

# THE SEPARATION OF ELECTORAL POWERS

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## I. INTRODUCTION

A cardinal principle of republicanism since at least Montesquieu has been the separation of powers. This principle—so second-nature to Americans by virtue of its presence in our founding constitutions, both state and federal, as well as the philosophical tracts written in support of those constitutions—calls for the placement of legislative, executive, and judicial power in three different institutions of government. One premise of this principle is that these three governmental powers are qualitatively different in nature: legislative enactment of laws is distinct from executive enforcement of them, and judicial pronouncement of how laws apply to particular circumstances should be distinct from both the initial adoption of rules as well as their prosecutorial enforcement.

This principle has served us well, but we need to supplement it. Traditional republican political theory lacks an adequate account of election laws and their relationship to the rest of the legal system. Republicanism developed prior to the formation of entrenched two-party electoral competition and thus could not anticipate the problem of one party capturing control of the legislature and being able to manipulate election rules so that the two-party competition is no longer a fair fight.<sup>1</sup> This problem has become familiar to us in the form of gerrymandering, but it can take other forms as well. We saw this particularly clearly in 2012, when Republican-controlled legislatures enacted various forms of restrictive voting rules—from stricter voter ID laws to reduced availability of early voting—in an apparent effort to tilt the electoral playing field in their favor.<sup>2</sup>

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1. For an interesting and valuable discussion of the role that election laws played in eighteenth century republican theory in America, see Kirsten Nussbaumer, *Republican Election Reform and the American Montesquieu* (draft available on SSRN). Nussbaumer argues that these Founding Era theorists believed that election laws should be imbedded in constitutional law and thereby protected from ordinary legislation. But, as I explain in this essay, it is unrealistic (at least in contemporary times) to expect that electoral rules can be confined entirely to constitutional, rather than ordinary, law—and thus some new alternative needs to be developed to implement the traditional spirit of republican theory, which attempts to protect the state from becoming hostage to partisan avarice.

2. See e.g. Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 Geo. Wash. L. Rev. \_\_\_\_ (forthcoming 2013). As Hasen observes in his *Voting Wars* book, Democrats are not immune from strategic behavior when considering which voting rules to advo-

To address this problem, I offer a new theoretical twist on the old separation-of-powers idea, which I call the separation of electoral powers. It has two dimensions. Its vertical dimension separates powers that govern the electoral process from the traditional powers that govern the rest of social life in the polity. The horizontal dimension replicates the traditional three-part division among legislative, executive, and judicial powers within the newly separate domain of electoral powers. Thus, there is a new electoral legislature, executive, and judiciary.

For this theoretical twist to be attractive, it needs to be workable in principle even if it is not likely to be implemented immediately. Therefore, after explaining the necessity for a development in republican theory along these lines, I offer an account of how the separation of electoral powers might actually operate in practice. In addition, to be persuasive in the twenty-first century, any theory concerning the separation of powers needs to take account of administrative law and the rise of administrative agencies that do not fit neatly into the eighteenth century tripartite division of legislative, executive, and judicial powers. Much of election law is necessarily a species of administrative law. Boards of election are administrative agencies, and the rules that they promulgate for the casting and counting of ballots—or the rules that are imposed on them by a Secretary of State or other statewide office—are administrative rules, presumptively subject to judicial review in accordance with general principles of administrative law unless otherwise specified in the state's constitution or statutes.

Yet in one crucial respect election law differs from every other specialty that falls under the umbrella of administrative law (such as environmental law, securities law, etc.): the rules of election law determine the identity of the elected officials responsible for adopting all those other areas of law. They are antecedent to the legislative process, whereas all other areas of administrative law are subsequent to the legislative process.<sup>3</sup> In any event, the separation of electoral powers as a theoretical idea designs

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cate or oppose. See Richard L. Hasen, *The Voting Wars: From Florida 2000 to the Next Electoral Meltdown* (Yale Univ. Press 2012). Indeed, as the nation's historical experience with gerrymandering shows, including recent examples in Illinois and Maryland, state legislatures controlled by Democrats can be just as guilty of this manipulative practice as Republican-controlled legislatures. For purposes of this essay, it is not necessary to make a comparative assessment of the relative extent to which Republicans and Democrats attempt to amend voting rules in an effort to secure partisan advantage.

3. This distinction is important because the democratic legitimacy of administrative rules is predicated on the assumption that these administrative rules are subordinate to, and constrained by, legislation enacted by a legislature that itself has democratic legitimacy. Yet for administrative rules that regulate elections, this assumption does not hold. Rather, in this unique context, the administrative rules affect the identity of the legislature itself, including whether it is entitled to be respected as democratically legitimate. Simply put, electoral administrative rules cannot derive their democratic legitimacy from the legislature. The relationship runs in the opposite direction: if the administrative electoral rules are not themselves democratically legitimate, the legislature will not be so.

the institutions of the electoral legislature and the electoral executive—and structures the relationship between these two electoral powers—in a way that benefits from the wisdom of administrative law developed in more recent decades. But first, why is it necessary to introduce this new theoretical twist into traditional republican theory?

