gained a great deal of attention when one member of the FEC, Commissioner Brad Smith, gave an interview in which he suggested that the FEC could soon crack down on Internet-based activities such as blogging. See Declan McCullagh, *The Coming Crackdown on Blogging*, C|NET News, March 3, 2005, available at: [http://news.com.com/The+coming+crackdown+on+blogging/2008-1028\\_3-5597079.html](http://news.com.com/The+coming+crackdown+on+blogging/2008-1028_3-5597079.html).

The scope of the final rules the FEC will promulgate is unclear. (The FEC held a hearing in late June 2005, and may issue final regulations at any time.) At the very least, the agency appears poised to regulate paid political advertising on the Internet. But the agency potentially could go further, and how far it goes depends both on how the Commissioners read the applicable statutes and on their policy choices. And whatever the FEC decides is likely to be challenged in court by some aggrieved party.

Putting aside the issues of statutory interpretation, consider the following policy questions:

1. Jerry is paid \$5,000 per month as a “consultant” by the Smith for Congress congressional campaign, and he frequently writes articles on his website critical of Smith’s opponent. His other work for the campaign consists of informally advising the campaign about media strategy. Should Jerry be required to disclose the fact that he is paid by the campaign on his website? If so, should the disclosure appear on each “page” of the website? (Note that payments to Jerry will eventually be reported by the Smith for Congress campaign in documents filed with the FEC, but it is possible the documents won’t be public until after the election.) See Richard Hasen, *Should the FEC Regulate Political Blogging?*, Personal Democracy Forum, March 7, 2005, available at: <http://www.personaldemocracy.com/node/416>.

2. Jane works at BigCorp in the sales department. On her lunch breaks and after office hours, Jane maintains a political blog and e-mail list supporting her favorite candidates for federal office. BigCorp allows Jane and other employees to use company computers outside of working hours for personal activities such as blogging. Should it be permissible for Jane to use corporate-owned computers for her Internet activities supporting federal candidates? If so, should there be a maximum amount of time that she should be allowed to spend on political activity using corporate-owned computers? Should it matter if BigCorp encouraged Jane to engage in the activity?

3. The FEC has indicated that it will likely extend the media exemption to online journals such as *Salon* and *Slate*, but it is less clear how it intends to treat individual bloggers. Mark is a successful blogger, and he derives \$50,000 per year of income from advertising on his blog. To protect himself from personal liability, he decides to incorporate. During federal election season, he devotes a considerable amount of space on his blog to posts and links urging the defeat of the incumbent president. Should this activity be considered illegal campaign activity by a corporation, or should Mark be able to take advantage of the “media exemption” under federal law? See Allison R. Hayward, *It’s Getting’ Hot (Headed) in Here: The FEC’s Internet Summer*, Personal Democracy Forum, June 16, 2005, available at: <<http://www.personaldemocracy.com/node/645>>.

## Chapter 17. The New Deference

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 885:

The United States Court of Appeals for the Second Circuit relied heavily on the relaxed *Shrink Missouri* evidentiary standard in holding that the candidate spending limits that Vermont imposed in 1997 could well survive constitutional challenge. *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004). The spending limits were part of an extensive campaign finance provision, Act 64, which the court described as follows:

As enacted, Act 64 is a comprehensive campaign finance reform package, regulating contributions, expenditures, and disclosures related to candidates for state office in Vermont and political organizations that participate in Vermont elections. Section 2805a limits the expenditures that a candidate for office may make during a two-year election cycle. Candidates for statewide office are restricted to varying amounts depending on the position sought, with a candidate for governor limited to \$300,000, for lieutenant governor to \$100,000, and other statewide offices to \$45,000. Candidates for governor and lieutenant governor also have the option of receiving public financing for their campaigns, provided they receive a certain number and amount of “qualifying contributions.” Candidates for state senator and county office are limited to \$4000 in expenditures, with state senators permitted an additional \$2500 per seat in multi-seat districts. Candidates for state representative in single-member districts can spend no more than \$2000, and those in two-member districts no more than \$3000. Incumbent candidates may spend only 85 percent of the permitted amounts, except for incumbents of the General Assembly who may spend 90 percent.

