Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency

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I. INTRODUCTION

In election after election, challengers contend that incumbents running for reelection are unfairly using the powers of their offices to influence the political campaigns. In 1980, for example, supporters of Senator Edward Kennedy for the Democratic presidential nomination alleged that President Jimmy Carter paid campaign expenditures out of federal funds, threatened to fire non-supporters, and used federal grants to coerce state and local leaders to support the President's bid for reelection.[1] Eight years earlier, President Richard Nixon was accused of employing government workers to perform campaign tasks[2] and of systematically abusing federal powers to harass his enemies.[3] Nor are such allegations of abuse of incumbency limited to presidential elections. In both Congressional campaigns[4] and state and local elections,[5] there are repeated claims that the incumbent is using government resources to aid the reelection effort.

Such allegations, that an incumbent is trying to use the powers of the government to stay in office, strike at the very heart of a democratic society.[6] The American political system is premised on the ability of the people to hold their officials accountable through open elections. The integrity of the electoral process is threatened if the government's powers and resources are used to aid one candidate and to oppose another.[7] Harvard Law Professor Laurence Tribe explains:

> Democracy envisions rule by successive temporary majorities. The capacity to displace incumbents in favor of the representatives of a recently coalesced majority, is therefore, an essential attribute of the election system in a democratic republic. Consequently, both citizens and courts should be chary of efforts by government officials to control the very electoral system which is the primary check on this power. Few prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by

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1. Winpisinger v. Watson, 628 F.2d 133, 135–36 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980).

2. Public Citizen, Inc. v. Simon, 539 F.2d 211, 212 (D.C. Cir. 1976).

3. SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, FINAL REPORT, S. REP. No. 981, 93d Cong., 2d Sess. 7, 108, 130 (1974).

4. *See, e.g.*, Belardino v. Murphy, 364 F. Supp. 1223 (S.D.N.Y. 1972); Levy v. Abzug, 355 F. Supp. 1299 (S.D.N.Y. 1972); Schiaffo v. Helstoski, 350 F. Supp. 1076 (D.N.J. 1972), *rev'd*, 492 F.2d 413 (3d Cir. 1974); Van Hecke v. Reuss, 350 F. Supp. 21 (E.D. Wis. 1972); Hoellen v. Annunzio, 348 F. Supp. 305 (N.D. Ill.), *aff'd*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973) (superceded by 39 U.S.C. § 3210 (1982)); Rising v. Brown, 313 F. Supp. 824 (C.D. Cal. 1970); State v. Cannon, 383 So. 2d 389 (La. 1980).

5. *See, e.g.*, Shakman v. Democratic Org. of Cook County, 435 F.2d 267 (7th Cir. 1979), *cert. denied*, 402 U.S. 909, *on remand*, 356 F. Supp. 1241 (N.D. Ill. 1972); White v. Snear, 313 F. Supp. 1100 (E.D. Pa. 1970).

6. *See infra* notes 32–47 and accompanying text.

7. *See infra* notes 32–37 and accompanying text.

> cleverly manipulating the system through which the voters, in theory, can register their dissatisfaction by choosing new leadership.[8]

As such, every allegation of abuse of incumbency requires prompt investigation and, if necessary, a quick remedy to halt the offense.

Logically, challengers and their supporters turn to the courts seeking an injunction ending the incumbent's illicit conduct. No other institution but the judiciary has the authority to restrain unconstitutional behavior by government officials.[9] Unfortunately, most courts have held that it is not the role of the federal judiciary to resolve challenges to improper actions by incumbents.[10] Although occasionally courts have allowed candidates and their supporters to bring suit,[11] most courts have held that such litigation is not justiciable.[12] Relying on restrictive interpretations of the standing doctrine, courts have declared that challengers and their supporters lack standing to sue.[13] As a result, voters in many areas of the country have no way of restraining unconstitutional actions by an incumbent during an election campaign.

In the midst of another election year, this is an issue of potentially great significance. I contend that federal courts should hear and decide cases involving allegations of abuse of incumbency. Section II of this Article analyzes why it is essential that the courts resolve such controversies and review the record of past attempts to invoke judicial protection against abuse of incumbency. Section III describes how all of the requirements for standing, both constitutional and prudential, are fulfilled when voters file suit challenging abuse of incumbency. Finally, section IV considers the possible objections to allowing standing in such cases.

II. Abuse of Incumbency: The Need for Judicial Action

A. *Abuse of Incumbency and the Courts' Role in a Democracy*

The phrase "abuse of incumbency" refers to the use of government resources, not available to any other candidates, to aid an incumbent running for reelection.[14] There are many ways in which officeholders have used their positions to further their election campaigns. For example, some candidates have tried to use government funds to pay campaign expenses, including the costs of travel, publications, and

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8. L. Tribe, American Constitutional Law 1097 (2d ed. 1988).

9. *See infra* notes 50–54 and accompanying text.

10. *See, e.g.*, Winpisinger v. Watson, 628 F.2d 133, 139–42 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980); Public Citizen, Inc. v. Simon, 539 F.2d 211, 212 (D.C. Cir. 1976).

11. *See, e.g.*, Shakman v. Democratic Org. of Cook County, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909, *on remand*, 356 F. Supp. 1241 (N.D. Ill. 1972); White v. Snear, 313 F. Supp. 1100 (E.D. Pa. 1970).

12. *See, e.g.*, Winpisinger v. Watson, 628 F.2d 133, 139–42 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980); Public Citizen, Inc. v. Simon, 539 F.2d 211, 212 (D.C. Cir. 1976).

13. *See infra* notes 67–80 and accompanying text.

14. Of course, constitutional violations may also occur when the government uses its resources to aid a candidate who is not an incumbent seeking reelection. For example, a lame-duck President may use the government's resources to aid his or her party's nominee. The analysis in this paper is applicable to any situation where the government is providing aid to one candidate that is not available to others running for the office. Throughout this paper I will focus on abuse of incumbency simply because these are the situations where it is most likely that the government's resources will be used to help only one candidate.

salaries.[15] Many officials have been accused of abusing the "franking privilege," sending campaign literature to constituents at government expense.[16]

Another form of abuse of incumbency is using government workers to perform campaign tasks while they are on the government payroll.[17] In fact, some incumbents purportedly threatened to fire workers who refused to support the officeholders' campaigns for reelection.[18] Incumbents also allegedly have manipulated the award of government grants and contracts to reward supporters and thereby encourage potential recipients to support the reelection effort.[19]

Other forms of abuse of incumbency are more subtle and virtually impossible to control. For example, some presidents have been accused of manipulating government statistics around the time of an election to make their administration look better.[20] Officials at all levels have manipulated news events to coincide with the

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15. For example, in 1980, the supporters of Senator Kennedy alleged that "[p]residential subordinates engaged in a concerted course of conduct designed to use the public treasury for salaries, travel expenses, costs of meetings and other political outlays." Winpisinger v. Watson, 628 F.2d 133, 135 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980). Specifically, the plaintiffs alleged "that on trips taken for campaign purposes only partial reimbursement to the federal treasury was made, if at all, and only after the trip was actually taken. This delay in making reimbursement acts, according to the complaint, is an interest free loan by the Treasury to the Carter-Mondale committee." *Id.* at 136. Similarly, the plaintiffs alleged a number of instances in which "federal funds are being used to publish materials favorable to the President." *Id.* at 136.

16. *See, e.g.*, Belardino v. Murphy, 364 F. Supp. 1223 (S.D.N.Y. 1972); Hoellen v. Annunzio, 348 F. Supp. 305 (N.D. Ill.) *aff'd*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973) (superceded by 39 U.S.C. § 3210 (1982)); Rising v. Brown, 313 F. Supp. 824 (C.D. Cal. 1970). For a discussion of abuses of the franking privilege, see also, M. GREEN, WHO RUNS CONGRESS? 160, 276–77 (1972); Shore, *The Congressional Franking Privilege: An Idea Whose Time is Up*, HARPER'S, April, 1973, at 102. Federal statutes limit use of the franking privilege to aid reelection campaigns. *See* 39 U.S.C. § 3210(a)(5), § 3210(a)(5)(C) (1982) (campaign mail cannot be sent under the frank); 39 U.S.C. § 3210(a)(5)(D) (1976) (no use of the franking privilege within 28 days of an election (this subsection, however, has been statutorily repealed)). *See also*, Comment, *The Franking Privilege—A Threat to the Fair Electoral Process*, 23 AM. U.L. REV. 883 (1974); Comment, *Use and Abuse of the Franking Privilege*, 5 LOY. L.A.L. REV. 52 (1974); Note, *Congressional Perquisites and Fair Elections: The Case of the Franking Privilege*, 83 YALE L.J. 1055 (1974) [hereinafter *Congressional Perquisites and Fair Elections*].

17. For example, in Public Citizen, Inc. v. Simon, 539 F.2d 211 (D.C. Cir. 1976), the plaintiffs contended that government salaries were paid to employees on the White House Staff "while they were devoting substantially all of their working time to the 1972 Presidential election campaign, rather than to the official business for which their positions are authorized." *Id.* at 212. Similarly, in White v. Snear, 313 F. Supp. 1100 (E.D. Pa. 1970), the planitiff alleged that the incumbent had given government employees the day off on the day of the primary election so that the workers could engage in campaign activities. *Id.* at 1102. *See generally* M. TOLCHIN & S. TOLCHIN, TO THE VICTOR (1971) (describing patronage practices).

