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Campaign Finance, Public Contracts and Equal Protection

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“Democracy envisions rule by successive temporary majorities. The capacity to displace incumbents in favor of the representatives of a recently coalesced majority is, therefore, an essential attribute of the election system in a democratic republic. Consequently, both citizens and courts should be chary of efforts by government officials to control the very electoral system which is the primary check on their power.”

I. Equal Protection and the Electoral Process

Although the rights to vote and run for office are generally considered essential features of a democracy, there is no constitutional provision explicitly protecting the right of franchise. Nevertheless, since the mid-1960's, the Supreme Court has applied an equal protection rationale in voting rights cases, reasoning that once the state has adopted an electoral process, the equal protection clause secures the rights of voters to participate on an equal basis. Moreover, since the rights to vote and run for office are fundamental rights, state action which burdens the exercise of these rights must be justified by a "compelling state interest." Using this doctrinal base derived from the fourteenth amendment the Court has struck down state poll taxes, prohibited lengthy residency requirements as prerequisites for voting, invalidated excessive candidate filing fees and prevented states from impeding minor
parties' access to the ballot.  

Taken together, the franchise rights cases indicate that candidates and voters have constitutionally protected rights to "an equal chance" and "an equally effective voice" in the electoral process. Yet in the area of campaign financing, state sanctioned practices which burden these rights continue to plague the electoral process. Throughout the past decade, reports of campaign finance abuse demonstrated how officials at all levels of government misused their authority to maintain themselves in office. Scandals erupted in several states as the public, its awareness heightened by Watergate, discovered that elected officials have used the leverage of their positions to extract campaign contributions from government contractors and public employees, groups that are highly vulnerable to official retaliation. 

Whether the current Supreme Court would extend the principles developed in the franchises rights cases to campaign financing abuses is highly problematic. In recent years, restrictive decisions concerning standing, legislative motivation and state action suggest that the expansion of equal protection doctrine in the voting rights area has come to a halt. Yet, as the Court itself has recognized, "notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change." Consequently, the possibility for a judicially fashioned remedy in cases involving campaign financing should not be considered foreclosed.

It has been argued that campaign financing practices that permit vastly disparate financial resources to favor one candidate over another

9. Shakman v. Democratic Organization of Cook County, 435 F.2d 267, 270 (7th Cir. 1970) [hereinafter cited as Shakman I].
12. On the standing issues see generally Nichol, Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint, 69 Ky. L.J. 185 (1981). The Supreme Court has not directly addressed the issue of causation as a standing requirement in the voting rights case. However, the rule laid down in Warth v. Seldin, 422 U.S. 490 (1975) and Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) have been applied by the D.C. Circuit in the electoral context. See Winpisinger v. Watson, 628 F.2d 133 (D.C. Cir. 1980); Public Citizen, Inc. v. Simon, 539 F.2d 211 (D.C. Cir. 1976). For a discussion of state action in the context of campaign financing see the Nicholson and Fleishman articles, infra note 14. Where it is alleged that government officials have wrongfully used the leverage of the state's power to contract to elicit campaign contributions from government contractors, the state action requirement should not pose too much difficulty, except of course, as a problem of proof. Where, however, it is alleged that campaign financing practices which result in significantly unequal resources for the candidate are per se constitutional, the state action requirement may be more problematic. See infra text accompanying note 14.
are *per se* unconstitutional. These arguments suggest that large campaign contributions from wealthy individuals give well-heeled contributors a decided advantage in determining the outcome of elections. Consequently, current fundraising practices discriminate against candidates and voters of modest means, violating their constitutional rights to participate on an equal basis in the political process. Under such an analysis any system of campaign financing that relies largely on unrestricted private contributions would be subject to constitutional challenge.

This article, however, has a narrower focus. It discusses the application of equal protection doctrines developed in cases involving the electoral process to efforts by incumbents to elicit campaign contributions from individuals and firms contracting with the government. The thesis, briefly stated, is this: The express or implied use of the states' purchasing power to generate large campaign contributions provides incumbents with an unfair advantage in election campaigns, violating the equal protection rights of out-of-power candidates and the voters who support them.

What follows sets forth the factual and doctrinal basis for challenging current fundraising abuses on equal protection grounds. This article will also briefly examine potential legislative responses and discuss whether such reforms could sustain a first amendment challenge.

II. PUBLIC CONTRACTS AND POLITICAL MONEY

During the past decade political scandals have repeatedly linked lucrative government contracts with large campaign contributions. The problem dramatically unfolded in 1973 when Vice-President Spiro T. Agnew was forced to resign after being accused of pocketing over $100,000 in campaign gifts in exchange for influencing the award of state and county contracts to seven engineering firms and one financial institution. In the mid-1970's reports of political corruption also emerged from Georgia, Indiana, Ohio, Louisiana, New Jersey and


Kansas where public officials allegedly influenced the awarding of government contracts in return for large campaign gifts.\textsuperscript{17}

The system of awarding architectural and engineering contracts, which generally are not subject to competitive bidding requirements, appears to be especially vulnerable to abuse.\textsuperscript{18} There is considerable evidence that the systematic solicitation of these contractors by elected officials or their agents is widespread. The executive director of the American Consulting Engineers Council, for example, has bluntly stated that the pressure on engineers to contribute to election campaigns is so great that "some firms have to hire former legislators and public officials who have some influence so they don't have to give as much."\textsuperscript{19}

On the national level the high pressure fundraising tactics of the Nixon Administration were exposed in graphic Senate testimony in the aftermath of the Watergate scandal.\textsuperscript{20} Several officers of major corporations with government contracts told the Committee that they illegally contributed to President Nixon's reelection campaign after being approached by Maurice Stans, the former Secretary of Commerce, and Herbert Kalmbach, President Nixon's personal attorney.\textsuperscript{21} The corporate executives claimed that the contributions were made to avoid possible government retaliation for not giving.\textsuperscript{22} Defense contractors also reported that they were subject to high-level requests for campaign funds; the suggested amount for the contribution was $100,000 but requests were scaled down for smaller firms.\textsuperscript{23} This pattern of aggressive fundraising by incumbent office-holders during the 1972 presidential elections prompted the observation that: "Ironically, the image of the greedy businessman as the corrupter seeking favors from the politician underwent change in the minds of some observers as reports of the kind


\textsuperscript{18} Karmin, \textit{supra} note 15; see also M. Tolchin and S. Tolchin, \textit{To the Victor} 269-77 (1971).

\textsuperscript{19} Quoted in Karmin, \textit{supra} note 15.


\textsuperscript{21} According to the testimony of the Counsel to the American Shipbuilding Company, George Steinbrenner, the firm's president, was told by Mr. Kalmbach that to gain "input into the Administration," he would need to contribute at least $100,000. At the time, the firm had claims pending with the government in connection with a ship it had built for the Maritime Commission. The Department of Justice also had filed an anti-trust action against the firm. Mayton, \textit{Politics, Money, Coercion and the Problem with Corporate PACs}, 29 EMORY L.J. 375, 382 (1980).

\textsuperscript{22} Senator Ervin noted that this form of solicitation by incumbents "borders on extortion," \textit{Final Report, supra} note 20, at 462.

\textsuperscript{23} \textit{Financing Politics, supra} note 15, at 77.
of pressures applied came to light. Instead, the businessman became the victim, not the perpetrator, of what some saw as extortion." \(^\text{24}\)

In Illinois there have been frequent reports of campaign scandals over the past decade and the disclosure of abuses continues. \(^\text{25}\) At the state level it has become clear since campaign disclosure was mandated in 1974 that state contractors contribute heavily in gubernatorial campaigns and such funds are disproportionately given to the incumbent's campaign. Often contributions to the incumbents are made by out-of-state contractors with no apparent ties to Illinois other than the receipt of state contracts. \(^\text{26}\)

The link between campaign contributions and state contracts were explored by Illinois' Auditor General in 1979, who had been asked by the Legislative Audit Commission to determine if there was a "relationship between campaign contributions and the awarding of professional and artistic" service contracts during the administration of Governor Dan Walker. \(^\text{27}\) The Auditor General's report found that of sixty-six consulting firms in his sample, thirty-one contributed to 1976 primary and gubernatorial election campaigns. The campaign of the incumbent, Governor Walker, accounted for seventy-four percent of the dollar amount contributed. The campaigns of his challengers, Mike Howlett and Jim Thompson, received nineteen percent and seventeen percent respectively. The report concluded that "there is a significant relationship between the identity of firms and individuals that made campaign contributions and individuals and firms that were awarded contracts for professional and artistic services." \(^\text{28}\)

In 1982 state contractors contributed heavily in the Illinois guber-

\(^{24}\) Id.

\(^{25}\) See, e.g., Manikas and Hood, Campaign Finance Disclosure, Illinois Issues, Sept. 1976 at 8-10. See also Neubauer and Recktenwald, Some Big Byrne Contributors Got City Contracts, Chicago Tribune, March 6, 1980 at 1, col. 1; Burton and Landman, How power built Byrne war chest, Chicago Sun-Times, Feb. 2, 1983, at 4, col. 1.

\(^{26}\) For example, Festivals Inc., a firm located in Milwaukee, Wisconsin that was hired to promote "Chicagofest", the City's lakefront festival, contributed $25,000 to Mayor Byrne's campaign fund. The firm's president solicited, on the Mayor's behalf, an additional $50,000 from Chicagofest subcontractors. Several of the subcontracting firms were also located outside the state and have no apparent interest in Chicago government except for their city contracts. See Golden, City fetes will not produce $1 million, Chicago Sun-Times, May 28, 1982 at 6, col. 1; Better Government Association, Press Release, May 20, 1982. Illinois' campaign financing disclosure provisions can be found in ILL. REV. STAT. ch. 48, §§ 9-13 (1981).


\(^{28}\) Id. at 35. The report states that 735 names were included in the sample, including the names of consulting firms, their key personnel and individual consultants. Of this total (735), 82 or 11 percent made political contributions totaling $141,163. The 82 contributors represented 31 of the 66 consulting firms in the sample. Id.
natorial campaign, the overwhelming portion of the funds going to incumbent Governor Thompson. Twenty-five construction contractors, for example, each contributed $2500 or more to the gubernatorial candidates. Twenty-four of these gave to Governor Thompson's campaign and only one gave to the challenger Adlai Stevenson's election effort. The economic stakes for the twenty-four firms were high; together they had received over 40 million dollars in state contracts during the 1982 fiscal year. It could be argued, of course, that government contractors contribute to political campaigns for many reasons and such contributions may be motivated, at least in part, by ideological concerns. However, there is at least some evidence that government contractors either failed to contribute to the Stevenson campaign or kept their contributions below the $150 reporting threshold because they feared government retaliation.

Incumbents, of course, enjoy an inherent advantage in the electoral process. Their visibility and access to the media unavoidably provides them with some degree of advantage in an election campaign. Is that advantage merely reflected in the contributions they receive from firms and individuals with public contracts? An analysis of campaign finance reports indicates that those with an economic stake in state government were much more likely to give to the campaign of Governor Thompson than those without state contracts. According to data compiled by Common Cause, Governor Thompson received over nine times the amount of special interest contributions than did Adlai Stevenson. However, Governor Thompson and his running-mate received only four times more than their challengers from individuals who were not engaged in government business. Contributions from government contractors to the incumbent clearly cannot be explained by the general advantage of incumbency alone.


30. Id.

31. Telephone interview with Herb Sirott, former Treasurer of the Stevenson for Governor Campaign Committee, Dec. 16, 1982. Mr. Sirott stated that he had been told by prospective contributors that they could not make a contribution or had to keep their contribution below the reporting threshold because of their economic relationship with state government. However, he also noted that he had no personal knowledge that concern about possible retaliation was justified. He also noted that such statements might serve as a convenient excuse by those who simply did not want to contribute to the Stevenson campaign or who wanted to keep their contributions to a minimum; that is, below the threshold for disclosure.

32. See Common Cause, supra note 29.

33. Id. It could be argued that government contractors are not contributing to the incumbents because they are officeholders, but because they are the candidates most likely to win. Yet,
In Chicago's mayoral elections, the role played by government contractors in financing the incumbent's campaign for public office has been particularly apparent. In 1975 it was reported that more than one-half of Mayor Daley's itemized campaign contributions, totaling $117,000, came from contractors, city employees and public officials. In contrast, the Mayor's challenger, William Singer, was reported to have had few, if any, contributions from those sources. In fact, candidate Singer had to raise 60 percent of his campaign receipts through loans. The practice of funding the mayoral incumbent's campaign through large contributions from government contractors continued with Mayor Michael Bilandic and seems to have reached unprecedented proportions in the 1982 mayoral primary campaign.

Mayor Jane Byrne raised almost ten million dollars in her bid for renomination, the largest sum ever raised by a candidate for municipal office; according to news accounts over forty-eight percent of the city's business, totalling over 600 million dollars, went to individuals and firms which contributed to her campaign. The mayor's two opponents received little support from these sources and together managed to raise contributions amounting to less than one-third of the mayor's campaign gifts.

since the two groups generally overlap, (incumbents usually win) the consequence remains the same: the state's purchasing power is still the lure which attracts the contribution. Moreover, as the text accompanying this note indicates, contractors are more likely to contribute to incumbents than are persons who have not received government contracts. It seems improbable that this is a result of differing assessments as to whom the winner is likely to be. In any case, the focus of this article is on the active solicitation by incumbents of contractor contributions. Absent a showing that a systematic and aggressive solicitation occurs, it is unlikely that the courts will find an equal protection violation. See infra notes 143-157 and accompanying text.