The Act also limits the size of contributions which candidates, political committees, and political parties may receive from a single source during a two-year election cycle. Candidates for state representative or local office may accept no more than \$200 from a single source, political party, or political action committee. Slightly higher limits apply to candidates for state senate or county office (\$300) and to candidates for statewide office (\$400). *See id.* Political action committees and political parties may accept no contribution greater than \$2000. *See id.* For the purpose of all of these contribution limits, a political party's state, county, and local branches (and national and regional affiliates of the party) count as a single unit.

The Act further imposes limits on the source of such contributions. Although candidates, political parties, and political action committees may accept contributions from out-of-state residents and political organizations, the sum of such amounts may not exceed 25 percent of the total contributions received.

Finally, the Act treats coordinated expenditures by third parties as both contributions to a candidate (subject to the applicable contribution limits) and expenditures by the candidate (counted against the candidate's permissible budget). The Act creates a rebuttable presumption that expenditures made by political parties or political action committees that recruit or endorse candidates are related expenditures if they primarily benefit six or fewer candidates.

The court upheld many of the provisions, struck some down, and remanded the case to the district court for findings related to some of the challenged provisions. Most importantly for our purposes, the Second Circuit panel by a 2-1 vote rejected the argument that *Buckley* foreclosed Act 64's expenditure limits:

[W]e hold today that the Supreme Court, in *Buckley*, did not rule campaign expenditure limits to be *per se* unconstitutional, but left the door ajar for narrowly tailored spending limits that secure clearly identified and appropriately documented compelling governmental interests. In applying the narrow tailoring tests, we hold that the State has established that the challenged expenditure limits are supported by its compelling interests in safeguarding Vermont's democratic process from (1) the corruptive influence of excessive and unbridled fundraising and (2) the effect that perpetual fundraising has on the time of candidates and elected officials. The evidence considered by the District Court and the Vermont legislature demonstrates that, absent expenditure limitations, the fundraising practices in Vermont will continue to impair the accessibility to elected officials which is essential to any democratic political system. The race for campaign funds has compelled public officials to give preferred access to contributors, essentially requiring candidates to sell their time in order to raise campaign funds. In addition, we affirm the District Court's finding that effective campaigns can be run under Act 64's limits.

Nevertheless, ...we conclude that a remand is necessary for further fact-finding on an aspect of the narrow tailoring inquiry that was not fully considered by the District Court: the crucial question of whether Act 64's expenditure limits provision was "the least restrictive means" of furthering the State's compelling anti-corruption and time-protection interests—or whether there are other less restrictive mechanisms available that might be as effective in satisfying the compelling interests established by Vermont....

The court disagreed with the opinions of two other circuit courts holding that *Buckley* categorically prohibits expenditure limitations. See *Homans v. City of Albuquerque*, 366 F.3d 900, 914-21 (10th Cir.), *cert. denied*, 125 S.Ct.625 (2004) and *Kruse v. City of Cincinnati*, 142 F.3d 907, 918-19 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998).

The panel's ruling prompted a lengthy and impassioned dissent from Judge Ralph K. Winter, who as a lawyer and law professor had represented plaintiffs challenging the 1974 FECA amendments in the original *Buckley* case:

*Buckley* held, without qualification, that government may not limit campaign expenditures by candidates for electoral office. Act 64 limits such expenditures notwithstanding *Buckley*. Indeed, the proponents of Act 64 never doubted its unconstitutionality under *Buckley* and enacted it for the explicit purpose of creating a vehicle for litigation to overturn *Buckley*. Act 64's limits on expenditures violate the First Amendment because they limit a broad spectrum of political speech and activity, including ordinary grassroots activities and editorializing and reporting by the press, for no permissible purpose. Further, they entrust those who enforce the law with unfettered, and unconstitutional, discretion to determine, often on an *ad hoc* basis, what acts of political advocacy are permitted and what are prohibited. Even if expenditure limits were not *per se* unconstitutional, the low level at which the limits are set by Act 64 so heavily favors incumbents that it can be upheld only by application of a legal test similarly skewed toward incumbents....