## II. THE PROBLEM OF PARTISAN LEGISLATION

Partisan manipulation of election laws in an effort to help one's own party win is arguably on the rise since 2000. Many have accused Secretaries of State of abusing their executive power over the enforcement of voting laws in order to secure an electoral advantage for their fellow teammates.<sup>4</sup> Consequently, scholars (including myself) have called for the creation of new, nonpartisan institutions to replace the authority of partisan Secretaries of State to enforce election laws.<sup>5</sup>

Giving executive power to enforce election laws to a nonpartisan Secretary of State, however, would do nothing to constrain the *legislative* power of a legislature controlled by one party to enact election laws that bias the voting process in its favor. Yet the partisanship of state legislatures was the innovative hallmark of the 2012 election. Much more than the administrative decisions of Secretaries of State, partisan rules written by state legislatures were a serious blight on the body politic.

In an effort to prevent gerrymandering, there have been recent attempts (with mixed success) to put the power to draw district lines, which otherwise would reside in the legislature, in the hands of a nonpartisan redistricting body.<sup>6</sup> But thus far there have been no similar calls to remove from the legislature all power to enact any form of election law (so that the rules for voter registration, voter ID, early and absentee voting, and the like would all be promulgated by some entity other than the ordinary legislature of the

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4. In Ohio alone, the last three Secretaries of State—Ken Blackwell, Jennifer Brunner, and Jon Husted—have all suffered these accusations. Similar accusations have arisen in many other states, including Colorado, Connecticut, Florida, Indiana, Kansas, and Minnesota. See e.g. Hasen, *The Voting Wars*, *supra* n. 2.

5. See e.g. Steven F. Heufner, Nathan A. Cemenska, Daniel P. Tokaji & Edward B. Foley, *From Registration to Recounts: Developments in the Election Ecosystems of Five Midwestern States* (Election Law @ Moritz, The Ohio State Univ. Moritz College of Law 2007); Hasen, *The Voting Wars*, *supra* n. 2. Dan Tokaji, my Moritz College of Law colleague, has also recently written about the largely successful implementation of a nonpartisan administrative alternative in Wisconsin. See Daniel P. Tokaji, *America's Top Model: Wisconsin's Government Accountability Board*, \_\_\_ U.C. Irvine L. Rev. \_\_\_ (forthcoming 2013).

6. California adopted a new nonpartisan redistricting commission, which drew the lines for the first time after the 2010 census. An attempt in Ohio that was modeled largely on California's experience failed at the ballot box in November 2012, after being subjected to a well-organized and well-funded campaign to defeat it. See Jim Siegel, *Redistricting revamp readily defeated*, *The Columbus Dispatch* 1B (Nov. 7, 2012).

state). The reason why we have not heard this call yet is that there is no more basic tenet in republican political theory than that legislative power resides with the legislature. This tenet is part of the separation-of-powers principle itself, and it is the principle that gives republican theory its democratic character—since the legislature is designed to be representative of the people. Thus, while carving out redistricting from the otherwise general legislative powers of the legislature might seem consistent with traditional republican theory, carving out all legislative power over the enactment of election laws is a much more radical idea (“radical” in its basic meaning of challenging the very “root” of republican theory).

For one thing, redistricting is meant to occur only once a decade, and it is a discrete single issue (even if a complicated one).<sup>7</sup> The task of updating a state’s election laws is potentially a continuous one. Should new voting technologies be adopted? Should the rules for absentee voting be revised in light of changing demographics or other societal factors? Similarly, should voter registration and its procedures be modernized? These (and a host of other policy questions concerning the optimal rules for the operation of the voting process) have always been thought, since the beginning of republican political theory, to belong to the province of the legislature.<sup>8</sup> In what institution would this power to enact election laws reside, if not the legislature, and how would this institution be adequately representative of the people?

### A. *The Limits of Traditional Constitutional Law*

One strategy to sidestep these difficulties is to rely on the judiciary to invoke constitutional principles like Equal Protection to constrain the power of a partisan legislature to write election rules in its favor. But there are limits to the effectiveness of this strategy. The Supreme Court, for example, has repeatedly shown its reluctance to police partisan gerrymanders.<sup>9</sup> Nor has the Court exhibited an eagerness to invalidate other forms of election laws, like voter ID requirements, that have a veneer of a policy justification—even when the evidence overwhelmingly indicates that the desire

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7. For a discussion of the philosophical underpinnings of decennial redistricting, see Dennis F. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* 38–53 (U. Chicago Press 2004).

8. For example, the U.S. Constitution gives to Congress (and if Congress does not act then the state legislatures) the authority for determining the “manner” of congressional elections. See U.S. Const. art. I, § 4.

9. See e.g. *Vieth v. Jubelirer*, 541 U.S. 267 (2004); see also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (refusing to invalidate a redistricting plan based on alleged partisan motivation alone).

to secure a partisan advantage actually motivated the enactment of these laws.<sup>10</sup>

To be sure, in 2012 lower courts largely blocked implementation of new laws that appeared motivated by partisanship and intended to make it more difficult for eligible voters to cast ballots than in the previous presidential election.<sup>11</sup> But one should not rely too heavily on these judicial victories, at least for the long run. First of all, some of these decisions were explicitly temporary, blocking implementation of the legislation for only the 2012 election, with the expectation that the new law would be permitted to take effect thereafter.<sup>12</sup> Second, several of these key rulings were predicated not on constitutional law but on § 5 of the Voting Rights Act, which may not survive the Supreme Court's review of its constitutionality.<sup>13</sup> Third, none of the 2012 rulings rested squarely on the partisanship of the statutes they invalidated but instead (like the Supreme Court in *Crawford*) judged the legislation in terms of the statute's policy justifications.<sup>14</sup> Thus, as long as the policy justification is adequate according to the generally deferential standard of review that courts use to evaluate regulations of the voting process (unless those regulations mandate an outright denial of the franchise), the judiciary will not stop a legislature's manipulation of voting rules to achieve a partisan advantage.