36. Id.

37. For contributions to former Mayor Bilandic, see Neubauer, Bilandic raised over $2 million in losing race, Chicago Tribune, May 30, 1979, Sec. 4, at 1, col. 4; Neubauer, Jury probes Rubloff campaign gift, Chicago Tribune, May 8, 1979, Sec. 3, at 1, col. 4. Mayor Byrne raised approximately $10 million in the 1983 Mayoral primary campaign, much of it from government contractors. See infra notes 38-40.

Recent examples of campaign abuse at the local level are by no means confined to Chicago. Earlier this year, for example, the New York Times reported that Boston Mayor Kevin White's campaign contributions had come "overwhelmingly" from city employees, government contractors and the recipients of large tax breaks. Those three groups provided three-quarters of the $382,690 Mayor White had raised last January during his bid for reelection. Clendinen, Contractors, City Workers are White's Biggest Fans, New York Times, Jan. 9, 1983, Sec. E, at 2, col. 3.

38. Burton and Draeger, Firms with city deals Byrne donors, Chicago Sun-Times, Feb. 17, 1983, at 4, col. 1. The same article notes that "the figure [$601 million] is highly conservative because it covers only firms contributing to the Mayor in their own name or through well-known donors." Company officials frequently donate as individuals.

39. In February 1983, before the primary election, it was reported that Mayor Byrne had
Press accounts also indicate that city officials who have the discretionary authority to award city contracts systematically solicited campaign funds for Mayor Byrne from firms which did business with their agencies.\textsuperscript{40} Active fundraisers for the Mayor reportedly included the city's Purchasing Agent, the Commissioner of Streets and Sanitation and the Mayor's patronage chief.\textsuperscript{41} It seems likely, to say the least, that persons who rely on city business pause to consider their future as a city contractor when they receive campaign solicitations from officials who have the power to control the flow of city contracts. That they are likely to view these requests for funds as implicitly coercive has struck many as obvious.\textsuperscript{42}

The Mayor, of course, lost her reelection bid; the candidate who spends the most does not always win. However, the gravamen of an equal protection argument is not found in the ultimate consequence of state action—who won or lost. The grievance, rather, lies in the unfair advantage the opposing candidates suffered in the election campaign. Candidate Richard M. Daley, a loser in the three way race, could certainly argue that the Mayor's implicitly coercive fundraising tactics placed him in a disadvantageous position by unfairly enhancing the Mayor's resources while reducing his potential support. This primary election might also be viewed as the exception that proved the rule; the Mayor's fundraising techniques backfired by generating adverse publicity, but only because of the enormity of her multi-million dollar campaign chest and the strong-arm tactics that were employed. The occasional defeat of an incumbent who employs these tactics is perhaps heartening, but it does not ensure the integrity of the electoral process. Nor should it nullify an equal protection claim.

\textit{Quid Pro Quos—Inferring a Corrupt Intent}

And what about the nine million bucks [raised by Chicago's Mayor Byrne]—an outrageous sum. The contractors, consultants and LaSalle Street moneybags who put up this dough will be looking for their \textit{quid pro quo} after the election. "They'll be asking the tradi-

\footnotesize{received $9,520,061; Richard M. Daley raised $1,475,107 and Harold Washington received about $500,000. Burton and Snyder, \textit{Byrne's campaign chest now tops $9.5 million}, Chicago Sun-Times, Feb. 5, 1983, at 3, col. 1.}

\footnotesize{40. Burton and Landman, \textit{How power built Byrne war chest}, Chicago Sun-Times, Feb. 2, 1983, at 4, col. 1.}

\footnotesize{41. \textit{Id} It was also reported that Charles R. Swibel, the former chairman of the Chicago Housing Authority was a major Byrne fundraiser. Snyder and Williams, \textit{Byrne denies Swibel plays a major role}, Chicago Sun-Times, Feb. 12, 1983, at 4, col. 1.}

\footnotesize{42. \textit{See, e.g.}, Bellow, \textit{Pols and other Perpetrators}, N.Y. Times, Feb. 20, 1983, Sec. 4, at 1, col. 2; Royko, \textit{It pays to play}, Chicago Sun-Times, Feb. 3, 1983, at 2, col. 1.}
tional Chicago question 'Where's mine?' . . .

While most citizens, like Saul Bellow quoted above, may harbor a lingering suspicion that public contracts are bought or sold in exchange for campaign gifts, the public record rarely reveals an explicit quid pro quo between the contractor and the incumbent. Consequently, one could argue that these contributions are not "compelled" or "coerced" in any conventional sense and must therefore be considered manifestations of voluntary political support.

If the courts were to adopt the position that the inequalities which result from current fundraising practices were per se unconstitutional there would, of course, be no need to show that those inequalities resulted from government misconduct. However, current equal protection doctrine in the voting rights area indicates that some showing that the discrimination against opposing candidates is "purposeful" is required. While the challenged government action need not amount to "coercion," there must be an intentional misuse of governmental power. Consequently, the question that arises for the courts is this: can it be reasonably inferred from the foregoing facts that elected officials have misused their official position to award government contracts in exchange for campaign gifts?

The quid pro quo concept has been given a broad interpretation by the courts, even where the stricter standards for intent in criminal cases apply. In United States v. Anderson, the District of Columbia Court of Appeals reviewed the conviction of a lobbyist who had made payments in the form of campaign contributions to Maryland's Senator Daniel B. Brewster to influence his actions on postal rate legislation. The Court noted that the lobbyist had made payments to the Senator

43. Bellow, supra note 42 (quoting Chicago Sun-Times columnist Mike Royko).
44. See Nicholson, supra note 14.
45. See City of Mobile v. Bolden, 446 U.S. 55 (1980); see also text accompanying notes 132-158 infra.

The recent Supreme Court and Seventh Circuit case law necessarily implies that proof of coercion is not an essential part of the plaintiffs' case. If independent candidates and voters have a protected constitutional entitlement to freedom from official discrimination against their candidacies and votes on the basis of their political beliefs, that right will be violated by any scheme of patronage employment that uses government jobs to elect government supported candidates. Whether the political precinct work done by the patronage workers is coerced becomes irrelevant for the purpose of proving the violation. The plaintiffs need only show that the government, in sponsoring the patronage system, is purposefully discriminating against them . . . and that the system provides regular Democrats with "an advantage" in elections.

Id. at 1341 (citations omitted).
on four separate occasions; each payment was associated with an “express or tacit” communication of interest in pending legislation. 48 In one instance, a check for $5,000 was declined with the understanding that Senator Brewster would keep an “open mind” on the pending legislative proposal. The defendant argued that since the giving of campaign contributions and attempts to influence legislation were both lawful activities, the bribery statutes’ requirement of corrupt intent could not be satisfied. 49 The Anderson court rejected the argument, ruling that even a tacit communication of the defendant’s interest in legislation coupled with the contribution provided sufficient evidence to support a finding of corrupt intent. 50

In deciding the fate of the other participant in the transaction, Senator Brewster, the court distinguished between the criminal intent requirements necessary to sustain a connection under the Bribery and Gratuities provisions of the federal law. 51 Under the Brewster court’s analysis, if an elected official agrees to perform an act in return for money, the Bribery provision is violated; if the official accepts a payment knowing the contributor intends to bind him to a specific act, he has violated the Gratuities section. 52 In the words of the court, “The Bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved. . . .” 53 In requiring some form of corrupt intent to establish a violation of either provision the court sought to establish a distinction between illegal and legitimate campaign contributions. According to the court’s formulation, a violation of the gratuity provision would appear to encompass any set of facts from which an “agreement” has been reached concerning a specific act between the contributor and elected official. 54 Since Anderson,

48. *Id.* at 331.
49. *Id.* at 330; *See also* Note, *Campaign Contributions and Federal Bribery Law*, 92 Harv. L. Rev. 451, 455 (1978).

The Anderson Court held that “intent could be derived from the nature of Anderson’s communications with Brewster, from the professed interest of Anderson’s client in Brewster’s position, and from subterfuge—delivering two large cash payments—in negotiating two Spiegel checks, and in preparing . . . (a witness) for the grand jury.” *Id.* at 331.

The standard used by the Court, however, is arguably broader than these specific facts suggest. According to one writer, under the Anderson court’s standard the Act of giving a campaign contribution, when the giver is associated with a clearly identified interest group, could communicate sufficient ‘tacit’ interest in pending legislation so as to provide the prosecution with a prima facie case of bribery.” 92 Harv. L. Rev. at 459-60.

52. *Id.* at 72.
53. *Id.*
it is clear that this “agreement” can be “tacit” or implied by the conduct of the parties.\textsuperscript{55}

In \textit{United States v. Cerilli},\textsuperscript{56} the Third Circuit Court of Appeals held that state public officials who demanded campaign contributions from government contractors could be found guilty of extortion under the Hobbs Act even without a specific showing of coercion or without demonstrating that the contributions were made under duress.\textsuperscript{57} In \textit{Cerilli}, officials from Pennsylvania’s Department of Transportation sought contributions from persons who had leased snow removal and road repair equipment to the state. The lessors testified that the campaign payments, sometimes amounting to between three and five percent of their income under the leases, were made as a condition to the use of the equipment. The court rejected the appellants’ argument that the solicitations were nothing more than “aggressive fundraising,” basing their findings largely on the “shake down” technique of demanding a specific amount, generally based on the lessors’ income.\textsuperscript{58}

The intent of a campaign contributor was also an issue before Illinois’ courts in the highly publicized case of \textit{People v. Brandstetter}.\textsuperscript{59} Here, an ERA supporter was convicted of bribery for having passed a note to a state representative stating: “Mr. Swanstron, the offer for help in your election and $1,000 for your campaign for pro ERA vote.”\textsuperscript{60}

The \textit{Brandstetter} court rejected the argument that the defendant thought she was engaging in activity that was protected by the first amendment. The promise to provide campaign funds, contingent upon the state representative’s favorable vote, was sufficient to meet the terms of the criminal statute.\textsuperscript{61}

That courts have often had a difficult time distinguishing between

\textsuperscript{55} United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974).

\textsuperscript{56} 603 F.2d 415 (1979).

\textsuperscript{57} § 1951 of the Hobbs Act provides:

\textit{Interference with Commerce by threats or violence}

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.


\textsuperscript{58} United States v. Cerilli, 603 F.2d at 422. The court stated that “eleven lessors testified to the demands made of them by the appellants. Although the ‘shakedown’ techniques were not always identical, the basic pattern of appellants’ demanding a specific amount, generally based on a percentage of the lessors’ income under the lease, remained essentially constant.” \textit{Id.}

\textsuperscript{59} 103 Ill. App. 3d 259, 430 N.E.2d 731 (1982).

\textsuperscript{60} \textit{Id.} at 260-61, 430 N.E.2d at 733.

\textsuperscript{61} \textit{Id.} at 263-64, 430 N.E.2d at 735.
a campaign contribution and extortion or bribery is clear. However, the important point is not that the act of making or soliciting a campaign contribution may border on criminal conduct but rather that the principles used in these cases for inferring corrupt intent are relevant to establishing an equal protection claim. As in Anderson, the court might look to the temporal proximity between the contribution and an official's act (the awarding of a contract, for example) to determine if there was a "tacit" agreement between the parties. When contributions are made by firms already holding government contracts, there should be little doubt that the elected officials receiving the contribution are aware of the firm's interest in having the contract renewed.

In Cerilli, the court focused on the techniques the officials used in eliciting funds from government contractors; such an inquiry should also prove useful in establishing an equal protection claim. In Chicago, the public record indicates that high-ranking officials with the authority to award contracts systematically requested funds from city contractors. Moreover, a pattern of incentives gives the fundraising activities a systemic base. "Rightly or wrongly, one of the ways people in the [Mayor Byrne] administration are measured is by how much they can do [in fundraising] for the Mayor," one city contractor reportedly stated. Influence, according to the Mayor's former patronage chief, is earned by assiduous political fundraising.

Admittedly, the activity that currently has been identified in news accounts does not reach the level of wrongdoing discussed in the cases above. The argument here is not that current practices amount to criminal conduct, but rather that one can infer that officials have misused their authority to aid the incumbent party. Surely, if Anderson and Cerilli serve as our guide in determining what evidence sufficiently supports a finding of corrupt intent in the context of a criminal case, there should be little doubt that an analogous finding of "corruption" can be sustained in the area of public contracting for purposes of establishing an equal protection violation.

63. See Burton and Landman, supra note 40.
64. Id.
65. Id.
66. Id.
III. Equal Protection Analysis

Overview

Over the past two decades the Supreme Court's expansive application of the equal protection clause has secured the broad right to participate in the political process. The Court's first thrust into the franchise rights area came in Gray v. Sanders\(^6\) and the malapportionment decisions that followed in its wake. These decisions established the "fundamentality" of the right to vote and recognized that this right was "preservative" of all others. In sweeping language the Court declared that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined.\(^6\)

Opinions striking down state enacted barriers to voting and candidacy followed the malapportionment decisions of the early 1960's.\(^6\)\(^9\) In less than ten years after the Gray Court first entered the political thick- et, the courts had invalidated financial barriers such as the poll tax and filing fees and had struck down measures which discriminated against minor parties and independent candidates, as in the ballot access and ballot placement cases.\(^7\)\(^0\) The latter cases, dealing largely with the mechanics of the electoral process, challenged obstacles which, in effect, resulted in the complete abnegation of the right to vote or to seek office;\(^7\)\(^1\) the earlier malapportionment cases prevented the "dilution" of voting rights and established a comprehensive right to "equally effective" participation in the political process.\(^7\)\(^2\)

67. 372 U.S. 368 (1963). In Gray, the Supreme Court invalidated the Georgia county—unit system of tallying votes in the state's primary elections. A year earlier, in Baker v. Carr, 369 U.S. 186 (1962), the Court reversed the policy it had announced in Colegrove v. Green, 328 U.S. 549 (1946) (declining to review malapportionment of Illinois congressional districts), and ruled that if Tennessee's state legislature was malapportioned as the plaintiffs alleged the issue was justiciable. Gray, however, is the Court's first substantive inquiry into this area. The malapportionment decisions include: Wesberry v. Sanders, 376 U.S. 1 (1964); and Reynolds v. Sims, 377 U.S. 533 (1964).