18. Of course, those federal employees covered by the Civil Service Act, and similar state and local statutes, are prohibited from engaging in partisan political activities and may not be fired for their refusal to do so. *See* United States Civil Serv. Comm'n v. National Assoc. of Letter Carriers, 413 U.S. 548 (1973); United Public Workers v. Mitchell, 330 U.S. 75 (1947) (upholding the constitutionality of the Hatch Act); 5 U.S.C. § 7324 (1982) (Hatch Act). However, many federal employees, especially those in "policy-making" positions are not covered by the Hatch Act. *See* Branti v. Finkel, 445 U.S. 507 (1980) *limited by*, McCormick v. Edwards, 646 F.2d 173 (5th Cir. Unit A May 1981), *reh'g denied* 651 F.2d 776 (5th Cir. Unit A June 1981). For example, supporters of Senator Kennedy alleged that Hamilton Jordan, Assistant to the President and Chief of the White House Staff, "said that federal employees who were not barred from political activity by federal law are expected to perform political activities only for President Carter and that anyone in that category supporting Senator Kennedy would be dismissed. President Carter is alleged to have instructed the defendant members of his Administration to require their subordinates who were outside the protection of the Civil Service Merit System to support his candidacy or suffer the threat of dismissal for refusing to do so." Winpisinger v. Watson, 628 F.2d 133, 135–36 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980).

19. In 1980, supporters of Senator Kennedy contended that "the granting of federal funds to states and cities had been conditioned upon officials of those entities supporting the Carter candidacy . . . [and] that in areas where official support has been for Senator Kennedy, assistance has been denied." Winpisinger v. Watson, 628 F.2d 133, 136 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980).

20. Zarefsky, Chemerinsky, & Loewinsohn, *Government Statistics: The Case for Independent Regulation—A New Legislative Proposal*, 59 TEX. L. REV. 1223, 1232–33 (1981) (accusations by Ronald Reagan that Jimmy Carter

election.[21] The common theme in all of these examples is that the incumbent is taking advantage of government powers and resources which are not available to challengers. The government is aiding one candidate and no others.

Such actions by incumbents are inconsistent with the very definition of a democratic government. The central feature of a democracy is that the people shall govern.[22] Because it obviously would be unworkable for all public decisions to be made by a majority of the people, the voters elect representatives to run the government.[23] Elected officials are held accountable through regularly scheduled elections.[24] The "knowledge that behavior in office must be submitted to the voters for approval deters unwise judgments or, failing that, enables the people to replace public officials with others who will implement better policies."[25] Thus, "[n]o institution is more central to the United States' system of representative democracy than the election. Beginning with the vote for the Virginia House of Burgesses in 1619 and the Governor of Plymouth in 1620, Americans have continually relied on elections to implement the principle that all sovereignty rests in the governed."[26]

However, elections only insure democratic rule if they are fair and open—that is, if the government allows all candidates to have an equal chance to win.[27] Accountability is subverted if an incumbent can use the resources of the office to perpetuate his or her occupancy of the office.[28] To preserve democratic rule, it is essential that the government be completely neutral in election campaigns.[29] In fact, "fearing that incumbents would use the resources of their offices to perpetuate themselves in power," the Framers of the Constitution explicitly intended for the

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manipulated the Consumer Price Index in October 1980, to show an artificial decrease in the inflation rate, and that similar accusations had been made by the Democrats challenging Richard Nixon in 1972).

21. *See, e.g.*, Arterton, *Campaign Organizations Confront the Media-Political Environment, in* RACE FOR THE PRESIDENCY 11 (J. Barber ed. 1978) (manipulating news events to gain media coverage).

22. The Declaration of Independence states that governments derive "their just Powers from the Consent of the Governed." Declaration of Independence para. 1 (U.S. 1776).

23. George Bernard Shaw wrote that, "[d]emocracy substitutes election by the incompetent many for appointment by the corrupt few." G.B. SHAW, MAN AND SUPERMAN 228 (1904). *See* Cocanower & Rich, *Residency Requirements for Voting*, 12 ARIZ. L. REV. 477, 508 (1970) ("Voting is the institutionalized means for the people to express their consent, and it is, therefore, the continuous process by which the people participate in the legitimization of government and in the peaceable assembly and association of individuals in the body politic. The assembly of votes together is a means of association, involving elements of speech, assembly, and petition and demonstrating the cognate nature of these rights and their function, in practice, of giving effect to political expression.").

24. Professor John Hart Ely commented that "it may be that desire for reelection, more than any community of interest, that is our insurance policy. If most of us feel we are being subjected to unreasonable treatment by our representatives, we retain the ability . . . to turn them out of office." J. ELY, DEMOCRACY AND DISTRUST 78 (1980).

25. Zarefsky, Chemerinsky, & Loewinsohn, *supra* note 20, at 1240.

26. Note, *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1114 (1975).

27. *Cf.* C. FRIEDRICH, MAN AND HIS GOVERNMENT, 258–59 (1963) (government decisions derive their legitimacy from the election process).

28. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1105 (1979) ("If a government can manipulate that marketplace, it can ultimately subvert the processes by which the people hold it accountable.").

29. In numerous cases the United States Supreme Court has recognized the government's duty to remain neutral during election campaigns. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 10 (1976); Broadrick v. Oklahoma, 413 U.S. 601, 616–17 (1973); United States Civil Serv. Comm'n v. National Assoc. of Letter Carriers, 413 U.S. 548, 555–56 (1973); James v. Valtierra, 402 U.S. 137, 142–43 (1971); United Public Workers v. Mitchell, 330 U.S. 75, 94–104 (1947).

government to be neutral in partisan elections.[30] For example, almost two hundred years ago, President Thomas Jefferson ordered his department heads to declare that no federal officer shall "attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it."[31]

Abuse of incumbency prevents fair elections by putting the government's resources behind one candidate[32] and, therefore, threatens to nullify the election process and to undermine the principle of self-government.[33] In short, as Professor Steven Shiffrin states, "[t]o permit a government armed with the biggest campaign chest of all—the public treasury—to attempt to dominate candidate elections threatens the basic integrity of the democratic process."[34]

Nor is the effect on the political process purely theoretical. Resources such as money, workers, and endorsements can mean the difference in election campaigns.[35] The Supreme Court, in *Elrod v. Burns*,[36] described the potential effects on fair elections when government workers are used to aid the incumbent officeholder:

> The free functioning of the electoral process . . . suffers [where political patronage is the practice]. Conditioning public employment on partisan support prevents support of competing political interests. . . . As government employment, state or federal, becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise. *Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant.*[37]

Moreover, as discussed more fully below, government support of the incumbent infringes basic constitutional rights.[38] The first amendment rights of supporters of challengers are violated if their tax dollars are used to support candidates they oppose[39] and if those who they might have associated with are bought off with government funds.[40] The government offends its basic first amendment duty of being content-neutral if it uses its resources to help one candidate but denies those resources

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30. Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535, 554 (1980).

31. United States Civil Serv. Comm'n v. National Assoc. of Letter Carriers, 413 U.S. 548, 557 (1973) (quoting 10 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 98–99 (1899)).

32. Yudof, *When Government Speaks: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 903 (1979) ("[G]overnment officials should not use their offices, staffs, or public monies to promote their reelection or other personal political interests.").

33. Kamenshine, *supra* note 28, at 1104.

34. Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 612 (1980); *See also id.* at 602 ("[t]he integrity of the democratic process could rightly be questioned if government officially intervened in the political process to favor particular candidates.").

35. *See, e.g.*, T. DYE & I. ZIEGLER, THE IRONY OF DEMOCRACY 181–86 (2d ed. 1972); H. MENDOLSOHN & I. CRESPI, POLLS, TELEVISION AND THE NEW POLITICS 297 (1970); J. STROUSE, THE MASS MEDIA, PUBLIC OPINION AND PUBLIC POLICY ANALYSIS 192, 201–02 (1975).

36. 427 U.S. 347 (1976).

37. *Id.* at 356 (emphasis added).

38. *See infra* notes 121–54 and accompanying text.

39. *See infra* notes 139–44 and accompanying text; *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Buckley v. Valeo, 424 U.S. 1, 19 (1976).

40. *See infra* notes 145–52 and accompanying text.

to all others.[41] Similarly, the equal protection clause of the fourteenth amendment is violated if the government acts to aid only the incumbent. Use of government power and money to favor an incumbent in an election contest violates the right to vote for those who support an incumbent's opponent by lessening the value and effectiveness of their votes and depriving their votes of equal weight by putting government money and power into the balance against them.[42] Those who support challengers have their votes diluted by abuse of incumbency in exactly the same way the malapportionment or stuffing of the ballot box lessens the effectiveness of an individual's vote.[43]

In sum, the government should not attempt to perpetuate itself or "influence the selection of candidates for elective office. That function must rest with the people. Citizens are entitled to a government that is neutral in the process of selecting candidates."[44] There is a constitutional mandate of government neutrality in election campaigns; a mandate which is violated by abuse of incumbency.[45]

Court action is the only way to limit abuse of incumbency. If the judiciary fails to act, unconstitutional practices will go unchecked. The matter cannot be left to the political process because the very claim is that the incumbent is subverting that process and preventing it from serving as a true reflection of the popular will.[46] The more successful an incumbent is in using government resources to influence voters, the less reliable the political process becomes. Professor John Hart Ely explains the "[m]alfunction [in the political process] occurs when the process is undeserving of trust, when . . . the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out. . . ."[47] That, of course, is precisely what happens when abuse of incumbency occurs: the "ins" are using government power and resources to prevent challengers from succeeding.

Theoretically, the political process can check abuse of incumbency because challengers may make the unconstitutional acts a major campaign issue. The hope is that outraged voters will refuse to elect incumbents who misuse their office to aid reelection bids. However, the notion that a backlash might occur assumes that more voters will be influenced by the claim of improprieties than are influenced by the improper practices such as government-funded advertisements and campaign

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41. *See infra* notes 153–154 and accompanying text; *see, e.g.*, Carey v. Brown, 447 U.S. 455 (1980); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 28 (1975).

42. *See infra* notes 121–38 and accompanying text.

43. Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 12 ("[a] state policy favoring incumbents often is no more than an euphemism [for] perpetuating themselves as a power elite unaccountable to the voters because of skewed districting. Put differently, 'rotten' legislators can render the right to vote quite as ineffective as 'rotten' boroughs."); *Congressional Perquisites and Fair Elections*, *supra* note 16, at 1081 n.161.

44. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 699 (1970) ("[G]overnment would not be empowered to engage in expression in direct support of a particular candidate for office. It is not the function of the government to get itself reelected."); Shiffrin, *supra* note 34, at 602.

45. Anderson v. City of Boston, 376 Mass. 178, 191 n.14, 380 N.E.2d 628, 637 n.14 (1978), *appeal dismissed*, 439 U.S. 1060 (1979) ("Surely the Constitution of the United States does not authorize the expenditure of public funds to promote the reelection of the President, Congressmen, and State and local officials (to the exclusion of their opponents) . . . . Government domination of the expression of ideas is repugnant to our system of constitutional government.").

46. L. TRIBE, *supra* note 8, at 129 ("[A] court . . . should not forget to inquire whether the nature of the injury, however widely inflicted, is such as to impede the effective operation of majoritarian process.").

47. J. ELY, *supra* note 24, at 103.

workers.[48] Professor Shiffrin explains that, in reality, a backlash against abuse of incumbency almost never occurs:

> When government funds have been used to influence the outcome of elections, there has been no significant backlash. Often the partisan character of the subsidy does not reach the public consciousness. . . . [F]or example, . . . the franking privilege is often used as a partisan subsidy, and such use not only fails to produce a backlash but is an important factor in assisting the election of incumbent representatives.[49]

Again, the more successful the abuse of incumbency, the less likely it is that a backlash can sway enough voters to outweigh the effects of the unconstitutional practices. In short, it is inappropriate to tolerate unconstitutional practices that thwart the democratic process because of a hope that sometimes the political process might work to cancel the effects of such violations.

Nor does any institution other than the courts have authority to halt abuse of incumbency. The Federal Election Commission is the federal regulatory body responsible for enforcing federal election laws.[50] However, the Federal Election Commission's authority consists primarily of enforcing the disclosure requirements and contribution limitations contained in the Federal Election Campaign Act Amendments of 1974 and administering the public funding of presidential elections created by those Amendments.[51] Nothing in the Federal Election Campaign Act or its Amendments gives the Commission authority to restrain most practices that constitute abuse of incumbency.

In fact, the Federal Election Campaign Act was amended in 1979 to explicitly exclude jurisdiction over abuses of federal power or federal funds.[52] In the 1979 Amendments to the Act, Congress redefined "persons" over whom the Commission has jurisdiction to exclude "the Federal government or any authority of the Federal government" and redefined "contribution" and "expenditure" to mean payments and gifts "made by any person."[53] Hence, the Commission lacks jurisdiction to oversee and restrain actions taken by federal agencies to support the incumbent or to

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48. If voters believe that "dirty tricks" and abuse of incumbency are a routine part of elections, then they are unlikely to consider it as a factor in casting their votes. The result is that the political process will never act as a limit on such conduct.

49. Shiffrin, *supra* note 34, at 615.

50. The Federal Election Commission was created to enforce the Federal Election Campaign Act Amendments of 1974. 2 U.S.C. §§ 437c–438 (1982).

51. The powers of the Commission as enumerated in the Amendments are to enforce the provisions of the Federal Election Campaign Act and its Amendments. *See* 2 U.S.C. § 437d(a) (1982). The Federal Election Campaign Act Amendments of 1974 made minor changes in a comprehensive disclosure statute which was part of the Federal Election Campaign Act of 1971, Pub. L. No. 92225, 431-441, 86 Stat. 3 (1971). The 1974 Amendments (which were repealed in 1976) also placed a $1,000 limitation upon contributions by individuals and groups to candidates and authorized campaign committees. 18 U.S.C. § 608(b)(1) (Supp. IV 1974). The statute also limited independent expenditures on behalf of a candidate to $1,000. 18 U.S.C. § 608(e) (Supp. IV 1974). (This section was repealed in 1976.). The Act also created expenditure limits in federal elections. 18 U.S.C. §§ 608(c)(1)(A)–(E) (Supp. IV 1974) (This section also was repealed in 1976.). In Buckley v. Valeo, 414 U.S. 1 (1976), the Supreme Court sustained the limits on contributions to candidates, but invalidated the limits on expenditures in elections that were contained in the Amendments.

52. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, §§ 301(8)(A), (9)(A), (11), 93 Stat. 1339, 1340, 1342, 1344 (1980).

53. *Id.*

investigate allegations that those agencies are spending federal funds to aid an incumbent's reelection effort.[54]

Nor would enforcement of existing criminal statutes limit campaign abuses by incumbents. The only specific federal statute limiting an incumbent's behavior is the antifranking statute[55] which prohibits use of the frank to send campaign mail and prevents use of the frank within sixty days of an election.[56] Although this statute is often criticized for its laxness,[57] it remains the only direct statutory limit on the election practices of incumbents seeking reelection to federal office.[58] Similarly, at the state and local level there are relatively few statutes restricting the abuse of office by incumbents[59] and those that do exist "have been easily evaded and rarely enforced."[60]

In fact, above all it should be the role of the federal courts to protect the political process and restrain abuses of incumbency. Professor Ely writes, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about."[61] Judicial action limiting abuse of incumbency can be likened to the decisions ending malapportionment of state legislatures,[62] because both practices prevent the political processes from operating in a fair and open manner.[63] Former Justice Lewis F. Powell has described *Baker v. Carr*,[64] the seminal case holding justiciable challenges to malapportionment, to be "a necessary response to the manifest distortion of democratic principles practiced by malapportioned legislatures and to abuses of the political system so pervasive as to undermine the democratic

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54. It also should be noted that the Federal Election Commission lacks authority to restrain even those practices over which it does have jurisdiction. The Commission's power is to "conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities." 2 U.S.C. § 437d(A)(9) (1982).

55. 39 U.S.C. § 3210(a)(5) (1982).

56. 39 U.S.C. §§ 3210(a)(5)(C)–(a)(6) (1982).

57. *See, e.g.*, Yudof, *supra* note 32, at 903 ("The [statute] effectively tells officials, if you avoid being too blatant, you may use the franking privilege to endear yourself to the electorate, describe your performance of official duties, but refrain from directly asking for votes or political contributions.").

58. There is a federal statute that generally requires an accounting for public monies. 18 U.S.C. § 643 (1982). This statute, however, is directed to stopping embezzlement and prohibits an officer of the federal government from "receiv[ing] public money which he is not authorized to retain as salary, pay, or emolument. . . ." *Id.* Thus, this statute does not limit expenditures of money to aid the campaign which do not directly and personally benefit the candidate.

59. *See, e.g.*, N.Y. PENAL LAW § 195.00 (McKinney 1975); TEX. PENAL CODE ANN. § 39.01 (Vernon 1974) (abuse of office statutes).

60. Yudof, *supra* note 32, at 903. *See also* H. ALEXANDER, REGULATION OF POLITICAL FINANCE 2 (1966); H. PENNIMAN SAIT, AMERICAN PARTIES AND ELECTIONS 567 (4th ed. 1948); Note, *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1299 n.3 (1975) ("Historically, political considerations have caused prosecuting attorneys to ignore most election violations.").

61. J. ELY, *supra* note 24, at 117. Professor Ely described the voting cases as involving rights "(1) that are essential to the democratic process and (2) whose dimensions cannot be left to our elected representatives, who have an obvious vested interest in the status quo." Abuse of incumbency involves these same voting rights in a context where the challenge is to the actions of the elected representatives.

62. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, *reh'g denied*, 379 U.S. 870 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963).

63. In fact, the famous *Carolene Products* footnote, often regarded as the origins of the modern theory of judicial review, *see*, J. ELY, *supra* note 24, explicitly recognizes the possibility of judicial review to ensure the fair functioning of the political system: "unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the 14th Amendment than are most other types of legislation." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

64. 369 U.S. 186 (1962).

processes."[65] Likewise, abuse of incumbency distorts the election processes by unconstitutionally placing the resources and power of the government behind one candidate in an election. Judicial review of such practices aids the democratic process by ending the malfunction of the political system.[66]

B. *Judicial Review of Abuse of Incumbency: A Mixed Record*

Not surprisingly, there have been a number of court challenges accusing incumbents of using the resources and powers of their office to aid reelection bids. The Supreme Court has yet to grant review in a case where voters supporting a challenger have sued to halt the allegedly unconstitutional behavior of an incumbent. Lower federal court decisions have split over the question of whether such suits are justiciable. Most federal courts have held that voters lack standing to challenge alleged abuse of incumbency.[67] A few courts have come to an opposite conclusion.[68]

In two major decisions the United States Court of Appeals for the District of Columbia Circuit held the challenges by voters to alleged abuse of incumbency is not justiciable. In *Public Citizen, Inc. v. Simon*,[69] taxpayers brought an action to require the Secretary of Treasury to recover all salaries paid to persons on the White House staff while they were devoting substantially all their working time to tasks related to the 1972 presidential election campaign. The plaintiffs contended that using federal funds to pay government employees to perform campaign-related activities violated federal statutory and constitutional provisions.[70] The court of appeals affirmed the district court's holding that plaintiffs lacked standing to challenge the alleged abuse of incumbency. The court stated:

> And the fair implication of appellants' position is to recognize taxpayer standing to attack any executive action that draws on an outstanding appropriation on the ground that the purchases or services are not in accord with the congressional intent in passing the appropriation. This would place the judiciary in the role of management overseer of the Executive Branch. Such oversight is a function of Congress. Taxpayer standing here would bring into play the separation of powers concern pervading [earlier decisions restricting taxpayer standing.][71]

The court of appeals concluded that if the result was that no one would have standing to challenge the allegedly illegal executive practices, that simply meant that the matter was left to the political process for control.[72]

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65. United States v. Richardson, 418 U.S. 166, 195 n.17 (1974) (Powell, J., concurring). *See also* Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209, 230 (1964) ("With political avenues for redress blocked in many states and with protest mounting, the Court has concluded that some judicial participation in the politics of the people is a precondition to there being any effective politics of the people.").