Act 64 suppresses ordinary political activity at every level of the electoral process. It reflects the philosophy of one witness for the defense who testified that government ought to regulate political speech the way it regulates public utilities. Act 64 may be a popular law—although this dissent will note several instances of great disquiet and even shock among proponents upon learning what it actually says—but only because its proponents systematically divert attention from the law's actual provisions to the nobility of their goal—here the transfer of political power from “special interests” to “ordinary citizens.” However, even this attractive rhetoric cloaks sinister purposes. Foiling “special interests” while empowering “ordinary citizens” is a rhetorical staple of electoral politicians of every viewpoint because the terms are used as synonyms for one's opponents and supporters respectively. In this light, the pursuit of this goal through the regulation of political speech is the road to the suppression of opponents.

*Sorell*, 382 F.3d at 152-53 (Winter, J., dissenting). Regarding “editorializing and reporting by the press,” Judge Winter wrote:

the law does not exempt the media from the definitions of “contribution,” “expenditure,” or “related expenditure.” Media support is a “thing of value” that, if “facilitated” or “solicited” by a candidate, would be a “related expenditure.” Indeed,... Vermont's Secretary of State has warned candidates that providing a photo, written materials, or “other assistance or information” to anyone for use in a publication will trigger a related expenditure. The extent of the burden imposed on the press by Act 64 is potentially vast, again depending largely on discretionary rulings by those who must administer Act 64.

By a 7-5 vote, the entire Second Circuit refused to hear the case en banc. Many judges on the court issued opinions concurring or dissenting from the denial of en banc rehearing (see *Landell v. Sorrell*, 406 F.3d 159 (2d. Cir. 2005) (order and opinions on denial of rehearing en banc)). Judge Calabresi, concurring in the denial of rehearing en banc, argued that the Supreme Court should hear the case to reconsider the entire *Buckley* framework:

The notion that intensity of desire is not well-measured by money in a society where money is not equally distributed has been, since *Buckley*, the huge elephant — and donkey — in the living room in all discussions of campaign finance reform. *Buckley*, by fiat, declared the state's explicit recognition and amelioration of wealth distribution problems in the electoral marketplace to be an insufficiently compelling interest to pass constitutional muster. And yet, I submit, it remains at least implicitly behind much campaign finance reform legislation.

The odd thing about *Buckley*'s exclusion of this interest from the field of discussion is that, as mentioned above, this concern is in part directly linked to the Supreme Court's asserted First Amendment concern — the desire to protect the right for people to express, in money terms, the intensity of their political ideas and affiliations. It may be that the High Court's failure to recognize this fact occurred because the Court in *Buckley* focused its attention on the desire not to favor one group, the rich, over another, the poor — or vice versa. And, in deciding not to give weight to that value, the Court failed to realize that it was also excluding — as a potentially compelling state interest — the First Amendment right to have one's intensity of desire, as expressed in monetary terms, be measured equally.

Be that as it may, the *Buckley* framework, which establishes that the desire to express intensity of political position through money is fundamental, at the same time prohibits the states from seeking to find a way of gauging and treating intensity of desire equally among its citizens, rich and poor.

As a result of this odd decision, the judicial discussion since *Buckley* has centered on other values, which, though by no means unimportant, are, I believe, not really at the core of the debate. There is much talk of "corruption" and what controls are necessary to avoid it, and of the danger that what is done under the guise of controlling corruption may be used to protect incumbents. There is, likewise, concern about the cost of fundraising and similar factors. I do not mean to suggest that these are not serious questions. But a treatment of campaign financing that focuses primarily on those issues is surely impoverished, for it does not deal with what is at least as important, and, perhaps, at the very heart of the problem.