68. Wesberry v. Sanders, 376 U.S. 1, 17 (1964). According to Professor Tribe, "Historically, it was the reapportionment cases that first compelled the courts to assay the scope and content of the right to vote." L. Tribe, supra note 1 at 738.

69. See supra notes 5-8.

70. Id. For cases dealing with access to the ballot see cases cited, supra notes 7 and 8; for cases dealing with ballot placement see Weisberg v. Powell, 417 F.2d 388 (7th Cir. 1969) (per curiam) and Bohus v. Board of Election Commission, 447 F.2d 821 (7th Cir. 1971).

71. For one court's elaboration of the distinction between the ballot access and ballot placement cases, see Shakman II, 481 F. Supp. 1315 (N.D. Ill. 1979). In Shakman II the court noted that "in ballot placement cases, unlike ballot access cases the government has not excluded any candidate or candidates from the electoral process." Id. at 1335.

72. See the cases cited supra notes 67 and 68. See also Moore v. Ogilvie, 394 U.S. 814 (1969) and Hadley v. Junior College District, 397 U.S. 50 (1970), Carrington v. Rash, 380 U.S. 89 (1965). As the Court noted in Reynolds v. Sims: "Equal electoral protection can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the exercise of the franchise." Reynolds v. Sims, 377 U.S. at 533.
Until the early 1970's the franchise rights cases had in large measure focused on the use of the state's regulatory power to police the electoral process. Legislation governing access to the ballot or carving-up legislative districts fall within the states' police powers if they are non-discriminatory and do not unduly infringe protected rights. Recently, however, the court has also upheld challenges to less authoritative state practices which tip the electoral scales in favor of one candidate over another. Hence, patronage dismissals which aid the party in power and compelled political contributions from public employees have been found to violate protected constitutional rights.73

The rapid development of the law in the franchise rights area suggests that it would be a short step to apply the emerging equal protection rationale to the area of campaign finance.74 The explicit or implicit use of the government's purchasing power to extract contributions from contractors has the effect of throwing the governments' substantial resources behind an incumbent, providing him or her with an unfair electoral advantage. Extension of equal protection doctrine here would be consistent with both the impulse and underlying rationale of the voting rights cases.

**The Two-Tiered Equal Protection Test**

Equal protection claims involve two distinct standards of review. Under the traditional approach, legislative enactments or state action which results in treating individuals differently are examined to determine if the governments' classification is "rationally related" to a "legitimate state interest." A stricter standard of review is invoked when state action establishes classifications which are inherently suspect (as when legislation differentiates between persons with respect to their race, alienage or nationality) or when government action infringes on a fundamental right (such as the rights of free speech or association).


The Consent Decree entered into by the parties in *Shakman* does prohibit "compulsory or coerced political financial contributions by any government employee, contractor or supplier ...." 481 F. Supp. 1356 (Appendix) (Consent Judgment Entered May 5, 1972). Enforcement of the decree, however, would not settle the constitutional issues discussed in this article, nor would the decree apply beyond the parties who signed it. Additionally, evidentiary issues, such as those discussed supra in the text accompanying notes 44-66, might still have to be resolved in an enforcement action.

74. See Nicholson and Fleishman articles, supra note 14.
Under this latter standard, the burden shifts to the state to show that the statute or practice in question is justified by a "compelling state interest."\textsuperscript{75}

Since there are few instances in which state action will be sustained once the stricter level of judicial scrutiny is applied the outcome of an equal protection challenge in the electoral context often depends on establishing that a fundamental right has been unduly burdened.\textsuperscript{76}

Consequently, a finding that the right to run for political office and the right to vote are fundamental rights is a critical step in establishing an equal protection claim.

\textbf{The Rights of Candidates}

Since the mid-1960's, the Supreme Court has frequently used the "strict scrutiny" standard to invalidate state laws which infringe voters' rights. The status of the right to seek political office is, however, more uncertain.\textsuperscript{77}

\textit{Williams v. Rhodes}\textsuperscript{78} is the first case to recognize a right of candidacy. \textit{Williams} also established a theoretical framework in which the rights of candidates and those of voters blend, forming mutually reinforcing rights which trigger the "strict scrutiny" standard.\textsuperscript{79}


\textsuperscript{76} Professor Tribe states, for example, that "strict scrutiny is . . . 'strict' in theory but usually 'fatal' in fact." Tribe, supra note 1, at 1000 (quoting Gunther, The Supreme Court 1971-1972 Foreword. In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972)). Tribe also notes that "judicial review of election laws has been roughly proportional to their potential for immunizing the current leadership from successful attack." Consequently the courts have been relatively lenient in reviewing candidate eligibility requirements and cautious in appraising laws "that determine which political groups can place any candidate of their choice on the ballot." L. Tribe, supra note 1 at 774 (emphasis in original). It should be noted, however, that when candidate eligibility cases implicate the rights of voters, strict scrutiny will be applied. See, e.g., Williams v. Rhodes, 393 U.S. 23 (1968). See generally, Jardine, supra note 4.

For cases which apply "strict scrutiny" but nevertheless uphold instances of impaired fundamental rights, see Marston v. Lewis, 410 U.S. 679 (1973) and Burns v. Fortson, 410 U.S. 686 (1973) (upholding a 50-day duration voter residency requirement as necessary to protect the states "important interest in accurate voter list." citing Marston v. Lewis 410 U.S. at 681). See also Buckley v. Valeo, 424 U.S. 1 (1976) (strictly scrutinizing but upholding congressionally imposed ceilings on campaign contributions); Storer v. Brown, 415 U.S. 724 (1974) (upholding a California statute barring the independent candidacies of persons who either voted in another party's last primary election or who had been registered with another party during the previous twelve months).

\textsuperscript{77} See generally Jardine, supra note 4.

\textsuperscript{78} 383 U.S. 23 (1968). See also Jardine, supra note 4, at 296.

\textsuperscript{79} See Williams v. Rhodes, 393 U.S. at 31. The intertwining of rights was apparent in the Court's formulation: "the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." Id. See, Note, Recent Develop-
Williams, the Court had adhered to the approach adopted in Snowden v. Hughes, where it adopted a "hands-off" approach on the grounds that the right to run for office was a privilege of state citizenship, not national citizenship, and therefore not protected by the privileges and immunities clause. In Williams, the Court abandoned this approach which had been the dominant theme in ballot access cases for twenty-five years.

Williams, then, is the first modern Supreme Court decision upholding a ballot access challenge. The decision allowed George Wallace's American Independent Party and the Socialist Labor Party to gain access to Ohio's presidential ballot in 1968 despite their failure to comply with the requirement that minor parties file petitions signed by fifteen percent of the qualified voters who had voted in the preceding election. Justice Black's decision was cast largely in first amendment rather than equal protection terms. He wrote "the right to vote is heavily burdened if that vote may be cast only for one of two parties when other parties are clamoring for a place on the ballot;" both the first amendment "right of individuals to associate for the advancement of political beliefs" and the fourteenth amendment "right of qualified voters to . . . cast their votes effectively" were violated when minor parties were kept off the ballot.

This "blending of rights" approach was also followed in Bullock v. Carter. There, the Supreme Court noted that candidacy had not achieved the status of a fundamental right; nevertheless, the Court invoked a "close scrutiny" test in striking down a Texas statute that required primary candidates to pay large filing fees to party county committees. The Court reasoned that the "rights of voters and the rights of candidates do not lend themselves to easy separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." The Bullock Court, however, departed from the standard of review used in the malapportionment cases by requiring that the statute be "closely" rather than "strictly" scrutinized. Moreover, the Court required that the law be "reasonably necessary to the
accomplishment of legitimate state objectives,” an apparent departure from the “compelling state interest” test.86

Candidates' rights cases since Bullock have failed to clarify the standard of review to be used when persons seeking office challenge barriers to candidacy. In Lubin v. Panish87 the Court held that a $700 filing fee required of candidates for county supervisor in Los Angeles County was constitutionally impermissible. The fees, the Court found, were simply not “necessary” to accomplish the state's purposes. The Court also noted that the fees effectively prevented candidates without sufficient resources from access to the ballot.88

In American Party v. White,89 the Court rejected a challenge to a provision in Texas' ballot laws that required an independent candidate to obtain 500 signatures on his nomination petition. As in Lubin, the Court did not fully articulate the equal protection test it was applying. It did indicate, however, that the barriers the statute posed to a new party were not insurmountable and that the law did not freeze in the status quo.90

On the same day that both Lubin and American Party were decided, the Court explicitly applied the “compelling state interest” test in Storer v. Brown.91 In Storer, two candidates challenged California’s one-year disaffiliation statute which prevented candidates who have been registered in another political party or who voted in a primary election during the previous year from running on an independent ticket. Focusing on the “substantial burdens on the right to associate for political purposes,” the Court invoked a strict standard of review. Nevertheless, the Court held the state’s interest in preventing “unrestrained factionalism” to be compelling. This is the first franchise rights case in which the Court found a compelling state interest under its two-tiered equal protection analysis.92

The question as to what standard of review the Court was actually applying in American Party and Storer has been termed “baffling.”93

86. Id. at 144. The Court stated that “the laws must be ‘closely scrutinized’ and found reasonably necessary to the accomplishment of legitimate state objectives. . . .” Id. See also Jardine, supra note 4, at 298-99.
88. See Jardine, supra note 4, at 300.
90. Id. at 787.
91. 415 U.S. 724 (1974). Storer represents one of the few occasions when the Supreme Court, using a two-tiered equal protection analysis, explicitly held a state interest to be compelling. Jardine, supra note 4, at 301. See also supra note 76.
92. L. Tribe, supra note 1 at 783.
93. Id.
In both cases, the Court referred to "strict scrutiny" but in practice seems to have adopted a lesser standard. Perhaps the only principle to be derived from both cases is that ballot access rules for independent candidacies will be upheld unless they are clearly unreasonable and empirical evidence shows that such rules have the effect of keeping independent candidates off the ballot.\textsuperscript{94}

\textit{The Rights of Voters}

In \textit{Harper v. Virginia Board of Elections}\textsuperscript{95} the Supreme Court struck down Virginia's poll tax as an unconstitutional infringement of voters' rights. Noting that the right to vote in state elections is not expressly mentioned in the Constitution, the Court stated that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."\textsuperscript{96} The Court also left little doubt as to what standard of review should be exercised when state action deprives citizens of their franchise: "[S]ince the right to exercise the franchise... is preservative of other basic civil and political rights," the Court states, "any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized."\textsuperscript{97}

In \textit{Harper}, the Court found the substance of voters' rights in the fourteenth amendment's equal protection clause; it was left to the Court in \textit{Kramer v. Union Free School District}\textsuperscript{98} to further refine the "compelling state interest" test. In \textit{Kramer}, the Court considered a challenge to a New York law which confined participation in school district elections to persons who owned or leased taxable real property or who were the parents of children enrolled in public school. The Court gave the challenged statute "a close and exacting examination"\textsuperscript{99}

\textsuperscript{94} \textit{Id.} at 784.
\textsuperscript{95} 383 U.S. 663 (1966).
\textsuperscript{96} \textit{Id.} at 665.
\textsuperscript{97} \textit{Id.} at 667. The issue of discrimination on the basis of wealth also affected the Court's decision to apply the strict scrutiny test: "... wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." \textit{Id.} at 670.

The inclusion of wealth as part of the "strict scrutiny" test was reiterated in \textit{Bullock v. Carter}, 405 U.S. 134 (1972): "Because the Texas filing fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude, as in \textit{Harper}, that the laws must be 'closely scrutinized'. ..." \textit{Id.} at 144.