66. Shiffrin, *supra* note 34, at 637.

67. *See infra* notes 69–76 and accompanying text.

68. *See infra* notes 81–86 and accompanying text.

69. 539 F.2d 211 (D.C. Cir. 1976).

70. Plaintiffs alleged that using government funds to pay campaign workers violated the appropriations clause of the Constitution, U.S. CONST. art. I, § 9, cl. 7, and congressional statutes requiring that all expenditures be for the purpose of the appropriation. 31 U.S.C. § 628 (1976) (This statute has been legislatively repealed.).

71. 539 F.2d 211, 217 (D.C. Cir. 1976).

72. *Id.*

Similarly, in *Winpisinger v. Watson*,[73] the Court of Appeals for the District of Columbia Circuit refused to allow voters supporting Senator Edward Kennedy to challenge alleged illegal and unconstitutional practices by federal officials in support of President Jimmy Carter.[74] Supporters of Senator Kennedy alleged that their constitutional rights were infringed by the use of government funds and federal employees to aid the President's reelection effort. The court of appeals held that the plaintiffs lacked standing because they could not show that their failure to succeed in the presidential primaries was a direct result of the allegedly illegal practices. The court stated:

> The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event. . . . Courts are powerless to confer standing when the causal link is too tenuous.[75]

Furthermore, the court of appeals held that the case was not justiciable because "the court's judgment would have to interject itself into practically every facet of the Executive Branch of the federal government, on a continuing basis, for the purpose of appraising whether considerations other than pure public service motivated a particular defendant in the performance of his or her official duties."[76]

Other courts also have followed the District of Columbia Circuit's reasoning. In *Cervase v. Rangel*,[77] the United States District Court for the Southern District of New York denied standing to a citizen and taxpayer who claimed that a congressman had abused franking privileges and gained an unfair advantage in the election process.[78] Likewise, in *United States ex rel. Joseph v. Cannon*,[79] the United States District Court for the District of Columbia held nonjusticiable a challenge to a senator's use of a government employee on the federal payroll to perform campaign tasks during working hours.[80] In all of these cases the courts refused to reach the merits of the claim that the Constitution was being violated, instead choosing to dismiss the cases at the pleading stage on justiciability grounds.

Perhaps the most dramatic case denying standing was the Seventh Circuit's decision in 1987 overturning its earlier holding in *Shakman v. Democratic Organization of Cook County*.[81] The case has a long history. In 1970, the Seventh Circuit held that candidates for office and their supporters had standing to challenge the use of government power to aid the election of candidates for office. The court of appeals, reversing a dismissal by the district court, concluded that, "[W]e see no ground upon which to decide that the controversy suggested by plaintiffs' claims is

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73. 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980). It should be disclosed that I served as co-counsel for the plaintiffs in this case.

74. *Id.*

75. *Id.* at 139.

76. *Id.*

77. 464 F. Supp. 68 (S.D.N.Y. 1978).

78. *Id.*

79. 642 F.2d 1373 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999 (1982).

80. *Id.*

81. 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

nonjusticiable. . . . [P]laintiffs are seeking redress for injuries to their own interests and the interests of others similarly situated."[82]

The Seventh Circuit's decision in *Shakman* was handed down in 1970, before a number of Supreme Court decisions restricted standing to sue in federal courts.[83] Hence, some courts had questioned whether the *Shakman* ruling remained good law.[84] In 1979, the United States District Court for the Northern District of Illinois, on remand, again upheld the plaintiffs' standing to challenge the allegedly unconstitutional practices of the defendants.[85]

In 1987, however, the Seventh Circuit reversed the district court and overturned its earlier holding.[86] The court said that recent Supreme Court decisions concerning standing convinced it that candidates and their supporters could not sue to challenge the incumbents' use of their offices to aid reelection campaigns. The Seventh Circuit said that the allegedly unconstitutional practices could not be sufficiently linked to the incumbents' reelection. The court observed that many factors contribute to election results and thus "the line of causation between the appellants' activity and the appellees' asserted injury . . . [is] particularly attenuated."[87] The court approvingly quoted from *Winpisinger*, but went even further, rejecting the concept of standing to challenge abuse of incumbency. The court remarked that "[a] plaintiff cannot assert injury to his viability as a candidate or his influence as a voter simply on the basis of the advantage—real or imagined—of incumbency."[88]

On the other hand, a few courts have allowed standing to challenge such abuses. In *White v. Snear*,[89] the United States District Court for the Eastern District of Pennsylvania upheld the standing of a challenger in a congressional primary to seek an injunction to prevent county officials from giving county employees a paid day off from work on primary day to campaign for the incumbent.[90] Similarly, in *Common Cause v. Bolger*,[91] a district court held justiciable a claim that the franking statute was unconstitutional as a federal subsidy of incumbent congressmen but not their challengers.[92]

More generally, courts have allowed standing when voters claim that their voting rights have been diluted or infringed. For instance, the reapportionment cases clearly establish that all citizens have "a plain, direct and adequate interest in

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82. *Id.* at 270.

83. *See, e.g.*, Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) (requiring showing of causality in order to obtain standing); Warth v. Seldin, 422 U.S. 490 (1975) (requiring showing of causality in order to obtain standing); United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (barrier to citizen and taxpayer standing).

84. The court of appeals in *Winpisinger* explicitly noted that *Shakman* was decided "in 1970, prior to many of the Supreme Court opinions reassessing the standing requirements." 628 F.2d 133, 141 n.32 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980).

85. 481 F. Supp. 1315, 1326 (N.D. Ill. 1979), *vacated*, Shakman v. Dunne, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988).

86. Shakman v. Dunne, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988).

87. *Id.* at 1397.

88. *Id.* at 1398.

89. 313 F. Supp. 1100 (E.D. Pa. 1970).

90. *Id.*

91. 512 F. Supp. 26 (D.D.C. 1980), *aff'd*, 461 U.S. 911 (1983).

92. *Id.*

maintaining the effectiveness of their votes."[93] Also, the Supreme Court frequently has upheld the standing of candidates for office to challenge impediments to their candidacy.[94] A recent decision of the Eleventh Circuit is instructive. In *Smith v. Meese*,[95] the plaintiffs sued the United States Attorney General and several United States attorneys for their failure to investigate complaints about unlawful election conduct by white officeholders.[96] The court allowed standing, concluding "[i]f the officeholders or candidates are harmed in their ability to run for office or to be re-elected, their injury is enough to satisfy the standing requirement."[97]

There is an obvious conflict among the courts as to whether candidates and their supporters have standing to challenge government actions taken in support of the incumbent. Because allegations of abuse of incumbency will inevitably resurface in future elections, it is important to analyze the question of whether such suits should be justiciable in light of prevailing Supreme Court standing doctrines.

III. Voter Standing to Challenge Abuse of Incumbency

Article III of the United States Constitution defines the judicial power of the federal courts in terms of "cases" and "controversies." This language has been interpreted by the Supreme Court as giving rise to a number of doctrines limiting what matters may be decided by federal courts. Perhaps the most important of these is standing which is the determination of "whether a particular person is the proper party to present a particular issue to the court for adjudication."[98] At the very least, it is the determination of whether the plaintiff has alleged "a personal stake in the outcome of the controversy."[99]

Standing doctrines are justified by several policy considerations.[100] First, they are seen as ways to prevent unnecessary judicial decisions.[101] If the courts decide cases which could be avoided, then valuable institutional resources, both in financial and political capital, are wasted.[102] Time and effort spent on cases that will not

93. Baker v. Carr, 369 U.S. 186, 208 (1962) (quoting Coleman v. Miller, 307 U.S. 433, 438 (1938)).

94. *See, e.g.*, American Party of Texas v. White, 415 U.S. 767, *reh'g denied*, 416 U.S. 1000 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Williams v. Rhodes, 393 U.S. 23 (1968).

95. 821 F.2d 1484, *reh'g denied*, 835 F.2d 291 (11th Cir. 1987).

96. *Id.*

97. *Id.* at 1494.

98. Homburger, *Private Suits in the Public Interest of the United States*, 23 Buffalo L. Rev. 343, 388 (1974).

99. *See* Baker v. Carr, 369 U.S. 186, 204 (1962). The requirement that a plaintiff demonstrate a personal stake in the outcome of a controversy has been termed by some critics as being an "idle and unnecessary Article III exercise." Scott, *Standing in the Supreme Court: A Functional Analysis*, 86 Harv. L. Rev. 645, 674 (1973); *see also* Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 Yale L.J. 816, 817–18 (1969) (arguing that there is no historical basis for the requirement of a plaintiff demonstrating a personal stake in a controversy).

100. It must be noted and emphasized that I am not arguing in favor of these policy considerations or the standing doctrine as it has been developed by the Supreme Court. In this Article, I am making no normative judgments about the desirability of the existing law. Rather, I am merely trying to summarize the law as it now stands so as to argue that voter standing to challenge abuse of incumbency is completely permissible. For excellent criticisms of the modern standing doctrines, see, *e.g.*, Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 Hofstra L. Rev. 545 (1977); Nichol, *Rethinking Standing*, 72 Calif. L. Rev. 68 (1984); Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 Ky. L.J. 185 (1981); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 Cornell L. Rev. 663 (1977).

101. Scott, *supra* note 99, at 670–83 (purpose of standing is to ration scarce judicial resources).

102. *See, e.g.*, D. Currie, Federal Courts: Cases and Materials 11 (3d ed. 1982).

change the status of the parties is diverted from those matters that do require judicial resolution.[103] Moreover, because the judiciary lacks the means to enforce its own decisions, it relies on other branches of government to follow its mandates.[104] Such compliance depends upon the legitimacy of the court's actions. Accordingly, the court should not squander its credibility on cases that do not warrant judicial deliberations.[105]

Recently, the Supreme Court has explained this value of standing in terms of separation of powers. In *Allen v. Wright*,[106] for example, the Court said that the "law of Article III standing is built on a single basic idea—the idea of separation of powers."[107] The notion is that standing limits the role of the federal courts and hence prevents them from excessively intruding into the domain of other branches of government.

