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PUBLIC FINANCING OF ELECTION CAMPAIGNS:  
CONSTITUTIONAL CONSTRAINTS ON STEPS  
TOWARD EQUALITY OF POLITICAL INFLUENCE OF  
CITIZENS

JOEL L. FLEISHMAN†

The gradual development of the principle of equality is, therefore, a providential fact. It has all the chief characteristics of such a fact: it is universal, it is lasting, it constantly eludes all human interference, and all events as well as all men contribute to its progress.

Alexis de Tocqueville<sup>1</sup>

Once loosed, the idea of Equality is not easily cabined.

Archibald Cox<sup>2</sup>

Wealth, like race, creed, color, is not germane to one's ability to participate intelligently in the electoral process.

*Harper v. Virginia Board of Elections*<sup>3</sup>

The human personality is defined by infinitely diverse combinations of traits—some genetically inherited, some freely chosen, and some environmentally conditioned. In essence, the richly varying patterns, always life's glory as well as sometimes its dilemma, constitute inequalities. They differentiate human beings one from another, and serve as the criteria by which we ration the scarce resources of society, choose our friends, and, indeed, make all social and individual choices, including the choice in a democracy of those who are to govern. Inevitably, therefore, they come to bear in the political process.

Some of the inequalities of politically active men and women are highly pertinent to their fitness for public office. What could be more properly the bases for citizen choice than candidates' comparative integrity, honesty, vision, intelligence, courage, charisma, and creativity? Even if it were thought desirable to limit the differential influence of

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<sup>1</sup>I DEMOCRACY IN AMERICA 6 (Bradley ed. 1946).

<sup>2</sup>Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

<sup>3</sup>383 U.S. 663, 668 (1966) (Douglas, J.).

such characteristics in the political process, it would be impossible to do so.

There is one inequality, however, that is simultaneously not pertinent to a candidate's qualifications to govern and yet most susceptible to social limitation—the amount of wealth that one commands. To the extent that this irrelevant inequality is permitted to influence electoral choice, the democratic quality of the choice is inherently diminished. When public elections depend entirely on the mobilization of private wealth, they are vulnerable to the risk that pertinent and proper choice criteria will be subordinated to the improper influence of wealth.

Enough has already been written elsewhere about how exclusive reliance on private financing inevitably requires private wealth to play the leading role in the gate-keeping and handicapping of political campaigns.<sup>4</sup> The manifold consequences of that reliance—in deterring impecunious but otherwise able candidates from running; in admitting only those candidates favored by, and presumably favorable to, wealth; in according differential advantage to those candidates to whom wealth is most readily available; in skewing post-election policy or official performance in favor of donors—are too well known to require elaboration here.<sup>5</sup> While the philosophical and moral implications of those consequences have been explored elsewhere,<sup>6</sup> the possible legal remedies have not.

During virtually our entire history of attempting to cure the worst consequences of private financing of elections—now nearly seventy-five years, we have exclusively employed measures which *constrain* undesirable characteristics of the campaign process, such as limitations on the size and source of contributions and on the object and level of expenditures. Unlike many other countries, we have never utilized measures that *support* desirable characteristics in election campaigns, such as the public subsidization of political activity. Nearly all of the attempts to constrain election activity have been ineffective. This suggests that the basic method itself may be ill-suited to the task. Methods of election constraint inherently address symptoms of disorder, rather than the

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<sup>4</sup>See J. FLEISHMAN, D. DAVIES, G. REICHARDT, R. RICE, & C. SAWYER, *PRIVATE MONEY AND PUBLIC ELECTIONS* ch. 1 (forthcoming 1974) [hereinafter cited as FLEISHMAN].

<sup>5</sup>*Id.* ch. 2. See also H. ALEXANDER, *MONEY IN POLITICS* ch. 9 (1972); L. GIBSON, *MONEY AND SECRECY* (1972); A. HEARD, *THE COSTS OF DEMOCRACY* chs. 4, 6 (1960); R. MCCARTHY, *ELECTIONS FOR SALE* (1972). For a comparative international perspective, see A. HEIDENHEIMER, *POLITICAL CORRUPTION* (1970).

<sup>6</sup>See FLEISHMAN, *supra* note 4, ch. 1.

disorder itself. Only public support of elections—in whole or in part—seems capable of coming to grips with the underlying problem, the financing of elections with private money.

The central difficulty of American elections is that there is no feasible way to finance campaigns solely from small contributions. The geographical size of constituencies and the costs of reaching voters through the media preclude any significant reduction in expenditures. More than half of all campaign contributions at presidential<sup>7</sup> and congressional<sup>8</sup> levels have usually come from large donors, and nearly all domestic and foreign efforts to broaden the base of campaign contributions have failed.<sup>9</sup> This has forced politicians to rely on large contributions, and has created significant wealth-based inequalities in the exercise of political influence in American politics.

This article is premised on the desirability of governmental efforts to equalize citizen political influence in the United States, in the sense that government should act to ensure that inequalities among citizens in the amounts of money they command do not affect the extent of their political influence. If that premise is assumed, an important inquiry is how it might best be translated into effective public policy. This article will examine the comparative possibilities and problems of the two primal modes of effecting legal change—the litigative and the legislative.

While the raw materials of analysis—Constitution, cases, and statutes—are substantially identical in both modes, the questions to be asked are quite different. In assessing the litigative possibilities, we must ask, first, whether courts would find constitutional infirmities in our system of private financing, and secondly, whether they would recognize and implement an affirmative obligation to equalize citizen political influence. The legislative analysis, on the other hand, assumes congressional enactment of a public subsidy for elections aimed at equalizing citizen political influence—hardly an unlikely possibility in view of the number and prominence of proposals at present before Congress.<sup>10</sup> It then requires an examination of, first, the extent of con-

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<sup>7</sup>*Id.*

<sup>8</sup>In the 1972 elections, 68% of all contributions were in amounts larger than \$100. See Common Cause News Release, *Common Cause Releases Study of 1972 Congressional Campaign Finances*, 5 (Sept. 13, 1973).

<sup>9</sup>See FLEISHMAN, *supra* note 4, ch. 1.

<sup>10</sup>See, e.g., S. 2718, 93d Cong., 1st Sess. (1973) (introduced by Senator Pell); S. 2297, 93d Cong., 1st Sess. (1973) (introduced by Senators Kennedy and Scott); S. 1954, 93d Cong., 1st Sess. (1973) (introduced by Senators Stevenson and Mathias); S. 1103, 93d Cong., 1st Sess. (1973)

gressional authority to enact such legislation, and, secondly, the limitations posed to the congressional exercise of that authority by the equal protection clause<sup>11</sup> and the freedoms of speech and political association guaranteed by the first amendment.<sup>12</sup>

### A. DO COURTS HAVE AN AFFIRMATIVE OBLIGATION TO EQUALIZE?

The central question is whether the dependence of political opportunity on private wealth violates any rights that citizens may have to run for office, or to vote for, and be represented by, candidates of their choice. For the purpose of analysis, the issues that must be considered in answering the question may be subdivided into five topics: (1) Equal Protection and Federal Action; (2) Constraining Legislation and the Election Process Itself As Governmental Action; (3) Political Activity As A "Fundamental Interest"; (4) Wealth as a "Suspect Class"; and (5) Equality of Citizen Political Influence: Another Chapter?

#### 1. *Equal Protection and Federal Action*

If the following analysis establishes that the private financing of elections violates rights protected by the equal protection clause, those rights would be clearly protected by the fourteenth amendment against state action, and possibly inaction.

The fourteenth amendment states:

No *State* shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>13</sup>

That amendment, however, protects citizens' rights against *state*, not federal, action.

Does the Constitution contain a ban against denial of equal protection by federal action? The Supreme Court has consistently answered the question by finding in the due process clause of the fifth amendment<sup>14</sup> a ban against denials of equal protection by federal action which is analogous to the fourteenth amendment ban against denials of equal

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(introduced by Senator Hart); H.R. 8401, 93d Cong., 1st Sess. (1973) (introduced by Congressman Smith of Iowa); H.R. 7612, 93d Cong., 1st Sess. (1973) (introduced by Congressmen Anderson of Illinois and Udall); H.R. 10889, 93d Cong., 1st Sess. (1973) (introduced by Congressman Gunter).

<sup>11</sup>U.S. CONST. amend. XIV, § 1.

<sup>12</sup>U.S. CONST. amend. I.

<sup>13</sup>U.S. CONST. amend. XIV, § 1 (emphasis added).

<sup>14</sup>U.S. CONST. amend. V.

protection by state action.<sup>15</sup> The case usually quoted with approval is *Bolling v. Sharpe*, in which Chief Justice Warren said:

The fifth amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this court has recognized, discrimination may be so unjustifiable as to be violative of due process.<sup>16</sup>

While this formulation leaves open the question of whether the same breadth of equal protection is afforded by fifth amendment due process as by fourteenth amendment equal protection, the Court has said in every succeeding case in which the issue has been presented<sup>17</sup> almost precisely what it said in applying the principle in *Bolling*, namely, that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than on the states.<sup>18</sup> Although the first-quoted *Bolling* language suggests the contrary,<sup>19</sup> the consensus seems to be "that the better view of the Due Process Clause of the Fifth Amendment may be to assume that its equal protection facet, applying to the Federal government, is identical to that of the Fourteenth Amendment applying to the States."<sup>20</sup>

## 2. *Constraining Legislation and the Election Process Itself As Governmental Action*

Early cases required a finding of "state action" as a first step in analyzing whether the equal protection clause (and by analogy, the due process clause of the fifth amendment) had been violated. While there is considerable doubt as to the continued need to find "state action"<sup>21</sup>

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<sup>15</sup>*Shapiro v. Thompson*, 393 U.S. 618, 642 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964). See also *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714, 721 (1963) (dictum).

<sup>16</sup>347 U.S. 497, 499 (1954).

<sup>17</sup>See cases cited note 15 *supra*.

<sup>18</sup>347 U.S. at 500.

<sup>19</sup>See text accompanying note 16 *supra*.

<sup>20</sup>Hughes, *Constitutional Limitations on Territorial Differences in Federal Food Assistance*, 4 SUFF. U.L. REV. 742, 750 (1970). See also Harvith, *Federal Equal Protection and Welfare Assistance*, 31 ALBANY L. REV. 210 (1967).

<sup>21</sup>As we deal with both federal and state action, we will use "state action" to embrace both.

in any significant sense before the equal protection guaranty can be invoked,<sup>22</sup> there already exists a variety of legislation regulating campaign financing which might be regarded as fulfilling the "state action" requirement. This legislation is found in the Federal Election Campaign Act<sup>23</sup> and in comparable state laws<sup>24</sup> that establish ceilings either on the amount that donors may contribute to political campaigns or on the amount that candidates may spend.

These limitations not only restrict contributions and expenditures in excess of the ceilings, but, by definition, also *permit* money to be deployed below the ceilings. Therein lies one possible infirmity. To the extent that they expressly sanction the use of a certain amount of private funds in public elections, they may impart to the use of those funds sufficient governmental character to constitute governmental action.

So far as formal legal requirements are concerned, the opportunity to run for office cannot be conditioned on any substantial monetary barrier.<sup>25</sup> Can it be conditioned, however, on an implied requirement that a citizen must have, or have access to, the permitted amount of funds with which to wage his campaign for office? Is such a condition unconstitutional despite the fact that it is informal (in the sense that one is not legally compelled to spend any money at all in order to run) and only permissive (in the sense that it allows, but does not mandate, other candidates to spend up to the ceiling in behalf of their candidacy)?<sup>26</sup>

If a court were willing to augment its scrutiny of the statutes with judicial notice that, except in extraordinary situations, a candidate cannot win an election without spending a considerable amount of money, it might possibly find the requisite governmental action. Since any high contribution or expenditure ceilings will be out of reach of the poorest citizens and thus deny them a meaningful chance to run for public office,

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<sup>22</sup>See Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Silard, *A Constitutional Forecast: The Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

<sup>23</sup>Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.A.). The Act establishes ceilings only on expenditures for media, not on expenditures as a whole or on campaign contributions. S. 372, amending the Act to establish contribution ceilings, passed the Senate on July 30, 1973.

<sup>24</sup>For a listing of these provisions, see 1970-1971 THE BOOK OF THE STATES 44-47 (Council of State Governments 1970).

<sup>25</sup>See text accompanying notes 68-76 *infra*.

<sup>26</sup>Senator Sam J. Ervin is an exception in many respects, not the least significant of which is his ability to run for state wide office, campaigning on \$21,000 and making a pro rated return of the excess. King, *That Watergate Senator Down Home in Carolina*, N. Y. Times, Aug. 16, 1973, at 72, col. 7 (late city ed.).

those ceilings could be construed as governmental action. A court might very well reason that, by *permitting* some candidates to spend large amounts of money which are not available to poorer citizens and candidates, the legislation inevitably violates the equal protection requirement.

To counter a finding of state action, one might argue that the spending of money in elections has always been regarded as more a private, rather than a public, act and as an appropriate expression of voter and interest group preferences.<sup>27</sup> Such differences among citizens' access to funds, it is argued, were created by private, not governmental, acts and are outside the scope of governmental equalization.

But while it may be true that the differences themselves are outside governmental reach, their impact in an election has been considered a proper subject of regulation by courts and legislators since the beginning of the century.<sup>28</sup> Governments *have* regulated the sources and amount of contributions to political campaigns, and *have* regulated how much money candidates might spend in seeking particular offices.

Moreover, since *Shelley v. Kraemer*,<sup>29</sup> it *has* been generally understood that "whenever legal consequence is to be given to the activities of private parties, state action is thought to be present."<sup>30</sup> We know that even governmental inaction in some circumstances where action is required may constitute a violation of equal protection:

[U]nconstitutional inequities may arise from the impact of a classification by government that fails to compensate for significant differences in classes that are not themselves the direct product of governmental action—that is, a state can deny equal protection of the laws by treating unequals equally. There may, in fact, have been no formal governmental classification in the traditional sense at all, but only a toleration by government of private conduct that has produced the inequality. To

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<sup>27</sup>See Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389, 459 (1973).

<sup>28</sup>The first explicit regulation of campaign financing was the prohibition of corporate contributions, enacted in 1907. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864. In 1910, Congress enacted the first contribution and expenditure law. Act of June 25, 1910, ch. 392, 36 Stat. 822. In 1911, an expenditure ceiling in nomination and election campaigns was imposed on all congressional candidates. Act of Aug. 19, 1911, ch. 33, 37 Stat. 25. The disclosure provisions were upheld in *Burroughs and Cannon v. United States*, 290 U.S. 534 (1934), but the expenditure and contribution limitations have never been expressly sustained. There are several early cases, however, explicitly recognizing the appropriateness of legislation to regulate the use of money in campaigns. See, e.g., *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Ex parte Curtis*, 106 U.S. 371 (1882).

<sup>29</sup>334 U.S. 1 (1948).

<sup>30</sup>*Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1072 (1969).



rectify these denials of equal protection the state may be required, if one wishes to put it this way, to perform an "affirmative duty."<sup>31</sup>

Furthermore, even under a much stricter "governmental action" requirement than the one thought currently to be in vogue, what could be more substantial governmental action than that which constitutes the election process itself—the quintessential democratic process for choosing leaders and laws to govern the people?

It was precisely such a consideration which led the court in *Terry v. Adams*<sup>32</sup> to invalidate the Texas white primary. Four members of the Court said that, "[w]hen a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play."<sup>33</sup> Professors Van Alstyne and Karst ask the pertinent question:

How did the State of Texas "structure" its electoral apparatus? By doing nothing; by permitting the Jaybirds to run a preprimary election to determine the candidates the Association would support in the Democratic primary which followed. How did this failure to act "devolve" upon the Jaybirds the choice of officials? There was a fifty-year history of Jaybird domination of county elections, virtually unopposed by other candidates. When a private election of this kind was the only one which counted, then state action was to be found in mere permission for the election to be held.<sup>34</sup>

Thus, "[w]hile the state did not create the economic inequality, it cannot treat all persons the same when that economic inequality will, under the standards set by the state, significantly impair so important an interest as the indigent's opportunity to vote."<sup>35</sup> The fact that the discrimination is accomplished in a non-mechanical, rather than explicitly mechanical way is "arguably more invidious [because] [b]y making the state's intrusion into the process less visible, pre-election discrimination may result in an election fair in form though not in substance."<sup>36</sup>

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<sup>31</sup>Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 58.

<sup>32</sup>345 U.S. 461 (1953).

<sup>33</sup>*Id.* at 484 (Clark J., concurring).

<sup>34</sup>Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 23-24 (1961).

<sup>35</sup>Karst & Horowitz, *supra* note 31, at 65.

<sup>36</sup>*Recent Cases: Equal Protection of the Laws*, 84 HARV. L. REV. 1547, 1554 (1971), discussing *Shakman v. Democratic Organization*, 435 F. 2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1972).

A plausible case can be made, therefore, that sufficient governmental action exists to warrant court intervention. But that is only the first step. Assuming a finding of governmental action, it would still remain for the Court to choose a standard of scrutiny by which to measure the discrimination inherent in the action.<sup>37</sup> That involves looking first at the nature of the rights involved and secondly at the character of the discrimination.

### 3. *Political Activity as a "Fundamental Interest."*

We have come much further in policy than we have in time since 1944, when the political character of political rights apparently caused the Court to question whether it could protect against their infringement.<sup>38</sup> Until the Sixties, a long line of case holdings supported the belief that, absent congressional action, the courts could do little to remedy equal protection violations of political rights by state governments.<sup>39</sup> Today, however, the presumption is exactly opposite; since *Baker v. Carr*,<sup>40</sup> there has been no real doubt that the courts may protect political rights. In first amendment cases, these rights are invariably given a "preferred position"<sup>41</sup> among already preferred rights, and in equal protection cases they are regarded as "fundamental interests."<sup>42</sup>

## *Chapter One: Equal Voting*

*Baker* was only the preface to the evolution of the Court's attitude

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<sup>37</sup>See text accompanying notes 214-49 *infra*. In order to deal more precisely with the court's likely choice of a particular formulation of the test by which it will determine whether or not an equal protection violation has occurred, treatment of that matter will be postponed until the discussion of specific legislative proposals. For the moment, we will assume that strict scrutiny will be applied.