Plaintiffs in the *Sorrell* case have filed a cert. petition in the Supreme Court. Usually one expects the winners in the court below to oppose certiorari, but the defenders of Vermont's Act 64 have urged the Supreme Court to hear the case to rethink *Buckley*.

Would Justices agreeing with the Second Circuit be more likely or less likely than those disagreeing with the Second Circuit to vote to hear this case? Note that if the Supreme Court denies certiorari, it could well get another opportunity after the district court rules on remand, and after the Second Circuit reconsiders the issues on appeal once again. In the meantime, the Second Circuit panel directed the District Court to designate an appropriate effective date for the spending limitations to go into effect in Vermont.

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

There is no question that section 527 organizations played a major role in the 2004 election, with one estimate placing their spending at nearly \$400 million in the 2004 federal elections. Steve Weissman and Ruth Hassan, *BCRA and the 527 Groups* at 25 (draft chapter of book posted at [http://cfinst.org/studies/ElectionAfterReform/pdf/EAR\\_527Chapter.pdf](http://cfinst.org/studies/ElectionAfterReform/pdf/EAR_527Chapter.pdf)). George Soros topped the list of individual donors to 527s at \$24 million (*id.* at 14), though labor unions gave about 4 times as much as Soros to pro-Democratic 527s (*id.* at 11).

Some criticized the Federal Election Commission for not regulating 527s as political committees during the 2004 election season. Treating 527s as political committees would have a number of consequences, most importantly limiting contributions to such committees to \$5,000 per person. The former chair of the FEC and his legal counsel defended the FEC's inaction, arguing that regulation of 527s would have exceeded the FEC's authority. Alison R. Hayward and Bradley A. Smith, *Don't Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 4 ELECTION LAW JOURNAL 82 (2004). After the election, the action moved to Congress, where bills were introduced in both the House and Senate to change the rules related to 527s. As this Supplement went to press, it was unclear whether any congressional regulation of 527s would pass and, if so, whether other changes in campaign finance laws would be packaged with 527 regulation.

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

## Memorandum

FROM: Daniel R. Ortiz

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

DATE: March 7, 2005

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

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

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

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

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

*CalMed* necessarily decided more, however, than the plurality and Justice Blackmun suggested. Justice Blackmun’s own vote (as well as the plurality’s) undercut his dictum. The political committee in *CalMed* argued not just that the \$5,000 contribution limit was generally unconstitutional but that it was unconstitutional in a particular way. Even if Congress could limit contributions that the committee would ultimately use for candidate contributions, it argued, Congress could not limit those ultimately used for administrative expenses and possibly for independent expenditures. Brief of Appellants at 34-35 (*CalMed*) (“Like other political committees, CALPAC may make independent expenditures as well as direct contributions to candidates. To the extent it makes independent expenditures CALPAC engages in first amendment activity that cannot be limited given the result in *Buckley*.”) Indeed, on the court below, several judges would have invalidated the \$5,000 limit precisely because of its effect on political committees’ independent expenditures. *California Medical Ass’n v. FEC*, 641 F.2d 619, 647 (1980) (Wallace, J., dissenting) (“A limitation on donations to committees restricts not only funds available for contributions by the committees to candidates, but also the funds available for independent expenditures through the committee framework. It is by repeatedly forgetting this incontestable fact that the majority erroneously likens the ... donation restriction to the contribution limitations upheld in *Buckley*.”).<sup>2</sup>

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

In *McConnell*, the Supreme Court made clear that this reading—that *CalMed* necessarily upheld limits on contributions to independent expenditure committees—is