Second, courts, unlike other branches of government, cannot conduct investigations or actively gather information.[108] Courts must rely on the parties to the litigation to present all relevant arguments and facts. Therefore, the Court should only consider cases where the issues are clearly formed. Premature review may deprive the court of the necessary record upon which to decide an issue.[109] Furthermore, it has long been believed that a party with a stake in the outcome of a controversy will have the greatest incentive to gather relevant evidence and marshall all available arguments.[110] Thus, the Supreme Court has held that Article III requires that a plaintiff allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[111]

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103. Note, *Judicial Determinations in Nonadversary Proceedings*, 72 HARV. L. REV. 723, 726–27 (1959); CURRIE, *supra* note 102, at 11.

104. Bernard, *Avoidance of Constitutional Issues in the United States Supreme Court: Liberties of the First Amendment*, 50 MICH. L. REV. 261, 262–64 (1951); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Scott, *supra* note 99, at 683–90.

105. The Supreme Court has explained the standing requirement as one "founded in concern about the proper—and properly limited—role of the courts in a democratic society." Warth v. Seldin, 422 U.S. 490, 498 (1975). The Supreme Court has declared that, "[s]hould the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches." United Public Workers v. Mitchell, 330 U.S. 75, 90–91 (1947).

106. 468 U.S. 737 (1984).

107. *Id.* at 752 (1984). *See* Scalia, *The Doctrine of Standing as an Essential Element of Separation of Powers*, 17 SUFFOLK L. REV. 881 (1983); *but see* Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 642–49 (1985) (criticizing separation of powers analysis as a basis for standing doctrines).

108. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 n.10 (1974) (standing doctrines are limited by the fact that courts cannot conduct investigations or actively collect information).

109. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1713 (1980) ("[A] purely non-Hohfeldian litigant may not present the courts with an actual example of how the challenged rule works in practice."). The reference to non-Hohfeldian litigants is to ideological plaintiffs who have not suffered a direct personal injury. *See* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

110. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Planitiff*, 116 U. PA. L. REV. 1033, 1037 (1968) ("It is argued that unless the plaintiff is a person whose legal position will be affected by the court's judgment, he cannot be relied on to present a serious, thorough, and complete argument."). *See also* Arnold, *Trial By Combat and the New Deal*, 47 HARV. L. REV. 913, 922 (1934) ("[C]ourts are more apt to formulate or apply rules soundly if the opposite sides are prevented from sitting around a table together in friendly conference. . . . Bitter partisanship in opposite directions is supposed to bring out the truth.").

111. Baker v. Carr, 369 U.S. 186, 204 (1962).

Finally, courts limit judicial review so as to protect people not before the court. Because judicial decisions have the effect of stare decisis, they may determine the outcome of future litigation. As Professor Lea Brilmayer explains: "We need to protect the neighbor's present and future interests; we do not want the concerned citizen to litigate abstract principles of constitutional law when the precedent established will govern someone else's first amendment rights."[112] Although any decision inevitably affects the rights of others, courts should avoid unnecessary decisions—decisions where there will be no change in the status of the parties—so as to minimize the effects on future litigants.

These policy considerations have led the Supreme Court to articulate a number of requirements that a plaintiff must meet in order to have standing to sue. First, the plaintiff must show that he or she personally has suffered some actual or threatened injury.[113] This requirement that plaintiffs allege "injury in fact" is viewed as the core of the Constitution's standing requirement.[114] Second, the plaintiff must allege that the injury is fairly traceable to the activities of the defendant and that it would be redressed by a favorable court decision.[115] The Supreme Court has held that Article III requires that a plaintiff demonstrate that the defendant's actions were the direct cause of the harm such that relief will redress the injury.[116]

In addition to these constitutional standing requirements, the Supreme Court also has articulated several prudential, nonconstitutional standing requirements. Prudential requirements are self-imposed limits which the Court believes are dictated by prudence and concern for sound judicial administration. One such prudential requirement is that a plaintiff must assert his or her own rights and not those of third parties.[117] Another prudential limitation on standing is that a litigant cannot assert a "generalized grievance"—that is, "a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.'"[118]

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112. Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case and Controversy" Requirement*, 93 HARV. L. REV. 297, 308 (1979).

113. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (requirement for injury in fact).

114. *See, e.g.*, Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99–100 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975). *See also*, Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 616 (1968) ("I think it entirely clear that the Court has always required 'economic and other personal interests' as the basis for standing without exception.").

115. *See* Allen v. Wright, 468 U.S. 737, *reh'g denied*, 468 U.S. 1250 (1984); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72 (1978); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. 490, 500 (1975).

116. Allen v. Wright, 468 U.S. 737, *reh'g denied*, 468 U.S. 1250 (1984); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273, 287 (1980) ("Under the Court's recent doctrine, a plaintiff lacks standing in the 'case or controversy' sense unless he shows both a personal injury and a sufficient causal connection between the injury and the challenged law or conduct to establish a 'substantial likelihood' that a decision in his favor will redress or prevent the injury.").

117. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106 (1976); Barrows v. Jackson, 346 U.S. 249, *reh'g denied*, 346 U.S. 841 (1953) (cases articulating the barrier to third party standing and explaining the exceptions to that doctrine); *see also* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962) (explaining the barrier to third party standing); Note, *Standing to Arrest Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 441 (1974).

118. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). It is unclear whether the barrier

Under the current law of standing, voters should be accorded standing to challenge abuse of incumbency.[119] All of the constitutional and prudential standing requirements are met, and the underlying purposes of Article III are served, by allowing voters standing to initiate litigation aimed at stopping officeholders from using the power and resources of the government to aid their reelection bids.

A. *Injury*

The first standing requirement is that a plaintiff must allege "injury in fact"—an injury to the plaintiff's legally protected rights or interests.[120] Voters challenging incumbents who are alleged to be misusing government resources in an election campaign can assert a direct injury to their constitutional right to a fair election. As one commentator notes: "The Supreme Court has made it clear that the interest of society in fair elections is constitutionally protected in terms of both the individual's [f]ourteenth [a]mendment right to vote and his [f]irst [a]mendment right to associate."[121] Thus, voters suing to restrain abuse of incumbency can claim standing based on their fourteenth amendment right to equal protection and their first amendment rights to freedom of association and expression.

The Supreme Court has recognized that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[122] The right to vote is regarded as fundamental because "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."[123] Accordingly, any impairment of the right to vote will be subjected to the most exacting scrutiny by the federal

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against federal courts deciding generalized grievances is constitutional or prudential. Western Mining Council v. Watt, 643 F.2d 618, 632 n.21 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981) ("not entirely clear" whether the generalized grievance barrier is constitutional or prudential); South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231, 235 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980) (impossible to tell whether the generalized grievance requirement is prudential or constitutional); Note, *The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate?*, 70 GEO. L.J. 1057, 1160 (1982). *See also* Marshall & Flood, *Establishment Clause Standing: The Not Very Revolutionary Decision at Valley Forge*, 11 HOFSTRA L. REV. 63, 64 n.6 (1982) ("It is not entirely clear whether a party seeking to litigate such a [generalized] grievance must be denied standing by the Court on the ground that his claim would not present a justiciable 'case or controversy' under Article III of the Constitution . . . or whether the Court may, pursuant to Article III, hear such a claim, but may also refuse to do so for prudential or self-restraint reasons. The better view, however, is that restraints on standing to litigate generalized grievances are prudentially based.").

119. It cannot be denied that the standing rules are not subject to formalistic, non-discretionary application. Rather, they are easily manipulated by a court depending on whether the court wants to decide or avoid the merits. *See* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425 n.1 (1974); Tushnet, *supra* note 109, at 1705. My argument is that voters challenging abuse of incumbency should be granted standing and that such standing is permissible under the existing standing doctrines.

Also, it should be noted that it is possible to distinguish between standing for voters and standing for candidates. However, courts have refused to draw such a distinction and my argument is that such a distinction is unnecessary because both groups should be accorded standing.

120. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99–100 (1979). The Supreme Court has made it clear that the injury need not be substantial, that even a "trifling" injury is enough for standing. Davis, *supra* note 114, at 613; *see also* Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L.J. 863, 865 (1977) (relaxation of injury requirement).

121. *Congressional Perquisites and Fair Elections*, *supra* note 16, at 1055, 1061 n.28.

122. Reynolds v. Sims, 377 U.S. 533, 555, *reh'g denied*, 379 U.S. 870 (1964).

123. Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

courts.[124] Thus, the Court has held that the Constitution forbids the government from altering ballots,[125] imposing poll taxes,[126] refusing to count ballots of qualified voters,[127] and barring eligible voters from the polls.[128]

Furthermore, it is not enough for government to allow each citizen to cast a ballot; each vote must be counted equally and given the same weight as all other votes. Any practice which has the effect of giving one citizen's vote less weight than another's violates the equal protection guarantees of the fifth or fourteenth amendments.[129] As such, any voter who claims an infringement of his or her right to vote or discrimination in the election processs alleges an injury sufficient to accord standing.[130] In *Baker v. Carr*,[131] the Supreme Court held that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue."[132] In case after case, the Court has affirmed voters' standing to challenge government actions which prevent a fair election process.[133]

The use of public funds and public employees to perpetuate incumbents in office distorts the election by, in effect, adding votes to one side in the election. The effect is to dilute the voting strength of those who support challengers to the incumbent. Professor Marlene Nicholson explains that government support of an incumbent ". . . has a potential multiplication of votes effect. . . . Whether discrimination is caused by manipulation of ballot position, machine support, or campaign financing, the effect upon voters and candidates is essentially the same—some voters are denied an 'equal voice' and some candidates are denied an 'equal chance.' "[134] In short, when "the state is alleged to work against and make more difficult the election of certain candidates, . . . the value of the votes of those supporting those candidates, in terms of their ability to affect the outcome of the election, is lessened."[135] Abuse of incumbency allows the incumbent to gain additional support through the use of government power and influence. The consequence of this is the same as ballot stuffing or malapportionment: it dilutes, by overwhelming the votes of those who oppose the favored candidates.[136] Professor Gerhard Casper explains that "a 'state

124. Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969); Reynolds v. Sims, 377 U.S. 533, 561–62, *reh'g denied*, 379 U.S. 870 (1964); *Ex parte* Yarborough, 110 U.S. 651 (1884).