The Court has also made it clear, however, that "poverty, standing alone, is not a suspect classification." \textsc{Dorsey, Bender, et al, II Political and Civil Rights in the United States 32} (1981 Supp.).
\textsuperscript{98} 395 U.S. 621 (1969).
\textsuperscript{99} \textit{Id.} at 626.
which the law did not survive. In justifying the strict standard applied to the statute the Court observed that the presumption of constitutionality given to most legislative enactments was based on the assumption that state government fairly represented all citizens. However, when this assumption itself is challenged it could "no longer serve as the basis for presuming constitutionality." 100

In *Dunn v. Blumstein*, 101 the Court applied the "compelling state interest" test to a Tennessee law that required residency in the state for one year and in the county for three months as prerequisites for registration to vote. In *Dunn*, however, the Court stated that even when a "compelling state interest" is present, that interest must be pursued by the "less drastic means." 102 "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" 103

The *Harper* - Kramer - Dunn line of cases establish the right to participate in the electoral process as a fundamental right. That the right has limitations is, however, clearly established in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*. 104 In *Salyer*, the Court found that there were circumstances when restrictions on the franchise need only be subject to "minimal scrutiny." The Court considered a statute limiting the vote for directors of a water storage district to landowners and weighted the votes by the value of the land held. Applying "minimal scrutiny" to the statute, the Court found that there was a rational relation between the statute and those who bore the primary burdens and reaped the largest benefits of the districts' activities. 105

It is difficult to explain *Salyer* in light of *Kramer* and other cases which invalidated attempts to confine electoral participation to persons with a special interest in an election. 106 It seems likely that *Salyer* can be treated as a narrow exception to the general principle that "strict scrutiny" will be applied where a special election or matters of "general governance" are involved. This is the approach explicitly stated by the

100. *Id.* at 628.
102. *Id.* at 343.
103. *Id.* (citing Shelton v. Tucker, 364 U.S. 479, 488 (1960)).
105. *Id.*
Court in *Hill v. Stone*,\(^\text{107}\) decided after *Salyer*: "as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest."\(^\text{108}\)

**Government Interference in the Electoral Process**

Filing fees, nomination selection requirements and voter eligibility laws deal principally with the mechanics of elections and political campaigns. Supreme Court and lower federal court decisions, however, have also addressed the constitutional issues which arise from less obvious, indirect interference in the political process.\(^\text{109}\) The tactics used by incumbents to maintain themselves in office, for example, can be quite subtle. Grants or budgetary decisions can be made on the eve of an election to elicit endorsements or attract voter support;\(^\text{110}\) patronage workers can be unleashed on election day to campaign for their employers;\(^\text{111}\) and public employees and government contractors can be solicited to contribute to the party in power.\(^\text{112}\) Practices such as these discriminate against opposing candidates and their supporters just as do restrictive ballot access laws.\(^\text{113}\) As one federal district court has put it, "The Constitution forbids 'sophisticated' as well as simple-minded modes of discrimination."\(^\text{114}\) Consequently, patronage abuses and other devices aimed at perpetuating the power of incumbents and their party have been found to violate fundamental constitutional rights.\(^\text{115}\)

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108. Id. at 297.
109. See, e.g., *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980) (alleging that Carter Administration officials wrongfully used public funds in the 1980 presidential primary campaign); *White v. Snear*, 313 F. Supp. 1100 (E.D. Penn. 1970) (enjoining county officials from paying patronage employees with public funds when they were campaigning on election day); *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970) (alleging numerous patronage abuses in support of incumbent political party). See also *Public Citizens, Inc. v. Simon*, 539 F.2d 211 (D.C. Cir. 1976) (taxpayer action to recover the salaries of White House staff who devoted working time to presidential election campaign).
110. See *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980).
111. It is interesting to note that at least some of the practices challenged in *Winpisinger* apparently are still going on. According to Lee Atwater, Deputy Assistant to the President for Political-Affairs, a group called "the assets-and-priorities group" met at the White House in 1982 "to decide which would be the targeted races in November, and to allocate to those races whatever assets the White House could call upon." Drew, *Politics and Money—I*, The New Yorker, Dec. 6, 1982 at 67.
112. See *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970).
Both the courts and Congress have long recognized that incumbents can, and do, abuse their official power for partisan ends. In *Ex parte Curtis*, decided in 1882, the Supreme Court censored the practice of higher-ranking government officials soliciting campaign contributions from their subordinates. The Court noted that the practice was highly susceptible to abuse for "what begins as a request may end as a demand." Campaign contributions that are received in this manner are likely to reflect the contributor's fear of losing his job or displeasing his employer if he does not contribute, rather than reflecting the free exercise of political privilege. Setting the stage for the patronage cases that were to come almost a century later, the Court also observed that when public employment is tied to party success, "those in office will naturally be desirous of keeping the party in which they belong in power." The *Curtis* Court went on the uphold a criminal statute that prohibited federal officials from accepting or receiving political funds from subordinate employees.

Recently, in *Abood v. Detroit Board of Education*, the Court considered the constitutionality of a state statute that permitted a public sector union to exact compulsory fees which were used for lobbying and to support political candidates from non-union employees who were subject to an "agency-shop" arrangement. The employees alleged that such compulsory political contributions violated their first amendment rights. The Supreme Court struck down the Michigan statute, holding that the state could not force public employees to support ideological causes or candidates they may oppose as a condition for holding a job.

In *Elrod v. Burns*, decided a year before *Abood*, the Supreme Court reversed the Michigan Court of Appeals which had recognized that compulsory service charges, which were allowed by state law, furthered "political purposes" unrelated to collective bargaining and could violate appellants' first and fourteenth amendment rights. The court of appeals, however, held that since the complaints had failed to allege that appellants had notified the Union of their objections, they were not entitled to restitution.

117. *Id.* at 374.
118. In *Curtis*, the Court noted, "contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, as to promote the political views of the contributor—to avoid a discharge from service, not to exercise a political privilege." *Id.*
119. *Id.* at 375.
120. Curtis was convicted of a misdemeanor for violating a statute, passed in 1867, providing that federal offices and employees were prohibited from "requesting, giving to, or receiving from, any other officer or employee of the government, any money or property or other thing of value for political purposes. . ." *Id.* at 371.
122. The Supreme Court reversed the Michigan Court of Appeals which had recognized that compulsory service charges, which were allowed by state law, furthered "political purposes" unrelated to collective bargaining and could violate appellants' first and fourteenth amendment rights. The court of appeals, however, held that since the complaints had failed to allege that appellants had notified the Union of their objections, they were not entitled to restitution. *Id.*
Court had already held that government employees could not be dismissed solely because they failed to support the incumbent political party. In *Elrod*, employees of the Sheriff's office in Cook County, Illinois challenged the long-standing practice whereby a newly-elected Sheriff discharged employees who did not enjoy the political sponsorship of the incumbent party. The Court found that “the practice of patronage dismissals clearly infringes First Amendment interest.”\(^{124}\)

The Court also held that to justify this encroachment, the state had to advance an interest that was “paramount, one of vital importance.”\(^{125}\)

The Court's plurality decision went on to find that the government's need for efficiency and effectiveness were indeed important, but could be fulfilled by less restrictive means.\(^{126}\)

*Elrod* and *Abood* both involved first amendment challenges and the rights of public employees, rather than the rights of candidates and voters, were at stake. Nevertheless, both cases may be viewed as setting a broad standard to which the political process must adhere: the constitution will not tolerate official practices which compel political support for one candidate or party over another.\(^{127}\) Moreover, when similar challenges have been considered by lower federal courts on behalf of voters and candidates, the courts have suffered little difficulty in translating the *Elrod* rationale into equal protection terms.

In *White v. Snear*,\(^{128}\) for example, a Republican congressional candidate in Delaware County, Pennsylvania sought to enjoin county officials from abusing the patronage system to frustrate his bid for the party's nomination. The candidate charged that the County Commissioners, who controlled the regular Republican Party, allowed patronage employees to campaign on Primary Election day in order to support the candidates the Commissioners had endorsed. Although the patronage employees were absent from their jobs and electioneering at the polls, they were recorded as present and working. The federal district court found that the defendants' activity amounted to an abuse of authority by seeking to perpetuate their power. The Court concluded that “A clearer violation of the Equal Protection Clause would be difficult to imagine.”\(^{129}\)

\(^{124}\) *Id.* at 360.

\(^{125}\) *Id.* at 362.

\(^{126}\) *Id.* at 366.

\(^{127}\) See also Illinois State Employees Union, Council 34 v. Lewis, 473 F.2d 561 (1972), cert. denied, 410 U.S. 928 (1973); Branti v. Finkel, 445 U.S. 507 (1980); and the cases cited in notes 111-123, supra.


\(^{129}\) *Id.* at 1104.
Candidates' and Voters' Rights in the Seventh Circuit

The Seventh Circuit has considered several equal protection challenges in the electoral context and has developed specialized approaches for dealing with different factual settings. Where the misuse of official power has impaired the rights of candidates and voters without resulting in the complete denial of those rights, two special requirements have emerged. First, the government's action must have been improperly motivated; that is, the court must find an intent to discriminate before the "strict scrutiny" standard is invoked. Secondly, the state's discretionary action must result in "an actual significant advantage" in an election.

In Weisberg v. Powell, both tests were applied when a candidate for delegate to the state constitutional convention challenged the manner in which his name was listed on the ballot. The plaintiff claimed that Illinois' Secretary of State, then Paul Powell, improperly arranged the order in which candidates filed their nominating petitions so as to discriminate in favor of candidates endorsed by party organizations by giving them the best places on the ballot.

The Seventh Circuit required a showing of "purposeful discrimination" where it was alleged that a statute "fair on its face" was applied in an unequal fashion. The court, however, had little trouble disposing of the issue, for Secretary Powell had candidly stated that his purpose had been to favor candidates backed by party organizations. Those candidates, the Secretary stated, had superior experience in government and therefore were best qualified to write a constitution.

The plaintiff in Weisberg was also required to show that a candidate who was listed in first or second place on the ballot had a substantial advantage in an election. The Court held that it need not be shown that placement on the ballot is decisive; only that it is "one of a number of factors" tending to affect the election's outcome. The Seventh Circuit found that expert witnesses had adequately established that there was such an advantage and concluded that the plaintiff's equal

131. Id. at 1338.
132. 417 F.2d 388 (7th Cir. 1969) (per curiam).
133. Id. at 392.
134. Id. at 391 note 4. When asked why he chose to favor people he knew, Secretary Powell stated "... I sure wouldn't want to put on somebody there first that I didn't know. I might be getting a Communist or somebody that's against our form of government... This is no kid game—re-writing the constitution of the State of Illinois." Id.
135. Id. at 392.
protection rights had been violated.136

In Bohus v. Board of Election Commissioners137 the Seventh Circuit considered what evidence was necessary to sustain a finding that ballot placement does in fact result in an electoral advantage. Here, a Republican candidate for City Clerk in Chicago charged that the habitual placement of Democratic candidates on the top line of the ballot was a violation of the fourteenth amendment’s equal protection clause. At trial, the district court was unpersuaded by three witnesses who testified on the plaintiff’s behalf that placement on the top line of the ballot was advantageous. The court distinguished the instant case from Weisberg on the basis that the candidates to be elected as delegates to the constitutional convention were not listed by party, as were the candidates for city office.138 Furthermore, the court noted that the delegate election in Weisberg involved multi-candidate districts where the number of candidates exceeded the number to be elected. In the city election considered in Bohus, only one candidate from each party was listed on the ballot. From these facts the court appears to have concluded that the candidates in Bohus could more easily be identified by the voters, and the voters themselves would be less inclined to be influenced by ballot placement where they could be guided by party labels.139

One year prior to the decision in Bohus, the Seventh Circuit applied the same two-pronged test to a broad-scale challenge to patronage practices in the City of Chicago and Cook County. In Shakman v. Democratic Organization of Cook County,140 the court recognized the right of taxpayer-voters to bring a suit alleging that the existence of a large-scale network of patronage workers whose jobs were conditioned on their performing political tasks violated the equal protection rights of opposing candidates and their supporters.

The Shakman court held that candidates have a constitutional right to be free from “intentional or purposeful discrimination.”141 The interests of candidates and voters in an “equal chance and an equal voice” is impaired, the court declared, when the misuse of official

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136. The witnesses, a graduate student in political science, a university political science professor and a Chicago alderman all testified to there being an advantage to being listed first on the ballot. Id. at 392-93. But see Bohus v. Board of Election Commission, 447 F.2d 821 (1971). In Bohus the Seventh Circuit affirmed the holding of the district court which had disregarded testimony of expert witnesses. The witnesses had stated that habitual placement of a certain party’s candidates on the top line of ballot was advantageous to those candidates. Id. at 823.
137. 447 F.2d 821 (1971).
138. Id. at 824-25.
139. Id.
140. 435 F.2d 267 (7th Cir. 1970).
141. Id. at 270.
power creates "a substantial, perhaps massive, political effort in favor of the ins and against the outs." 142

In Weisberg, Shakman and Bohus the Seventh Circuit left little doubt that candidates and voters have a constitutionally protected right to be free from official discrimination in an electoral contest. All three cases involved the use of state power to render less effective a challengers' attempt to unseat an incumbent. In Shakman, the court recognized that an officially organized effort to mobilize the government's resources on behalf of the party in power tends to freeze in the status quo and impairs constitutionally protected rights. These same themes, of course, are also present in the campaign financing context. When the government uses its leverage over contractors, consultants and others who receive government funds to extract campaign gifts for incumbents, the same result occurs. Challengers are placed in a situation of comparative disadvantage. Without the same inducements to offer potential contributors—namely, governmental funds—they have more difficulty raising the campaign money necessary to launch an effective challenge.

The special test used by the Seventh Circuit requiring a showing that the discrimination against the challenger is "purposeful," however, presents particular difficulties when applied to the campaign financing area. Such an inquiry into legislative motivation would likely prove fatal to an attack which alleged that current fundraising practices which favor incumbents are unconstitutional per se.

**Legislative Motive: Proving Discriminatory Intent**

The test employed in Weisberg, Bohus and Shakman requiring a showing of "discriminatory purpose" was elaborated in a district court opinion in the Shakman case. 143 Nine years after the Seventh Circuit's decision, the remaining issues in Shakman were finally resolved in a wide-ranging opinion by Judge Bua of the Northern District of Illinois. Inasmuch as the opinion provides a rather detailed rationale for inquiring into legislative motive and may be influential within the Seventh Circuit, it is worth reviewing here.

The ballot placement cases decided by the Seventh Circuit are the point of departure for the district court's discussion. 144 The ballot

142. Id.
143. 481 F. Supp. 1315 (N.D. Ill. 1979). The Shakman litigation has a long and complicated history which was retraced by the district court. Id. at 1320-25.
144. Id. at 1335.
placement cases, like Shakman, involve allegations that the government has interfered in the electoral process by favoring certain candidates over others. Yet, unlike the ballot access cases where a candidate is totally excluded from the ballot, the ballot placement cases assert that the government has favored, perhaps to a relatively small degree, certain candidates because of their political affiliation. The ballot placement cases, Judge Bua found, consistently required a showing of "intentional or purposeful discrimination by authorities in which one class is favored over another." By analogy, this was the standard adopted by the Shakman court.