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10. In *Crawford v. Marion Co. Election Bd.*, 553 U.S. 181, 203 (2008), the plurality opinion indicated a voter ID law would be invalid because of partisan motives underlying its enactment *only if* the legislature offered no other reason for the law's adoption. Therefore, as long as the legislature articulates a policy pretext for its new electoral rule—however insincere that pretext may be—the Court will not invalidate the statute for having a partisan motive but instead will assess the constitutionality of the statute as if the pretext had been the legislature's actual motive (and thus evaluate the validity of that policy justification under the Court's balancing test for electoral regulations).

11. For a survey of these judicial developments, see Hasen, *The Voting Wars*, *supra* n. 2.

12. The new voter ID laws in South Carolina and Pennsylvania were temporarily suspended in this way. *Id.*

13. On November 9, 2012, the U.S. Supreme Court granted certiorari in *Shelby Co., Ala. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012) to consider the constitutionality of § 5 of the Voting Rights Act. Many legal scholars believe the Supreme Court is likely to rule § 5 unconstitutional, as being beyond the scope of congressional power under the "congruence and proportionality" test because the burdens of § 5 apply only to some states. The Court may conclude, by a 5–4 vote, that Congress lacks an adequate justification for continuing to impose these burdens exclusively on some states when contemporary evidence indicates that other states also pose a significant risk of adopting discriminatory election laws.

14. For example, a Pennsylvania trial judge adjudicating a dispute over that state's voter ID law based a temporary injunction not on the evidence of the law's partisan motive but instead on its potentially disenfranchising effect. *Applewhite v. Pa.*, 2012 WL 4497211 at \*\*3–5 (Pa. Cmmw. Oct. 2, 2012). Likewise, a three-judge panel recently denied preclearance under § 5 of the Voting Rights Act to Florida's rollback of early voting hours not based on the partisan motive underlying this rollback but instead on Florida's failure to provide that it would not have a discriminatory effect on African-American voters. *Fla. v. U.S.*, No. 11-1428, 2012 WL 3538298 at \*2 (D.D.C. Aug. 16, 2012). Finally, although the Sixth Circuit did note the risk of partisan manipulation in its decision on Ohio's rollback of early voting, it also ultimately rested on the State's inadequate policy justifications for the rollback in light of its differential curtailment of voting opportunities. *Obama for Am. v. Husted*, 697 F.3d 423, 435–436 (6th Cir. 2012).

Moreover, the judiciary itself may be tainted by partisan favoritism. This was certainly the perception of many after *Bush v. Gore*,<sup>15</sup> with respect to both the Florida and U.S. Supreme Courts.<sup>16</sup> Although 2012 notably lacked partisan divisions among the appellate judges who decided the year's electoral cases, these divisions were quite apparent in 2008 and easily could occur again in the future.<sup>17</sup> Consequently, there is no guarantee that constitutional constraints designed to curb partisan favoritism in the legislature will be implemented in a nonpartisan manner by conventional courts, whether elected or appointed.<sup>18</sup>

Perhaps we could be more specific in the constitutional rules we wish the judiciary to uphold so that a partisan court would have diminished ability to interpret those rules in ways that favor its own party. But that wish is unrealistic. We cannot expect a constitution to specify all the details of the voting process, such that there is no room for partisan maneuvering by either the legislature or the judiciary (or both). For example, the Constitution is not the place to itemize the kinds of IDs that would satisfy an appropriate voter ID requirement; nor is it suitable to write into the Constitution all the details for the verification of provisional ballots.

### B. *The Need for More Than Just a Nonpartisan Court*

Perhaps instead we could change the method of selecting judges so that those selected would be much more likely to act in a nonpartisan manner even in highly charged election cases. For example, we could amend the Constitution to require that Supreme Court justices be confirmed by two-thirds, or even three-quarters, of the Senate. This kind of supermajoritarian confirmation requirement would force presidents to nom-

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15. *Bush v. Gore*, 531 U.S. 98 (2000).

16. See e.g. Akhil Amar, *Bush, Gore, Florida, and the Constitution*, 61 Fla. L. Rev. 945, 946 (2009).

17. Most prominently, the en banc Sixth Circuit revealed deep partisan divisions in *Ohio Republican Party v. Brunner*, 544 F.3d 711 (6th Cir. 2008) (en banc), *vacated*, 555 U.S. 5 (2008). The Eleventh Circuit also split 2–1 along party lines in *Fla. NAACP v. Browning*, 522 F.3d 1153 (2008), an important case involving voter registration and provisional ballots. See generally Hasen, *The Voting Wars*, *supra* n. 2.