<sup>38</sup>"Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Snowden v. Hughes*, 321 U.S. 1, 11 (1944).

<sup>39</sup>*Breedlove v. Suttles*, 302 U.S. 277 (1937); *Mason v. Missouri*, 179 U.S. 328 (1900); *Williams v. Mississippi*, 170 U.S. 213 (1898); *McPherson v. Blacker*, 146 U.S. 1 (1892); *Minor v. Happensett*, 88 U.S. (21 Wall.) 162 (1874); *Drueding v. Devlin*, 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125 (1965).

<sup>40</sup>369 U.S. 186 (1962).

<sup>41</sup>*Kovacs v. Cooper*, 336 U.S. 77, 88 (1949); *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The phrase probably entered judicial language in Mr. Justice Stone's dissent in *Jones v. Opelika*, 316 U.S. 584, 608 (1942). See also *Cahn, The Firstness of the First Amendment*, 65 *YALE L.J.* 464 (1956).

<sup>42</sup>*Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

concerning its competence to protect political rights. *Gray v. Sanders*,<sup>43</sup> decided two years later, was the real opening of the first chapter, a chapter now twelve years long, entitled "Equal Voting." Declaring that congressional districting was subject to the equal protection guarantee, the Court worked out the reasoning it would use over and over again to fill out the chapter:

How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlines many of our decisions.<sup>44</sup>

*Reynolds v. Sims*,<sup>45</sup> decided the next year, extended the scope of equal protection to both houses of state legislative bodies. Declaring that "[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature,"<sup>46</sup> the Court created a new metaphor, "equally effective voice." That voice, the Court explained, "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."<sup>47</sup>

The policy had been proclaimed; then came its refinement. How equal was equal to be? In *Wesberry v. Sanders*,<sup>48</sup> the Court prescribed that congressional districts be mathematically equal, which it later defined as "precise mathematical equality" in *Kirkpatrick v. Preisler*,<sup>49</sup> and *Wells v. Rockefeller*.<sup>50</sup> State legislative bodies, however, are appar-

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<sup>43</sup>372 U.S. 368 (1963).

<sup>44</sup>*Id.* at 379-80.

<sup>45</sup>377 U.S. 533 (1964) (requiring that both houses be constituted on a population basis).

<sup>46</sup>*Id.* at 565.

<sup>47</sup>*Id.* at 555.

<sup>48</sup>376 U.S. 1 (1964).

<sup>49</sup>394 U.S. 526 (1969).

<sup>50</sup>394 U.S. 542 (1969).

ently not to be held to so strict a standard.<sup>51</sup>

In these cases, the Court barred the subtle debasement of the *value* of votes cast. In addition, it has also utilized the equal protection clause since 1965 to strike down a number of direct burdens on the *casting* of the vote. Among those invalidated during that period have been state laws or local ordinances excluding servicemen from voting,<sup>52</sup> restricting the vote in school district elections to owners or lessees of real property and parents of school children,<sup>53</sup> and restricting the vote in bond elections to those owning real estate.<sup>54</sup> For the time being, the Court has refused to extend its ban on property ownership prerequisites to voting to include elections in certain special districts,<sup>55</sup> but the opinions make clear that the general rule of the other cases is in full effect with respect to all elections in general governmental units.<sup>56</sup>

The most well-known of the vote-casting cases were *Harper v. Virginia Board of Elections*,<sup>57</sup> which invalidated the poll tax, and *Dunn v. Blumstein*,<sup>58</sup> which prohibited residency requirements, apparently in excess of thirty days, as prerequisites to voting.<sup>59</sup> By 1972, the Supreme Court seemed to be quite clear about the question of burdens on voting. "In decision after decision," it said in *Dunn*, "this Court has made clear that a citizen has a Constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."<sup>60</sup> Thus, what began as a vote became first, in *Reynolds*, a voice, and then, in *Dunn*, a "right to participate on a equal basis" in elections.

<sup>51</sup>In *White v. Regester*, 93 S. Ct. 2332 (1973), a Texas lower house apportionment with a 9.9% variation between largest and smallest units, and an average deviation of 1.82% from precise mathematical equality, was sustained. In *Mahan v. Howell*, 410 U.S. 315 (1973), a Virginia lower house apportionment with a 16.4% variation between largest and smallest units, and an average deviation of 3.89% from precise mathematical equality was similarly sustained.

<sup>52</sup>*Currington v. Rash*, 380 U.S. 89 (1965).

<sup>53</sup>*Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

<sup>54</sup>*City of Phoenix v. Kolodziejcki*, 399 U.S. 294 (1970); *Cipriano v. Houma*, 395 U.S. 701 (1969).

<sup>55</sup>*Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973) (per curiam); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). *Salyer* sustained limiting the vote for board of directors of a water district to landowners within the district, and permitted weighting the vote according to acreage owned. *Associated* involved the initial vote to create a water district which was similarly limited and weighted.

<sup>56</sup>Cases cited note 55 *supra*.

<sup>57</sup>383 U.S. 663 (1966).

<sup>58</sup>405 U.S. 330 (1972).

<sup>59</sup>*See Woodsum v. Boyd*, 341 F. Supp. 448 (1972). *But see Marston v. Lewis*, 410 U.S. 679 (1973), which sustained a fifty day residency period for voting in Arizona.

<sup>60</sup>405 U.S. at 336.

*Chapter Two: Equal Candidacy*

Chapter Two began in 1968 with *Williams v. Rhodes*,<sup>61</sup> a case of great constitutional importance but widely known chiefly because it enabled Governor Wallace to gain access to the Ohio presidential election ballot despite his failure to meet the procedural and substantive requirements of that state's complicated election law. The exact rationale of the decision is not entirely clear on first examination, since Mr. Justice Black, speaking for five members of the Court, utilized both first amendment and equal protection language in reaching the Court's result,<sup>62</sup> as did Mr. Justice Douglas' separate concurring opinion. As might have been expected, Mr. Justice Harlan continued his erudite and lonely war against the extension of the equal protection clause to political rights.<sup>63</sup> Thus, six members of the Court shared the belief that Ohio's complicated requirements for minor party access to the printed ballot violated the rights of minor parties to the freedoms of political association and speech, as well as the right of access to a ballot position equal to that of major parties.

The Court, however, did not find merely an infringement of the rights of those citizens who actually undertook the effort to organize political groups. Going further, it traced those rights back to the right of voters "to cast their votes effectively,"<sup>64</sup> declaring that "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."<sup>65</sup> By deriving infringement of the candidate's right to equal ballot access from the voter's right to a wide choice among candidates, the Court immeasurably strengthened the position of the candidate's right, and created a formula which has now become standard in all equal political participation cases, including recent opinions of Chief Justice Burger.<sup>66</sup> This augmented power of equal protection has already had enormous consequences in subsequent decisions,<sup>67</sup> and seems likely to hold even greater promise for the possibility of achieving equality of citizen influence in all facets of the election process.

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<sup>61</sup>393 U.S. 23 (1968).

<sup>62</sup>*Id.* at 30-34.

<sup>63</sup>*Id.* at 41-48.

<sup>64</sup>*Id.* at 30.

<sup>65</sup>*Id.* at 31.

<sup>66</sup>*Bullock v. Carter*, 405 U.S. 134 (1972).

<sup>67</sup>*See Bullock v. Carter*, 405 U.S. 134 (1972); *Gonzales v. City of Sinton*, 319 F. Supp. 189 (S.D. Tex. 1970) (mem.); *Stapleton v. City of Inkster*, 311 F. Supp. 1187 (E.D. Mich. 1970).

### Chapter Three: Financial Barriers to Candidacy

Chapter Three has barely begun. After *Williams* had pointed the way, and *Jenness v. Fortson*<sup>68</sup> reinforced the direction, a number of lower federal courts began striking down property ownership prerequisites to candidacy.<sup>69</sup> At the same time, the constitutionality of the long utilized candidate filing fees divided still other federal courts.<sup>70</sup> One of the latter group of cases, *Carter v. Dies*,<sup>71</sup> in which a Texas filing fee statute was invalidated, gave the Court the opportunity to speak clearly on state-imposed financial barriers to candidacy. Deciding the case under the name of *Bullock v. Carter*,<sup>72</sup> a unanimous Court affirmed the lower court's decision invalidating the filing fee in question. As in *Williams*, the Court traced the candidate's burden back to harm to the voter. Chief Justice Burger, in explaining the use of the strict scrutiny standards by the Court, used language identical in spirit with Mr. Justice Black's words in *Williams*:

The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.<sup>73</sup>

The filing fee scheme involved in *Bullock* was unusual. Its purpose

<sup>68</sup>403 U.S. 431 (1971). The Court did, however, hold a different Georgia ballot access law to be constitutional.

<sup>69</sup>*Gonzales v. City of Sinton*, 319 F. Supp. 189 (S.D. Tex. 1970) (mem.); *Stapleton v. City of Inkster*, 311 F. Supp. 1187 (E.D. Mich. 1970).

<sup>70</sup>Upholding the fees were *Spillers v. Slaughter*, 325 F. Supp. 550 (M.D. Fla. 1971) (3-judge court); *Fowler v. Adams*, 315 F. Supp. 592 (M.D. Fla. 1970) (3-judge court); *Wetherington v. Adams*, 309 F. Supp. 318 (N.D. Fla. 1970) (3-judge court). Invalidating the fees were *Carter v. Dies*, 321 F. Supp. 1358 (N.D. Tex. 1970) (3-judge court); *Thomas v. Mims*, 317 F. Supp. 179 (S.D. Ala. 1970); *Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035 (N.D. Ga. 1970) (3-judge court); *Jenness v. Little*, 306 F. Supp. 925 (N.D. Ga. 1969) (3-judge court), *appeal dismissed as moot sub. nom.* *Matthews v. Little*, 397 U.S. 94 (1970). See also Avins, *The Right to Hold Public Office and the Fourteenth and Fifteenth Amendments*, 18 MERCER L. REV. 367 (1967); Ireland & Ireland, *The Political Arena: Revolution in the Barriers to Entry*, 1970 LAW & SOCIAL ORDER 213; Wassenaar, *The Emerging Right to Candidacy in State and Local Elections: Constitutional Protection of the Voter, the Candidate, and the Political Group*, 17 WAYNE L. REV. 1543 (1971); Note, *The Constitutionality of Candidate Filing Fees*, 70 MICH. L. REV. 558 (1972); Note, *Equal Protection and Property Qualifications for Office*, 118 U. PA. L. REV. 129 (1969). The latter contains a comprehensive listing of all state qualifying fee requirements.

<sup>71</sup>321 F. Supp. 1358 (N.D. Tex. 1970) (3-judge court).

<sup>72</sup>405 U.S. 134 (1972) (Powell & Rehnquist, J.J., not participating).

<sup>73</sup>*Id.* at 142-43.

was to pay the cost of conducting party primary elections. The fee was scaled according to the population embraced within the jurisdiction of the office being sought, the salary of the office, the length of the term, and other factors; the amount to be assessed was determined for each office in each election by the county executive committee of the political party. While the plaintiff's fee was 1400 dollars to run for the Democratic nomination for Commissioner of the General Law Office, the fees that could be assessed in races for other offices ranged as high as 8900 dollars. Clearly this was a filing fee at its worst, and the Court took care to point out that "nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts."<sup>74</sup> But the Court's language makes clear that the only filing fee it would deem reasonable would be one which "candidates could be expected to fulfill from their own resources or at least through modest contributions."<sup>75</sup> In language which could be crucial to a determination of the constitutionality of election financing, the Court went on to note:

Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. The effect of this exclusionary mechanism on voters is neither incidental nor remote. Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments, a phenomenon that can hardly be rare in light of the size of the fees, it tends to deny some voters the opportunity to vote for a candidate of their choosing. . . .<sup>76</sup>

Will there be a fourth chapter, entitled "Equality of Citizen Political Influence?" At present, there are already enough case holdings and court dicta to justify it. If the prohibitive cost of running an election is not a sufficient violation of the prospective candidate's personal rights, it is arguably at least sufficient to deprive those voters who favor him

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<sup>74</sup>*Id.* at 149.

<sup>75</sup>*Id.* at 143.

<sup>76</sup>*Id.* at 143-44. See also *Brown v. Chote*, 411 U.S. 452 (1973), sustaining a preliminary injunction enabling a candidate for U.S. House of Representatives to file for election without paying a filing fee of \$425, 1% of the annual salary.

of the right to vote for him. *Bullock* could provide the means of transforming the one-man-one-vote requirement of *Gray* and *Reynolds* into a less euphonic but immeasurably more valuable requirement of one-citizen-one-influence-unit with respect to public elections. That is the only way that each citizen's voice can really be made equal to the voices of every other citizen, and that the non-germane factor of wealth, stressed in *Harper*,<sup>77</sup> can be eliminated in elections. Until *any* citizen can run for office, whether or not he has or can get from private sources the money to finance a campaign, voters will not have the right, in fact, to vote for "whomsoever they please."<sup>78</sup>

#### 4. *Wealth As a Suspect Class*

The right of impecunious voters to equal electoral participation with the wealthy includes a corollary right—the right to be free of wealth-based electoral influence in excess of one-citizen-one-influence-unit. That right has considerable support in two cases which have not yet been fully considered.

Equal protection analysis in the Sixties—the so-called "New Equal Protection"—gave the Court a choice as to the intensity of scrutiny with which it would examine particular state actions. If the right asserted was deemed a "fundamental interest," as voting and candidacy were, a strict standard of scrutiny would be applied, and the state would be required to prove a "compelling interest" in order to justify the restriction.<sup>79</sup> In the absence of such a "fundamental interest," the state would be required to demonstrate the existence only of "a not irrational basis" for the law under review.<sup>80</sup>

Strict scrutiny would also be applied to classifications based on wealth. Notwithstanding Mr. Justice Harlan's vigorous and scholarly attempt to prevent the creation of wealth as a "suspect class,"<sup>81</sup> the Court, in the landmark case of *Harper v. Virginia Board of Elections*,<sup>82</sup> did just that. In invalidating the poll tax, which had already been repealed by Congress in elections for federal office and by state legisla-

<sup>77</sup>*Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

<sup>78</sup>*Williams v. Rhodes*, 393 U.S. 23, 39 (1968) (Douglas, J., concurring).

<sup>79</sup>See text accompanying notes 214-49 *infra*.

<sup>80</sup>*Goesaert v. Cleary*, 335 U.S. 464 (1948); *Kotch v. Board of River Port Pilot Comm'rs.*, 330 U.S. 552 (1947).

<sup>81</sup>See his dissents in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 680-86 (1966), and in *Reynolds v. Sims*, 377 U.S. 533, 589-632 (1964).

<sup>82</sup>383 U.S. 663 (1966).



tures in elections in all but four states,<sup>83</sup> the Court asserted that "lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."<sup>84</sup> While Mr. Justice Douglas, in his engagingly peremptory way, failed to offer any evidence of this tradition, the principle that wealth is a suspect class appears to have become firmly established, at least in political participation cases, and accepted by all members of the present Court.<sup>85</sup> Speaking for a unanimous Court, Mr. Justice Burger explained in *Bullock v. Carter*:

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 *Harper*, that the laws must be "closely scrutinized". . . .<sup>86</sup>

Relying on these two cases, the argument can be made that forcing political campaigns to subsist on private funds inherently gives wealthy citizens vastly greater voice than other citizens in electoral decisions. The reasoning might be as follows: the opportunity to run for public office is available only to those who have or can raise sufficient funds to mount a campaign. A candidate who cannot obtain those funds cannot run. As a consequence, those without, or without access to, funds are effectively denied the right to candidacy, and those citizens who would have voted for the excluded candidates have been denied their right to an effective vote.

Then, drawing upon *Harper* to the effect that "wealth, like race, creed, or color, is not germane to one's ability to participate in the electoral process,"<sup>87</sup> it would be reasonable to decide that wealth is an inappropriate and impermissible means of determining who shall and shall not be permitted, in fact if not in law, to run for public office. Next, relying on the recent holding in *Boddie v. Connecticut*,<sup>88</sup> it would be possible to analogize the government's monopoly over elections to its monopoly over divorce proceedings, which led the Court to invalidate the use of a fee as a prerequisite to instituting action for divorce.<sup>89</sup>

<sup>83</sup>*Id.* at 680.

<sup>84</sup>*Id.* at 668.

<sup>85</sup>For an example of the Court's unwillingness to regard wealth as a suspect class in other circumstances, see *James v. Valtierra*, 402 U.S. 137 (1971) (finding no equal protection violation by a California constitutional provision requiring the placement of low income housing projects to be submitted to community referenda).

<sup>86</sup>405 U.S. 134, 144 (1972).

<sup>87</sup>383 U.S. 663, 668 (1966).

<sup>88</sup>401 U.S. 371 (1971).

<sup>89</sup>*But cf.* *United States v. Kras*, 409 U.S. 434 (1973), which sustained the prerequisite of a fee

Furthermore, while electoral influence in our democracy will depend on many different resources, money, which is among the most unequally distributed resources in any society, is one on which it should *not* depend. Moreover, by failing to subsidize candidates, thereby forcing elections to be financed by private funds, the government invidiously discriminates against those who have insufficient funds to back candidates. Such a default allows superior economic power to dilute the effectiveness of the votes of the less wealthy. The conclusion could be buttressed with the observation that wealth-derived campaign influence is much more antagonistic to equal political participation than poll taxes, property qualifications for voting, and large filing fees.

Would the Court reason this way? Predictions are inherently hazardous, but the *Bullock* Court was not very far away:

[A]t the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor . . . [which] is endemic to the system. This disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause, and there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee. But we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.<sup>90</sup>

##### *5. Affirmative Obligation to Achieve Equality of Citizen Electoral Influence: Another Chapter in Litigative History?*

It does not require an especially liberal interpretation of the equal protection cases, therefore, to read them as implying an obligation on government to reduce, if not eliminate, the influence of the suspect category of wealth upon effective participation in the nation's political life. Nearly all of the major political equal protection cases *do* require affirmative state action. Even before some of the recent decisions, Professor Archibald Cox made the point emphatically:

[T]he cases require the state to make changes in the *status quo*—some alteration of a widespread and long accepted practice, some improvement from the standpoint of human rights. . . . Earlier cases sustaining a constitutional claim were typically mandates directing the gov-

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in order to file for bankruptcy, which was regarded as not being a constitutional right.