According to the district court, an inquiry into legislative purpose was required by the Supreme Court's decision in Washington v. Davis. In Washington, a group of black police officers alleged that the written personnel test administered by the District of Columbia discriminated against black applicants. Justice White's opinion noted that the plaintiffs did not claim that there was intentional discrimination; they claimed only that the test had "a highly discriminatory impact in screening out black candidates." Holding against the black police officers, the Court maintained that the test could not be held unconstitutional "solely because it has a racially disproportionate impact." While the law's effects on race could be considered as part of the totality of relevant facts, impact alone was insufficient to establish an equal protection claim.

In explaining the court's application of Washington, Judge Bua

145. Id.
146. Id.
148. 426 U.S. at 235.
149. Id. at 239.
150. Id. at 242. The test for determining when the evidence supports a finding of "discriminatory purpose" has not been clearly established. In Washington, Justice White's opinion noted "... our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact. ... This is not to say that the necessary discriminatory impact must be express or appear on the face of the statute, or that the laws' disproportionate impact is irrelevant in cases involving discrimination." Id. However, White dissented in both City of Mobile and Village of Arlington Heights, supra note 147, where he found the facts supported an inference that there was an "invidious discriminatory purpose." City of Mobile v. Bolden, 446 U.S. at 94-103 (White, J., dissenting). Justice Stevens in his opinion has attempted to outline categories of "vote dilution practices" which are "governed by entirely different constitutional considerations." Into the category which he would exempt from an inquiry into legislative motive fall poll taxes, literacy tests and other practices that "draw into question a political structure that treats all individuals as equals but adversely affects the political strength of a racially identifiable
quoted approvingly from the work of Professor John Hart Ely who has written extensively on motivation analysis. According to Ely, analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right). However, where what is denied is something to which the complainant has a substantive constitutional right—either because it is granted by the terms of the Constitution, or because it is essential to the effective functioning of a democratic government—the reasons it was denied are irrelevant . . .

Applying Professor Ely's formulation, the district court concluded that since candidates do not have an explicit constitutional right to run for office "judicial review protects plaintiff's candidacies, per se, only from those government decisions that are improperly motivated."

The Supreme Court has not recognized an affirmative obligation to provide the rights to vote or run for office; in that sense, those rights are "constitutionally gratuitous." The district court's decision, however, seems to have ignored the second test that Hart would apply: motivation analysis should not be invoked where the right which was denied is "essential to the effective functioning of a democratic government." At least where the rights of voters (if not candidates) are concerned, the Supreme Court has left little doubt that it considers the right to freely cast a ballot "the essence of a democratic society, and any restrictions on that might strike at the heart of representative government." Consequently, it could certainly be argued that campaign practices that infringe on the ability of voters to effectively participate in the governmental process require an extraordinary justification regardless of the intent which animated those practices.

The district court's inquiry into motivation did not, of course,
prove fatal in *Shakman*; the court found that the government’s action "deliberately uses the patronage system to favor one candidate over another. . . ." A similar finding might be expected where it is alleged that campaign contributions are wrongfully elicited from contractors to deliberately aid the party in power. An argument, however, which asserted that the current system of raising political funds is *per se* unconstitutional solely because of its impact on non-incumbents (that is, because the consequences of campaign financing practices tends to favor the party in power) would likely fail under the *Shakman* court’s analysis. Since current state campaign financing laws generally permit both incumbents and non-incumbents to raise funds from the same sources, it could be contended that the advantages that result to incumbents merely reflect the outcome of a fair contest in the competition for political funds. Under this analysis, a showing that the contest was not "fair" because the incumbent party either directly or indirectly conditioned the awarding of contracts on campaign contributions would therefore be necessary. Proof that government officials acted wrongfully in obtaining the contribution, in effect, provides evidence that the discrimination against non-incumbents is "purposeful" and not a result of neutral factors.

The courts’ application of “motivation analysis” certainly presents obstacles to plaintiffs seeking to challenge campaign financing practices on equal protection grounds; but those obstacles, as *Shakman* demonstrates, are not insurmountable. It is part of the folklore of Chicago, and other major urban areas, that those who receive public contracts must pay an unofficial price. Explicit *quid pro quo’s* are not generally discussed in public forums. Yet the evidence that already exists, and the inferences that can be drawn from that evidence, indicate that it would be disingenuous, to say the least, to suggest that the contributions that flow from government contractors to the party in power result from fair and free competition. In reviewing the evidence as to whether current fundraising practices are fair and provide candidates

156. It has been argued that the government has an affirmative constitutional duty to eliminate the inequalities that result when candidates are allowed to raise unrestricted funds from private donors. If the Court were to recognize this affirmative obligation, presumably no inquiry into motivation would be required. *See* the Nicholson and Fleishman articles cited supra at note 14.

157. *See supra* notes 15-42 and accompanying text.
and voters with an "equal chance and equal voice" the courts might well consider the words of one judge, written over a century ago:

We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness and forbidden to know as judges what we see as men 

The Problem of Standing and the Causation Corollary

If candidates and voters have constitutionally protected rights to seek political office or support those who do, it would seem axiomatic that the equal protection clause would not permit government resources to be used to tip the electoral balance in favor of incumbents or their political party. Substantial problems of proof, of course, remain; the plaintiffs must convince the court that government officials have actually misused their power on behalf of incumbents. However, recent Supreme Court and lower court standing decisions have erected barriers that make it increasingly difficult to launch a challenge to such government conduct.

In Winpisinger v. Watson, supporters of Senator Edward M. Kennedy's quest for the presidential nomination in the 1980 Democratic Primary sought to enjoin officials in the Carter Administration from using tax funds and other federal resources to promote the renomination of the incumbent, President Jimmy Carter. Kennedy's supporters alleged that federal officials used tax funds to travel to key primary states campaigning on President Carter's behalf, printed and distributed campaign literature at government expense and used federal grant and loan money to induce the support of influential Democratic Party leaders.

The Circuit Court of Appeals for the District of Columbia upheld a lower court dismissal which had denied the plaintiff's standing to sue because they had failed to show that the "asserted injury was the consequence of the defendants' actions or that prospective relief will remove the harm." The court also found that "prudential considerations" were a barrier to relief.

The Winpisinger court held that the appellants had failed to demonstrate two conditions required to establish standing: they had not alleged a "distinct and palpable injury to themselves" nor had they established an injury "that fairly can be traced to the challenged action

159. 628 F.2d 133 (1980).
of the defendants.” The court concluded that “The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections ... forecloses any reliable conclusion that voter support is ‘fairly traceable’ to any particular event.”

The standing test applied by the court was derived from two Supreme Court cases which established a doctrine of causation as a corollary to existing standing requirements. In *Warth v. Seldin* and *Simon v. Eastern Kentucky Welfare Rights Organization* plaintiffs were denied standing when the Court could not find a sufficient causal relationship between the challenged state action and the asserted injury. In *Warth*, plaintiffs who challenged an allegedly exclusionary zoning ordinance in the town of Penfield, New York were denied standing when the Court found that the existence of available housing depended not on the zoning ordinance but also on the willingness of third parties to build low-cost housing units.

In *Eastern Kentucky*, decided just one year after *Warth*, the Court extended this reasoning to a group of indigent plaintiffs who challenged an Internal Revenue Service rule providing favorable tax treatment to non-profit hospitals that denied low-income persons access to the hospital except for emergency room care. Standing was denied when the Court found that the hospital could elect to forego favorable tax treatment rather than assume the cost of treating indigent patients. Since the persons seeking care would not necessarily receive it if they prevailed in their suit, the Court concluded that they had failed to show that their injury would be redressed by a favorable verdict.

Two major requirements, then, emerge from *Warth* and *Eastern Kentucky*: the plaintiff's injury must be “fairly traceable” to the defendant's action and the injury sustained likely to be redressed by a favorable decision. Both tests have been jointly employed by the Supreme Court to determine whether a sufficient causal connection exists between the plaintiff's injury and the alleged illegal activity of the defendant.

Both *Warth* and *Eastern Kentucky* were decided in the wake of

160. Id. at 139.
162. 426 U.S. 26 (1976). See also Nichol, supra note 12. Much of the discussion in the text accompanying notes 163 to 178 is derived from Nichol's article.
165. Id.
166. See G. Nichol, supra note 162; Tribe, supra note 1 at 93-95. See also Winpisinger v. Watson, 628 F.2d at 139.
**United States v. SCRAP,**167 which had gone far in extending the chain of causation in cases alleging indirect injury. Indeed, even Justice Stewart's opinion noted that the SCRAP plaintiffs had outlined an "attenuated line of causation to the eventual injury."168 It was against this backdrop of SCRAP's expansive interpretation of standing rules that the re-examination of the causation requirement took place. Yet, if the restrictive holdings of Warth and Eastern Kentucky are comprehensible in terms of the Court's desire to limit SCRAP, the rationale underlying the emerging causation doctrine remains hazy. The doctrine has, in fact been the subject of a considerable amount of scholarly criticism.169

Certainly the "adversely affected" requirement of Article III requires the establishment of a causal connection between the alleged injury and the defendant's conduct. The "adversely affected" plaintiff must have suffered "an injury in fact" which can be attributed to the defendant's wrongful act. However, as some critics have noted, the specificity in pleading which Warth and Eastern Kentucky demand is inconsistent with the liberal standards of the Federal Rules of Civil Procedure; current pleading rules generally allow a complaint to be viewed in a light most favorable to the plaintiff before a motion to dismiss will be granted.170

In the context of Eastern Kentucky, the Court's interpretation of the pleading standards place a burden on the plaintiffs which they cannot reasonably be expected to surmount. The low income plaintiffs of Eastern Kentucky were asked to demonstrate prior to discovery and trial that the hospital's refusal to admit indigents was directly traceable to the tax ruling. Moreover, the Court's assertion that it is "purely speculative" that hospital decisionmakers were affected by the tax law in making policy is contrary to the view taken by both Congress and the Internal Revenue Service. In fact, the plaintiff's allegation that there was a link between the tax ruling and hospital policy could be supported by evidence that was part of the public record.

Similarly, in Winpisinger the connection between the use of government resources to promote an incumbent’s candidacy and the challenging candidates electoral chances hardly seems "purely

167. 412 U.S. 669 (1973). In SCRAP the Court granted standing to students who challenged an Interstate Commerce Commission railroad rate increase. The plaintiffs alleged that the tariff increase would discourage the use of recyclable goods, which, in turn, would eventually result in economic and environmental harm.
168. Id. at 688.
169. See e.g., Nichol, supra note 12; TRIBE, supra note 1 at 93-95; Davis, Standing, 1976, 72 N.W. L. REV. 69, 69-81 (1977).
170. Nichol, supra note 12, at 195. See also FED. R. CIV. PROC. 8(f) and 8(e)(1).
Federal law currently prohibits elected officials from employing certain federal resources in their election campaigns precisely because that practice skews the election process. As in *Warth*, the connection between the defendant’s conduct and the alleged injury may be indirect, but it hardly defies logic to suppose that government support of one candidate over another may have an impact on an election campaign. By demanding a greater degree of evidence in support of the plaintiff’s allegation in the drafting of the complaint, the Court appears to be reaching the merits of the case prematurely, even when logic suggests that causation may be sufficiently established if the case is allowed to proceed.

The redressability requirement as applied by the Court is also troublesome. In both *Warth* and *Eastern Kentucky*, the plaintiffs were denied standing because they could not demonstrate that the relief they sought would ineluctably flow from a favorable verdict. In seeking certainty rather than probability that relief would be effective, the plaintiffs were faced with a burden they could not overcome. Yet in *Warth*, the low-income plaintiffs were denied the opportunity of even seeking housing in Penfield. Whether such housing would be built in response to the emergence of a new market necessarily remains a matter of conjecture.

In the context of equal protection analysis, this application is clearly inconsistent with prior holdings. In *Warth*, the Court focused on the plaintiff’s ultimate ability to obtain housing rather than the opportunity that had been denied. Yet is is often a denial of opportunity alone that constitutes the injury in equal protection cases. In *Regents of the University of California v. Bakke*, for example, Alan Bakke challenged the affirmative action program at the University of California at Davis Medical School on equal protection grounds. If the redressability standard of *Warth* was applied to Alan Bakke, a showing that he would have been accepted to medical school absent the special pro-

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171. The Winpisinger Court stated: “[W]hether an appellant is viewed in the character of a voter, contributor... supporter or a candidate... a court would have to accept a number of very speculative inferences... to connect his alleged injury with activities attributed to appellants.” 628 F.2d at 139.
174. Id.
gram for minority students would have been required. Justice Powell, the author of the Court's opinion in both *Warth* and *Bakke*, however, explicitly rejected that standard as it might operate on the medical school applicant. Justice Powell noted that "[e]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing." The injury, Justice Powell noted, lay not in the plaintiff's failure to gain admittance, but "in the University's decision not to permit Bakke to compete . . . for all 100 places in the class."

In *Winpisinger*, the District of Columbia Circuit Court followed the reasoning of *Warth* and *Eastern Kentucky*, ignoring the equal protection implications that were apparent in Justice Powell's remarks. The court stated that since there were an "endless number of diverse factors contributing to the outcome of state presidential primary elections" there could not be "any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event." Yet, just as the injury Bakke suffered was not his failure to ultimately gain admittance to medical school, the harm incurred by Kennedy's supporters was not their failure to prevail in the primary campaign. The injury they alleged was to their ability to compete fairly in the election process when government resources were wrongfully marshalled in support of the President.

The Seventh Circuit's recent decision in *Mulqueeny v. National Commission on the Observance of International Women's Year* raises questions as to how that court will deal with the causation question. Plaintiffs who were active in opposing the adoption of the Equal Rights Amendment brought suit to enjoin the Commission from engaging in lobbying activities in support of ERA. The plaintiffs alleged that the Commission's activities violated the Administrative Procedure Act and federal statutes prohibiting the use of congressional appropriated funds for lobbying.