18. For a nineteenth century lament on the widespread partisanship of state judges in election cases, see Frederick C. Brightly, *A Collection of Leading Cases on the Law of Elections in the United States* (Kay & Brother 1871), the preface of which states: “this work has an aim and a purpose, and that is, to call public attention to what the Author sincerely believes to be the greatest vice in our political system, the delegation of discretionary powers, in political cases, to an elective Judiciary, holding by a limited tenure.” *Id.* at iv. Throughout his book, Brightly condemns examples of what he considers to be partisan rulings, describing one: “A more fallacious argument was never penned: it only shows how the judgment of an estimable, honest and learned judge can be warped by his party feelings, in a contested election case; and how unfit a depository of this delicate jurisdiction, is the judicial department, as organized in the United States.” *Id.* at 511. Thus, insofar as the problem of judicial partisanship in election cases continues into the twenty-first century, it is hardly a new or transient phenomenon.

inate individuals who are acceptable to both major political parties and who are thus less likely to exhibit partisan favoritism when ruling from the bench on election cases.

Later in this essay, I will invoke the merits of this supermajoritarian confirmation requirement by applying a version of it to the creation of new specialized election courts. I shall argue that it should be adopted for the adjudication of election cases even if it is rejected for other forms of litigation (and thus even if the confirmation of regular Supreme Court justices remains a simple majority vote of the Senate<sup>19</sup>). The courts that adjudicate election cases should be as nonpartisan as possible, and this supermajority confirmation requirement is the best way to maximize the likelihood of nonpartisan adjudication.

Even so, the creation of nonpartisan election courts would not solve all our difficulties. Insofar as we are attempting to achieve a republican form of government, we do not want to vest *legislative* power over the enactment of election laws in the hands of a nonpartisan election *court*. To be sure, we do want to vest *judicial* power over the adjudication of election cases in the hands of a nonpartisan election *court*, but that is a distinct matter from determining where the *legislative* power to adopt election laws in the first place should reside.

Suppose we are fortunate to have in place the ideal form of a nonpartisan election court. It would be a small body, of three to nine members, all of whom are highly talented and accomplished attorneys, possessing the intellectual skills and training suitable for adjudicating legal disputes on the merits (according to the most faithfully objective understanding of the law that is possible given existing legal materials<sup>20</sup>). But as ideal as this body is for the task of *interpreting* the law of elections, it is not well-suited for the enterprise of enacting electoral legislation in the first place. Even at its largest, a nine-member tribunal of intellectual elites from the legal profession is not at all representative of the people as a whole. It cannot begin to qualify as a fair cross-section of the populace. Were it to have the authority for enacting all the election laws for the state, the regime would be an oli-

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19. Current filibuster rules in the Senate require sixty votes to close debate, even though only a simple majority is necessary on the confirmation vote itself. After Republicans threatened to eliminate filibusters for judicial confirmations, there developed an informal understanding that Supreme Court nominations should not be filibustered except in extreme circumstances. See Walter J. Oleszek, *The "Memorandum of Understanding": A Senate Compromise on Judicial Filibusters* (Cong. Research Serv. Rpt. RS22208 July 26, 2005). In any event, a three-fifths requirement for closing debate on a nomination is not nearly as strong a commitment to nonpartisanship as a two-thirds or three-quarters requirement for confirmation itself.

20. The model for the ideal judge is Justice Hercules, as Ronald Dworkin has described him (or her, since he has refined his description to be gender-neutral). See Ronald Dworkin, *Law's Empire* (Harvard U. Press 1986).

garchy or aristocracy, at least with respect to the enactment of election laws, which are fundamental to determining the character of the regime as a whole.

Thus, if we truly want a democratic republic, we need a genuinely representative body for the enactment of election laws. A representative legislature, not a nine-member court, should decide whether to hold elections on Tuesdays or some different day of the week. The same point applies to whether there should be early voting in advance of Election Day and, if so, for how long and in what form. Likewise, a representative legislature, not a nine-member court, should decide how broadly or narrowly to make available the option of voting by mail and what specific rules and procedures should attend the practice of postal voting—ditto for the institution that decides what technologies to employ for the casting and counting of ballots and for the registering of voters, as well as related policy issues concerning voter registration, such as how and when voters are entered into the system and the means for verifying the accuracy of registration databases.

The list of policy choices regarding the operation of the electoral process could go on and on, but the basic point remains the same: these policy choices should be made by a representative legislature, not by a court of nine intellectually elite attorneys who have been selected for their special skill and expertise at interpreting the law already adopted by others (and resolving disputes based on their interpretation of the law). Thus, even if we were to have in place the best possible nonpartisan court for the adjudication of election cases, we would still need a representative legislature for the initial enactment of election laws.

Yet, if possible, we would like that representative legislature to also be nonpartisan in its enactment of election laws. As we said at the outset, we would much prefer that the legislature not be biased by partisan favoritism in its enactment of election laws. That preference is what sent us down the road thinking of the judiciary as a potential nonpartisan constraint on the machinations of a partisan legislature. We have seen that a nonpartisan court can constrain a partisan legislature somewhat but not completely. Thus, we are still left searching for a way to remove the taint of partisan bias from initial legislative enactment of election rules.