125. *See, e.g.*, United States v. Classic, 313 U.S. 299, *reh'g denied*, 314 U.S. 707 (1941).

126. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

127. *See, e.g.*, United States v. Mosley, 238 U.S. 383 (1915).

128. *See, e.g.*, Smith v. Allwright, 321 U.S. 649, *reh'g denied*, 322 U.S. 769 (1944).

129. Brown v. Thompson, 462 U.S. 835 (1983); Karcher v. Daggett, 462 U.S. 725 (1983); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Avery v. Midland County, 390 U.S. 474 (1968); Reynolds v. Sims, 377 U.S. 533, 577, *reh'g denied*, 379 U.S. 870 (1964).

130. Ratner, *Reapportionment and the Constitution*, 38 S. CAL. L. REV. 540, 541 (1965) ("Voters who claim unconstitutional discrimination are entitled to be heard, and in the past the equal protection clause has provided a manageable standard for judicial decision.").

131. 369 U.S. 186 (1962).

132. *Id.* at 207–08.

133. *See, e.g.*, American Party of Texas v. White, 415 U.S. 767, 770, *reh'g denied*, 416 U.S. 1000 (1974); Bullock v. Carter, 405 U.S. 134, 136 (1972); Williams v. Rhodes, 393 U.S. 23 (1968); Ripon Soc'y v. National Republican Party, 525 F.2d 567, 572 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976) ("[A]n individual, claiming that his vote is diluted . . . has standing.").

134. Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815, 827–28 (1974).

135. Shakman v. Democratic Org. of Cook County, 481 F. Supp. 1315, 1335 (N.D. Ill. 1979), *vacated*, Shakman v. Dunne, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988).

136. The court in *White v. Snear* noted: "The effect of defendants' conduct is to favor a certain segment of a political

policy' favoring incumbents . . . can render the right to vote quite as ineffective as 'rotten' boroughs."[137] Accordingly, a voter who alleges that the incumbent is using government resources in a discriminatory manner to favor the incumbent's reelection bid alleges a sufficient personal injury to meet the standing requirement.

Additionally, voters challenging abuse of incumbency have standing because they allege an injury to their first amendment rights.[138] The use of government resources and power to favor one candidate over others violates the first amendment rights of supporters of opposing candidates in several ways. First, the first amendment guarantees that one cannot be compelled to contribute to a political cause that one opposes.[139] Thomas Jefferson once wrote that "to compel a man to furnish contributions of money for the propagation of opinions for which he disbelieves, is sinful and tyrannical."[140] Similarly, Justice Hugo Black observed, "I can think of few plainer, more direct abridgements of the freedoms of the [f]irst [a]mendment than to compel persons to support candidates, parties, ideologies, or causes that they are against."[141] Thus, for example, in *Abood v. Detroit Board of Education*,[142] the Supreme Court held that workers may not be compelled to contribute to political candidates and that workers may prevent the union's spending a part of the required dues to contribute to political candidates.[143]

If government resources are used to support the incumbent's reelection bid, either directly or by paying the salary of government employees who spend working time performing campaign tasks, then opponents of the incumbent are forced to subsidize the candidate they oppose. When the incumbent uses public funds in aid of a reelection effort, all in society are paying for the campaign. There is a clear infringement of the first amendment rights of voters who support challengers.[144]

Second, government support for the incumbent is an impermissible content-based discrimination by the government. A central protection of the first amendment is that government cannot regulate speech based on its content.[145] The first

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party and to perpetuate its power through an abuse of authority conferred upon defendants by the state. By doing so, they discriminate against all other segments and candidates within that party. A clearer violation of the Equal Protection Clause would be difficult to imagine." 313 F. Supp. 1100, 1104 (E.D. Pa. 1970).

137. Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 12.

138. It is beyond question that infringement of one's first amendment rights is an injury sufficient to create standing. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 816 (1975); Freedman v. Maryland, 380 U.S. 51, 56 (1965); Dellums v. Powell, 566 F.2d 167, 194–95 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Haymes v. Montanye, 547 F.2d 188, 191 (2d Cir. 1976), *cert. denied*, 431 U.S. 967 (1977).

139. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–36, *reh'g denied*, 433 U.S. 915 (1977). *See also* Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) (Constitution prevents forcing students to pay fees that are used for political organizations.).

140. I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948).

141. Lathrop v. Donahoe, 367 U.S. 820, 873, *reh'g denied*, 368 U.S. 871 (1961) (Black, J., dissenting).

142. 431 U.S. 209, 234–36 n.31, *reh'g denied*, 433 U.S. 915 (1977).

143. *Id.*

144. *See, e.g.*, Yudof, *supra* note 32, at 903 ("the undesirability of requiring taxpayers to fund government speech that they find objectionable"). *See also* Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535, 549–50 (1980) ("[C]ourts invalidating municipal electioneering expenditures had asserted that dissenters should not be compelled to finance partisan municipal viewpoints . . . ." (citing Citizens to Protect Pub. Funds v. Board of Educ., 13 N.J. 172, 98 A.2d 673 (1953); Mines v. Del Valle, 201 Cal. 273, 257 P. 530 (1927), *rev'd*, Stanson v. Mott, 17 Cal. 3d 206 (1976)).

145. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Southeast Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

amendment prohibits the government from favoring some messages or ideas over others.[146] Yet, when the incumbent uses the resources and power of the government on behalf of his or her campaign, the government is speaking only on one side and discriminating against all other views. This, of course, is the very definition of an impermissible content-based restriction of speech. As Professor Shiffrin explains: "If *Barnette*'s fixed star guides navigation at all, it must lead to the view that government speech in support of specific candidates cannot be reconciled with the first amendment."[147]

Finally, abuse of incumbancy violates the first amendment right of freedom of association of voters supporting challengers. In numerous cases the Supreme Court has held that freedom of association is at "the core of those activities protected by the [f]irst [a]mendment."[148] Freedom of association guarantees each citizen the right to join with others to promote a political candidate.[149] Only by associating with others can a voter most effectively advocate his or her favored candidate. That is why, as the Supreme Court has declared, the first amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office."[150] Thus, each citizen has the right to persuade others to join in such political association. Any government action which impedes this, absent a compelling government interest, is clearly unconstitutional.[151]

Abuse of incumbency directly impinges on the freedom of association of voters who support challengers. When government workers are compelled to support the incumbent, or when votes are swayed toward the incumbent by campaigning paid for by government funds, there is a reduction in the number of people available for voters to associate with in campaigning against the incumbent. In other words, "when the state acts to oppose the electoral efforts of certain candidates on the ballot, it renders less valuable the associational rights of those candidates and their supporters."[152] Therefore, a voter alleges an injury to his or her first amendment rights to freedom of association by claiming that the incumbent is using government resources to aid a reelection campaign.[153]

In sum, a voter challenging abuse of incumbency meets the first standing

146. *See, e.g.*, Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

147. Shiffrin, *supra* note 34, at 612.

148. Elrod v. Burns, 427 U.S. 347, 356 (1976), *limited by*, McCormick v. Edwards, 846 F.2d 173 (5th Cir. May 1981). The seminal case holding that freedom of association is protected by the first amendment is NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958): "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *See also* Bates v. City of Little Rock, 361 U.S. 516, 523 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250–51, *reh'g denied*, 355 U.S. 852 (1957); Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964).

149. *See, e.g.*, Kusper v. Pontikes, 414 U.S. 51, 57 (1973).

150. *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

151. *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463–65 (1958).

152. Shakman v. Democratic Org. of Cook County, 481 F. Supp. 1315, 1334 (1979), *vacated*, Shakman v. Dunne, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988).

153. Although this discussion focuses on the standing of voters to challenge abuse of incumbency, it should be noted that opposing candidates obviously also suffer an injury that would be sufficient to permit standing. *See, e.g.*, Turner v. Fouche, 396 U.S. 346, 362 (1970) (Candidates "have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications . . . .").

requirement of "injury in fact" by alleging an injury to fourteenth amendment rights to equal influence in the election process and to first amendment rights to freedom of speech and association.

B. *Causation and Redressability*

The second constitutional standing requirement is that the plaintiff must allege injuries that fairly can be traced to the challenged action of the defendant such that a favorable court decision would redress the claimed injuries.[154] When a voter sues to restrain abuse of incumbency, the alleged injury is a denial of a fair election process and the violation of the specific rights described above. The injury—the interference with the political process—directly results from the defendants' challenged conduct. Hence, a court injunction of the allegedly illegal practices, by definition, would remedy the injury and restore fairness to the election system.

More specifically, a plaintiff challenging abuse of incumbency claims that the use of government funds to obtain support for the incumbent dilutes support for opposition candidates. This dilution is caused solely by the challenged practices and would be eliminated by court action. Similarly, the injuries to first amendment rights are entirely a result of the allegedly improper actions of the incumbent. For example, the use of tax dollars to fund an incumbent's campaign violates the right of opponents to not have their money used to support a candidate they oppose. An injunction halting such misuse of funds would end the injury. Likewise, the claim that government favoritism is an impermissible content-based action can be remedied simply by ending the favoritism. The harms to freedom of association will be eliminated by ending the incumbent's use of federal resources and power to unfairly influence voters, thereby making it possible for supporters of all candidates to have an equal opportunity to influence potential allies.