The district court had found that the *Mulqueeny* plaintiffs had standing to sue and determined that the Commission's programs con-

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176. *Id.* at 280-81, n. 14.
177. *Id.*
178. *Id.*
181. Prior to the time any funds were appropriated for the Commission, the plaintiffs filed a complaint alleging violation of Article V of the Constitution (which provides, in pertinent part, for the proposing and ratification of constitutional amendments) and violations of the statutory prohibitions against using appropriated monies for lobbying activities. *Id.* at 1118.
stituted prohibited lobbying activities. The Seventh Circuit reversed, stating that the ERA opponents had not met the injury in fact requirement. Their injury, the court said, "[m]ust be interpreted in actuality as a potential that the efforts employed by plaintiffs toward their goal of defeating legislation . . . might ultimately prove fruitless, should the position they advocate not prevail." The court therefore followed the analysis of *Warth* and *Eastern Kentucky*, emphasizing the eventual attainment of the plaintiff's desired result in determining whether the "injury in fact" requirement had been fulfilled. Yet, just as the injury suffered by the Kennedy supporters in *Winpisinger* was to their ability to compete and not in their failure to reach a certain result, so too might the injury to the ERA opponents be cast. The harm they suffered was to their ability to compete effectively in the ratification contest, not in their eventual failure to obtain a legislative victory.

*Mulqueeny*, however, did not involve an equal protection infringement that might have more sharply focused the court's attention on the denial of opportunity rather than the failure to achieve a specified result. When the Seventh Circuit was faced squarely with an election rights case in an equal protection context, they found that standing requirements had been met but treated the matter with little discussion.

In *Shakman v. Democratic Organization of Cook County*, the plaintiffs included a candidate in an election for delegate to the Illinois constitutional convention who challenged the patronage practices of the incumbent political party in Chicago and Cook County on equal protection grounds. Michael Shakman alleged that up to 30,000 patronage workers were employed in the County and as a condition of their employment, they were required to contribute money and campaign for Democratic candidates. The case had been dismissed by the district court, in part, on the grounds that the plaintiffs lacked standing. The Seventh Circuit reversed, stating only that assuming that the plaintiffs' allegations were true and the injured rights were constitutionally protected, their standing to bring the action "is apparent."

182. *Id.* at 1121.

183. Professor Tribe makes a similar point in regard to elections generally. He states, "... election-related rights display the special feature that the equality with which they are made available, rather than the fact of their availability or absence, ordinarily proves decisive." *Tribe, supra* note 1, at 737 (emphasis omitted). It should be noted that *Mulqueeny* involved neither an equal protection claim nor an election; the plaintiffs' claim did not center on their being voters or candidates nor did it hinge on a first amendment violation. For the Court's characterization of the injury asserted by the plaintiffs see *Mulqueeny v. National Commission on the Observance*, 549 F.2d at 1121.

184. 435 F.2d 267 (7th Cir. 1970).

185. *Id.* at 269.
Almost ten years later the district court once again had the opportunity to decide the standing question. Following the Seventh Circuit’s reversal in 1970, the *Shakman* plaintiffs had entered a consent decree with several of the defendants. However, there were issues that had not been resolved by the decree and several defendants had failed to sign it. Consequently, in 1979, when the matter again came before the district court on cross motions for summary judgment, the court held that an infringement of rights of candidates and voters “creates a case or controversy between the plaintiffs and the defendants and gives this court so-called ‘constitutional’ standing under Article III . . . .”

More importantly, both the Seventh Circuit and the district court’s application of equal protection doctrine in election rights cases has been quite inconsistent with the result-oriented causality test. While the courts have acknowledged that the plaintiffs must show that the incumbents’ actions provided them with “an actual, significant advantage” in elections, “the advantage need not be a massive or overwhelming one.” In order to prevail in *Shakman*, the plaintiffs needed only to show that the advantage “will help the regular Democrats win some elections.”

Unlike *Winpisinger*, then, which required in effect that the plaintiffs demonstrate that they would prevail but for the defendants’ wrongful acts, the *Shakman* plaintiffs were required to show only that the impact on their interest was more than *de minimus*. Although the *Shakman* court was addressing the merits of the substantive dispute, it would be ironic, to say the least, if the same court were to impose a more stringent standard on the threshold question of standing than would be required to establish a substantive constitutional infringement of a candidate’s or voter’s rights.

If the standard applied in *Shakman* is also applicable to plaintiffs challenging campaign finance abuses, they should not need to show that their failure to prevail in the suit would necessarily result in electoral defeat. They need only demonstrate that campaign contributions elicited from government contractors are a “significant factor” in the election. Their injury lies in the competitive advantage incumbents ob-

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187. *Id.* at 1328.

188. The court noted, however, that “The existence of a force of many thousands of employees for the purpose of helping regular Democrats win election over Independents shows, by itself, that the regular Democratic defendants made a ‘substantial, perhaps massive, political effort.’” *Id.* at 1336, n. 18.

189. *Id.* at 1337.
tain when the state’s power to contract is used to induce political support. Candidates and voters have a right to compete fairly for elective office; they, of course, do not have a right to any particular outcome for their efforts.

Whether the reasoning of Shakman or that of Winpisinger will be followed in the future is difficult to predict. As Professor Davis has noted, the law of standing is “confused and cluttered” and the emergence of the causation corollary to standing doctrine has hardly clarified what path the courts are likely to take. As applied during the past decade, the causation analysis is highly manipulatable and has allowed the courts to prematurely dispose of cases which they “substantively disfavor.” However, the Supreme Court had not confronted the causation issue in the context of a franchise rights case. Paradoxically, it may be a hopeful sign that, “about all that is certain on the subject [of standing] is that the last word has not been written.”

IV. A LEGISLATIVE REMEDY FOR CAMPAIGN FINANCE ABUSE

Reform in the area of campaign financing need not await the arrival of judicial relief. In fact, legislative efforts to curtail fundraising abuses date back to the mid-19th century; in recent years both Congress and several state legislatures have enacted measures to restrict the role of private money in politics and equalize the rights of participants in the electoral process.

These legislative efforts to regulate campaign financing have several advantages over judicially formulated relief. While a court imposed remedy, for example, must be circumscribed to fit the litigative facts, a legislatively enacted reform can be more comprehensive in scope. Hence, a statute can more easily address the concerns of vot-
CAMPAIGN FINANCE

ers, contributors, candidates and other parties such as governmental contractors, all of whom might not be parties in litigation before a court. Statutorily imposed reform can also frame administrative and enforcement mechanisms, the development of which may lie beyond the competence of the court. Thus, contribution limitations, prohibitions on specified political donations, as well as public financing of election campaigns can be combined to legislatively fashion far-reaching reforms in the electoral process.

Federal Regulation of Campaign Financing

At the federal level, the first attempts to prevent campaign abuses came in the aftermath of the Civil War, when Congress passed legislation to protect federal workers from the “strong-arm” fundraising tactics of higher-ranking government officials. The first major effort to directly regulate campaign financing, however, was proposed by President Theodore Roosevelt who urged that: “All contributions by corporations to any political committee or for any political purpose should be forbidden by law.” In response, Congress passed the Tilmon Act of 1907 which prohibited corporations and national banks from funding the campaigns of candidates for federal office. Between 1910 and 1940, Congress passed several pieces of legislation which required the disclosure of campaign receipts and expenditures and set spending have only two options. One would be to prohibit the use of all money and things of value in campaigns, which is unreasonable if not impossible. The other would be to require that the public subsidize all campaigns, which would cost several hundred millions of dollars per year. (written prior to passage of the Federal Election Campaign Act of 1974). The first amendment problems in shaping relief should also be noted. See text accompanying notes 238-55 infra. See, e.g., White v. Snear, 313 F. Supp. 1100 (E.D. Penn. 1970) where the court wrote:

County employees are entitled to engage in political activity in support of candidates of their choice. It would infringe upon their rights if I were to enter an order prohibiting employees from absenting themselves from work on Primary Election Day. It is proper, however, to enjoin the Commissioners from recording as present those employees who absent themselves from work. . . .

Id. at 1104 (for a discussion of the case see supra note 128 and accompanying text).
195. See discussion supra note 192.
196. The President, however, did not endorse placing a general limitation on campaign contributions. The remaining part of his message reads:

In political campaigns in a country as large and populous as ours it is inevitable that there should be much expense of an entirely legitimate kind. This, of course, means that many contributions, and some of them of large size, must be made, and, as a matter of fact, in any big political contest such contributions are always made to both sides. It is entirely proper both to give and receive them, unless there is an improper motive connected with either gift or reception.

40 CONG. REC. 96 (1905).
limits for House and Senate candidates;198 and in 1943, the War Dis-
putes Act placed the same restrictions on labor unions as had been im-
posed on corporations and national banks.199 These prohibitions were
incorporated into the Labor-Management Relations Act of 1947 (Taft-
Hartley Act), which stated that “It is unlawful for any national bank . . .
corporation . . . or labor union to make a contribution in connection
with any [federal election].”200

Government contractors have been prohibited from making con-
tributions in federal elections since 1940, when Congress first amended
the Hatch Act (“An Act to Prevent Pernicious Political Activities”).201
The statute proscribed political contributions from any person who en-
tered into a contract with the federal government to supply goods or
services or for “selling any land or building.”202

The impetus behind the legislation is not difficult to discern: In
1939, Congress, fearful that an army of politically active patronage
workers would be generated by the New Deal’s expansion of the fed-
eral workforce, banned political involvement by government employ-
ees in federal election campaigns. The Hatch Act’s prohibition was
needed, it was argued, because federal workers “gained financially by
reason of their connection with the United States . . . and because they
are subject to undue influence or coercion on the part of their
superiors.”203

Speaking on behalf of his amendment to extend a similar ban to
stockholders, corporations which received tax and tariff benefits, as
well as to all government contractors, Michigan’s Senator Prentiss
Brown wanted to “apply the same test to the National City Bank . . .
or their large stockholders.”204 The Brown Amendment, in short, was
designed to reach political donations like those from the Rockefeller
and Pew families, names that came up frequently in the congressional
debate, who had given hundreds of thousands of dollars to Republican
candidates in the 1936 election campaign.205 While the sweeping
changes Senator Brown urged were rejected, a narrower provision was
ultimately incorporated into the 1940 legislation, applying to persons,

198. See CONGRESSIONAL QUARTERLY, DOLLAR POLITICS (3d ed. 1982). For a general review
of federal efforts to regulate corporate and union campaign activities see Epstein, Corporations and
201. 54 Stat. 772 (1940).
202. Id.
203. CONG. REC. 2579 (daily ed. March 8, 1940).
204. Id.
205. Id.
firms, or corporations contracting with the federal government. At the federal level, then, the ban on political contributions from government contractors has been with us since the days of the New Deal.

In 1971 and again in 1974, federal election laws underwent a thorough revision. In the Federal Election Campaign Act of 1971, a ceiling was set on the amount federal candidates could spend on media advertising and Congress removed several ambiguities relating to the prohibitions on corporate and union contributions. Funds spent by the corporation, for example, on communicating to its shareholders were expressly excluded from being considered a "contribution or expenditure" under 18 U.S.C. § 610. Corporate expenditures for non-partisan registration and get-out-the-vote drives, as well as bank loans to candidates, were also excluded. Additionally, the 1971 Act expressly sanctioned PACs (political action committees) and provided guidelines for

206. See supra note 201. The current version of this provision is contained in 2 U.S.C. § 441c (Supp. III, 1979) which provides in part:

441(c) Contributions by government contractors

(a) PROHIBITIONS. It shall be unlawful for any person—

(1) who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof or for selling any land or building to the United States or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement or negotiations for and the later of—

(A) the completion of performance under; or
(B) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land or buildings,
directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any contributions to any political party, committee, or candidate for public office or to any person for any political purpose or use; or

(2) knowingly to solicit any contributions from any such person for any such purpose during any such period.

(b) SEPARATE SEGREGATED FUNDS. This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation, labor organization, membership organization, cooperative, or corporation without capital stock for the purpose of influencing the nomination for election, or election, of any person to Federal office, unless the provisions of section 441b of this title prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, such fund. Each specific prohibition, allowance, and duty applicable to a corporation, labor organization, or separate segregated fund under section 441b of this title applies to a corporation, labor organization, or separate segregated fund to which this subsection applies.

(c) "LABOR ORGANIZATION" DEFINED. For purpose of this section, the term "labor organization" has the meaning given it by section 441b(b)(1) of this title.


208. See Epstein, supra note 198, at 40.
their use.\textsuperscript{209} The 1971 Act also amended 18 U.S.C. § 611 relating to federal government contractors who were henceforth prohibited from contributing money "or [any] other thing of value" in state and local as well as in federal election campaigns.\textsuperscript{210} The Act, which applied to corporations and labor organizations with government contracts, created concern as to whether the PACs allowed under § 610 would be prohibited under § 611, if the organizations concerned contracted with the federal government. The issue was resolved three years later when the 1974 Amendments to the Act explicitly permitted corporations and labor unions contracting with the government to establish separate, segregated funds.\textsuperscript{211}

The Federal Election Campaign Act of 1974 was Congress’ response to the Watergate scandal. The statute sought comprehensive reform through its major provisions which placed limitations on individual contributions to and expenditures for federal candidates. The Act also required the extensive disclosure of campaign gifts and provided public subsidies for presidential candidates in the primaries and in the general election campaign.\textsuperscript{212} The Act was challenged on first amendment grounds in \textit{Buckley v. Valeo},\textsuperscript{213} where the Supreme Court upheld most of its core provisions. The Court, however, struck down the candidates’ spending ceiling and overturned the “independent expenditure” restriction on what individuals could spend on behalf of a candidate (as distinguished from a contribution made directly to a candidate or committee). The Court also removed the limit on how much money candidates could spend on their own campaign. The Act’s public disclosure, contribution limitation and public financing provisions were left largely intact.