### III. AN ALTERNATIVE APPROACH

We need to create a new institution: a representative but nonpartisan specialized legislature for the enactment of election laws, different from the regular legislature in the same way that a nonpartisan specialized elections court is different from the regular judiciary. Indeed, to speak more broadly,



we need to recognize the separation of *electoral* powers as a distinct principle that supplements the separation of regular powers.

The separation of electoral powers, as I noted in the introduction to this essay, has two dimensions. First, it recognizes the need to separate the distinct domain of election law into the three basic divisions of legislative, executive, and judicial power. In other words, the electoral legislative power (the power to enact election laws) is different from the electoral executive power (the power to administer elections pursuant to the enacted election laws), and both in turn are different from the electoral judicial power (the power to adjudicate disputes pursuant to the enacted election laws). Three different nonpartisan institutions should possess each of these distinct electoral powers: an Elections Assembly, Elections Director, and Elections Court.

The identification of these three specialized electoral institutions indicates the second dimension to the separation of electoral powers: the three electoral powers, in addition to being separate from each other, should be separate from the three corresponding regular powers. In other words, the electoral legislative power should be kept separate from the regular legislative power by being vested in a separate nonpartisan Elections Assembly, rather than in the regular legislature. Likewise, the electoral executive power should be kept separate from the general executive power by being vested in a separate nonpartisan Elections Director, who is not subservient to the regular chief executive of the state. Similarly, the electoral judicial power should be placed in the hands of the special Elections Court, with its supermajoritarian confirmation requirement, rather than in the hands of the regular judiciary. There is thus, if you will, both a vertical as well as horizontal dimension to the separation of electoral powers: the vertical being the separation of the three electoral powers as a group from the three regular powers, and the horizontal being the separation of the three electoral powers from each other.

It is necessary, of course, to describe in some detail each of the three specialized electoral institutions. We should start with the Elections Assembly because explaining its differences from the regular legislature is the most significant ingredient to the separation of electoral powers as theoretical construct. It is also the most novel and thus unfamiliar of the institutional innovations associated with this theory. (Moreover, while tailored primarily to state government, this theory is also suitable for implementation at the national level. I trust that readers will keep this point in mind as they consider the specific institutions contemplated by this theoretical innovation.)

A. *An Elections Assembly: Legislative Powers*<sup>21</sup>

Consider a body of roughly one hundred randomly selected citizens, gathered together for the sole purpose of deciding what should be the election laws for their state. This Elections Assembly would be a thoroughly representative, republican institution. Random selection ensures that the Assembly would be a fair cross-section of citizenry as a whole, like a jury or especially a grand jury. Indeed, because this Assembly would be much larger than either a jury or grand jury, it would be even more demographically representative than those longstanding and quintessentially republican (“of the people”) institutions.<sup>22</sup>

Random selection would also ensure that this Assembly would be as nonpartisan as possible. If the partisan make-up of the state’s citizenry is divided into thirds—one-third Democratic, one-third Republican, and one-third independent (or not affiliated with the two major parties)—then the Assembly will mirror this tripartite division. Because members of the Assembly do not run for office, they need not think of themselves primarily as partisans in holding the office (whereas the members of an elected legislature inevitably think of themselves primarily as partisans because party identity is the way they secured their jobs). The members of the Assembly thus will be able to deliberate more freely about the merits of alternative election rules. They will not be beholden to any party position on the issue. Further, the Assembly will not be organized into majority and minority parties, with majority and minority whips functioning to hold members of their respective party caucuses in line.

The entire operation of the Assembly will be more open and fluid in its deliberation on the merits of alternative election law proposals when com-

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21. Inspiration for the idea of the Elections Assembly comes, in part, from the growing literature on citizen assemblies. See e.g. Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions against Everyday Politics*, 6 Election L.J. 184 (2007) and sources cited therein. But one important feature of the Elections Assembly distinguishes it from most conceptions of citizen assemblies: the Elections Assembly would have actual legislative power with respect to the domain of elections; it would not be merely advisory, and it would not need to submit its legislation for approval in a referendum.

Thus, conceptually, it is important to distinguish citizen assemblies as either exceptions or supplements to the regular lawmaking process of a polity, for the purposes of a one-time major reform effort, from the Elections Assembly as the permanent and ongoing institution holding the polity’s legislative power with respect to the governance of the electoral process. As a theory, the separation of electoral powers tells us that we do not merely need a reform commission from time to time to recalibrate the regular legislative process but instead need to recognize the electoral legislature should be constitutionally and perpetually separate from the regular legislature.

22. I leave aside whether random selection should be constrained by a guarantee of demographic representativeness. See e.g. Heather K. Gerken & Douglas B. Rand, *Creating Better Heuristics for the Presidential Primary: The Citizen Assembly*, 125 Pol. Sci. Q. 233, 248–249 (2010) (advocating the assurance of gender, ethnic, and geographic representativeness for a citizen assembly designed to assist the presidential primary process).

pared to the comparable proceedings of a regular legislature. There is a much greater chance that the policy choices made by the Assembly regarding the voting process—how much early voting, what method of voter registration, what form of voter identification requirement, and so forth—will more accurately reflect the views of the citizenry as a whole on these issues, as compared to a regular legislature whose choices may be driven by the partisan desire to tilt the rules in the majority party's favor.