<sup>90</sup>405 U.S. at 144.

ernment to refrain from a particular form of regulation. Now the emphasis is upon measures the states must adopt in carrying on their activities and steps they must take to offset disabilities not of their creation. . . .<sup>91</sup>

Furthermore, after hearing the Court's own language above, it is hardly necessary to add that "the electoral process is . . . the single most appropriate place to begin the construction of affirmative state obligations to assure equality."<sup>92</sup> Especially is that the case where, as in *Boddie v. Connecticut*,<sup>93</sup> a "fundamental right" is involved—access to public office—and the government has a "monopoly" over it. In such circumstances, as in *Terry v. Adams*,<sup>94</sup> the government has structured its process so that wealth is determinative, and it must, therefore, be responsible for the consequences.

The problem, however, is in the matter of remedy. Unlike all other equal protection cases, which required affirmative action or restraint of burdensome conduct, the only conceivable remedies to the inequitable system of private campaign financing would require a great deal of money to implement. A court that wished to act would 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 million dollars a year. In the equal protection cases discussed above, the action mandated by the Court rarely entailed spending more than marginal amounts of money, since they generally involved *how* processes, which were already functioning, should be redesigned. The incremental costs of furnishing a record to indigents on appeal<sup>95</sup> or of providing counsel to a criminal indigent on appeal<sup>96</sup> are minimal compared to the projected costs of public subsidy of elections. Even extending the right to assigned counsel in criminal trials,<sup>97</sup> now available in all proceedings in which a jail sentence is to be imposed,<sup>98</sup> involves an aggregate outlay which is much less than the cost of full

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<sup>91</sup>Cox, *supra* note 2, at 92-93.

<sup>92</sup>Karst & Horowitz, *supra* note 31, at 67.

<sup>93</sup>401 U.S. 371 (1971) (involving access to the divorce court).

<sup>94</sup>345 U.S. 461 (1953) (involving election process structured so that "unofficial primary" was determinative).

<sup>95</sup>See *Griffin v. Illinois*, 351 U.S. 12 (1956).

<sup>96</sup>See *Douglas v. California*, 372 U.S. 353 (1963).

<sup>97</sup>*Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>98</sup>*Argersinger v. Hamlin*, 407 U.S. 25 (1972).

election subsidy.<sup>99</sup> While those cases offer some support for creation of an affirmative obligation irrespective of great cost, the right to counsel explicitly appears in the Bill of Rights, and its broadening was achieved over a span of forty years.<sup>100</sup>

It is unlikely that the Court would create an affirmative obligation where the costs of performing it are as substantial as they would be here. In the only recent case raising a similar equal protection issue, the question of equalization of school district expenditures, the Court was unwilling to find an affirmative obligation to equalize, although there it denied that the inequality was keyed to wealth.<sup>101</sup>

A second flaw in the outlook is the problem of governmental action. Most of the equal protection cases discussed here have dealt with actively discriminating governmental practices—that is governmental *action*, as distinguished from *inaction*. While all of the arguments made above are valid, there *is* a fairly clear line between a formal statutory prerequisite to the performance of a protected act, and a statute permitting protected activity but limiting the amount of campaign contributions and expenditures. This is a line which courts would be exceedingly reluctant to ignore. Most likely, the existence of laws limiting contributions and expenditures would work against, rather than for, a finding of constitutional infringement because such laws have always been understood to constitute efforts to *reform* the political process. Ameliorative legislation in general bears a burden of equal protection justification before the courts which is less onerous than that carried by restrictive legislation.<sup>102</sup>

The case, then, is not terribly persuasive. While the wisdom of such a course may be clear, there are too many weak links in the legal chain. For a court to venture unaided by explicit legislation into this particular political thicket, to invalidate the basic arrangements by which elections are supported, and to declare that governments have to appropriate vast sums of money would require a kind of judicial activism which any court would be likely to shun, and with good reason.

The judicial activism of the Warren Court, which for the first time

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<sup>99</sup>The *annual* cost of subsidizing all primary and general elections for President, Vice President, and Congress, assuming four candidates in each major party's primary, a primary in both parties for every office, and a subsidy level of fifteen cents per person of voting age in the jurisdiction involved, would be \$221,000,000. See FLEISHMAN, *supra* note 4, ch. 7.

<sup>100</sup>Powell v. Alabama, 287 U.S. 45 (1932).

<sup>101</sup>San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

<sup>102</sup>See Katzenbach v. Morgan, 384 U.S. 641 (1966). See also Cox, *supra* note 2, at 106-08.

permitted major judicial interventions into political processes, was aimed at a critical state of representational disrepair which seemed hopeless of remedy without Court action. Some legislatures were refusing to perform their decennial congressional redistricting duties at all, while the plans of others hardly contained models of compact districts of roughly the same size. The legislatures themselves were badly malapportioned, grossly over-representing some citizens at the expense of others. Most important, in nearly all cases<sup>103</sup> there were *no* available means of bringing about the desired changes because the interests that would have their influence diminished by proper congressional districting and legislative apportionment were themselves in control of the legislatures that were charged with effecting the reforms. It is difficult to see how the Court could have avoided activism in those circumstances.<sup>104</sup>

Campaign financing is in quite a different state today from that in which legislative districting was ten years ago. We have already witnessed congressional enactment of major campaign reform legislation,<sup>105</sup> and there are some three to four dozen campaign finance reform proposals pending in Congress at the present time. If nothing were to come of these legislative efforts after several years, it is not inconceivable that courts might bring themselves to act. But it is hard to imagine that reasonable judges would be willing to rush in where congressmen are still treading. For if congressmen are not angels, neither are judges fools.

Most observers of the Court, however, would have predicted, prior to *Baker* and *Reynolds*, that it would not act as it finally did. Hindsight rationalizes what foresight denied—the seeming inevitability of action then. It is conceivable that comparable action will occur now, but any sanguine estimate must be less than hopeful.

The financing of campaigns is every bit as crucial to representational fairness as congressional districting and legislative apportionment. But this time the burden is squarely on Congress, and the courts will undoubtedly be noting what is enacted there. Attention must there-

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<sup>103</sup>In some cases, however, there was the possibility of a referendum.

<sup>104</sup>Professor Bickel, with characteristic eloquence, argues to the contrary, A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

<sup>105</sup>Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.A.); Presidential Election Campaign Fund Act, Pub. L. 92-178, tit. VIII, 85 Stat. 562 (codified in 26 U.S.C. §§ 9001-13 (Supp. I, 1971)); the Revenue Act of 1971, Pub. L. No. 92-178, tit. VII, 85 Stat. 560 (codified in scattered sections of 26 U.S.C., *as amended*, (Supp. I, 1971)).

fore be turned to the sources and limits of congressional power to enact such legislation.

## B. THE SOURCES AND SCOPE OF CONGRESSIONAL AUTHORITY

### 1. *Sources of Authority Over Congressional Elections*

Because the power of Congress is clearest when congressional elections are involved, it is best to begin there. There are two primary sources of that power—one explicit and the other general. The explicit power is contained in article I, section 4, of the Constitution, which provides as follows:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.<sup>106</sup>

The rationale for expanding the obvious meaning of this section to cover any aspect of congressional elections, including voting age,<sup>107</sup> was first proclaimed in 1884 in *Ex parte Yarbrough*:

That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. . . . [I]t must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.<sup>108</sup>

Referring to the times, places, and manner clause, the Court has held elsewhere:

It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous

<sup>106</sup>U.S. CONST. art. I, § 4.

<sup>107</sup>*Oregon v. Mitchell*, 400 U.S. 112 (1970).

<sup>108</sup>*Ex parte Yarbrough*, 110 U.S. 651, 657-58 (1884).

requirements as to procedures and safeguards which experience shows are necessary in order to enforce the fundamental right involved.<sup>109</sup>

The general power over congressional elections is contained in the necessary and proper clause.<sup>110</sup>

Both of these powers are theoretically subject to constraint by other constitutional provisions. Article I, section 2 defines the electorate for House members from a given state as the same as that for "the most numerous Branch of the State Legislature,"<sup>111</sup> and the seventeenth amendment similarly defines the electorate for Senator.<sup>112</sup> Both of these provisions imply considerable state power over the definition of the electorate, but its exercise has been consistently<sup>113</sup> held to be completely modifiable by congressional action under the times, places, and manner clause, and the necessary and proper clause. Indeed, the generally accepted formulation is that of Mr. Justice Stone in *United States v. Classic*:

While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Art. I, § 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."<sup>114</sup>

## 2. Sources of Authority Over Presidential Elections

There is no explicit constitutional source of authority for Congress to regulate presidential elections. Indeed, the Constitution appears to leave the matter up to the states. Article II, section 1 provides that:

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<sup>109</sup>*Smiley v. Holm*, 285 U.S. 355, 366 (1932).

<sup>110</sup>U.S. CONST. art. I, § 8, cl. 18; *United States v. Classic*, 313 U.S. 299, 315 (1941).

<sup>111</sup>U.S. CONST. art. I, § 2.

<sup>112</sup>U.S. CONST. amend. XVII.

<sup>113</sup>From the time of *Ex parte Siebold*, 100 U.S. 371 (1879), until the present, the Court has only once restricted the power of the Congress to regulate congressional elections. In *Newberry v. United States*, 256 U.S. 232 (1921), it held that Congress had no power to regulate primary elections for Congress. Cf. *United States v. Gradwell*, 243 U.S. 476 (1916). This decision was overruled in *United States v. Classic*, 313 U.S. 299 (1941). See also two other cases involving regulation of primaries: *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

<sup>114</sup>313 U.S. 299, 315 (1941).

“[E]ach State shall appoint, in such Manner as the Legislature thereof may direct,” the presidential electors.<sup>115</sup> In the leading case of *Burroughs and Cannon v. United States*,<sup>116</sup> however, the Court construed congressional power to regulate presidential elections to be quite broad:

The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.<sup>117</sup>

The case primarily relied upon as precedent in *Burroughs*, and from which the Court quoted two full pages,<sup>118</sup> was *Ex parte Yarbrough*,<sup>119</sup> which dealt with *congressional* elections.

This expansive congressional authority over presidential elections has never been circumscribed by the Court. In the recent, extremely complex decision in *Oregon v. Mitchell*,<sup>120</sup> varying additional sources of congressional authority over presidential elections were advanced. There were five separate opinions, none of which was supported by a majority of justices. Mr. Justice Black found the necessary plenary authority in article I, section 2,<sup>121</sup> augmented by the necessary and proper clause.<sup>122</sup> He reasoned that “[since] Congress has ultimate supervisory power over congressional elections, [it] cannot be seriously contended that Congress has less power over the conduct of presidential elections. . . .”<sup>123</sup> Justices Douglas, Stewart, Blackmun, and the Chief Justice found no plenary authority over presidential elections, but discovered in the privileges and immunities clause of the fourteenth amend-

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<sup>115</sup>U.S. CONST. art II, § 1.

<sup>116</sup>290 U.S. 534 (1934).

<sup>117</sup>*Id.* at 545.

<sup>118</sup>*Id.* at 546-47.

<sup>119</sup>110 U.S. 651 (1884).

<sup>120</sup>400 U.S. 112 (1970).

<sup>121</sup>U.S. CONST. art. I, § 2.

<sup>122</sup>U.S. CONST. Art. I, § 8, cl. 18.

<sup>123</sup>400 U.S. at 124.



ment,<sup>124</sup> and in that amendment's congressional enforcement powers,<sup>125</sup> the necessary authority for sustaining the congressional ban of residency requirements in presidential elections.<sup>126</sup> Justices Douglas, Brennan, White, and Marshall found sufficient congressional authority in section five of the fourteenth amendment alone.<sup>127</sup> One may hope to be pardoned for expressing a decided preference for the simple clarity of the *Burroughs*<sup>128</sup> statement of the matter.

As with congressional elections, such authority as the states possess to regulate presidential elections is subject to the equal protection clause, and the Court will protect against violations on its own motion,<sup>129</sup> as well as sustain congressional action aimed at preventing such violations.<sup>130</sup>

### 3. Sources of Authority Over State and Local Elections

As a general statement, Congress has no plenary power over state and local elections.<sup>131</sup> But if a state regulation forbids or requires an act in connection with an election at which both federal and state or local officials are to be chosen, Congress may intervene<sup>132</sup> even if the allegedly illegal state action was intended primarily to affect the non-federal election.<sup>133</sup>

While no general congressional authority over state and local elections exists, the states cannot regulate those elections in such ways as to violate the equal protection clause<sup>134</sup> or the privileges and immunities clause.<sup>135</sup> The extent of congressional power to enforce the guarantees of those clauses by utilizing section five of the fourteenth amendment, however, is unclear. After *Katzenbach v. Morgan*<sup>136</sup> was decided, it

<sup>124</sup>*Id.* at 147-50; 28, U.S. CONST. amend. XIV, § 1.

<sup>125</sup>U.S. CONST. amend. XIV, § 5.

<sup>126</sup>§ 202 of the Voting Rights Act Amendments of 1970, Pub. L. 91-285, 84 Stat. 314 (codified at 42 U.S.C. § 1973 aa-1 (1970)).

<sup>127</sup>400 U.S. at 134-44, 236-39.

<sup>128</sup>See text accompanying note 117 *supra*.

<sup>129</sup>*Williams v. Rhodes*, 393 U.S. 23 (1968).

<sup>130</sup>*Oregon v. Mitchell*, 400 U.S. 112 (1970).

<sup>131</sup>*Id.* See also *Blitz v. United States*, 153 U.S. 308, 314 (1894); *United States v. Reese*, 92 U.S. 214 (1875).

<sup>132</sup>*Ex parte Yarbrough*, 110 U.S. 651, 661 (1884).

<sup>133</sup>*In re Coy*, 127 U.S. 731 (1888).

<sup>134</sup>*Bullock v. Carter*, 405 U.S. 134 (1972); *Reynolds v. Sims*, 377 U.S. 533 (1964); see *City of Phoenix v. Kolodziejewski*, 399 U.S. 204 (1970); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

<sup>135</sup>See *Dunn v. Blumstein*, 405 U.S. 330 (1972).

<sup>136</sup>384 U.S. 641 (1966).

would have been safe to say that congressional authority to legislate pursuant to section five was clearly ample enough to sustain all acts aimed at remedying equal protection violations, even with respect to matters explicitly reserved by the Constitution to the states. The Court stated there that, "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."<sup>137</sup> The generous Court interpretation of those and similar enforcement powers in other cases<sup>138</sup> also buttressed the validity of a broad interpretation. Indeed, distinguished scholars felt justified in predicting a nearly unlimited scope for congressional ameliorative activity:

The *Morgan* case is soundly rooted in established constitutional principles, yet it clears the way for a vast expansion of congressional legislation promoting human rights. . . . For the future the decision logically permits the generalization that Congress, in the field of state activities and except as confined by the Bill of Rights, has the power to enact any law which may be viewed as a measure for correction of any condition which Congress might believe involves a denial of equality or other fourteenth amendment rights.<sup>139</sup>

Then along came *Oregon v. Mitchell*<sup>140</sup> with shifting majorities coalescing on shared conclusions by divergent rationales. For the purposes of this discussion, the crucial holding, supported by the Chief Justice and by Associate Justices Black, Harlan, Stewart, and Blackmun, was that congressional power under section five of the fourteenth amendment, or any other constitutional authority, was not broad enough to sustain legislation regulating *voting age* qualifications in state

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<sup>137</sup>*Id.* at 651.

<sup>138</sup>*Jones v. Mayer*, 392 U.S. 509 (1968) (utilizing U.S. CONST. amend. XIII, § 2 to sustain the congressional ban of racial discrimination in private housing); *United States v. Price*, 383 U.S. 787 (1966) (utilizing U.S. CONST. amend. XIV, § 5 to sustain a congressional act making it a crime willfully to subject any inhabitant of any state, under color of law, to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws of the United States); *United States v. Guest*, 383 U.S. 745 (1966) (utilizing U.S. CONST. amend. XIV, § 5 to sustain a congressional act making it a crime for two or more persons to conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (utilizing U.S. CONST. amend. XV, § 2 to sustain the Voting Rights Act of 1965); *Screws v. United States*, 325 U.S. 91 (1945) (utilizing U.S. CONST. amend. XIV, § 5 to sustain an earlier statute analogous to the one sustained in *Guest*).

<sup>139</sup>Cox, *supra* note 2, at 107.

<sup>140</sup>400 U.S. 112 (1970).

and local elections.<sup>141</sup> The opinions simply do not make clear from where the inadequacy of congressional power stems. Does it stem from the implied constitutional delegation to the states of the power to fix voting age qualification,<sup>142</sup> giving voting age qualifications a special immunity? Or is Congress without power to intervene under the equal protection and privileges and immunities clauses in state and local elections in general? The language in *Katzenbach v. Morgan*<sup>143</sup> suggests no such limitation, and four members of the *Oregon Court*—Justices Douglas, Brennan, White, and Marshall—explicitly so held.<sup>144</sup> Mr. Justice Black wrote what can only be described as a very strange opinion. Where the Constitution reserves to the states power over the matter involved, (which he believed to be the case with respect to state and local elections) he regarded congressional authority under section five<sup>145</sup> to be limited to matters dealing with racial discrimination, and not to permit congressional action against all of the other kinds of equal protection violations that the Court itself has frequently invalidated. But, “on the other hand, where Congress legislates in a domain not exclusively reserved by the Constitution to the States, its enforcement power need not be tied so closely to the goal of eliminating discrimination on account of race.”<sup>146</sup>

Mr. Justice Black was the *only* member of the Court so to limit congressional power. Mr. Justice Stewart, in whose opinion the Chief Justice and Associate Justice Blackmun concurred, did not address the issue, and Mr. Justice Harlan’s views on the general inapplicability of the fourteenth amendment to political matters have never gained adherents on the Court. Justices Brennan, White, and Marshall explicitly contradicted Mr. Justice Black’s interpretation,<sup>147</sup> as did Mr. Justice Douglas:

If racial discrimination were the only concern of the Equal Protection Clause, then across-the-board voting regulations set by the States would be of no concern to Congress. But it is much too late in history to make that claim, as the cases listed in the Appendix to this opinion show. Moreover, election inequalities created by state laws and based

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<sup>141</sup>*Id.*

<sup>142</sup>U.S. CONST. art. I, § 2; art. II, § 1; amend XVII.