\textit{State Reforms}

The 1970’s saw a flurry of activity at the state level as almost every

\textsuperscript{209} The law expressly allowed “the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization.” \textit{Id.}

\textsuperscript{210} \textit{Id.}

\textsuperscript{211} \textit{Id.} at 41.


\textsuperscript{213} 424 U.S. 1 (1976). \textit{See also} text accompanying notes 236-44 infra.
state legislature reviewed and revamped their campaign financing laws.\textsuperscript{214} By 1980, every state except North Dakota had enacted disclosure provisions requiring the reporting of campaign contributions and expenditures. Twenty-five states now place restrictions on what an individual may contribute to a political campaign. New Jersey has set the lowest limit: individuals may not contribute more than $800 in that state's gubernatorial election. Most statewide individual limits, however, range from $1,000 to $3,000 per election (or per year). Twenty-four states restrict contributions by corporations, but only ten states ban labor union contributions to campaigns. Some states prohibit contributions on a more discriminating basis; Oregon, for example, bars contributions from publicly regulated businesses such as banks, utilities, and common carriers. Other states which ban such contributions often exclude those from insurance companies as well.\textsuperscript{215}

Seventeen states have enacted some form of public financing for state election campaigns.\textsuperscript{216} Thirteen states have adopted an income tax checkoff provision, like that used by the federal government. Participation by taxpayers is voluntary and has no effect on tax liability. The average rate of participation among those states that use this system is 22 percent, slightly lower than the participation rate at the federal level.\textsuperscript{217} Four states use a tax surcharge system which adds a one dollar charge to tax liability. As might be expected, the surcharge participation rate is even lower than that under the checkoff system. In 1977, only .5 percent of the taxpayers in Maine chose to participate.\textsuperscript{218}

Seven states restrict contributions from government contractors.\textsuperscript{219} West Virginia, for example, bans state contractors from making a contribution during the contract negotiation period or when the contract is being performed; in Tennessee, it is unlawful for any public officer or employee to knowingly solicit campaign funds from any person who has received contracts, loans or any other benefit financed by public funds.

\textsuperscript{214} See FINANCING POLITICS, supra note 11.
\textsuperscript{215} Id. at 129.
\textsuperscript{216} Id. at 136. In 1978, Seattle, Washington became the first municipality to adopt a public subsidy program for city elections. Jones, State Public Financing and the State Parties, in PARTIES, INTEREST GROUPS AND CAMPAIGN FINANCE LAWS, 286 (M. Malbin ed. 1980).
\textsuperscript{217} Alexander, supra note 11, at 137.
\textsuperscript{218} Id.
As experience with the Federal Election Campaign Act has made abundantly clear, there is no panacea for campaign finance abuses. Despite the clear statutory prohibition of corporate contributions, for example, several major firms violated the law in making donations to President Nixon's 1972 reelection campaign. Furthermore, new channels of legal campaign giving have opened to corporations, unions and government contractors through the authorization of PACs. Consequently, while these organizations remain barred from directly contributing to a federal election campaign, they continue to play a substantial role in funding the political process. The rapid emergence of PACs appears to have at least partially cancelled the effects of the contribution limitations contained in the 1974 Act; that provision was designed to dispel the suspicion that large contributors exercised undue influence over the legislative process. "When these political action committees give money," Senator Robert Dole recently said, "they expect something in return other than good government." With PACs, the appearance of a quid pro quo remains.

Yet, if reform has not proved to be an unmitigated success, neither should it be considered a failure. Abuses have not been totally eliminated but they have been curtailed. The illegal contributions to President Nixon's campaign were disclosed and over twenty "blue chip" firms were convicted of violating federal law; there does not appear to be any reason to believe that enforcement of the Federal Election Campaign Act will be lax or ineffective. The PAC phenomenon, while troublesome, should also be kept in perspective. Corporations, unions and government contractors are still prohibited from directly contributing organizational funds to federal candidates; such funds can only be used to administer a system that solicits individual contributions from an organization's members or stockholders. Limitations

220. See Alexander, supra note 11. In addition to the twenty firms that pled guilty to making illegal donations to President Nixon, several firms also illegally contributed to the campaigns of Senators Humphrey, Muskie, McGovern, Jackson and Representative Mills. Id.

221. See note 209 supra.


223. Alexander, supra note 11. The fines imposed on the Nixon donors ranged from $1,000 to $20,000. Id.


225. See supra note 209 and accompanying text. But see Drew, Politics and Money—1, New Yorker, Dec. 6, 1982, at 63. Drew notes that corporate and union PACs have circumvented the law in two ways: through making independent expenditures and through the use of "soft money" which consists of funds contributed to state committees, ostensibly to be used in non-federal
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on PAC contributions also apply; multicandidate committees cannot contribute more than $5,000 per election to a candidate. PACs have, to be sure, become increasingly important to the funding of political campaigns. Yet it should also be kept in mind that in 1980, PACs supplied only 25 percent of all the contributions received by House and Senate general election candidates.226

At the federal level, the Federal Election Campaign Act provides the framework within which future reforms are likely to occur. No such structure exists at the level of state and local governments. Throughout the fifty states, campaign finance reform constitutes a patchwork of legislation ranging from public financing to disclosure to nothing at all. In Illinois, the public disclosure of campaign receipts and expenditures provides the linchpin of the state’s campaign financing law; contributions from corporations, union and government contractors are permitted.227

The need for further reform at the state and local level was graphically illustrated in Chicago’s recent mayoral primary election.228 To summarize, political money emerged as a major campaign issue. Contributions from government contractors were a principal source of Mayor Byrne’s political funds; indeed, campaign money generated from firms doing business with the city appear to have formed the bulk of her campaign receipts of almost $10 million. News accounts of the Mayor’s fundraising effort indicate that high-ranking city officials who exercise the power to award or withhold city contracts personally and

elections. In practice, Drew argues, these funds are used to motivate people to vote for the entire party ticket and therefore benefit candidates for federal office as well. These funds can be spent on items such as bumper stickers, billboards and other campaign paraphernalia. Id Drew’s argument notwithstanding, independent expenditures (which must be reported) do not constitute a substantial portion of all contributions. Such expenditures amounted to only 1 percent of all funds spent in the 1980 House and Senate races. CONGRESSIONAL QUARTERLY, DOLLAR POLITICS 79 (2d ed. 1982). Her argument is stronger with respect to presidential elections. The twelve million dollars that independent committees spent on behalf of Ronald Reagan came to almost one-half of the twenty-nine million dollars he received in the form of a public subsidy. Drew, Politics and Money—II, The New Yorker, Dec. 13, 1982, at 99.


Legislation to limit the role of PACs was introduced in 1982 by Congressman David Obey (D-Wis.) and Thomas Railsback (R-Ill.). Their bill (HR 7277) would limit PAC contributions to $5,000 (instead of $10,000) in a two-year election cycle and limit candidates to accepting a total of $50,000 from all PACs. The bill will be re-introduced in 1983 and assigned a different number.


228. See supra notes 34 to 43 and accompanying text.
systematically solicited campaign contributions from city vendors.\textsuperscript{229} Comments made by the government contractors, as well as by the Mayor's former patronage chief, noted that this "strong arm" fundraising technique is systemic in origin; that is, city officials and party workers are rewarded on the basis of their ability to raise funds for the party in power.\textsuperscript{230} The circumstances under which many contributions were raised from city contractors strongly suggest that there was at least a tacit understanding that contracts would be awarded or renewed in exchange for the campaign gift.\textsuperscript{231}

There are four principal ways legislators can address these abuses: (1) direct solicitation of contributions from government contractors can be prohibited; (2) contributions from government vendors can be outlawed altogether; (3) limits can be placed on the amount a government contractor may contribute; and (4) public financing can replace such contributions or at least render them largely redundant.

These approaches to reform, of course, contain several practical difficulties. For example, whether a contractor has been knowingly solicited may be difficult to determine. Officials accused of soliciting could contend that the firm or individual was asked for a contribution not because of his contract but because his name appeared on a larger list of potential donors. In any case, a ban on solicitation, while perhaps remedying the most egregious abuses of political fundraising, would not prevent the contractor from initiating the contribution hoping to win a future contract. The element of coercion or compulsion that currently surrounds these contributions would be eliminated if solicitation were banned; however, the city's purchasing power would still act as a magnet, attracting campaign funds from those who seek contracts from city hall.

An absolute prohibition on contractor contributions, applying to both firms and their officers and major shareholders could effectively prevent direct contributions to political campaigns but is likely to lead to a proliferation of PACs. In fact, in states which have enacted such prohibitions this is precisely what has occurred.\textsuperscript{232} Yet, when the prohibition is coupled with a general limitation on the amount an individ-

\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Professor Alexander writes "In recent years, business, industry and trade association PACs have proliferated at the state level as they have at the federal level." H. Alexander, Financing Politics 129 (2d ed. 1980). See also Budde, The Practical Role of Corporate PAC's In the Political Process, 22 Ariz. L. Rev. 555, 563-67 (1980).
ual or a PAC may contribute, the impact of these contributions can at least be minimized.

Public financing also involves numerous practical difficulties, not the least of which is public acceptance.\textsuperscript{233} State approaches to public financing have not been uniformly effective, as has been previously noted.\textsuperscript{234} The public's willingness to participate in voluntary financing schemes has simply not been impressive, particularly when to do so would increase the participants' tax liability. Nevertheless, at the federal level, the public financing of presidential campaigns has produced sufficient financial support for the candidates and has reduced the role of large individual donors and PACs in the presidential selection process. The federal experience, then, indicates that public financing can be effective. It appears that state experiments in this area are mechanically, rather than conceptually, flawed.

Another objection to public financing is based on the fear that the laws would work to the disadvantage of new parties and challengers. New parties would have difficulty qualifying for the subsidy and challengers, it is argued, need more money than incumbents to wage an effective race.\textsuperscript{235}

The problems faced by a new party which must attract "start-up capital" are significant. Yet they can be at least somewhat ameliorated by treating new parties differently than the major parties. Federal law, for example, allows a candidate to reject a public subsidy and the expenditure ceiling that acceptance of the subsidy triggers. Hence, a new party can attempt to raise funds unimpeded by expenditure limitations. Another manner of dealing with the problem is to remove the limitation on individual contributions to new party candidates.

Challengers, generally, should not be placed in a disadvantageous position. Incumbents usually are able to raise much more money because of their position and frequently outspend challengers. Public

\textsuperscript{233} Polling has produced conflicting results. One survey, conducted by Civic Service Inc. in 1979, indicates that 67 percent of those interviewed in a nationwide survey disapprove of providing public subsidies in congressional campaigns. However, a Gallup Poll conducted the same year shows that 57 percent of those surveyed supported public financing. H. Alexander, \textit{supra} note 11, at 150.

\textsuperscript{234} \textit{Id.}

\textsuperscript{235} A Congressional Quarterly study found, for example, that 95 percent of all incumbents running for seats in the House of Representatives in 1978 won re-election; 87 percent of the incumbents outspent their challengers. \textit{Congressional Quarterly, Dollar Politics} (3d ed. 1982). It should also be noted that incumbents receive the vast majority of business and labor PAC money. In 1976 labor gave 4.7 million dollars (67 percent of their total contributions) to incumbents. Epstein, \textit{Business and Labor Under the Federal Election Campaign Act of 1971} in \textit{Parties, Interest Groups and Campaign Finance Laws} 122 (M. Malbin ed. 1980).
subsidies, coupled with an expenditure ceiling or limitations on large
individual contributions, should reduce the advantage the incumbent
would otherwise enjoy.

The question, of course, should not be whether any of these re-
forms are without problems; the appropriate question is whether their
implementation would improve the status quo. The palpable abuses
that have occurred in the past have generated controversy and concern
that equal rights in the electoral process are in jeopardy. The practical
difficulties that reform entails are not insurmountable. Indeed, the ef-
fort that it would take to overcome them seems a small price to pay to
enhance the integrity of our system of representative government.

V. Campaign Finance Reform and the First Amendment

Reform efforts that prohibit or restrict political spending can be
expected to face challenges on first amendment grounds. Recent
Supreme Court decisions have recognized that funds spent for political
expression by corporations, as well as by individuals, are subject to first
amendment protection. In the context of a political campaign,
money can be equated with speech and the court will apply “strict scru-
tiny” to reforms which curtail money spent for political advocacy.
The precise scope of the first amendment’s shield in this area is, how-
ever, undetermined. Despite court rulings striking down various fed-
eral and state campaign finance regulations, the federal restrictions
prohibiting corporations and unions from spending funds for the elec-
tion of federal candidates still stand. Predictions of the imminent de-
mise of these prohibitions have proved to be premature if not wholly
mistaken.