Of course, there would need to be orderly rules of procedure by which the Assembly operates so that it can conduct deliberations and enact policy. The state constitution could establish basic rules by which the Assembly operates. For example, a majority vote of the Assembly would suffice to enact a proposed rule into law, and proceedings of the Assembly shall follow Robert's Rules of Order unless the Assembly adopts otherwise. The nonpartisan Elections Director (discussed below) could help to set the Assembly's agenda by making specific proposals to consider. The Director could also chair the Assembly's meetings, which would be preferable to having contests within the Assembly itself to determine which members should serve as chair.<sup>23</sup>

As a practical matter, the views of the Director are likely to have considerable influence over the Assembly, since the Director is a full-time expert on the subject and the Assembly needs to meet only for a relatively brief period (perhaps for a month or so, every couple of years in advance of the next major general election) in order to assess whether the state's existing election laws need to be revised in light of new developments. Because the members of the Assembly are ordinary citizens and not professional experts in the field of elections, they need to be educated on the issues about which they will deliberate. The Director will play a primary role in this educational process by giving background information and briefing materials to the Assembly's members. Each Assembly, like a jury or grand jury, will consist of new individuals, and thus (unlike a regular legislature) basic information concerning the voting process needs to be provided each time.<sup>24</sup>

Still, the Director will not have the same degree of influence over the Assembly as a prosecutor typically does over a grand jury. The Assembly should be constitutionally required to meet in public, in contrast to a grand

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23. In thinking about the relationship of the Assembly and the Director, I have been influenced by the work on deliberative assemblies of Jim Fishkin and Chris Elmendorf, among others. See e.g. James Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford U. Press 2009); Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 *Election L.J.* 425 (2006).

24. Because of the powerful informal influence that the Director inevitably will have over the Assembly, I would not give the Director formal veto authority over electoral laws enacted by the Assembly.

jury's secrecy. Consequently, voting rights groups like the League of Women Voters can present their own proposals for the Assembly's consideration if they disagree with the proposals submitted by the Director. The transparency of the Assembly's deliberations should yield a genuinely open and public debate about what changes in voting rules and procedures are most in the public interest. After receiving input from their fellow citizens, channeled through various advocacy organizations, the citizens of the Assembly will adopt election laws that they believe best reflect the interests and wishes of the citizenry as a whole.<sup>25</sup>

One additional way to diminish the influence of the Director is to incorporate the republican principle of bicameralism into the design of the electoral legislature. There could be an upper house of the electoral legislature—an Elections Council—to balance the more popular Assembly. For example, suppose the Council has ten members (no more than five from any single political party), all of whom have previous government service of some kind. Suppose, too, that the Council is a continuous body, with each member serving a ten-year term and with the seats staggered so that one opens up each year.<sup>26</sup> This body could develop considerable expertise concerning the administration of elections and thus would serve as a counterweight to the inexperience of the Assembly.

Requiring new electoral legislation to undergo deliberation in both the Assembly and the Council, in accordance with the principle of bicameralism, would ensure that election laws reflect the input of both popular sentiment and expert judgment. The expertise of this ten-member Council would prevent the individual views of the Director from becoming too dominant in the consideration of which new election laws to adopt. One need not worry, however, that the Council, with ten members (again, no more than five from any one party), will often deadlock in a five-to-five tie. As I explain later, if the Council's power is limited to vetoing legislation enacted

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25. There is a risk that the Assembly would be swayed by the most persuasive of advocacy organizations, whose particular views might not accurately reflect the views of the public at large. But this risk is tempered by the fact that the members of the Assembly, being collectively a fair cross-section of the entire public, could confidently rely upon their own views, rather than those of the advocacy organizations, to the extent that these views diverged. In other words, the testimony of advocacy organizations would be useful for input but not necessarily influence: these groups could provide information and insight, but the members of the Assembly ultimately could still rely on their own independent judgment.

26. I would have the regular governor of the state appoint the members of the Council, one per year, subject to confirmation by three-fourths of the regular Senate. If a seat remains unfilled because of a failure of the governor to nominate a candidate capable of receiving the necessary confirmation, there could be a special alternative selection process whereby the majority and minority of the leadership in the regular Senate propose candidates and a coin toss determines which candidate prevails (subject to the constitutional requirement that no more than five of the seats are held by individuals from the same political party). Mid-term vacancies could be filled by the same method as regular appointments: gubernatorial nomination, Senate supermajority confirmation, and a gridlock-breaking coin toss when necessary.

by the Assembly, or vetoing orders issued by the Director, then a five-to-five tie by the Council cannot block legislative or executive action from occurring when the Assembly or Director think necessary. In other words, the Council—when it musters enough votes of its members—can serve as a brake on the other bodies. But inertia by the Council cannot, in itself, bring the entire electoral system of the state to a halt.

It might seem ironic that the legislature empowered to enact the laws for operating elections should itself not be an elected body. Upon reflection, however, this apparent anomaly should be understood as appropriate. To ensure that the elections themselves are fair, it is important that the laws themselves not be tainted by being the product of a biased process. Therefore, there needs to be a kind of “original position” (to use Rawls’s term loosely) that is antecedent to the operation of the elections to make sure that they are free from partisan taint.<sup>27</sup> The way to achieve this is to have the body that writes election rules be selected by some fair and representative means apart from the electoral process that this body itself adopts. Random selection serves this purpose.