It would seem that the requirement for causality and redressability should pose no hurdle to voter standing to challenge abuse of incumbency, because the challenge is to precisely the practice which inflicts the injury. Nonetheless, in *Winpisinger*, the United States Court of Appeals for the District of Columbia Circuit refused to allow voters supporting Senator Edward Kennedy standing to challenge alleged abuses of incumbency by aides of President Jimmy Carter because of the causality and redressability standing requirements.[155] The court of appeals denied standing because plaintiffs could not show that Senator Kennedy's failure to win in the primary elections was a direct result of the defendants' conduct.[156] The court of appeals concluded that the "endless number of diverse factors potentially contributing to the

154. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 44–45 (1976); *see also* Allen v. Wright, 468 U.S. 737, *reh'g denied*, 468 U.S. 1250 (1984); Village of Arlington Heights v. Metropolitan Dev. Corp., 429 U.S. 252, 261 (1977); Warth v. Seldin, 422 U.S. 490, 501 (1975).

155. Winpisinger v. Watson, 628 F.2d 133, 135 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980). The alleged improper practices by supporters of President Carter are summarized at *supra* notes 74–76 and accompanying text.

156. The court of appeals in *Winpisinger* affirmed the district court's holding that "the plaintiffs' ability to influence the election process or induce support for Senator Kennedy may turn on 'a number of factors that are unrelated to defendants' alleged abuses.'" *Id.* at 137.

outcome of state presidential primary elections . . . forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event."[157]

The court of appeals clearly mischaracterized the alleged injury to the plaintiffs. The constitutionally-based injury to the plaintiffs was not Senator Kennedy's comparatively low standing in the polls nor his failure to succeed in the primary elections. The injury was to plaintiffs' ability to compete in the election process unimpeded by government interference or favoritism. The injury was to the fourteenth amendment right to equal voting influence and numerous first amendment rights; the claimed injury had nothing to do with the specific election results. Regardless of the outcome of the elections, the constitutional injuries would have been remedied by a favorable court decision. If the court of appeals was implicitly saying that challengers to abuse of incumbency only have standing if they demonstrate that their candidate will succeed in the election, no one ever will have standing to sue to restrain abusive practices by officeholders. There is obviously no way to demonstrate in advance that a court's decision will decide the election. It is absurd to ask a plaintiff to demonstrate the results of elections not yet held in order to obtain standing.[158]

The recent Seventh Circuit Court of Appeals decision in *Shakman v. Dunne*[159] adopted similar reasoning. The court said that voters do not have standing to challenge abuse of incumbency because they cannot demonstrate that their injury is traceable to the defendant's conduct.[160] The court reasoned that so many factors influence how people vote, it is impossible to link abuse of incumbency to the election results.[161] Again, this assumes that the sole injury is loss of the election. The injuries described above—to fourteenth amendment and first amendment rights—are caused directly by the incumbents' conduct and these injuries would be remedied by a favorable federal court decision regardless of the outcome of the election.

C. *Generalized Grievance*

The final potential barrier to voter standing to restrain abuse of incumbency is the rule preventing courts from deciding "generalized grievances." Even where a plaintiff's case is constitutionally justiciable, he or she may still lack standing "under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated."[162] The Supreme Court has held that the bar against generalized grievances means that the "litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.' "[163] A generalized grievance exists if the plaintiff does

157. *Id.* at 139.

158. *Cf.* Schwemm, *Standing to Sue in Fair Housing Cases*, 41 OHIO ST. L.J. 1, 33 (1980) (The more effective the scheme the less likely standing will exist because of the inability to demonstrate that favorable relief will work.).

159. 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988).

160. *Id.* at 1397.

161. *Id.*

162. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99–100 (1979).

163. *Id.* at 100 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)).

not allege a violation of a personal right, but instead objects to an alleged unconstitutional government action solely as a taxpayer or a citizen interested in having the government follow the law. If the plaintiff asserts an injury to a *personal* constitutional right, then there is not a generalized grievance regardless of how many other people share the injury. For example, in *United States v. Students Challenging Regulatory Agency Procedures*,[164] the Court held:

> Nor . . . we said, could the fact that many persons shared the same injury be sufficient reason to disqualify from seeking review of an agency's action any person who had in fact suffered injury. . . . To deny standing to persons who are in fact injured, . . . would mean that the most injurious and widespread [g]overnment actions could be questioned by nobody.[165]

For example, if the federal government enacted a law prohibiting all religious worship, challengers to the law would not be denied standing just because all residents of the United States are similarly injured. Likewise, challenges to malapportioned state legislatures are not deemed nonjusticiable even though the injury is shared by a large number of residents in the state.[166]

A generalized grievance exists if there is no claim of an injury to the plaintiff's personal constitutional rights, but rather only a citizen's or taxpayer's claim that the government is violating the Constitution. For example, in *United States v. Richardson*,[167] the plaintiff, suing as a federal taxpayer, contended that the statutes providing for the secrecy of the Central Intelligence Agency budget were unconstitutional.[168] The planitiff argued that such secret expenditures violated the Constitution's requirement that a "regular statement and account of the receipts and expenditures of all public money shall be published from time to time."[169] The Supreme Court held that the plaintiff was "seeking 'to employ a federal court as a forum in which to air his generalized grievances about the conduct of government.' "[170] Accordingly, the Court ruled that because the plaintiff's interest as a taxpayer was "undifferentiated and 'common to all members of the public' he lacked standing."[171]

Similarly, in *Schlesinger v. Reservists Committee to Stop the War*,[172] the Supreme Court held that plaintiffs suing as taxpayers and citizens lacked standing to raise the claim that the incompatibility clause of Article I, § 6 prohibits members of Congress from holding commissions in the Armed Forces Reserves during their time in office. Chief Justice Burger's majority opinion concluded that "the generalized

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164. 412 U.S. 669 (1973).

165. *Id.* at 686–88.

166. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 206 (1962) ("[V]oters who allege facts showing disadvantages to themselves as individuals have standing to sue. . . .").

167. 418 U.S. 166 (1974).

168. *Id.* at 167–68.

169. U.S. CONST., art. I, § 9, cl. 7.

170. United States v. Richardson, 418 U.S. 166, 175 (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).

171. *Id.* at 177 (quoting *Ex parte* Levitt, 302 U.S. 633, 634 (1937); Laird v. Tatum, 408 U.S. 1, 13, *reh'g denied*, 409 U.S. 901 (1972)).

172. 418 U.S. 208 (1974).

interest of all citizens in constitutional governance" was not sufficient to justify standing.[173]

In neither *Richardson* nor *Schleshinger* was there a claim of an injury to a personal constitutional right, such as the first amendment or the equal protection clause of the fourteenth amendment. In contrast, plaintiffs challenging abuse of incumbency do not allege standing simply by virtue of their status as taxpayers. Their cause of action is based entirely on claims of infringements of first and fourteenth amendment rights. The right to vote and the rights of expression and association are obviously personal rights. An allegation of infringement of these rights long has been regarded to be exactly the type of injury which federal courts would redress.

Furthermore, in *Richardson* and *Schlesinger* the Court rejected standing because the plaintiffs could end the unconstitutional government practices "in the political forum or at the polls."[174] However, while the Court was willing to trust the election process in *Richardson* and *Schlesinger*, such trust is obviously inappropriate when the plaintiffs claim that the government is subverting the political process. Therefore, if anything, *Richardson* and *Schlesinger* support standing when there is a claim that government action prevents fair elections.

Thus, all of the requirements of standing—injury in fact, redressability, and the absence of a generalized grievance—are met when a plaintiff challenges government actions supporting one candidate in an election campaign.[175]

IV. Judicial Review of Abuse of Incumbency: Analyzing the Objections

Use of government resources to support an incumbent's reelection bid violates the first, fifth, and fourteenth amendment rights of voters who support opposing candidates.[176] Hence, plaintiffs seeking to restrain state and local governments from supporting incumbents can file suit under 42 U.S.C. § 1983, which prohibits state or local officials from violating "any rights, privileges, or immunities secured by the Constitution and laws" of the United States.[177] Plaintiffs seeking to halt unconstitutional federal government support for an incumbent can sue directly under the first

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173. *Id.* at 217.

174. *Id.* at 179 ("It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. . . . Lack of standing within the narrow confines of [Article] III jurisdiction does not impair the right to assert his views in the political forum or at the polls.").

175. The prudential rule preventing plaintiffs from asserting the rights of third parties, *see supra* note 117 and accompanying text, is not implicated when a plaintiff challenges abuse of incumbency because the plaintiff is asserting an injury to his or her own rights.

176. *See supra* notes 121–53 and accompanying text. The fifth amendment is implicated because the fourteenth amendment does not apply directly to the federal government and the Supreme Court instead has held the fifth amendment prevents the federal government from denying equal protection of the laws. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

177. 42 U.S.C. § 1983 (1982). The statute reads in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

and fifth amendments of the United States Constitution.[178] As explained above, such suits are fully justiciable in that all of the standing requirements are met. There are two possible objections to such court review: that the case presents a political question and that there would be excessive judicial interference with the Executive Branch.

A. *The Political Question Doctrine*

The political question doctrine provides that some subject matter is not appropriate for judicial determination, but instead should be left to the other branches of government and to the political process.[179] As Professors John Nowak, Ronald Rotunda, and Nelson Young explain: "The political question doctrine . . . holds that certain matters are really political in nature and best resolved by the body politic rather than suitable for judicial review."[180] The political question doctrine, however, has no bearing when plaintiffs allege a direct violation of their personal constitutional rights by government action supporting an incumbent.