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

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

[In *CalMed*], we upheld FECA’s \$ 5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA’s \$1,000 limit on individual contributions to candidates. Given FECA’s definition of “contribution,” the \$5,000 ... limi[t] restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, *but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures.*

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

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

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

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

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

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

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

Contributions to 527 IECs pose exactly this same “greatest risk” of corruption. Since these organizations must necessarily have the “major purpose” of nominating or electing candidates for federal office, *Buckley*, contributions to them, even more

than those covered by § 323(b), will likely be used “to benefit federal candidates directly.” It does not matter how the political committee actually uses them. Contributions used for direct candidate contributions, coordinated expenditures, and independent expenditures all represent “contributions . . . that can be used to benefit federal candidates directly.”

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

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

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

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

benefit federal candidates. This is, of course, one of the primary purposes for which 527 IECs put their contributions to work.

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

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

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

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

to federal candidates. As George Soros admitted in talking to a reporter, this is the point: “I’ve been trying to exert some influence over our policies and I hope I’ll get a better hearing under Kerry.”...

*Notes and Questions*

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

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

3. Despite Ortiz’ suggestion at the beginning of footnote 4 of his memorandum, there is no evidence that the major 527 organizations in fact coordinated with political parties or candidates in the 2004 election. As Ortiz explains further in the footnote: “The parties’ 527 IEC strategies were similar. They encouraged people closely and visibly associated with them to form and operate officially independent 527 IECs, which the party through its officials and leading members could then identify to donors as appropriate funding vehicles. Those 527 IECs could, in turn, because of their management by people so intimately familiar with the needs and aims of the party effectively aid a campaign without any formal coordination.” How do these facts cut in the constitutional analysis?

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

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 954:

Wisconsin Right to Life, a corporation not entitled to the *MCFL* exemption, brought such an “as applied” challenge in the summer of 2004. It sought a court order allowing it to run television and radio advertisements in Wisconsin including one criticizing Senator Russell Feingold’s support of Senate filibusters. Feingold was running for reelection in Wisconsin. The advertisements appeared to be electioneering communications paid for with a corporation’s general treasury funds as prohibited by BCRA section 203, but WRtL claimed a constitutional right to run the ads anyway because they constituted “grassroots lobbying.” A three-judge court denied a motion for a preliminary injunction in an unpublished opinion, holding that *McConnell* foreclosed this argument, and Chief Justice Rehnquist, in his capacity as circuit justice, affirmed the decision to deny preliminary relief. *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 125 S.Ct. 2 (2004) (Rehnquist, J., in chambers).

In May 2005, the three-judge court dismissed the case on the merits, and WRtL has appealed to the Supreme Court. You can find the jurisdictional statement, with an

appendix containing the lower court rulings, at this link: <http://www.jamesmadisoncenter.org/WI/JurisdictionalStatement.pdf>. A decision on whether or not to set a hearing in this case, or issue a summary order, is likely in fall 2005.

ADD THE FOLLOWING AFTER NOTE 10 ON PAGE 956:

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

12. As if things were not complicated enough, the FEC issued a series of detailed and complex regulations implementing BCRA. Congressmen Shays and Meehan, the House sponsors of BCRA, brought suit challenging many of these regulations as inconsistent with congressional intent. Judge Kollar-Kotelly (one of the three judges on the original *McConnell* panel) struck down many of the regulations. *Shays v. Federal Election Commission*, 337 F.Supp.2d 28 (D.D.C. 2004). The FEC appealed five of Judge Kollar-Kotelly's rulings, but the Court of Appeals affirmed the district court, \_\_\_ F.3d \_\_\_ [<http://pacer.cadc.uscourts.gov/docs/common/opinions/200507/04-5352a.pdf>] (D.C. Cir. July 15, 2005).

The FEC did not appeal the district court's holding striking down an exemption from the "public communications" definition for Internet communications. On the new rulemaking that followed, see this Supplement to Chapter 16.

## Chapter 19. Campaign Finance Disclosure

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

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