Random selection is not the same as an election, but it is no less democratic and representative. As far back as the ancient Greeks, it has been recognized that selection by lot is a fully democratic alternative to selection by vote.<sup>28</sup> The Assembly, when selected randomly from the entire adult citizenry of the state (with the obligation to serve if called), is fully democratic and representative, though not directly elected.<sup>29</sup>

This is not to say that regular legislatures should be chosen by lot instead of being elected. There are advantages to elections; they permit the electorate to send representatives to the legislature whom the voters think will do a better job than the average person chosen at random. It is solely for the purpose of making the election laws themselves that a separate legislative assembly should be chosen at random so as to counteract the favoritism that can occur when the regular legislature is permitted to choose the election rules.

The Assembly is not exactly a constitutional convention, but it shares some features of a constitutional convention, especially when considering

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27. See John Rawls, *A Theory of Justice* (Harvard U. Press 1971).

28. See e.g. Christopher Eisgruber, *Constitutional Self-Government* 51 (Harvard U. Press 2009); Robert Dahl, *Democracy and Its Critics* 304 (Yale U. Press 1989).

29. The Council would not be selected randomly; only the more popular Assembly would be so selected. To avoid the concern that the Council is insufficiently democratic to share equal legislative power with the Assembly, the constitution should structure their legislative relationship asymmetrically. As I elaborate elsewhere in this essay, the constitution should specify that it requires a majority, or even supermajority, vote of the Council to veto a law enacted by the Assembly.

its relationship to the regular legislature.<sup>30</sup> A constitutional convention writes the rules organizing the legislature and constraining its operation, including the fundamental rules for election of the legislature's members.<sup>31</sup> As we have seen, a constitution cannot specify all the detailed rules governing the electoral process, but a permanent constitutional convention could do so on an ongoing basis. The Assembly is not a permanent constitutional convention; like the regular legislature, it too is organized and constrained by the constitution. But it occupies something of a middle position between a constitutional convention and the regular legislature.

With respect to election rules unspecified in the constitution itself, the Assembly has the authority to specify those rules, and the regular legislature is elected on that basis and must abide by those rules. In this respect, enactments of the Assembly occupy a position superior to the regular legislature and inferior to the constitution. To the extent that the regular legislature attempts to enact laws that conflict with the authority of the Assembly, it would be preempted.<sup>32</sup>

The Assembly would also need legislative authority to appropriate enough funds to pay for operation of the electoral process, including the administrative expenses associated with each of the electoral bodies: Assembly, Council, Director, and Court. The Assembly need not have the power to tax so long as it has the power to spend; the regular legislature could still be charged with the responsibility of determining how best to raise funds for the Assembly. If there is a concern that the Assembly might be too extravagant in determining the appropriate amount of electoral ex-

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30. Hereafter, unless otherwise specified, all references to the Assembly refer to its power of electoral legislation, whether held by itself in a unicameral legislature or jointly with the Council in a bicameral legislature. As previously indicated, the relationship between the two bodies could be specified by giving the Council the power to veto legislation enacted by the Assembly, and this arrangement could be characterized as either bicameral (if the Council is considered primarily a legislative body) or unicameral (if the Council is considered primarily as executive, but with the power to veto legislation as a president or governor may have).

31. This point is a further basis for distinguishing the Assembly from one-time citizen assemblies that are convened to recommend fundamental constitutional reforms concerning the governance of the electoral process. Compare with Gerken, *supra* n. 21. It is a momentous decision whether the regular legislature of a polity should be chosen by proportional representation rather than a first-past-the-post system, and thus one would expect to see a decision of this nature to be imbedded in the polity's constitution, rather than adopted by a legislative choice. The need for the citizenry to ratify any such constitutional reform would require that a citizen assembly convened for this purpose would need its proposal to secure such ratification, and that is why Professor Gerken has devoted attention to the important question of how to enable a citizen assembly of this type to be appropriately sensitive to political considerations that inevitably would arise during a ratification debate. *Id.* This concern, however, is inapplicable to the Assembly insofar as its role is not constitutional reform but rather implementing legislation constrained by electoral choices already imbedded in the polity's constitution.

32. Preemption by the Assembly would operate in much the same way as the preemption of state law by Acts of Congress. So long as the Assembly is acting within the scope of its lawmaking authority, any conflicting law by the regular legislature would be preempted.

penditures, the constitution could provide that the regular legislature, by a two-thirds vote of each chamber, can suspend the Assembly's appropriation, sending it back to the Assembly for reconsideration.

The question may arise as to whether it is necessary to create the separate Assembly to achieve nonpartisan electoral legislation. Might it be possible instead to create special rules for the enactment of election laws by the regular legislature? For example, the constitution might provide that election laws must be passed by two-thirds of each house in the state's legislature, rather than by a simple majority. This supermajority requirement might guarantee nonpartisan, or at least bipartisan, election laws in the same way that a supermajority requirement for the confirmation of judges maximizes the likelihood of nonpartisan adjudication.