<sup>143</sup>384 U.S. 641, 651 (1966).

<sup>144</sup>400 U.S. at 141, 231.

<sup>145</sup>U.S. CONST. amend. XIV, § 5.

<sup>146</sup>400 U.S. at 130.

<sup>147</sup>*Id.* at 278.

on factors other than race may violate the Equal Protection Clause, as we have held over and over again. The reach of § 5 to "enforce" equal protection by eliminating election inequalities would seem quite broad. Certainly there is not a word of limitation in § 5 which would restrict its applicability to matters of race alone.<sup>148</sup>

It is paradoxical, to say the least, that the Court now finds itself in the untenable position of having asserted much greater power over state and local elections on its own, always resting its opinions on the equal protection clause of the fourteenth amendment, than it is willing to allow Congress to exercise under Section five of that same amendment, which expressly delegates to Congress the "Power to enforce by appropriate legislation, the provisions of this article."<sup>149</sup>

Two interpretations suggest themselves. First, it may be that the Court believes either that voting and candidacy in state and local elections are not within those areas reserved by the Constitution to state control, or at least that state exercise of the power to regulate elections, although reserved to the states, is subject to the strict scrutiny test for equal protection violations. A second interpretation is that the Court views its own power to invalidate state and local laws that it regards as violative of the equal protection clause to be somehow greater than congressional power under the same clause, despite section five's delegation of power to Congress.

It is difficult to square the first interpretation with the explicit language used by Justices Black and Harlan in *Oregon v. Mitchell*<sup>150</sup> unless the holding in that case is to be narrowly limited to the establishment only of voting age qualifications. It is even harder to reconcile the latter interpretation with Mr. Justice Black's own language in *Harper*,<sup>151</sup> as well as the following language, quoted from *Ex parte Virginia*<sup>152</sup> by Mr. Justice Black in his *Oregon* opinion:

<sup>148</sup>*Id.* at 143-44.

<sup>149</sup>U.S. CONST. amend. XIV, § 5. Recall, for example, *Bullock v. Carter*, 405 U.S. 134 (1972); *City of Phoenix v. Kolodziejewski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964). These cases dealt with state or local elections, and all rested primarily on the protection afforded voting rights by the equal protection clause of the fourteenth amendment. None of the cases was decided by a close split, and in every one of them the Court invalidated a provision dealing with state and local elections.

<sup>150</sup>400 U.S. at 126, 154.

<sup>151</sup>*Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (dissenting on the grounds that Congress did indeed have the power under § 5 to strike down state poll taxes).

<sup>152</sup>100 U.S. 339, 345 (1880).

It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of the State in violation of the prohibitions. *It is the power of Congress that has been enlarged.*<sup>153</sup>

Nor is the second interpretation compatible with the explicit holding in *Katzenbach v. Morgan*,<sup>154</sup> or with the judicial restraint frequently reflected in the opinions of Mr. Justice Powell and the Chief Justice.

A correct reading of the *Oregon* holding with respect to congressional authority over state and local elections would limit that case to matters involving voting age qualifications, that being apparently the only electoral matter explicitly reserved to the states by the Constitution. This view of *Oregon* is supported by Mr. Justice Stewart's opinion, concurred in by the Chief Justice and Mr. Justice Blackmun.<sup>155</sup> Their decision turned on the nature of the group being discriminated against—in that case eighteen to twenty-one year olds. In their view, the discrimination was not sufficiently invidious to justify a decision by the Court either to strike it down or to sustain congressional enactment overriding state control by fixing a single national voting age limit in all elections.<sup>156</sup> Further, they went on to add that, generally, “[S]tate action regulating suffrage is *not* immune from the impact of the Equal Protection Clause.”<sup>157</sup>

The exact scope of congressional authority over state and local elections, then, is not clear; but this construction of *Oregon v. Mitchell*,<sup>158</sup> augmented by the explicit holding in *Katzenbach v. Morgan*,<sup>159</sup> and the language quoted above in *Bullock v. Carter*<sup>160</sup> suggests that, at least with respect to power to decrease financial disparities among candidates in state and local elections, Congress has sufficient authority.

To construe the law otherwise would be both illogical and contrary to nearly every other case the Court has decided in recent years. If Congress were to conclude, therefore, that equal availability of funds for

<sup>153</sup>400 U.S. at 128.

<sup>154</sup>See text accompanying notes 136-39 *supra*.

<sup>155</sup>400 U.S. at 281.

<sup>156</sup>*Id.* at 295-96 (separate opinion).

<sup>157</sup>*Id.* at 294 (emphasis added). See Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 226-39 (1970).

<sup>158</sup>400 U.S. 112 (1970).

<sup>159</sup>384 U.S. 641 (1966).

<sup>160</sup>405 U.S. 134 (1972); see text accompanying note 76 *supra*.

election campaigns is desirable in order to equalize citizen political influence, it would seem to have sufficient power under section five of the fourteenth amendment to extend to state and local elections any federal subsidy program that it might enact. And that would be the case whether or not the unequal availability of funds in politics is a violation of the equal protection clause.<sup>161</sup> Needless to say, this broad power could be used only to widen, and never to contract, equality of political opportunity.<sup>162</sup>

#### 4. Sources of Congressional Authority Over Particular Kinds of Actors

From the time of the earliest congressional attempts to regulate political financing, Congress has augmented its general power over the election process with an additional power arising not from congressional capacity to control the elections themselves, but rather out of congressional authority, derived from various constitutional provisions, over particular categories of actors or transactions. Thus, in 1907 Congress prohibited any federally chartered corporation from contributing in *any* elections, federal, state, or local,<sup>163</sup> and in 1936 forbade political contributions by public utility holding companies, regulated under the interstate commerce clause.<sup>164</sup> In 1943, Congress extended the ban on corporate political contributions to bar contributions by labor unions.<sup>165</sup> Other congressional prohibitions against political activity apply to federal employees,<sup>166</sup> state and local employees working in programs supported in whole or in part by federal funds,<sup>167</sup> federal office-holders,<sup>168</sup> and any political activity occurring on federal premises.<sup>169</sup>

#### 5. Scope of Congressional Authority Over All Elections

Aside from first amendment limitation, which will be considered

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<sup>161</sup>Katzenbach v. Morgan, 384 U.S. 641, 648 (1966).

<sup>162</sup>*Id.* at 657.

<sup>163</sup>Act of Jan. 26, 1907, ch. 420, 34 Stat. 864.

<sup>164</sup>Egan v. United States, 137 F.2d 369 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943).

<sup>165</sup>Act of June 25, 1943, ch. 144, § 9, 57 Stat. 167.

<sup>166</sup>United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 3880 (1973); United Public Workers v. Mitchell, 330 U.S. 75 (1947); *Ex parte Curtis*, 106 U.S. 371 (1882).

<sup>167</sup>Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127 (1947).

<sup>168</sup>United States v. Thayer, 209 U.S. 39 (1908).

<sup>169</sup>United States v. Wurzbach, 280 U.S. 396 (1930); Brehm v. United States, 196 F.2d 769 (D.C. Cir. 1952).

later,<sup>170</sup> the power that Congress may exercise pursuant to its authority is exceedingly broad in scope. With regard to congressional elections, it has been held to be as wide as Chief Justice Marshall's famous formulation in *McCulloch v. Maryland*:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional . . . .<sup>171</sup>

As the Court noted in *Classic*, this combination of authority over congressional elections "leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution."<sup>172</sup>

Whatever the source of congressional authority over presidential and vice-presidential elections,<sup>173</sup> that scope, too, has been held to be quite broad.<sup>174</sup>

Moreover, Congress enjoys the same breadth of power under the fourteenth amendment's enforcement clause.<sup>175</sup> Indeed, *Katzenbach v. Morgan*<sup>176</sup> specifically analogizes the scope of congressional fourteenth amendment power to the scope of power which Congress may exercise under the necessary and proper clause. Therefore, to the extent that the tests for equal protection violation are identical,<sup>177</sup> the necessary and proper clause seems to give Congress additional power under the due process clause of the fifth amendment.

Finally, there can be no doubt that this broad scope of congressional power over elections is sufficiently ample to embrace the appro-

<sup>170</sup>See text accompanying notes 344-88 *infra*.

<sup>171</sup>17 U.S. (4 Wheat.) 316, 421 (1819), *quoted in* *United States v. Classic*, 313 U.S. 299, 320 (1941).

<sup>172</sup>*United States v. Classic*, 313 U.S. 299, 320 (1941).

<sup>173</sup>See text accompanying notes 115-30 *supra*.

<sup>174</sup>In *Burroughs and Cannon v. United States*, 290 U.S. 534, 547-48 (1934), the Court said: The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain that end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.

<sup>175</sup>U.S. CONST. amend. XIV, § 5. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power. *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880).

<sup>176</sup>384 U.S. 641, 650 (1966).

<sup>177</sup>See text accompanying notes 17-20 *supra*.

priation of funds with which to subsidize campaigns and parties. Congressional authority to tax and spend for the general welfare<sup>178</sup> surely provides Congress with the power to implement its broad authority over elections even to the point of paying for them.<sup>179</sup>

#### *6. Congressional Authority Required By Particular Election Subsidy Proposals*

Nearly all advocates of campaign reform, and virtually every proposal currently under congressional consideration, embrace the establishment of a strong, independent federal agency to supervise and administer the election laws. Such proposals obviously raise important points of congressional authority.

##### *a. Congressional Establishment and Designation of Members of An Independent Federal Elections Agency*

The congressional powers discussed above are certainly adequate to sustain congressional creation of an independent agency to supervise and enforce election laws, and to distribute subsidy benefits. A problem might arise, however, out of any attempt by Congress to specify the membership of such an agency.

Under article II, section 2, clause 2, the President has power to nominate, "and by and with the Advice and Consent of the Senate" to "Appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ." That same provision goes on, however, to state that, "[B]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."<sup>180</sup>

As part of this authority to create new offices and agencies, Congress would seem to have nearly unlimited power over the method of appointment and the qualifications of prospective appointees. It certainly has exercised broad power in circumscribing the President's choice of persons to be nominated to fill particular offices by specifying the characteristics which they must possess:

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<sup>178</sup>U.S. CONST. art. I, § 8, cl. 1.

<sup>179</sup>Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. LEGIS. 359, 411 (1972), citing *United States v. Butler*, 297 U.S. 1 (1936).

<sup>180</sup>U.S. CONST. art. II, § 2, cl. 2 (emphasis added).



As incidental to the establishment of an office Congress has also the power to determine the qualifications of the officers, and in so doing necessarily limits the range of choice of the appointing power. First and last, it has laid down a great variety of qualifications, depending on citizenship, residence, professional attainments, occupational experience, age, race, property, sound habits, and so on. It has required that appointees be representatives of a political party, of an industry, of a geographic region, or of a particular branch of the Government. It has confined the President's selection to a small number of persons to be named by others. Indeed, it has contrived at times to designate a definite eligibility, thereby virtually usurping the appointing power.<sup>181</sup>

In addition, Congress has limited those eligible for appointment to particular positions to those to be named by others;<sup>182</sup> it has specified that particular public officers will constitute, or will name those who constitute, particular boards and commissions;<sup>183</sup> and it has even named specified individuals to particular offices.<sup>184</sup>

These precedents, coupled with the express constitutional power reserved to Congress by article II, section 2, clause 2,<sup>185</sup> seem ample enough to justify congressional specification of the members of the agency, even if they are to come only from the ranks of retired federal appellate judges, as has been suggested.<sup>186</sup>

The one major case squarely dealing with the question, *Springer v. Philippine Islands*,<sup>187</sup> construed not a congressional act appointing an executive officer, but an act of the Philippine legislature. In the opinion in that case, the Court took care to point out that where the appointment power is "expressly granted or incidental to its [the legislature's] powers,"<sup>188</sup> it would be a constitutional exercise of power.<sup>189</sup> *Myers v.*

<sup>181</sup>E. CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 39, 88th Cong., 1st Sess. 501 (1964), cited in *Hearings on Various Measures Relating to Federal Election Reform Before the Subcomm. on Privileges and Elections and the Senate Comm. on Rules and Administration*, 93d Cong., 1st Sess., 352-53 (1973).

<sup>182</sup>*E.g.*, Act of Feb. 23, 1920, ch. 91 § 304, 41 Stat. 456, 470; see dissenting opinion of Mr. Justice Brandeis in *Myers v. United States*, 272 U.S. 52, 274 n.56 (1926).

<sup>183</sup>*E.g.*, Act of March 2, 1929, ch. 534, 45 Stat. 1512; Note, *Power of Appointment to Public Office Under the Federal Constitution*, 42 HARV. L. REV. 426, 431-43 (1929).

<sup>184</sup>*E.g.*, Act of June 24, 1914, ch. 125, 38 Stat. 388; see Note, 42 HARV. L. REV., *supra* note 183, at 430.

<sup>185</sup>See text accompanying notes 102-04 *supra*.

<sup>186</sup>In Stern, *A Cure for Political Fund-Raising*, HARPER'S MAGAZINE, May, 1962, at 63, the suggestion is made that the Chief Justice make appointments from among the ranks of Federal Judges.

<sup>187</sup>277 U.S. 189 (1928).

<sup>188</sup>*Id.* at 202.

<sup>189</sup>See also *Shoemaker v. United States*, 147 U.S. 282 (1893).

*United States*,<sup>190</sup> which restrained Congress from requiring the President to obtain congressional approval before removing certain postmasters, was serverly limited in *Humphrey's Executor v. United States*.<sup>191</sup> Both cases dealt with removal, and no case has been found invalidating a congressional exercise of its power to designate the qualifications of those to be appointed to an office. In view of the "ultimate supervisory power over congressional . . . and presidential and vice-presidential elections"<sup>192</sup> possessed by Congress the matter would seem hardly to bear any doubt.

*b. Vesting of Independent Litigative Power in Such An Agency*

There are many precedents for congressional grant of independent power to sue and be sued in *civil* actions. The Bank of the United States was given such power in 1816, and the delegation of power was sustained in *Osborn v. Bank of the United States*.<sup>193</sup> Most of the independent regulatory agencies have such discretionary authority, including the Securities and Exchange Commission,<sup>194</sup> the Federal Power Commission,<sup>195</sup> the Civil Aeronautics Board,<sup>196</sup> the National Labor Relations Board,<sup>197</sup> and the Federal Trade Commission.<sup>198</sup> In addition, some executive branch agencies not generally regarded as independent agencies, such as the Environmental Protection Agency,<sup>199</sup> and the Small Business Administration<sup>200</sup> have received similar grants of authority. The constitutionality of such delegations has been upheld in *Texas Pacific Railroad Co. v. ICC*.<sup>201</sup>

No precedents have been found, however, for granting independent agencies the power to initiate criminal proceedings.<sup>202</sup> But there appears to be no authority for the proposition that Congress cannot make such a delegation. In view of Congress' plenary supervisory role over federal

<sup>190</sup>272 U.S. 52 (1926).

<sup>191</sup>295 U.S. 602 (1935).

<sup>192</sup>*Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (Black, J.).

<sup>193</sup>22 U.S. (9 Wheat.) 738 (1824).

<sup>194</sup>15 U.S.C. §§ 77t(b), 78u(e); 80a-41(e), 80b-9(e) (1970).

<sup>195</sup>15 U.S.C. §§ 717s(a), (c) (1970).

<sup>196</sup>49 U.S.C. § 1486(a) (1970).

<sup>197</sup>29 U.S.C. § 154(a) (1970).

<sup>198</sup>15 U.S.C. § 56 (1970); see *United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

<sup>199</sup>42 U.S.C. 1857c-8 (1970).

<sup>200</sup>15 U.S.C. § 687c(a) (1970).

<sup>201</sup>162 U.S. 197 (1896).

<sup>202</sup>See Letter to the Editor, *The Washington Post*, May 4, 1973.

elections,<sup>203</sup> and the imperative need to guarantee both actual and publicly perceived neutrality in the administration of the election laws, congressional removal of criminal enforcement powers over election laws from the Department of Justice to a neutral or bi-partisan independent agency would seem to be constitutional.<sup>204</sup> At the very least, an independent election control agency could clearly be delegated authority to request from the Chief Judge of the District Court of the District of Columbia the impaneling of special grand juries, without proceeding through the Department of Justice.

*c. Delegation of Power to Certify Winners in Federal Election*

The specificity with which the Constitution details the presidential election process<sup>205</sup> would seem to preclude any agency certification of winners in presidential elections. The choice is up to the presidential electors, and there appears to be no way in which they might delegate that authority.

The situation is different with respect to congressional elections. While the Constitution provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members"<sup>206</sup> there appears to be no reason that each House could not delegate its power to the independent agency which Congress establishes. If congressional power to delegate legislative power to the executive branch is as wide as it now appears to be,<sup>207</sup> *a fortiori* Congress can delegate to the agency it creates and endows with supervisory power over federal elections the authority to certify winners, especially if each House were to retain ultimate say over the certification of elections of its own members, as it would be required to do under the Constitution.<sup>208</sup> Thus, while a decision of the agency could always be appealed to a particular House, that would probably rarely occur.

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<sup>203</sup>Oregon v. Mitchell, 400 U.S. 112 (1970).

<sup>204</sup>See Memorandum from the Counsel of the Office of Federal Elections, reprinted in *Hearings on Various Measures Relating to Federal Election Reform Before the Subcomm. on Privileges and Elections and the Comm. on Rules and Administration*, 93d Cong., 1st Sess. 351 (1973).

<sup>205</sup>U.S. CONST. art. II, § 1, cl. 3.

<sup>206</sup>U.S. CONST. art I., § 5.

<sup>207</sup>See *Yakus v. United States*, 321 U.S. 414 (1944); Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359 (1947).

<sup>208</sup>U.S. CONST. art. I, § 5. See *Roudebush v. Hartke*, 405 U.S. 15 (1972).