First, the fact that the challenged practices are part of the political election process does not make the matter a political question.[181] As the Supreme Court explained in *Elrod v. Burns*:[182] "That matters related to a State's, or even the Federal Government's, elective process are implicated by this Court's resolution of a question is not sufficient to justify our withholding decision of the question."[183] The courts consistently review challenges to allegedly unconstitutional practices during primary elections.[184] In fact, the Court has held that any action that affects the process by which candidates are nominated is subject to constitutional restraints.[185] In *Baker v. Carr*,[186] the Supreme Court concluded that challenges to malapportionment of state

178. *See, e.g.*, Davis v. Passman, 442 U.S. 228 (1979) (inferring a cause of action under the fifth amendment for violations of equal protection by the federal government); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (inferring a cause of action under the fourth amendment).

179. TRIBE, *supra* note 8, at 96–107 (political question doctrine is invoked by courts to avoid ruling on a matter when the resolution of the matter is committed to the discretion of another branch of government). For early discussions of the political question doctrine, see Dodd, *Judicially Non-enforceable Provisions of Constitution*, 80 U. PA. L. REV. 54 (1931); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925).

180. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 102–10 (3d ed. 1986).

181. *See, e.g.*, Rauh, Bode, & Fishback, *National Convention Apportionment: The Politics and the Law*, 23 AM. U.L. REV. 1, 3–11 (1973); Bellamy, *Applicability of the Fourteenth Amendment to the Allocation of Delegates to the Democratic National Convention*, 38 GEO. WASH. L. REV. 892 (1970); Note, *Judicial Intervention in the National Political Conventions: An Idea Whose Time Has Come*, 59 CORNELL L. REV. 107, 122–25 (1973); Note, *The Presidential Nomination: Equal Protection at the Grass Roots*, 42 S. CAL. L. REV. 169, 177–78 (1969); Note, *Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions*, 78 YALE L.J. 1228, 1233–35 (1969) (challenges to unconstitutional government practices during the nomination process do not pose a political question).

182. 427 U.S. 347 (1976).

183. *Id.* at 351–52.

184. Georgia v. National Democratic Party, 447 F.2d 1271, 1275 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971). *Cf.* Newberry v. United States, 256 U.S. 232, 286 (1921) (Pitney, J., concurring) (importance of the nominating process as ultimately determining who will govern).

185. *See, e.g.*, American Party v. White, 415 U.S. 767, *reh'g denied*, 416 U.S. 1000 (1974); Storer v. Brown, 415 U.S. 724, *reh'g denied*, Frommhagen v. Brown, 417 U.S. 926 (1973); Kusper v. Pontikes, 414 U.S. 51 (1973); Bullock v. Carter, 405 U.S. 134 (1972); Williams v. Rhodes, 393 U.S. 23 (1968).

186. 369 U.S. 186 (1962).

legislatures is not a political question.[187] More recently, the Court held that challenges to allegedly unconstitutional gerrymandering of election districts was justiciable.[188] Likewise, litigation objecting to unconstitutional government support for incumbents should be reviewed by the federal courts.

Second, deference to another branch of government or the political process is inappropriate when the claim is that the incumbent is subverting the electoral system. While the Court has held that certain subject matter, such as foreign policy, is best left to other branches,[189] it is obviously undesirable to declare that challenges to presidential misbehavior in elections will be left to the political branches for resolution. Likewise, claims that government conduct is preventing fair elections cannot be left to the political process to resolve because the very point of the suit is that the electoral process is being subverted. In short, challenges to abuse of incumbency should not be dismissed as posing a political question.

B. *Excessive Judicial Interference with the Executive Branch*

Some courts have refused to review challenges to abuse of incumbency on the ground that such review would entail excessive judicial oversight of the Executive Branch of government.[190] For example, in *Public Citizen, Inc.*, the United States Court of Appeals for the District of Columbia Circuit refused to determine whether government officials had unconstitutionally spent working hours performing campaign tasks because such review "would place the judiciary in the role of management overseer of the Executive Branch."[191] Likewise, in *Winpisinger*, the same court refused to reach the merits of the case because "[w]hether shaped as declaratory relief, or injunctive relief, or both, the court's judgment would have to interject itself into practically every facet of the Executive Branch of the federal government, on a continuing basis."[192]

While courts understandably are reluctant to intrude into the domains of other branches of government, such deference should not permit specific constitutional violations to go unremedied. Judicial interference in executive branch functions is proper when fundamental rights are at stake. The traditional rule is that courts should not supervise executive actions "*absent* actual present or immediately threatened injury resulting from unlawful governmental action."[193]

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187. *Id.* at 227. *See also* Note, *Legislative Reapportionment—The Scope of Federal Judicial Relief*, 1965 DUKE L.J. 563 (challenge to reapportionment is not a nonjusticiable political question); Note, *Reapportionment and the Problem of Remedy*, 13 UCLA L. REV. 1345 (1966); Note, *The Case for District Court Management of the Reapportionment Process*, 114 U. PA. L. REV. 504 (1966).

188. Davis v. Bandemer, 478 U.S. 109 (1986).

189. *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307, 1309 (3rd Cir.), *cert. denied*, 416 U.S. 936 (1973); Da Casta v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1973); Sarnoff v. Connally, 457 F.2d 809, 809–10 (9th Cir.), *cert. denied*, 409 U.S. 929 (1972); A. D'AMATO & R. O'NEILL, THE JUDICIARY AND VIETNAM 51–58 (1972); Henken, *Vietnam in the Courts of the United States: "Political Questions"*, 63 AM. J. INT'L L. 284 (1969); Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135 (1970).

190. Winpisinger v. Watson, 628 F.2d 133, 139 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980); Public Citizen, Inc. v. Simon, 539 F.2d 211, 217 (D.C. Cir. 1976).

191. 539 F.2d at 217.

192. Winpisinger v. Watson, 628 F.2d 133, 139 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980).

193. Laird v. Tatum, 408 U.S. 1, 15, *reh'g denied*, 409 U.S. 901 (1972) (emphasis added).

It is a constitutional maxim that it "is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded."[194] Courts do not refuse to protect rights simply because the remedies may interfere with the day-to-day functioning of the Executive Branch of government. For example, courts have supervised every aspect of prison administration when such action was deemed necessary to protect the constitutional rights of inmates.[195] Similarly, federal courts have enacted and monitored detailed plans for school and housing desegregation when such sweeping supervision was deemed necessary under the fourteenth amendment.[196] Accordingly, where federal rights are violated, federal courts assume the duty of fashioning relief, even if such remedies intrude upon executive decision-making.[197]

Obviously, federal courts are somewhat limited in the extent to which they can oversee governmental conduct to insure that it is not based on partisan considerations. The courts certainly cannot assume the function of reviewing every grant or contract awarded by an executive official. However, the fact that some practices which constitute abuse of incumbency cannot be restrained does not mean that the courts should refuse to limit those actions which can be more easily halted. For example, a court can enter an injunction preventing government workers from being fired if they refuse to work for the incumbent.[198] Likewise, a court can prohibit the use of government funds to pay for campaign expenses such as travel for electioneering and campaign literature.

The question of whether a remedy can be fashioned to limit unconstitutional practices should not be considered at the justiciability stage, but rather examined when the court is formulating its relief. Under traditional equity principles, an injunction will be issued only if it can be administered by the court.[199] Thus, the Executive Branch will be restrained only if the court can articulate a clear, readily monitored standard, defining lawful conduct. Where such a standard can be devised, the degree of interference with the Executive Branch is only what is necessary to stop the constitutional violations. For example, in *Shakman v. Democratic Organization of Cook County*,[200] the United States District Court for the Northern District of Illinois issued an order restraining such practices as the firing of government workers who did not support "machine candidates," the performance of political work on

194. J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); *see also* Bell v. Hood, 327 U.S. 678, 684 (1946).

195. *See, e.g.*, Cruz v. Beto, 405 U.S. 319 (1972); Johnson v. Avery, 393 U.S. 483 (1969); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Hall v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

196. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977); Hills v. Gautreaux, 425 U.S. 284 (1976); Keyes v. School Dist. No. 1, 413 U.S. 189, *reh'g denied*, 414 U.S. 883 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, *reh'g denied*, 403 U.S. 912 (1971).

197. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

198. For example, pursuant to the United States Supreme Court's holding in Elrod v. Burns, 427 U.S. 347 (1976), on remand, the district court entered an order prohibiting any employee in the sheriff's office from being fired as a result of his or her political affiliation. Elrod v. Burns, No. 71 C 607 (N.D. Ill. April 14, 1977).

199. *See* Parker & Stone, *Standing and Public Law Remedies*, 78 COL. L. REV. 771 (1978) (standing is a separate inquiry from remedies; traditional remedies principles limit relief).

200. 481 F. Supp. 1315 (1979), *rev'd*, 829 F.2d 1387 (7th Cir. 1987).

public time, and the use of political considerations in employment practices of the government defendants.[201]

The reluctance to oversee executive conduct is understandable and desirable, but deference need not mean the complete absence of judicial review. Moreover, the separation of powers considerations that are present in reviewing presidential actions are inapplicable when courts are asked to consider the conduct of other federal, state, and local officeholders. In short, while some forms of abuse of incumbency may not be susceptible to judicial control, others, especially the most blatant improprieties, can be restrained by court injunction with minimal interference with executive branch functions. The courts must do all that they can to fashion relief to end unconstitutional government support for incumbents in election campaigns. Deference and reluctance to intrude should not translate into complete abdication.

V. Conclusion

The core of democratic theory is that government officials should be held accountable for their actions through the electoral process. Free and fair elections are lost if the government's resources and powers can be used to aid one candidate. Government actions in support of incumbents seeking reelection violates the constitutional rights of supporters of opposing candidates. Accordingly, court action to restrain such unconstitutional behavior is appropriate and even essential because there is no other means for halting the improper conduct. Challenges to abuses of incumbency are fully justiciable and should be decided by the federal courts.

201. *Id.*