The first broad-scale challenge to campaign finance reform came
in Buckley v. Valeo, decided in 1976. Several plaintiffs, including
Senators James Buckley and Eugene McCarthy, contended that the

Service Commission regulation preventing public utilities from discussing “controversial issues of
public policy” with inserts placed in billing envelopes). See generally, Nicholson, The Constitu-
tionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expendi-
tures, 65 CORNELL L. REV. 945 (1980).
238. See, e.g., Bolton, Constitutional Limitations on Restricting Corporate and Union Political
Speech, 22 ARIZ. L. REV. 373 (1980); Kiley, PACing the Burger Court: The Corporate Right to
(1980). See also First National Bank of Boston v. Bellotti, 435 U.S. at 820-21 (White, J.,
dissenting).
239. 424 U.S. 1 (1976).
provisions of the Federal Election Campaign Act of 1974 limiting contributions and expenditures for federal candidates violated their rights of free expression and association. The Court upheld the restrictions on contributions as necessary to prevent corruption, or its appearance, in the electoral process. Expenditure limitations, however, were held to be invalid. The Buckley Court reasoned that independent expenditures made by a supporter on the candidates' behalf did not pose the same danger of a quid pro quo arrangement as is presented by contributions. Unlike contributions, expenditures cannot be prearranged or coordinated with the candidate's campaign. According to the Court, the absence of this link between the candidate and expenditure "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."

Several writers have argued that the Court's rationale can also be used to dislodge the Act's prohibitions on corporate and union campaign expenditures. If the government's interest in preventing corruption and undue influence does not justify limiting an individual's expenditures, how can a complete ban on similar spending by an organization be supported? Surely, it might be argued, a one-hundred dollar—or perhaps a one-thousand dollar—corporate expenditure is not likely to unduly influence a candidate.

Further doubt on the future of the ban on corporate expenditures was raised in the Court's decision in First National Bank of Boston v. Bellotti. In Bellotti, the Court's five-to-four decision invalidated a Massachusetts statute which prohibited corporate expenditures supporting or opposing referenda questions "not materially affecting" the corporation. Two principal arguments were advanced by the state to justify the prohibition. First was the desire to prevent the undue influence that corporations might exercise in the referendum process. Second, the state sought to protect shareholders by preventing corporate

241. Independent expenditures are defined in the Code of Federal Regulations as follows:
(a) "Independent expenditure" means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate which is not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate.
management from spending the firm's funds on a political message with which the shareholders might disagree. The Court rejected both arguments. There was nothing in the record, the Court noted, to suggest that corporate expenditures were in fact a corrupting influence. The Court stated:

If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes . . . these arguments would merit our consideration. . . . But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.245

Regarding the shareholders, the Court held that the prohibition must fall because it is both underinclusive and overinclusive.246 It was underinclusive because it did not restrict corporate lobbying or other expenditures on promoting issues not subject to a referendum. It was overinclusive because it prevented expenditures even on those issues with which the shareholders might agree.

Whether Bellotti will inexorably lead to the complete abandonment of restrictions on corporate expenditures and contributions in election campaigns is, however, far from certain. The Court itself noted:

our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.247

Yet, as Justice White observed in his dissent, the Court's disclaimer is not entirely persuasive.248 He stated that the Court had already held in Buckley v. Valeo that the governmental interest in

245. Id. at 789-90.
Judge J. Skelly Wright has observed that corporate involvement in a referendum campaign can have a major impact on the outcome. He argues that California's 1978 anti-smoking initiative was defeated largely because of a last minute infusion of funds from Phillip Morris and R.J. Reynolds tobacco companies which together spent $1.7 million to defeat the initiative. According to Judge Wright, two months before the referendum vote the polls showed 58 percent of the voters favored the measure while 38 percent opposed it. After the corporations lent their financial support to defeating the measure, the vote on election day was 45 percent in favor and 55 percent against the proposition. Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 COLUM. L. REV. 609, 623 (1982). It could also be argued, however, that this corporate money simply made more information available to the public and allowed voters to make a better informed decision.

246. Id. at 793.

247. Id. at 788, n.26.

248. Id. at 820-21 (White, J., dissenting).
preventing corruption could not justify restrictions on individual expenditures. In *Bellotti*, the Court concluded that "the corporate identity of the speaker" makes no difference. According to Justice White, "all the Court has done is to reserve the formal interment of the Corrupt Practices Act and similar state statutes for another day." 249

Early in 1982, legislative efforts to regulate campaign financing were further eroded when the Supreme Court affirmed a district court's decision in *Common Cause v. Schmitt*. 250 The district court struck down a provision in the Federal Election Campaign Act prohibiting political action committees from making expenditures over $1000 in a publicly subsidized presidential campaign. This decision, removing the statutory obstacle to organizational expenditures, could be seen as one further step toward the "final internment" 251 of the restrictions on corporate and union expenditures. Yet here too, the Court's decision did not foreclose the possibility that the ban on corporate and union election spending will be found constitutionally permissible.

Underpinning the decision was the Court's view of political committees as "pooling agents" for "many small voices wishing to make intelligible political statements." 252 That expenditures made by these committees could implicitly carry a *quid pro quo* was simply found to be unbelievable. "It is difficult . . . to imagine," the Court stated, "how the thousands of 'small voices' associated together in a political committee could compromise a candidate for President." 253

The Court also noted that one safeguard remained intact: contributions to committees were restricted to $5,000 or less. Consequently, the Court reasoned, powerful individuals could not control the committees and, through them, the candidates they favor. 254

Neither of the Court's points apply to corporations. Since corporations generate their own capital through the sale of goods and services, they cannot be viewed as merely "pooling agents" for other peoples' money. Nor would the $5,000 restriction apply to corporations; for it applies only to political committees by the terms of the statute. Thus, although the *Schmitt* decision has opened the door to

249. *Id.* at 821.
250. 455 U.S. 129 (1982) (per curiam); 512 F. Supp. 489 (1980). Because of the Supreme Court's even division, (Justice O'Connor took no part in the decision), the Court's ruling has no weight as precedent. It's practical effect, however, leaves independent committees free to spend unlimited amounts in presidential campaigns.
252. 512 F. Supp. at 489, 496.
253. *Id.* at 498.
254. *Id.* at 498-99.
independent expenditures by organizations, corporations (and presumably unions) can still be distinguished in terms of the Court's underlying rationale.

When a direct challenge to the restrictions on corporate and union expenditures does come before the Supreme Court, it seems likely that the fundamental premises of the Buckley, Bellotti and Schmitt decisions will be attacked. In both Buckley and Schmitt, the rulings emphasized that independent expenditures, being "independent" of the candidate, were unlikely to result in a quid pro quo arrangement for two reasons: first, since independent expenditures could not be coordinated with the candidate's campaign they probably would not be of much assistance and indeed may prove "counterproductive." Second, independence diminishes the danger that the expenditure would be given in exchange for an improper commitment from the candidate.

In the six years since Buckley was decided, however, the role that independent committees play in the electoral process has changed enormously. In 1976, independent expenditures totaled two million dollars; by 1980 they had risen to sixteen million dollars—an eight-fold increase. Almost one-half of these expenditures were made by two independent committees: the Congressional Club, which is based in North Carolina and associated with Republican Senator Jesse Helms, and the National Political Action Committee (NCPAC) together spent almost eight million dollars.

There is also increasing evidence that the "independence" of these committees is less than complete. The staffs of an independent committee and a candidate's campaign may never speak to each other, Pat Cadell, the Democratic pollster, stated, "but through reading the press and other things they can know as well as if they were sitting in the same room what states are being stressed, where you need help, where you don't want it, what your issues are." Republican fundraisers for independent committees have made the same point. According to Paul Dietrich, whose Fund for a Conservative Majority spent two million

255. See A. Cox note 243 supra.
256. Buckley v. Valeo, 424 U.S. at 47.
258. Id. at 80. It seems likely that when Buckley was decided, the Justices did not imagine that independent expenditures would be managed by highly sophisticated and professionally staffed PACs. Congressional Quarterly notes that "independent spending used to be an occasional undertaking reserved for politically minded millionaires and small interest groups." Id. at 81. Indeed, in the year preceding the Buckley decision there were only 608 PACs of any kind registered with the Federal Election Commission. By the end of 1978 that number rose to 1,633. Epstein, supra note 235, at 115.
dollars on Ronald Reagan's behalf in the 1980 presidential campaign, "There is no way to enforce independence as long as a press corps is giving us information and as long as one group puts out information and gets it to the others."260 Dietrich added, "If I really want a poll from the Republican National Committee on a campaign, I can get it. They'll leak it to me."261

The federal ban on corporate election expenditures was enacted in 1907; the prohibition was extended to all government contractors in 1940 and to labor unions in 1943. Clearly, there is long history of congressional recognition that these organizations present a special danger of corrupting the electoral process.262 To what extent should the Supreme Court defer to this legislative judgement?263 Justice Powell noted in Bellotti that no evidence or legislative record had been introduced to support the contention that corporate expenditures constitute a threat to the integrity of the referendum process.264 The implication, of course, is that if such a record was established the prohibition on corporate and union contributions could survive a first amendment challenge. From the muckraking days of the early 1900's to Watergate, Congress has repeatedly registered its view that corporate involvement is a potentially corrupting influence in political campaigns.265 Whether the Supreme Court will accept that judgement, or reject Congress' findings as it did implicitly in Buckley v. Valeo266 is a critical question that remains unanswered.

While the Supreme Court has not yet directly faced the issue,

260. Id. at 91.
261. Id.
262. See supra notes 192-213 and accompanying text.
263. See A. Cox, supra note 243, at 85 (refering specifically to Justice White's dissent in Bellotti).
264. See supra note 245 and accompanying text.
265. See generally, Epstein, note 198 supra. It is clear that in order to sustain the current prohibition on corporate independent expenditures it must be argued that such expenditures create a greater risk of undue influence and corruption than that which is posed when the same expenditures are made by individuals. Such an argument might note that corporations are organized for financial gain and their contributions present a greater threat of quid pro quo arrangements than those of individuals whose political spending is motivated by a broader set of concerns. See Nicholson supra note 236 at 991-92. In any case, most Americans view corporate political involvement suspiciously. In May of 1977 the Harris survey reported that "most Americans are very wary of any kind of corporate related contributions to political campaigns." Alexander, Corporate Political Behavior in Corporations and Their Critics 35 (T. Bradshaw and D. Vogel, ed. 1981).
266. See 424 U.S. at 259-66 (White, J., concurring in part and dissenting in part).
lower district courts have upheld the constitutionality of the restrictions on corporation contributions. In United States v. Chestnut the campaign manager of Hubert Humphrey's 1970 Senatorial campaign challenged the ban on corporate gifts after he was indicted for accepting an illegal contribution. The court sustained the prohibition, noting that unions and corporations could still communicate with their members, shareholders and customers. The statute, the court stated, "has been construed in a careful fashion to minimize its restrictive impact."

In Federal Election Commission v. Weinstein, decided after Bellotti, the District Court for the Southern District of New York again upheld the Federal Election Campaign Act prohibition on corporate campaign gifts as well as the ban on contributions from government contractors. The Weinstein court noted that in Buckley a distinction had been made between contributions made in the context of election and expenditures made in a referendum campaign. Since the danger of a quid pro quo arrangement was thought to be greater in the former, the court had little difficulty determining that the prohibition on corporate contributions was justified by the government's interest in preventing corruption. The court's analysis applied a fortiori to the ban on contributions from government contractors. It stated that there is an even greater likelihood that the public will perceive corrupt relationships between elected officials and corporations when those firms have received government contracts. Furthermore, the court noted that the ban on gifts from contractors was narrowly drawn; since the broader statute applying to all corporations was not found to be overly restrictive, the statute applying to the subset of firms with government contracts could easily be sustained. The court concluded, "if this issue reaches the Supreme Court, the prohibition ... on contributions will be upheld because of the essential nature of 'free speech' and of the present speaker, a corporation doing business with the government."

VI. Conclusion

[T]he problem of money in politics has taken on a new urgency in the American Politics of the 1980s ... Financial irregularities

268. Id. at 591.
270. 462 F. Supp. at 249.
271. Id.
272. Id.
pose a pervasive and growing threat to the principle of 'one person, one vote,' and undermine the political proposition on which this nation is dedicated—that all men are created equal.\textsuperscript{273}

It has been argued here that when the government implicitly or explicitly uses its power to contract in order to generate campaign funds, the equal protection rights of out-of-power candidates and the voters who support them are infringed. The argument logically extends to other circumstances in which elected officials wrongfully use government resources to retain themselves in office; this argument has focused on public contracting largely because it is a particularly obvious and pervasive abuse. As Chicago's recent mayoral election shows, this misuse of public authority enables incumbent officeholders to generate a massive "political effort in favor of the ins and against the outs."\textsuperscript{274} That is precisely what was held to be unconstitutional by the Shakman court.\textsuperscript{275}

The extension of equal protection doctrine could be applied to campaign financing abuses consistent with precedents established in the franchise rights cases. Recent Supreme Court decisions in the areas of standing and legislative motivation, however, suggest that this extension may not soon come to pass.\textsuperscript{276}

Nevertheless, legislative action can be taken to prevent campaign finance abuses. Although the Supreme Court has invalidated restrictions on spending by individuals on first amendment grounds, the federal prohibitions on corporate, union and government contractors' expenditures still stand. It seems that at least four Supreme Court Justices are unwilling to rigidly apply the first amendment rationale developed in Buckley and Bellotti to the ban on corporate contributions;\textsuperscript{277} a ban that has been in effect since the first decade of this century. Moreover, because campaign spending by government contractors involves a greater danger of corrupting the electoral process, prohibitions on their election spending is even more likely to be upheld. In any case, direct contributions to candidates can be limited and the practice of aggressively eliciting contractor contributions can be banned. The current Supreme Court may be reluctant to find that the equal protection

\textsuperscript{273} Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 COLUM. L. REV. 609, 609-10 (1982).
\textsuperscript{274} Shakman v. Democratic Organization of Cook County, 435 F.2d at 270.
\textsuperscript{275} Id. See also notes 115, 140-43 supra and accompanying text.
\textsuperscript{276} See notes 143-191 supra and accompanying text.
clause compels the termination of these campaign finance abuses, but these abuses are surely ripe for legislative relief. The reform is long overdue.
NOTES
&
COMMENTS