### C. EQUAL PROTECTION AND DUE PROCESS LIMITATIONS ON ELEMENTS OF THE SUBSIDY PLANS

It need hardly be repeated that congressional power to regulate and finance elections, however derived, must not be exercised in such a way as to violate rights protected by the Constitution. The primary rights potentially threatened by subsidy plans are those guaranteeing equal protection of the laws, dealt with in this section, and those guaranteeing freedoms of speech and association, dealt with in the next.<sup>209</sup>

As noted above,<sup>210</sup> the due process clause of the fifth amendment subjects congressional acts to equal protection review, just as the equal protection clause of the fourteenth subjects state actions to scrutiny. The criteria by which federal actions are tested are thought to be the same as those by which state actions are measured.<sup>211</sup>

In examining the constitutionality of proposed subsidy legislation under equal protection analysis, we will be concerned with two primary problems—eligibility criteria and subsidy distribution—differentials. The problems exist because of the inherent requirement of deciding, respectively, *who* is to receive the subsidy, and *how much* each is to be given. The first is pre-eminently a problem for subsidy plans which include primary elections; the latter arises almost entirely out of the common-sense need to distinguish between the major and minor parties in apportioning subsidy proceeds. As eligibility of some connotes ineligibility of others, and as any differential distribution means by definition that some eligibles will receive more than others, both problems obviously contain serious equal protection hazards. If, for example, the law were to employ signature petitions as an eligibility-determining device, or to utilize distribution-differentials based on the numbers of votes received, the percentages established in both cases would clearly constitute the kinds of “classifications” which have been traditionally the subject of equal protection examination.<sup>212</sup> Furthermore, one cannot avoid testing such benefit conferrals for constitutionality by regarding them as privileges rather than rights.<sup>213</sup>

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<sup>209</sup>See text accompanying notes 344-88 *infra*.

<sup>210</sup>See text accompanying notes 14-16 *supra*.

<sup>211</sup>See text accompanying notes 17-20 *supra*.

<sup>212</sup>See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065 (1969).

<sup>213</sup>*Sherbert v. Verner*, 374 U.S. 398, 404 (1963); see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). *But cf.* *United States Civil Service Comm. v. National Ass'n of Letter Carriers*, 93 S. Ct. 2880 (1973).

### 1. *The Test By Which the Plan Is Likely To Be Measured*

The question of the varying measures of strictness with which the Court scrutinizes equal protection classifications has been mentioned above.<sup>214</sup> It would not be appropriate in an article such as this, in which the main focus is to apply the test to particular provisions, to examine in detail the background and application of the varying tests employed by the Court in such circumstances. The most which can reasonably be offered here is a distillation of current views on the issue.<sup>215</sup>

Prior to the Warren Court, the general test applied to classifications was the so-called "minimum rationality test," defined as determining whether *any* set of facts existed which could justify the classification. As the Court put it in *McGowan v. Maryland*, "[S]tatutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."<sup>216</sup> The Warren Court, however, adopted and increasingly utilized a two-tier test, described as the "New Equal Protection,"<sup>217</sup> which retained the minimum-rationality test for all classifications except those regarded as either impinging on specially preferred rights or utilizing innately suspect categories. Where it applied the minimum-rationality test, the Court gave a restrained review, looking only to see if there were a reasonable relationship between the classification and purpose. Where preferred rights or suspect categories were involved, however, the Court gave an activist or stringent review, requiring the classifications to be imperatively justified by a compelling state interest.<sup>218</sup>

Because the Burger Court's statement of the test is different, it is uncertain whether it is continuing to utilize the Warren Court's two-tier test:

To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: The character of the classification in question; the individual interest affected by the classification; and the gov-

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<sup>214</sup>See text accompanying note 37 *supra*.

<sup>215</sup>For a full exploration of the tests, see Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); *Developments*, 82 HARV. L. REV., *supra* note 212.

<sup>216</sup>366 U.S. 420, 426 (1961).

<sup>217</sup>See *Developments*, 82 HARV. L. REV., *supra* note 212.

<sup>218</sup>"[I]n moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

ernmental interest asserted in support of the classification.<sup>219</sup>

Professor Gunther describes this test as the old equal protection with a new bite,<sup>220</sup> a minimum rationality test focused on the means utilized in order to determine whether the legislative means are appropriate to the legislative ends, not whether in some hypothetical case they might be. Some recent cases<sup>221</sup> suggest that Professor Gunther is right, and at least one circuit court has discovered an intermediate equal protection test.<sup>222</sup> But Justice Burger's own language in *Bullock v. Carter*<sup>223</sup> referred to applying the "strict standard of review"<sup>224</sup> of *Harper*,<sup>225</sup> and his formulation that it requires both reasonableness and necessity<sup>226</sup> to justify the classification certainly sounds like the Warren Court's old two-tier test.<sup>227</sup>

In reviewing equal protection questions, regardless of what the test is called, the Burger Court, in fact, engages in several subsidiary steps. It examines the purpose of the legislation involved, the permissibility of the purpose, the reasonableness of the means utilized in the light of its purpose, and the onerousness of the means chosen in comparison with other means available.<sup>228</sup> And in carrying out that analysis, the Burger Court clearly utilizes the terminology evolved by the Warren Court, if not the precise formula. It is therefore necessary to examine those terms briefly.

"Suspect classifications" have been held to include wealth,<sup>229</sup> race,<sup>230</sup> alienage,<sup>231</sup> illegitimacy,<sup>232</sup> sex,<sup>233</sup> and, according to Mr. Jus-

<sup>219</sup>*Dunn v. Blumstein*, 405 U.S. 330, 335 (1972); see *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

<sup>220</sup>See Gunther, *supra* note 215, at 21.

<sup>221</sup>*Weber v. Aetna Casualty & Surety Co.*, 409 U.S. 164 (1972); *Chicago Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

<sup>222</sup>*Eslinger v. Thomas*, 476 F.2d 225, 231 (4th Cir. 1973), *construing Reed v. Reed*, 404 U.S. 71 (1971).

<sup>223</sup>405 U.S. 134 (1972).

<sup>224</sup>*Id.* at 142.

<sup>225</sup>*Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

<sup>226</sup>See 405 U.S. at 144.

<sup>227</sup>See Comment, *A Constitutional Remedy for the High Cost of Broadcast and Newspaper Advertising in Political Campaigns*, 60 CALIF. L. REV. 1371, 1381-82 (1972). See also Hughes, *supra* note 20, at 751.

<sup>228</sup>See authorities cited note 212 *supra*.

<sup>229</sup>*McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966); *Douglas v. California*, 372 U.S. 353 (1963). *But see James v. Valtierra*, 402 U.S. 137 (1971), discussed note 85 *supra*.

<sup>230</sup>*Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (constitutionally suspect); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (requiring most rigid scrutiny); in *Hirabayashi v. United States*,

tice Harlan, a vigorous and consistent critic of the Warren Court's formulation, possibly the "criterion of political allegiance."<sup>234</sup> Bankruptcy is not a suspect class.<sup>235</sup> "Fundamental interests" have been held to include the right to vote,<sup>236</sup> the right to procreate,<sup>237</sup> and the right to travel interstate,<sup>238</sup> but not the right to education.<sup>239</sup> The utilization of a "suspect classification" for any purpose, or the burdening of a "fundamental interest" by any means, will trigger strict court scrutiny so as to prevent "invidious discrimination"<sup>240</sup> against rights which are protected, and will require a "compelling governmental interest"<sup>241</sup> as justification if the classification or burden is to stand.

In the context in which we are examining proposed subsidy legislation, there would be no suspect classification on the basis of wealth, although present arrangements of campaign financing lend themselves to easy utilization of wealth as a suspect class in order to invoke strict scrutiny.<sup>242</sup> In our present context, however, fundamental interests are at stake, namely the rights to vote and to have an "equally effective voice"<sup>243</sup> in elections. That factor militates strongly in favor of strict scrutiny of the eligibility criteria and distribution formulas of the subsidy statutes.

320 U.S. 81, 100 (1943) (in most circumstances irrelevant).

<sup>234</sup>*Graham v. Richardson*, 403 U.S. 365 (1971); *In re Griffiths*, 413 U.S. \_\_\_\_ (1973); *Sugarman v. Dougall*, 93 S. Ct. 2842 (1973).

<sup>235</sup>*Gomez v. Perez*, 409 U.S. 535 (1973).

<sup>236</sup>Justices Brennan, Douglas, White and Marshall so held in *Frontiero v. Richardson*, 93 S. Ct. 1764 (1973), and Mr. Justice Stewart implicitly concurred by finding "invidious discrimination." Associate Justices Powell and Blackmun, along with the Chief Justice, found it unnecessary and undesirable to create this new "suspect class," although they concurred in finding discrimination.

<sup>237</sup>*See Shapiro v. Thompson*, 393 U.S. 618, 659-61 (1960) (Harlan, J., dissenting).

<sup>238</sup>*United States v. Kras*, 409 U.S. 434 (1973).

<sup>239</sup>*Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (possible restraints must be "closely scrutinized and carefully confined"); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (any alleged infringement must be "carefully and meticulously scrutinized"). *See also Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (which speaks of the "exacting standard of precision we require of statutes which selectively distribute the franchise").

<sup>240</sup>*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). *But see Dandridge v. Williams*, 397 U.S. 3471 (1970).

<sup>241</sup>*Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

<sup>242</sup>*San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>243</sup>*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

<sup>244</sup>*Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

<sup>245</sup>*See text accompanying notes 79-90 supra.*

<sup>246</sup>*Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

On the other hand, it must be recalled that the subsidy legislation is clearly intended to *increase* equality of voters rather than to diminish it, a distinction established in *Katzenbach v. Morgan*:

In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise.<sup>244</sup>

The subsidy proposals do constitute reform measures, "extending rather than denying a right,"<sup>245</sup> for most citizens, while comparatively diminishing it for those with wealth. This is their rationale:

If financial barriers to the right to vote are constitutionally forbidden, there is a legitimate argument that reduction of financial barriers to the right to influence voters is constitutionally *permitted*. And if the Constitution requires that each man's vote count equally, may not that fact be deemed pertinent in consideration of the validity of measures intended to reduce inequalities in men's opportunities to affect the vote?<sup>246</sup>

Under the formulation of the Warren Court, which decided *Katzenbach*, the subsidy proposals would probably be given restrained review. Furthermore, if Professor Gunther is correct, the evolving equal protection doctrine in the Burger Court would tend to increase the likelihood of such restrained review.<sup>247</sup>

The Court is likely to ask something like the following question: does the evidence so clearly establish that those citizens denied equal voice in elections by the system of private political financing are so obviously not disadvantaged thereby that the contrary conclusion of Congress as expressed in public subsidy legislation must be regarded as utterly lacking in rational support?

Such a test imposes on the opponents of subsidy legislation a burden which they would find impossible to overcome. It is, however, premised on the assumption that the congressional purpose is in fact to

<sup>244</sup>384 U.S. 641, 657 (1966).

<sup>245</sup>See *Developments*, 82 HARV. L. REV., *supra* note 212, at 1111.

<sup>246</sup>Rosenthal, *supra* note 179, at 376-77.

<sup>247</sup>*Schilb v. Kuebel*, 404 U.S. 357 (1971); see Gunther, *supra* note 215, at 21. *Contra*, Note, *Constitutional Standards for Encouraging Political Contributions*, 55 IOWA L. REV. 981 (1970), which fails to consider the impact of *Katzenbach v. Morgan* and its "reform" legislation distinction.



equalize political opportunity, so stated in the legislation,<sup>248</sup> and not vitiated by eligibility criteria or distribution formulas which obviously discriminate against minor parties or dissident political groups. If, as has been cynically suggested, the latter purposes do motivate major party election subsidy proposals,<sup>249</sup> and the plans are so designed as to benefit the major parties unduly in comparison with minor parties, the Court would undoubtedly and properly invoke strict scrutiny. If the subsidy plan does not directly serve the central aim of eliminating private money in public elections, and instead offers only partial subsidy, through one or another of the means discussed below, it is conceivable that the Court might apply strict scrutiny on the theory that the means chosen were inadequate to achieve the ameliorative purpose.

## 2. *Limits on Eligibility-Determining Devices for Candidates in Primaries*

### a. *The Goal of Limiting the Number of Candidates*

Paradoxically, we are bound to be constrained in achieving our goal of equality of citizen political influence by the need to discriminate among those whom we will subsidize. Even without subsidization, no election system could permit a large number of candidates for every office because of the inevitable confusion of the voters which would result. Given the innate tendency of subsidization to encourage and facilitate candidacies, the Treasury could be bankrupted.

It goes without saying that the mere presence of eligibility criteria, which exclude some candidates, and distribution formulas, which give some parties a larger subsidy than others, would not in themselves trigger strict scrutiny. Any resource distribution other than on a basis of absolute equality requires some criteria by which allocations are made. The question here is how reasonable are those criteria in relationship to the purpose of the legislation as a whole.

The Court, on three separate occasions, has recognized the legitimacy of this common-sense necessity.<sup>250</sup> In *Bullock v. Carter*, the Court elaborated the rationale for such a goal:

[T]he State understandably and properly seeks to prevent the clogging

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<sup>248</sup>See *Developments*, *supra* note 212, at 1075.

<sup>249</sup>See Sterling, *Federal Regulation of Political Party Finances: A Study in Public Policy*, 19 PUBLIC POLICY 143, 158-60 (1971).

<sup>250</sup>*Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

of its election machinery, avoid voter confusion and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of run-off elections.<sup>251</sup>

If the government, then, has an interest in limiting the number of candidates, how can it be faulted for limiting the number of recipients of campaign subsidies? On the other hand, great care must be taken in formulating the criteria by which frivolous candidates are separated from non-frivolous ones, lest the burden of proving seriousness fall more heavily on some than others, thereby constituting an equal protection violation.

*b. Money Payments as Means of Limiting Candidacy and Insuring Seriousness*

The one clear criterion which may not be used to determine seriousness is money. Two lower courts have addressed that point explicitly. In *Georgia Socialist Workers Party v. Fortson*,<sup>252</sup> the Court noted that, "while . . . it may be true that serious candidates traditionally attract money for their candidacy, we cannot say as a matter of law that one's candidacy is not serious or that he does not have the right to run merely because he does not have or has thus far failed to attract a certain amount of money." In *Thomas v. Mims*<sup>253</sup> the court observed that "[t]he wealth of the individual candidate is too cynical a test to be applied to the legitimacy of his effort." As we have already seen, that is the clear implication of *Bullock v. Carter*, at least with respect to all but the smallest filing fees.<sup>254</sup>

Direct manifestation of some existing public support for a candidacy is just as clearly a sound criterion as money is a faulty one. The Court commented on this point in *Jenness v. Fortson*:

There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization and its candidates on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.<sup>255</sup>

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<sup>251</sup>405 U.S. 134, 145 (1972).

<sup>252</sup>315 F. Supp. 1035, 1041 (N.D. Ga. 1970), *aff'd on other grounds sub nom. Jenness v. Fortson*, 403 U.S. 431 (1971).

<sup>253</sup>317 F. Supp. 179, 182 (S.D. Ala. 1970).

<sup>254</sup>405 U.S. 134 (1972) (Court disallowed \$1,000 fee).

<sup>255</sup>403 U.S. 431, 442 (1971).

Indeed, insofar as a money payment can be rationalized as an eligibility criterion, it is as evidence of underlying public support of candidacy. If direct evidence of public support is obtainable, however, it would obviously be more reliable than money as a criterion of seriousness, and less susceptible to being used to show support where none or little exists. Thus, while the purposes of money payments and direct manifestations of public support are the same—to limit the number of candidates and to deter frivolous ones—the former favor the rich and discriminate against the poor, while the latter are most appropriate, and, indeed, the best available.<sup>256</sup> It is true that campaigns to obtain the necessary showings of public support cost money,<sup>257</sup> but the wealth discrimination involved is not of the same order as the exaction of an equivalent amount of money in the form of a filing fee or security deposit, because petition signature campaigns do not *have* to cost money. They can be organized entirely with volunteers, and have the additional virtue of encouraging prospective candidate-public interactions even before the campaign.<sup>258</sup> To the extent that it is desirable to eliminate *any* influence that wealth might bring to bear in the election process, however, it would be possible to prohibit the use of any funds in circulating the petitions.<sup>259</sup> This would tend to increase citizen participation in politics, perhaps more than most other election reforms.

Similarly, establishing eligibility by requiring prospective primary candidates to raise from private sources a fixed amount of money as evidence of voter support leaves wealthier citizens in the position of determining who will and will not receive public campaign funds. If the ceilings on individual contributions were sufficiently low—ten to twenty dollars—it is conceivable that such a mechanism might be held constitutional. Higher contribution ceilings, however, would permit the wealthy to control the field of primary candidates and then to enjoy a free ride at the expense of the taxpayers for the major proportion of campaign costs themselves.

Requiring a money payment alone, therefore, would be unconstitutional. *Quaere* a statutory scheme which provided alternative eligibility-determining mechanisms—either petition signatures or a money pay-

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<sup>256</sup>*Id.*; see Comment, *The Constitutionality of Qualifying Fees for Political Candidates*, 120 U. PA. L. REV. 109, 129-30 (1971).

<sup>257</sup>Governor Wallace spent \$750,000 in circulating his petitions for access to the California ballot in 1968. Ireland & Ireland, *supra* note 70, at 218.

<sup>258</sup>See Comment, 120 U. PA. L. REV., *supra* note 256, at 129.

<sup>259</sup>See FLEISHMAN, *supra* note 4, ch. VII.

ment? While such a plan would permit the less wealthy to utilize petitions, it would also make it easier for the wealth-backed candidates to qualify than for those without wealth, who would be subjected to the burden of a petition campaign. Its constitutionality would seem, therefore, suspect.

c. *Permissible Ranges in Petition Signature Requirements*

Petition signatures are already being utilized by nearly all states in determining which minor parties and independent candidates will be given a place on the printed ballot. In determining initial access for a minor party, forty-two states require the signatures of one percent or fewer of the eligible voters.<sup>260</sup> The formulas for retention of a ballot place depend on performance at the polls and vary quite widely among the states.<sup>261</sup> Forty-three utilize petition signatures in qualifying independent candidates for the printed ballot. Nineteen use varying percentages of different bases, and twenty-four use absolute numbers.<sup>262</sup> The typical range is from a high of five percent of registered voters<sup>263</sup> to a low of half a percent of the votes cast in the preceding election for some particular public office.<sup>264</sup> Only two states exceed those requirements—North Carolina, with twenty-five percent, and Arkansas, with fifteen percent, of the votes cast in the preceding gubernatorial election.<sup>265</sup> States granting ballot access on the basis of an absolute number of signatories require anywhere from twenty-five thousand signatures in Illinois to

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<sup>260</sup>Sixteen states require 0 to 0.1 per cent, 26 require 0.1 per cent to 1 per cent, 3 states require 1.1 per cent to 3 per cent, and 4 states require 3.1 per cent to 5 per cent; *see Williams v. Rhodes*, 393 U.S. 23, 47 n.10 (1968) (Harlan, J., concurring); *Id.* at 33 n.1 (opinion of the Court).

<sup>261</sup>*See* Legislative Developments, *The Uncertain Impact of Williams v. Rhodes on Qualifying Minority Parties for the Ballot*, 6 HARV. J. LEGIS. 236, 242-44 (1969).

<sup>262</sup>Note, *Constitutional Law-Elections-Equal Protection*, 20 CASE W. RES. L. REV. 892, 901-02 (1969).

<sup>263</sup>*Id.* at 901-02 n.30.

<sup>264</sup>The following states require that petition signatures be obtained in the amount of the indicated percentage of the specified base for ballot access by an independent: Georgia, 5% of registered voters; California, 5%, and West Virginia, 1%, of the votes cast in the last general election; Missouri, 1% of the votes cast in the next general election; North Carolina, 25%, Arkansas, 15%, Kansas, 5%, Massachusetts, 3%, South Dakota, 2%, Arizona, 2%, Maine, 1%, Texas, 1%, and Vermont, 1%, of the votes cast in the last election for governor; Indiana, 0.5% of the votes cast in the last election for secretary of state; Pennsylvania, 0.5% of the votes cast for any successful state-wide candidate; Montana, 5%, and Connecticut 0.5%, of the votes cast for the successful candidate for the same office in the last general election; Nevada, 5%, and Oregon, 3%, of the votes cast in the last general election for a representative in Congress. Note, 20 CASE W. RES. L. REV., *supra* note 262, at 901-02 n.30.

<sup>265</sup>*Id.*

twenty-five in Tennessee.<sup>266</sup>

What would be a permissible range for subsidy eligibility? We know that the Court struck down a fifteen percent third party petition signature requirement in *Williams v. Rhodes*<sup>267</sup> but only as *one* of many restrictive components in a statutory scheme, which, as a whole, was overly burdensome. Mr. Justice Harlan, in his concurring opinion in *Williams*, expressed the view that the fifteen percent requirement, "even when regarded in isolation, must fall,"<sup>268</sup> and the court seemed to agree.<sup>269</sup> In *Jenness v. Fortson*,<sup>270</sup> the Court sustained a five percent signature requirement, but again stressed the unrestrictive nature of the combination of requirements rather than the validity of the five percent requirement itself.<sup>271</sup> The tone of the Court's discussion, however, suggests that a five percent fee is on the high side, and requires a favorable context in order to be saved.<sup>272</sup> The lower court in *Jenness* had invalidated the five percent requirement,<sup>273</sup> as another lower court later did a seven percent requirement in Ohio.<sup>274</sup> All that can be said safely is that a one percent requirement is certainly acceptable in itself,<sup>275</sup> that a three percent requirement probably is also,<sup>276</sup> and that, in an expansive rather than restrictive election law context, five percent would be, too.<sup>277</sup>

We have excellent guidelines for determining restrictiveness of the

<sup>266</sup>The following states require the indicated number of signatures on the petitions for ballot access by an independent candidate: Illinois, 25,000; North Dakota, 15,000; New York, 12,000; Mississippi, 10,000; South Carolina, 10,000; Maryland, 5,000; Oklahoma, 5,000; Idaho, 3,000; Minnesota, 2000; Alaska, 1000; Iowa, 1000; Kentucky, 1000; Nebraska, 1000; New Hampshire, 1000; New Jersey, 800; Rhode Island, 500; Alabama, 300; Colorado, 300; Utah, 500; Virginia, 250; Wyoming, 100; Hawaii, 25; and Tennessee, 25. *Id.*

<sup>267</sup>393 U.S. 23 (1968).

<sup>268</sup>*Id.* at 46.

<sup>269</sup>*Id.* at 33.

<sup>270</sup>403 U.S. 431 (1971).

<sup>271</sup>*Id.* at 438-39.

<sup>272</sup>*Id.*

<sup>273</sup>*Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035 (N.D. Ga. 1970). The court did uphold a 5% signature requirement.

<sup>274</sup>*Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970), *appeal dismissed on other grounds sub. nom. Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972) (no mention of fee requirements made in district court). *See also Barnhart v. Mandel*, 311 F. Supp. 814 (D. Md. 1970), which construed a Maryland statute with a 3% requirement, but which turned on another question.

<sup>275</sup>*Williams v. Rhodes*, 393 U.S. 23 (1968). *See also State ex rel. Plimmer v. Poston*, 58 Ohio St. 620 (1898).

<sup>276</sup>*See Note*, 20 CASE W. RES. L. REV., *supra* note 262, at 901.

<sup>277</sup>*Jenness v. Fortson*, 403 U.S. 431 (1971). *See also Casper, Williams v. Rhodes and Public Financing of Political Parties Under the American and German Constitutions*, 1969 SUP. CT. REV. 271, 283.

scheme as a whole, because the *Jeness* Court was quite explicit. In referring to opportunities open to other than major party candidates in Georgia, the Court observed:

They may confine themselves to an appeal for write-in votes. Or they may seek, over a six months' period, the signatures of 5% of the eligible electorate for the office in question. If they choose the latter course, the way is open. For Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions. A voter may sign a petition even though he has signed others, and a voter who has signed a petition of a non-party candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand, is a person who is not even registered at the time of previous election. No signature on a nominating petition need be notarized.<sup>278</sup>

This is not to say that any one of these characteristics, standing alone, would be unconstitutional, or even that a combination of several would be. Rather it is to note that the more the number of such restrictions in combination, the more questionable the scheme as a whole. The only qualification we know to be invalid by itself is a requirement like the one contained in an Illinois statute, that petition signatories be geographically distributed among a large number of geographical sub-units of a state.<sup>279</sup>

A geographical distribution requirement for determining minor party eligibility has been frequently incorporated in subsidy plans for presidential elections.<sup>280</sup> If the plan requires no more than that a minor party qualify for the ballot in as many states as have sufficient electoral votes to elect a president, it is tempting to think that it might be acceptable. Such an exception could perhaps be justified by the nature of the electoral college system of weighted voting by states, and by the apparent reasonableness of giving subsidies only to those candidates who have a *formal*, even if not a formidable, chance of winning. The trouble is, however, that minor parties are frequently confined to single states or regions, and that, in any event, they will never be able to become na-

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<sup>278</sup>403 U.S. at 438-39 (citations omitted).

<sup>279</sup>*Moore v. Ogilvie*, 394 U.S. 814 (1969), *overruling* *MacDougall v. Green*, 335 U.S. 281 (1948). The Court held unconstitutional an Illinois requirement that petition signatures had to be spread over 50 counties, with at least 200 per county, *overruling* an earlier decision in so holding.

<sup>280</sup>*See, e.g., TWENTIETH CENTURY FUND, VOTERS' TIME* 22-23 (1969).

tional without starting in only a few states at a time. Any subsidy plan, therefore, which defined eligibility on the basis of multiple state ballot positions would be inherently discriminatory and probably unconstitutional.

At the state level, however, the situation might not be the same. The flaw in the Illinois plan was in its arbitrary designation of a fixed number of counties from which signatures had to be obtained, as well as in its obvious intent to discriminate against Chicago and Cook County. If a geographical distribution feature required only that a minimum number of signatories be obtained from so many sub-units as have a majority of citizens eligible to vote in the jurisdiction involved, its validity would at least be arguable. The analogy is obviously not perfect, however, because unlike the situation in presidential elections, votes in elections within states *can* cross geographical boundaries and be counted. But there is nonetheless something to be said for attempting to avoid, or at least minimize, the discrimination against rural candidates that is implicit in plans that depend on signature petitions to determine eligibility. Population density of cities obviously facilitates petition signature gathering, and the low density of rural areas similarly hinders it. A distribution formula requiring signatures from no more than the number of counties that have a majority of the voters in the jurisdiction would therefore seem reasonable.

Because of the need to verify signatures, the eligible pool of signatures would have to be limited to eligible voters. In the majority of states requiring registration, this requirement would limit possible signers to those registered. In other states, those eligible to vote according to state law would be eligible to sign petitions for candidacy. This would seem permissible in view of the fact that all states currently require that signatures on petitions be verified by checking to see if all are eligible to vote. Only three states require that signatures be notarized, and only three require that each signature be witnessed by the circulator of the petition.<sup>281</sup>

For the purpose of determining eligibility to receive a considerable sum of public money, a ban on multiple signing of petitions would seem to be acceptable, even though when used for ballot placement it might be regarded unfavorably.

Finally, in order to prevent established patronage organizations from dominating the petition signature drives, it might be permissible

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<sup>281</sup>Note, 20 CASE W. RES. L. REV., *supra* note 262, at 903.

to prohibit government employees from circulating, and perhaps even from signing, the petitions.<sup>282</sup> At the very least, they should be prevented from coercing signatures. Whatever doubt there was about the constitutionality of such a restriction on the political rights of government employees was removed by the Court in *United States Civil Service Commission v. National Association of Letters Carriers*.<sup>283</sup> If the Court were willing to circumscribe political expression of government employees where no specific socially useful purpose was present, it should certainly be willing to do so where the statutory purpose is to increase the equality of citizen political influence.

No doubt, the use of ballot-access requirements to determine subsidy eligibility may be questioned. But since the issue to be determined is the same in both cases—the existence of a base of popular support—and since both are being used to ration political opportunity, they are obviously comparable. Whether the difference in function would be sufficient to cause the Court to apply a more stringent test in assessing subsidy eligibility thresholds than it would in examining ballot placement prerequisites is debatable. Because the awarding of a subsidy is both an active governmental intervention into the political process, and a distribution of public funds to some and not to others, stricter scrutiny might be warranted. On the other hand, ballot placement is relatively costless to the state, in contrast with election subsidies, and this factor could be interpreted to justify a restrained review and even, perhaps, higher eligibility requirements. In view of the ameliorative nature of the statute, the latter interpretation seems likely.

#### *d. Security Deposit as Eligibility-Determining Device*

The subsidy plan introduced in the United States Senate by Senator Hart in 1973<sup>284</sup> uses a security deposit of twenty percent of the value of the subsidy available to the prospective candidate as the eligibility-determining device. This deposit, which must be obtained from private contributors and only in amounts of 250 dollars or less from each, would be subject to forfeiture if the candidate received fewer than ten percent of the votes in the primary or general election.<sup>285</sup> If the candidate wins,

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<sup>282</sup>*Cf. Shakman v. Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1972).

<sup>283</sup>93 S. Ct. 2880 (1973).

<sup>284</sup>S. 1103, 93d Cong., 1st Sess. (1973).

<sup>285</sup>*Id.* §§ 7(a)(1)(B), 12(a).



the deposit is to be returned to the contributors.<sup>286</sup>

From the foregoing discussion, particularly that involving *Bullock v. Carter*,<sup>287</sup> such a provision seems unconstitutional. It is true that such a deposit is not in any sense a bar to formal candidacy as was the case in *Bullock*. The deposit, however, is required as a precondition of receiving the subsidy, and that is the point at which the basic inequality emerges. In a scheme in which all candidates are eligible for the subsidy, the conditioning of eligibility on the payment of a much larger deposit than was involved in the fee struck down by *Bullock*, is even more discriminatory, because the inevitable result is a substantial public subsidy *only* to the rich or well-connected candidate.

*e. Repayment Requirements As Penalties For Low Voter Support*

The imposition of the risk of liability to repayment of all or part of the subsidy for failure to obtain a certain level of votes in the election involved is another means of eligibility determination utilized by a number of the subsidy proposals.<sup>288</sup> Such a liability would not be as exclusionary as a security deposit because it would operate only after the fact, but it would undoubtedly constitute some deterrence to poor candidates. Because of the desirability of screening out frivolous candidates, and so long as the threshold were not too high, probably not higher than seven to ten per cent, requiring repayment would seem to be permissible as the least onerous method of deterrence,<sup>289</sup> especially as it is keyed to actual performance at the polls.

*f. Opt-out Provisions As Means of Mitigating Repayment Risk*

In order to mitigate the repayment risk imposed on subsidy recipients, thereby freeing less amply endowed prospective candidates to run, one plan includes an opt-out mechanism. If exercised before twenty-five percent of the subsidy entitlement has been drawn, and prior to thirty days before the election, the recipient could extricate himself from the

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<sup>286</sup>*Id.* § 7(a)(5) (deposit returned if candidate receives over 10% of votes).

<sup>287</sup>405 U.S. 134 (1972).

<sup>288</sup>*See, e.g.*, § 7(a)(1)(C) of S. 1103, 93d Cong., 1st Sess., (1973). *See also* Annot., 32 L. Ed. 2d 936 (1973).

<sup>289</sup>*See James v. Strange*, 407 U.S. 128 (1972), which invalidated a statutory scheme for state recoupment of counsel fees for indigent defendants on grounds that the statute did not give the same exemptions to counsel fee judgment debtors as were generally available to other judgment debtors in the state. The implication was, however, that there was nothing objectionable, in principle, in the repayment requirement.

race without incurring the obligation to repay more than a fraction of the amount of the subsidy that he had actually received. Such a provision would be clearly acceptable, and would help considerably in reducing the deterrence posed to impecunious prospective candidates by repayment provisions.<sup>290</sup>

*g. Subsidy Levels and the Incumbency Advantage*

It goes without saying that any scheme which provides campaign funds to challengers and incumbents at identical levels inherently discriminates against challengers because it fails to take account of the accumulated political capital in public familiarity and organizational contacts possessed by incumbents. This problem is not peculiar to public financing proposals; any provision which holds all candidates to the same level of campaign expenditures is similarly defective. All that need be said here is that the lower the subsidy level, the greater the advantage to incumbents and the more likely the scheme as a whole will be found constitutionally discriminatory.

*h. Summary*

It is worth repeating again that no single requirement will be determinative of the validity in any plan. As the Court made clear in *Williams*<sup>291</sup> and *Jenness*,<sup>292</sup> all of the characteristics of the process have to be weighed together in order to determine whether the plan discriminates in favor of some citizens, while excluding others. It is, as the Court said, "the laws taken as a whole"<sup>293</sup> that count.

*3. Limits on Subsidy-Distribution Formulas: The Minor Party Problem*

By far the greatest dilemma posed to subsidy proponents is how to subsidize the major parties, the candidates of one of which will, in fact, be elected in virtually every election, without discriminating against the candidates of minor parties, none of whose candidates is likely to win. The difficulty appears so great that some scholars express doubt as to

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<sup>290</sup>See FLEISHMAN, *supra* note 4, ch. 7.

<sup>291</sup>*Williams v. Rhodes*, 393 U.S. 23 (1968).

<sup>292</sup>*Jenness v. Fortson*, 403 U.S. 431 (1971).

<sup>293</sup>393 U.S. at 34.

the possibility of devising a constitutionally acceptable formula.<sup>294</sup> Unfortunately, much of the writing on the subject seems motivated more by anti-subsidy animus than by a desire to clarify the issues in order to discover an acceptable solution.<sup>295</sup> This is all the more regrettable because the problem is a technical one that is incapable of solution by polemic.

It is not clear from the one holding in point, *Williams v. Rhodes*,<sup>296</sup> whether it is only favoritism to two particular political parties that is forbidden, or also favoritism to a two party system. As justification for its scheme, Ohio urged the propriety of favoring a two party system because of its politically stabilizing tendencies. The Court found that the Ohio system in fact favored not a two party system but *the* two particular parties then in existence, and tended overwhelmingly to perpetuate them.<sup>297</sup> It then went on to add that "new parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past."<sup>298</sup> On another occasion, when a different kind of discrimination was involved, the Court made clear the policy reasons for protecting minor parties:

All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted . . . . The absence of such voices would be a symptom of grave illness in our society.<sup>299</sup>

It would seem, then, that any subsidy plan which excluded minor parties entirely would be unconstitutional.<sup>300</sup> That conclusion would continue to hold even though minor parties had the easiest possible formal ballot access. Once the government intervenes to affect the outcome of the election it must do so even-handedly. In this context, however, even-handedness does not mean giving the same number of subsidy dollars to the minor parties as are given to the major parties, irrespective of the disparity in votes at the polls. Presumably, only such a

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<sup>294</sup>See Rosenthal, *supra* note 179, at 412.

<sup>295</sup>See Sterling, *supra* note 249, at 158-59.

<sup>296</sup>393 U.S. 23 (1968).

<sup>297</sup>*Id.* at 32.

<sup>298</sup>*Id.*

<sup>299</sup>*Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957).

<sup>300</sup>See Casper, *supra* note 277, at 284.

subsidy would be unquestionably equitable, although it would utterly violate common sense. No court would insist on supporting a group of citizens who organize themselves into a political party at the same level as the established parties, irrespective of their comparative likelihood of attracting votes. In the *Jenness*<sup>301</sup> case, which sustained Georgia's burdening of smaller parties with a petition signature requirement not imposed on major parties, the Court noted "that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. . . ." and that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."<sup>302</sup> As the Michigan Supreme Court had pointed out in another case, "[A] minority cannot have an equal right to govern. . . ."<sup>303</sup> Rather, as Professor Rosenthal noted, it must be afforded an opportunity to compete, to make its "appeal of new. . . voices" heard.<sup>304</sup>

This suggests, then, that differential distribution of subsidies would not be unconstitutional in principle, especially in view of the purpose of the subsidy legislation. Professor Rosenthal has made the point well:

This is not to say that no conceivable program of direct subsidies giving different amounts to major and minor parties could possibly be constitutional. There is a strong interest in freeing political campaigns from dependence upon private contributions which would have to be balanced against the unequal payments to minor parties. If the latter were treated generously even though not equally, it might be shown that they were in fact accorded a better chance to convey their views to the voters than if all parties were dependent solely on private contributions.<sup>305</sup>

How can we determine equitability of distribution? What would be acceptable as a criterion?

The Court has already pointed the way by observing in *Bullock v. Carter* that "the criterion for differing treatment must bear some relevance to the object of the legislation."<sup>306</sup> The main objective of subsidy legislation is to free those who actually have a chance of winning office

<sup>301</sup>*Jenness v. Fortson*, 403 U.S. 431 (1971).

<sup>302</sup>*Id.* at 441-42.

<sup>303</sup>*Schweitzer v. Clerk for City of Plymouth*, 381 Mich. 485, 493, 164 N.W.2d 35, 39 (1969).

<sup>304</sup>*Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

<sup>305</sup>Rosenthal, *supra* note 179, at 416.

<sup>306</sup>405 U.S. 134, 145 (1972).

from dependency on private money contributions. Just as resort was made to manifestations of public support in sorting out the serious from the frivolous prospective candidates in the first place, it should be perfectly appropriate to look to manifestations of public support as an indicator of likelihood of winning. The fact that a minor party is, in the end, *minor* and likely to remain so is a legitimate criterion for differing treatment, so long as the subsidy enables it to wage a campaign commensurate in size with the demonstrated numbers of its supporters. The Court implicitly sanctioned such a criterion when it observed in *Williams v. Rhodes* that "of course, the number of voters in favor of a party. . . is relevant in considering whether state laws violate the Equal Protection Clause."<sup>307</sup> Thus, any differential distribution scheme which computes minor party subsidy entitlement on the basis of its support in either past or current elections must be presumed to be constitutional *in principle*.

Critics argue that vote-based differential distribution formulas inherently reinforce the political status quo.<sup>308</sup> While unquestionably accurate in principle, there would be much less status quo reinforcement under public subsidization of elections than exists at present under the system of private financing. Most minor parties can now obtain very little financial support at all. Any reinforcement tendency could be further mitigated by leaving minor parties free to raise and spend additional private money up to the level of public subsidization of major party candidates, which would place minor parties in a much more favorable situation than they are now. A differential distribution plan, then, which favors major parties over minor parties by keying subsidy entitlement to popular vote attainment would seem to be constitutional in principle, so long as minor party entitlements are sufficiently ample to enable their voices to be heard in the political forum, even if greatly over-shadowed by the actual contenders for office—the major party giants.

The foregoing discussion suggests that any attempts to discriminate against minor parties by establishing thresholds for subsidy entitlement, like the five million vote floor contained in the never-implemented Long Act of 1966,<sup>309</sup> would be unconstitutional. In addition, relying exclusively on a past election for the vote-base would be unconstitutional since it would deprive minor parties formed since the last election of the

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<sup>307</sup>393 U.S. 23, 34 (1968).

<sup>308</sup>See Sterling, *supra* note 249, at 150.

<sup>309</sup>Presidential Election Campaign Fund Act of 1966, Pub. L. No. 89-809, 80 Stat. 1587.

chance to qualify for the subsidy.<sup>310</sup> For this reason, minor party entitlement formulas should utilize both past and present election year alternatives as vote-bases, with the distribution figured on the higher of the two.

The crucial determinant of the constitutionality of differential distribution formulas is obviously the relationship between major and minor party allocation formulas. If minor party entitlement is determined by actual votes received, while major party entitlement is a function of the number of persons of voting age in a particular jurisdiction, major parties would receive disproportionately more than minor parties. To insure constitutionality, therefore, the minor party entitlement should not be computed as a direct function of the number of votes received by the minor party. It should be calculated instead as a ratio, in other words as that proportion of the major party entitlement which the minor party vote bears to the average of the major party votes. Most of the current proposals, such as the Hart,<sup>311</sup> Stevenson-Mathias,<sup>312</sup> and Kennedy-Scott<sup>313</sup> plans, as well as the Presidential Election Campaign Fund Act,<sup>314</sup> utilize such a ratio in determining minor party entitlement.

Such a ratio also insures that if a minor party acquires more and more votes, its subsidy entitlement will not be markedly less than the major parties' entitlement at points just below the threshold for qualification as a major party. If, for example, "major party" were defined as one receiving twenty-five percent or more of the votes in the preceding election, and a direct vote-base were used for minor party entitlement, a minor party with twenty-four percent of the vote would receive considerably less than the major parties. A ratio formula avoids that discrimination.

The minor party floor is more troublesome than the ceiling. The Presidential Election Campaign Fund Act, for example, gives no subsidy at all to minor parties receiving fewer than five percent of the votes.<sup>315</sup> Neither do most of the subsidy plans thus far advanced.<sup>316</sup> While there is obviously some useful public purpose to be served in

<sup>310</sup>Note, 55 IOWA L. REV., *supra* note 247, at 989.

<sup>311</sup>S. 1103, 93d Cong., 1st Sess. § 10(c) (1973) (proportioned to the number of votes received by the major party with the lowest vote total).

<sup>312</sup>S. 1954, 93d Cong., 1st Sess. § 304(b) (1973).

<sup>313</sup>S. 2297, 93d Cong., 1st Sess. § 904(a)(2)(A) (1973).

<sup>314</sup>INT. REV. CODE OF 1954, § 9004(a).

<sup>315</sup>*Id.*

<sup>316</sup>See bills cited notes 311-13, *supra*.

avoiding subsidization of fringe groups, the use of such a threshold of eligibility might be considered by the Court as a discriminatory factor in assessing the subsidy plan as a whole. Rather than risk jeopardizing the validity of the plan, it would be preferable to waste that small amount of public money involved in supporting the Greenback or Prohibition party.

Finally, here as in the case of eligibility criteria, it is the scheme as a whole that will determine the validity of the plan, and not any particular component.<sup>317</sup>

#### 4. Tax Subsidies

While tax subsidies are of questionable utility in attracting additional private money into political campaigns,<sup>318</sup> and are, by definition, of no use at all in eliminating reliance on private contributions, they continue to be urged as a primary form of public subsidy<sup>319</sup> and have now finally been enacted.

The Revenue Act of 1971<sup>320</sup> enacted both a tax credit<sup>321</sup> and a tax deduction;<sup>322</sup> it also revived the tax check-off enacted in 1966 as part of the Long Act.<sup>323</sup> A taxpayer can claim a credit of half of the value of his contribution, up to a maximum credit of twelve dollars and fifty cents for a single taxpayer and twenty-five dollars for taxpayers filing joint returns.<sup>324</sup> In the alternative, a taxpayer can claim a deduction of half of the value of his contribution, up to a maximum deduction of twenty-five dollars for a single taxpayer, and fifty dollars for taxpayers filing joint returns.<sup>325</sup> The check-off provision enables a taxpayer to designate one dollar of his tax liability, or in the case of taxpayers filing joint returns two dollars of their tax liability, for payment into the Presidential Election Campaign Fund.<sup>326</sup>

The problems involved in defining eligibility for payment from the

<sup>317</sup>Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23 (1968).

<sup>318</sup>See FLEISHMAN, *supra* note 4, ch. 7.

<sup>319</sup>COMMITTEE FOR ECONOMIC DEV., FINANCING A BETTER ELECTION SYSTEM (1968).

<sup>320</sup>Pub. L. No. 92-178, 85 Stat. 560 (codified in scattered sections of 26 U.S.C., *as amended*, (Supp. I, 1971)).

<sup>321</sup>INT. REV. CODE OF 1954, §§ 41, 642.

<sup>322</sup>*Id.* §§ 218, 642.

<sup>323</sup>Presidential Election Campaign Fund Act of 1966, Pub. L. No. 89-809, 80 Stat. 1587 (now INT. REV. CODE OF 1954, § 6096).

<sup>324</sup>INT. REV. CODE OF 1954, § 41.

<sup>325</sup>*Id.* § 218.

<sup>326</sup>*Id.* § 6096.

Presidential Election Campaign Fund, and determining the amount to which major and minor parties are respectively entitled, have already been discussed above.<sup>327</sup> Here the concern is instead with whether congressional use of the tax subsidy itself can be questioned on equal protection grounds. There are two separate questions involved. First, is the giving of favorable tax consequences to private political donations such governmental action as to subject it to equal protection scrutiny? Second, is there such discrimination among taxpayers involved in the tax deduction, credit, or check-off as would violate the equal protection requirement embraced within the fifth amendment due process clause?

The first question can be dealt with summarily. Of late, courts have been willing more and more to examine whether the granting of tax exemption constitutes sufficient governmental action to be subject to scrutiny for constitutional infirmity.<sup>328</sup> Tax subsidies, therefore, appear to be losing whatever immunity from court scrutiny they formerly enjoyed, and in this respect are regarded increasingly as more akin to direct appropriations.<sup>329</sup> There is no question that, in principle, tax subsidies are reviewable.

The more difficult question is the second. In all the cases examined,<sup>330</sup> the subsidy was attacked on the basis that some policy of the exempt organization—usually exclusion on the basis of race<sup>331</sup> or sex<sup>332</sup>—violated equal protection guarantees, or that the granting of the exemption to particular organizations violated a constitutional pro-

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<sup>327</sup>See text accompanying notes 250-317 *supra*.

<sup>328</sup>See *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972), (federal tax exemption to a fraternal organization which barred non-whites from membership was sufficient governmental involvement to constitute governmental action under the fifth amendment due process clause); *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971) (3-judge court) (holding similarly with respect to racially discriminatory private schools, both as to tax exemption and as to tax deductibility of contributions). *Contra*, *McCoy v. Schultz*, 73-1 U.S. TAX CAS. ¶ 9233 (D.D.C. Feb. 13, 1973), which held that exclusion from membership in a private club on the basis of sex did not constitute governmental action with respect to a tax-exempt foundation operated by the private club, where the complainant claimed exclusion from the club on the basis of sex excluded her from participating in the administration of the foundation. See also *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970), which held that the granting of tax exemption to a church did not constitute such governmental action as to violate the establishment clause of the first amendment. No equal protection question was there involved.

<sup>329</sup>For a discussion of the general advantages of direct appropriations over tax subsidies, See Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

<sup>330</sup>See cases cited note 328 *supra*.

<sup>331</sup>*McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972); *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971) (3-judge court).

<sup>332</sup>*McCoy v. Schultz*, 73-1 U.S. TAX CAS. 9233 (D.D.C. Feb. 13, 1973).



hibition against federal support of such organizations.<sup>333</sup> In no case has the differential availability of the tax subsidy among taxpayers been the basis of constitutional attack, but the facts and language of the pertinent cases do not rule out a challenge on such a ground. If there is any equal protection flaw in tax subsidies for political contributions, it must lie in their differential availability among taxpayers, for the breadth of definition of those political actors and organizations eligible to receive deductible or creditable contributions<sup>334</sup> would seem to rule out, except on first amendment grounds which are considered below<sup>335</sup> any constitutional questions about the recipient organizations.

But what of differential availability? Do the unequal availability and unequal benefits of the existing tax subsidies violate equal protection guarantees?

A good argument can be made that they do. Any tax deduction can benefit only those taxpayers who itemize deductions, and fifty-two percent of the taxpayers do not, choosing instead the standard deductions.<sup>336</sup> For those taxpayers, therefore, the political contribution deduction provides no tax savings and no incentive to contribute. Furthermore, the tax benefits received by those who *do* itemize their deductions will be valuable in proportion to the size of their income, since income level determines tax bracket rates. In other words, under the present law, a contribution costs a poor taxpayer *more* in real income than it does a wealthy taxpayer. For these reasons, tax deductibility has long been disfavored by reformers, and alone would certainly be questionable constitutionally.<sup>337</sup>

As we have noted, however, current federal law permits a tax credit as an alternative to the deduction. A tax credit does not inherently discriminate either in its availability, since it can be claimed by taxpayers whether they itemize deductions or not, or in the cash value of its benefits, since it reduces all taxpayer's tax liability, dollar for dollar. Credits do not, however, benefit those citizens who pay no taxes at all,

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<sup>333</sup>This was unsuccessfully argued in *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970).

<sup>334</sup>INT. REV. CODE OF 1954, § 41(c).

<sup>335</sup>See text accompanying notes 344-88 *infra*.

<sup>336</sup>INTERNAL REVENUE SERVICE, STATISTICS OF INCOME—1970: INDIVIDUAL INCOME TAX RETURNS, at 103, Table 2c and Chart 2B. 28.3% (20,905,272) took the standard minimum deduction, while 23.7% (17,527,129) took the ten percent standard deduction. 48% (35,430,047) itemized deductions.

<sup>337</sup>Goldman, *Income Tax Incentives for Political Contributions: A Study of the 1963 Proposals*, 11 U.C.L.A. L. REV. 212 (1964).

so that, for them, there would be neither incentive to contribute nor means of partially recouping through taxes any funds which they did contribute. The approximately twenty percent<sup>338</sup> of the people who pay no income taxes at all, therefore, would be denied any publicly-subsidized financial voice in choosing and supporting candidates to represent them. In view of the fundamental nature of political rights, and the inherently suspect nature of any wealth classification, it is difficult to see how Chief Justice Burger could reconcile the discrimination involved in political tax incentives with the concern that he expressed in *Bullock* for the political rights of poor people.<sup>339</sup> It must be remembered that, to the extent that they result in cash benefits to citizens, tax incentives constitute nothing more nor less than the equivalent of positive appropriations,<sup>340</sup> and, as we have already seen,<sup>341</sup> there can be no doubt about the unconstitutionality of using money payments alone as a criterion of eligibility to receive a campaign subsidy.

The tax check-off is quite different from other tax subsidies, because it funnels money through the Treasury to campaigns, without any designation of the ultimate recipient, in contrast with tax deductions or credits, which involve citizen giving directly to candidates. It does not constitute, therefore, a citizen-mediated choice as the determinant of public subsidy recipients. In that respect, the tax check-off is really only a variety of direct appropriation rather than a tax incentive.

##### 5. Matching Grants

Provisions in proposed legislation, such as that in the Udall-Anderson plan,<sup>342</sup> which would match a certain percentage of each private political contribution with federally appropriated funds, would seem to be subject to the same defects as tax subsidies. By giving public funds only to those candidates who can raise private funds, the matching grant plan essentially relies on the choice of private citizens to determine the recipients of public subsidy funds. Whatever the virtue of such a mechanism in avoiding the difficult eligibility-determining and subsidy-distributing problems, its vice is to rely on a wealth criterion in order to determine eligibility. It is little different, in principle, from high filing

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<sup>338</sup>INTERNAL REVENUE SERVICE, *supra* note 336, at 4, Table 1C. The total number of non-taxable returns in 1970 was 14,962,460.

<sup>339</sup>*Bullock v. Carter*, 405 U.S. 134, 143-45 (1972).

<sup>340</sup>See *Surrey*, *supra* note 329.

<sup>341</sup>See text accompanying notes 252-59 *supra*. But see *Rosenthal*, *supra* note 179, at 417.

<sup>342</sup>H.R. 7612, 93d Cong., 1st Sess. (1973).

fees, security deposits, and tax subsidies in its violation of the political rights of poor people. It gives to those who have, and denies to those who have not. Under *Bullock v. Carter*,<sup>343</sup> such plans would seem unconstitutional.

#### D. FIRST AMENDMENT LIMITATIONS ON ELEMENTS OF SUBSIDY PLANS

The potential threat posed by plans for subsidization of elections to first amendment freedoms of speech and association is so clear as not to warrant elaboration. Whenever government touches in any way the process of its own selection, it inevitably impinges on first amendment rights. Indeed, Alexander Meiklejohn, perhaps the most devoted and perceptive of first amendment scholars, regarded that amendment as protecting primarily the bundle of rights required for self-government.<sup>344</sup>

Since these matters have been examined at great length elsewhere,<sup>345</sup> ordinarily there would be no point in repeating the discussion here. The focus of the earlier inquiry was limited, however, to the constitutionality of the disclosure and media expenditure limitation provisions of the Federal Election Campaign Act of 1971,<sup>346</sup> while the focus of this article is public subsidy of elections. The case precedents are the same, as are most of the constitutional issues and pertinent political and economic facts. But there are significant differences between the two subjects, which warrant some consideration here.

The two matters are *quite* different. Subsidy is a mode of governmental *support* of political costs, while contribution and expenditure limitations and disclosure are modes of government *constraint* of political activity. Furthermore, as noted above,<sup>347</sup> expenditure limitations, standing alone, are inherently suspect under equal protection theory as well as under first amendment free speech and association. Public subsidy, as suggested elsewhere,<sup>348</sup> introduces an entirely new dimension, perhaps even a redeeming grace, yet it requires some consideration of first amendment problems. This treatment will necessarily build on the

<sup>343</sup>405 U.S. 134 (1972).

<sup>344</sup>Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256.

<sup>345</sup>Fleishman, *supra* note 27. See also Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. REV. 900 (1971); Rosenthal, *supra* note 179; Note, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 214 (1972).

<sup>346</sup>Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.A.).

<sup>347</sup>See text accompanying notes 21-37, *supra*.

<sup>348</sup>See Fleishman, *supra* note 27, at 479-83.

earlier analysis, and will not repeat the sources previously cited.<sup>349</sup>

It should be noted at this point that, while the ameliorative statute exception is likely to lead to a restrained equal protection review, there is no such doctrine in first amendment analysis.<sup>350</sup> If rights are found burdened as they surely are by some features of the subsidy plans, the only way to save the plan is by proving an overriding governmental interest to balance against the infringement. Thus, in examining the questions, we will assume the existence and presumptively protected nature of the basic rights involved,<sup>351</sup> then look briefly at the potentially infringing elements of the subsidy plans, and finally weigh the governmental interest asserted to justify the infringement.

### 1. *Subsidy Plan Infringements on First Amendment Freedom*

Nearly every component of the subsidy plan harbors a potential violation of the first amendment.

First, there is the act of intervening itself—the granting of the subsidy. Because of the “preferred position”<sup>352</sup> of the rights involved, courts will undoubtedly scrutinize painstakingly the subsidy eligibility-determining mechanism and the differential distribution formulas to be certain that no one’s freedom of speech or association is unduly burdened.<sup>353</sup>

Second, to the extent that subsidy plans include a ban on private money contributions to political candidates, they clearly restrain citizens from expressing their political preferences by means of dollars. Professor Ralph Winter put this point well:

A limit on the amount an individual may contribute to a political campaign is a limit on the amount of political activity in which he may engage. A limit on what a candidate may spend is a limit on his political speech as well as on the political speech of those who can no longer effectively contribute money to his campaign. In all of the debates surrounding the First Amendment, one point is agreed upon by everyone; no matter what else the rights of free speech and association do they protect explicit political activity. But limitations on cam-

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<sup>349</sup>*Id.*

<sup>350</sup>See *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 93-94 n.34 (1969).

<sup>351</sup>See Fleishman, *supra* note 27, at 408-09.

<sup>352</sup>*Kovacs v. Cooper*, 336 U.S. 77, 88 (1949); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

<sup>353</sup>*Bullock v. Carter*, 405 U.S. 134 (1972); *Williams v. Rhodes*, 393 U.S. 23 (1968), especially Mr. Justice Harlan’s concurring opinion.

paign spending and contributing expressly set a maximum on the political activity in which persons may engage.<sup>354</sup>

There has been a ban on corporate contributions to federal campaigns since 1907,<sup>355</sup> and one on labor contributions since 1943,<sup>356</sup> but in no case has the Court confronted squarely the constitutional issues implicit in placing a ban on the use of private money in politics. In *United States v. UAW*,<sup>357</sup> and *United States v. CIO*,<sup>358</sup> it brushed them lightly, delighted to be able to avoid deciding the controversial issue.<sup>359</sup> Despite the existence since 1940 of a limitation on the amount an individual could legally contribute to federal campaigns,<sup>360</sup> and the existence since 1971 of a ceiling on the amount which a candidate or a candidate's close family could contribute to his campaign,<sup>361</sup> the Court has never had occasion to weigh the first amendment consequences of the limitations. The only outright bans, however, have been those on labor unions and corporations, which would seem to pose less serious first amendment problems than the ones now proposed, which would apply to individuals directly, rather than to organizations.

Unless some over-riding public interest can be found, then, the constitutionality of such bans is doubtful.<sup>362</sup>

Third, most of the subsidy plans impose expenditure limitations on candidates on the well-considered assumption that, without any limitations, the subsidy would raise spending levels even further, rather than substitute public for private funds while retaining the present level of expenditure. That seems to have been what occurred when Germany tried subsidies without expenditure limitations.<sup>363</sup> But while there are

<sup>354</sup>Winter, *Money, Politics and the First Amendment*, in CAMPAIGN FINANCES 60 (American Enterprise Institute For Public Policy Research 1971). See also Winter, CAMPAIGN FINANCING & POLITICAL FREEDOM (1973).

<sup>355</sup>Act of Jan. 26, 1907, ch. 420, 34 Stat. 864-65.

<sup>356</sup>Act of June 25, 1943, ch. 144, 9, 57 Stat. 167.

<sup>357</sup>352 U.S. 567 (1957).

<sup>358</sup>335 U.S. 106 (1948).

<sup>359</sup>The labor contribution-expenditures ban was first effectively avoided by defining "voluntary contributions" expansively in *Railway Clerks Union v. Allen*, 373 U.S. 113 (1963); *International Ass'n of Machinists v. Street*, 367 U.S. 746 (1961); *Railway Employers Dep't v. Hanson*, 351 U.S. 225 (1956). The expansive definition was then incorporated by explicit statutory provision into the Federal Election Campaign Act.

<sup>360</sup>Act of July 19, 1940, ch. 640 § 13, 54 Stat. 770 codified, *as amended*, 18 U.S.C. § 608 (1970).

<sup>361</sup>Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 203, 86 Stat. 3 (codified at 18 U.S.C.A. § 608 (Supp. 1973)).

<sup>362</sup>See Redish, *supra* note 345.

<sup>363</sup>See Casper, *supra* note 277.

serious doubts concerning the first amendment constitutionality of expenditure limitations,<sup>364</sup> the scholarly consensus seems to support their validity on the grounds of the over-riding public interest in keeping election costs down.<sup>365</sup>

Fourth, the bane of any kind of campaign expenditure limitations is the political actor *not* under the actual or presumptive control of candidates. It is common practice in American political campaigns for individuals, and sometimes committees, acting in a bona fide independent fashion, to express their support of political candidates, and even to declare their support in newspaper advertisement and leaflets. There are also anti-candidate committees, sometimes hand-in-glove with the candidate benefiting from the attacks on his opponent, but sometimes quite clearly genuinely independent. Finally, there are the issue-committees, which campaign for or against a particular candidate primarily because of his stand on an issue about which they care deeply.<sup>366</sup> In order for a ban on private money or a limitation on expenditures to be effective, these activities will have to be either suppressed, regulated, or subject to registration. Any of those three strategies clearly collides in some measure with the first amendment shield.

Fifth, to the extent that either an expenditure limitation or a total ban on private money is imposed as part of a subsidy plan covering primaries, it will have to prohibit committees formed to "draft" an individual to run.<sup>367</sup> In the absence of such a prohibition, prospective candidates' friends could easily evade the limitations governing the direct activities of the candidates themselves.

Finally, some of the subsidy plans require that the subsidy funds be kept on deposit in a federal election agency, with the agency expending the funds directly to campaign employees and providers of goods and services, on the basis of certified invoices. At least one subsidy

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<sup>364</sup>See articles cited *supra* note 345; Ferman, *Congressional Regulation of Campaign Spending: An Expansion or Contraction of the First Amendment?* 22 AM. U.L. REV. 1 (1972).

<sup>365</sup>Rosenthal, *supra* note 179 at 423; A. ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS 66 (1971) (statement of Professor Bickel) *id.* at 75 (statement of Professor Freund).

<sup>366</sup>See, e.g., Franklin, *Gun Lobby Hails Tydings Defeat*, N.Y. Times, Nov. 8, 1970, at 35, col. 1 (late city ed.).

<sup>367</sup>See Alexander & Myers, *A Financial Landslide for G.O.P.*, FORTUNE, Mar. 1970, at 187 for a description of Stewart Mott's advertisement campaign urging Nelson Rockefeller to seek the Republican presidential nomination on an anti-war slate. See also *Ervin v. Capitol Weekly Post, Inc.*, 97 So. 2d 464 (Fla. 1957), for an example of a gubernatorial draft effort in behalf of Fuller Warren in Florida.

plan<sup>368</sup> would require all money expended in federal elections by *any* political actors—issue committees, anti-candidate committees, bona fide independent actors, as well as minor party candidates, who would remain free to raise and spend private funds—to deposit all contributions with, and to make all expenditures through, the federal election agency. While such requirements obviously lessen the extent of privacy accorded to these transactions, they differ from present disclosure requirements only in degree and not in kind, and seem perfectly acceptable.

In summary, the subsidy plans have three primary kinds of impact on first amendment rights. They necessarily regulate the activities of candidates and those under their direct control. They necessarily regulate the activities of supporters of candidates—those committed to particular candidates. Finally, they necessarily regulate third party political actors—those primarily committed *not* to a particular candidate in himself, but to their conception of the public interest or their private interest, and who attempt to serve that interest by working for or against a particular candidate. It is hard to conceive of any pattern of regulation of political activity more likely to pose a threat to first amendment rights.

## 2. *Equalization of Citizen Political Influence: An Overriding Governmental Interest?*

It has been ably argued that there is a protected right to spend one's private money without restriction for political purposes.<sup>369</sup> One must ask, however, how such a right can conceivably coexist side by side with the Court's repeated affirmation of a diametrically opposite right—the right of citizens to be free of wealth distinctions in acting, and being acted upon, in the political process.<sup>370</sup> Moreover, those same opinions imply an affirmative obligation to reduce or eliminate wealth-derived influence in political campaigns.<sup>371</sup> If there is such an affirmative obligation to reduce or prevent the impact of money in politics, how can there simultaneously be a right to use one's money freely in politics? Thus, in theory,<sup>372</sup> and on the basis of more than enough practical

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<sup>368</sup>See FLEISHMAN, *supra* note 4, ch.7.

<sup>369</sup>See Winter, *supra* note 354.

<sup>370</sup>Bullock v. Carter, 405 U.S. 134 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

<sup>371</sup>See text accompanying notes 78-92 *supra*.

<sup>372</sup>J. RAWLS, A THEORY OF JUSTICE 225-26 (1971).

reasons,<sup>373</sup> a legal right to act politically by means of one's material wealth cannot be seriously maintained.

Furthermore, even if there were such a right, like all the other first amendment primary rights from which it derives—speech and association—it is not absolute. Only last term, in *United States Civil Service Commission v. National Association of Letter Carriers*,<sup>374</sup> the Court, in reaffirming the constitutionality of the Hatch Act prohibition on political activities by public employees, stated that “[n]either the right to associate nor the right to participate in political activities is absolute in any event.”<sup>375</sup> The survival and indeed the increased utilization of expenditure limitations, contribution limitations, and bans on certain organizational gifts, buttress further the conception of such a right as clearly subject to governmental limiting. Moreover, that the overwhelming consensus of legal scholars supports the constitutionality of such limitations on political activity<sup>376</sup> gives added weight to the interpretation of such a right as non-absolute in nature. The fact that no federal court has ever invalidated any campaign-constraining legislation surely suggests general acceptance of the overriding need for limiting the use of personal wealth in elections. So does the long line of cases sustaining a variety of constraints on political activity.<sup>377</sup> In one of those cases, now nearly a hundred years old, the Court gave its rationale:

If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.<sup>378</sup>

Indeed, the kind of over-riding interest present here is of the same nature as those involved in the few cases in which courts have sustained admitted burdens on first amendment rights,<sup>379</sup> and is, if anything, of

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<sup>373</sup>See FLEISHMAN, *supra* note 4, chs. 1-2.

<sup>374</sup>93 S. Ct. 2880 (1973).

<sup>375</sup>*Id.* at 2891.

<sup>376</sup>See articles cited notes 345 & 365 *supra*.

<sup>377</sup>See cases cited and discussed in Fleishman, *supra* note 27, at 417, 421-22, 434-38, 444-46.

<sup>378</sup>*Ex parte Yarbrough*, 110 U.S. 651, 667 (1884).

<sup>379</sup>*Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); see *Viereck v. United States*, 318 U.S. 236 (1943).



even greater weight.

Finally, whatever the scope of any right to the free use of personal wealth in elections—and this analysis suggests that it is infinitely limitable by legislation—that right could certainly be voluntarily waived by the candidate in return for the subsidy. While such a waiver would not extend to third party actors, it would remove any doubt as to the violation of any rights of the candidate himself, or rights of his supporters operating under his direction.

The theory underlying reliance on voluntary waiver is that if the subsidy were one hundred percent of what candidates could legally spend, it would be difficult for any candidate to refuse it. In the unlikely event that one did, thereby opting for one hundred percent private financing and no limits, he would be at a tremendous political disadvantage, subjecting himself to charges by his opponents of being a willing creature of vested interests.

The Presidential Election Campaign Fund Act includes such a waiver, in effect, in the form of requiring as a prerequisite to receiving any subsidy payment an agreement to limit campaign expenditures to the levels established in the Act.<sup>380</sup> The trouble with a voluntary waiver is that it leaves the private financing option open to those candidates who wish to escape whatever limitations are imposed, and there has already been at least one statement from the Republican National Committee that if the Presidential Election Campaign Fund Act had been in effect for the 1972 Elections, the Republican party would have refused the subsidy rather than abide by the limits.<sup>381</sup>

A better use of waiver would be to compel it, even if that makes a fiction of the notion. Federal law already provides for coercing criminal testimony if immunity from prosecution is granted,<sup>382</sup> thus avoiding the fifth amendment's rule against self-incrimination. It might be possible to require candidates for federal office to accept public subsidy and to refuse any private contributions. The recent *Letter Carriers* case<sup>383</sup> holds that government may condition employment on a citizen's willingness to waive his right to participate in partisan political management, on the theory that the unrestrained exercise of that right by a govern-

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<sup>380</sup>INT. REV. CODE OF 1954, § 9003(b).

<sup>381</sup>See N. Y. Times, Nov. 24, 1971, at 15, col. 1 (late city ed.).

<sup>382</sup>See Annot., 32 L. Ed. 2d 869 (1973).

<sup>383</sup>93 S. Ct. 2880 (1973). The case was significant mainly because it was decided contrary to a trend of evolving Court theory over the past twenty-five years. See Fleishman, *supra* note 27, at 437, 444.

mental employee reduces the likelihood that he will be able to perform impartially in his employment. This would suggest that the government might also condition acceptance of the subsidy, and perhaps eligibility for federal candidacy itself, on waiver of any right to accept private contributions. So long as the public money payment is reasonable in size and is to be used in place of private money, the clear intent of preventing purchased partiality would seem to justify the constraint and the compelled waiver. The waiver rationale, however, is not very convincing, and, because the evidence against the existence of any right to spend one's money freely in political activity is so strong anyway, waiver really isn't needed.

### 3. *Public Subsidy: The Least Onerous Alternative*

In assessing the first amendment infringements, the Court would weigh the means chosen against all other reasonably available means in order to be certain that it is the least onerous alternative.<sup>384</sup> As suggested elsewhere,<sup>385</sup> public subsidy is inherently the most effective and least burdensome mode of achieving integrity in the election process.

It is far more effective than contribution and expenditure limitations alone, in that it directly addresses and eliminates the problems of candidate deterrence, campaign contribution-purchased private influence on public policies, and the differential advantage available to wealthy or wealth-backed candidates in elections. Expenditure limitations attempt to achieve these goals indirectly—by keeping down the total cost of elections, while contribution limitations address only the second and third problems, and then only half-heartedly. Moreover, contribution and expenditure limitations can only control the flow of funds to those who are already attracting them; they do nothing for minor parties, minorities, and dissidents. Subsidy goes directly to the heart of these matters, and it is the only mode of campaign regulation which does.

It frees all citizens from financial constraints on the opportunity to seek public office, and thereby severs the dependency of candidates on the policy preferences and personal interests of existing sources of wealth. It promises to give political opportunity to all shades of political opinion, without unduly unsettling the stability and orderly change

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<sup>384</sup>United States v. Robel, 389 U.S. 258, 267-68 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960). Comment, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

<sup>385</sup>See Fleishman, *supra* note 27, at 479.

which characterize centrist democracies, such as ours.

While public subsidy is inherently the least onerous alternative, its constitutionality would certainly be affected by particular components of the plan. Of special worry are the provisions dealing with third party actors. By no theory can their political activity be constitutionally banned, or can they be prohibited from using a particular candidate's name in election advertising. Nor does it seem feasible to devise a mode of public subsidization of their activities.

A limitation on the amount which they might spend, if it were of reasonable size so that it gave their voice the opportunity to be heard, would appear constitutional, but there are absolutely no guidelines available as to reasonableness.

One conceivable answer, at least, would seem to lie in requiring the financing of all political activities of such groups to be administered through a federal election agency. This seems perfectly constitutional, as well as a satisfactory way of dealing with what is, after all, only a minor portion of election activity. Because the exclusion of private money from major party races might tend to encourage it to flow through such committees into the campaign, a reasonable expenditure limitation would seem to be permissible.

A criterion is available here, too. The legislation could define committees subject to such administration in much the same way as the Federal Election Campaign Act does, as any committee undertaking activity "for the purpose of influencing the nomination for election, or election, of any person to Federal office."<sup>386</sup> Thus, any actor who publishes leaflets or purchases advertisements using a candidate's name or picture, or unmistakably referring to him, could be required to place the funds to purchase such publicity in a deposit account in the federal election agency and have the agency pay the printer or publisher by check.

So long as third party actors do not campaign for a particular candidate, they should be free to spend money directly for publicity, arguing their interest publicly. That right would seem clearly and properly immune from restriction, although there is some language in the cases which suggest that registration of such efforts might properly be required by Congress.<sup>387</sup>

One of the arguments used by opponents of total public subsidy is

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<sup>386</sup>Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 201, 86 Stat. 3 (codified at 18 U.S.C.A. §§ 591(f), (d) (Supp. 1973)).

<sup>387</sup>*E.g.*, *United States v. Harriss*, 347 U.S. 612 (1954).

that such plans inevitably benefit candidates with wide support among people with time, such as students and labor union members, to the detriment of those candidates whose supporters have more money than time.<sup>388</sup> The assumption is probably specious because citizens with higher incomes have much more discretion in the use of their time during the working day than do labor union members, for example. But even if it were valid, there is a great deal to be said for requiring participation in politics to be through a common currency available to all citizens—time. If the wealthy were put on the same footing as the poor, and were forced to donate time in order to be politically effective, the benefit to the society would be immense, not only because of the added personal participation, but also because society would be rid of the corrosive practice of buying oneself out of a civic responsibility by the payment of money. In any event, if one must choose between giving an advantage to wealth on the one hand and to numbers on the other, a democracy can, in conscience, choose only the latter.

Finally, to whatever extent the ban on private money discriminates against the rich, it is more than justified by the new freedom of speech and association it gives to the poor for the first time.

#### 4. *Public Subsidy: No Greater Conceivable Overriding Interest*

The last decade has made ever clearer the determination of the Court to insure that political opportunity and influence are allocated equally among all our citizens. Any reasonable legislative policies which breathe reality into that opportunity, and which diminish inequalities in the exercise of political influence, serve vital constitutional goals, repeatedly sanctioned by the Court.

The attainment of those goals depends primarily on eliminating the use of privately donated money in campaigns. In no other way can government be opened to participation by all segments of the population, giving talented poor people for the first time a genuine chance to compete for office. In no other way can public policy-making be insulated from skewing by private interest. In no other way can the electoral balances be immunized from the effects of differential wealth distribution in the society as a whole.

Any resource as unevenly distributed as wealth has no place in the political arena. While individual characteristics of candidates—

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<sup>388</sup>See Winter, *supra* note 354.

intelligence, charisma, energy, integrity, dedication, and vision—cannot be equalized in the competition for public office, wealth can!

Political opportunity in a democracy must depend on citizens' individuality rather than on their material possessions. Indeed, the realization of political democracy rests finally on as complete a divorce as possible between personal wealth and political influence.

#### E. CONCLUSION

Public subsidization of elections constitutes an attempt to ensure that the rights guaranteed in the first amendment are distributed equally among the people, as required by the fifth and fourteenth amendments.

That it has taken us two centuries to perceive the flaw in our system of political financing is shameful, but not nearly as shameful as it would be to ignore that flaw now that Watergate has raised it to consciousness. What is at stake is citizen confidence and trust in our government, citizen participation in effecting government by the people, in other words the republic itself. To save the republic requires a bold departure from the ways of the past. More of the same can result only in a continuation of shameful elections and untrusted government. Is that the way we wish to enter our third century of a nationhood?