The problem with this alternative, however, is the high probability of legislative stalemate that would result from a supermajority requirement for the enactment of election laws. The legislature simply would not pass any significant election reforms because each side would veto any reforms that might cause a disadvantage to its side's chances of winning future elections. The probability of stalemate over the content of election laws is higher than over a judicial appointment, which can be resolved simply by finding a fair-minded individual agreeable to both sides. But to break legislative gridlock over the content of election law amendments, each side must agree that the substance of the proposed change would not pose a risk to its electoral prospects. With respect to any proposal coming from the other side, each side will think it is simpler and easier just to preserve the status quo. Consequently, imposition of a supermajority requirement for the adoption of new election rules would likely result in the existing rules remaining frozen in place, no matter how obsolete or outdated they may become.<sup>33</sup>

This likelihood of legislative deadlock is a result of the inherent partisan nature of regular legislatures. Just as it is pernicious (because of the bias that will ensue) to give one party unilateral power to write election laws over the objection of the other, so too is it problematic to give both major parties veto power over election laws proposed by each other. Instead, it is necessary to break out of the partisan mold and design a special nonpartisan legislature for the enactment of election laws. The proposed Assembly serves this purpose by avoiding gridlock through simple majority

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33. An example of legislative gridlock occurred after 2008 with respect to Ohio's provisional voting rules. Both political parties recognized the inadequacy of existing rules and thus both proposed reforms. But each party proposed separate reforms and could not agree on a compromise. One party controlled the State's senate while the other party controlled the State's house of representatives. Therefore, no reform was enacted despite the recognized necessity for new legislation on both sides. It is only rarely, as with the bipartisan consensus to improve the process for military voters in the MOVE Act, that electoral reform legislation can be accomplished when the legislative process requires both parties to sign on.

rule, allowing it to adopt whatever reforms its members think is most in the public interest. But giving it the power to enact election laws by simple majority vote does not risk domination of one party over another because the selection of its members by random lottery prevents the Assembly from becoming organized along majority-versus-minority lines.

*B. An Elections Director and Elections Council: Executive and Administrative Powers*

Should the electoral executive power be placed in the hands of a single individual or, rather, a multimember body? The advantage of a single individual is that it enables everyone to know easily who is responsible if the voting process does not go smoothly—thereby giving this individual the incentive to make sure that the voting process does work well. A single individual is also able to make decisions more quickly than a multimember body, and it is often the case that decisions about the voting process need to be made extremely quickly. For example, what should be done if polling locations run out of emergency backup ballots or if—as Superstorm Sandy demonstrated in 2012—emergency conditions require a last-minute adjustment to the voting process? Conversely, a multimember body poses less risk of idiosyncratically authoritarian rule. In eighteenth century republican theory, executive powers were given to a single individual (governor or president), and lawmaking power to a multimember body. That combination was designed to achieve the advantages of executive accountability and efficiency while preventing the lawmaking power from falling into the hands of a dictatorial autocrat.

*1. The Relationship of the Council to the Director and Assembly*

The rise of administrative agencies in the twentieth century suggests that the division of legislative and executive powers is not so simple. Consequently, it makes sense to consider the possibility of a multimember Elections Council with responsibilities for the administration of the electoral process, together with a single individual serving as Elections Director, who is primarily accountable for the day-to-day and hour-by-hour operation of the electoral process. The idea of the ten-member Council, serving alongside the single Director, enables us to have both the accountability of an individual electoral executive and the supervisory role of a multimember electoral administrative agency.

What should be the relationship between the Director and the Council, and what in turn should be the relationship of both to the authority of the Assembly? Is the Council part of the electoral executive or part of the electoral legislature—or both, as something of an administrative hybrid that



cannot be easily categorized in eighteenth century terms? Moreover, if both the Director and Council exist, is there really a need for the Assembly? All of these questions deserve attention.

My preference is to consider the Council as legislative, not executive. It is the upper house of the bicameral electoral legislature, as described above, with the Assembly as the lower, or more popular, house. But I would give the Council, as an ongoing body (in contrast with the Assembly, which meets only temporarily), the authority to engage in a one-house “legislative veto” of administrative orders issued by the Director. This legislative veto would give the Council the character of an administrative agency, as its rulings (in the absence of new electoral legislation adopted by an Assembly) would stand as the operative law that the Director must enforce.

Indeed, I would also explicitly permit the Council to promulgate interstitial administrative regulations when the Assembly is not in session. These regulations would be subordinate to the laws enacted by the Assembly and deemed necessary for the implementation of those laws. One would hope that the need for such interstitial quasi-legislative administrative rulemaking would be infrequent and that the laws enacted by the Assembly would be adequately specific for the Director to administer in an executive capacity without the requirement of additional lawmaking.

It is not realistic, however, to expect that there never would be a need for such interstitial rulemaking. Consider the topic of provisional ballots, for example. The Assembly might enact a thoroughly detailed code for the casting and counting of provisional ballots, and still an ambiguity in the code might arise after the Assembly has disbanded but while the Director is undertaking preparations for the upcoming election. In this situation, the Director would have the authority to make an executive decision on how to handle the particular problem. But the point of giving the Council the power to issue a one-house legislative veto over the Director’s decision is that the Council, as one house of the bicameral legislature, is likely to have a better sense of what interstitial provision is more in keeping with the spirit of the original legislation. For the same reason, rather than having to wait to veto an executive decision issued by the Director, the Council ought to have the explicit authority to take the initiative of providing interstitial administrative regulations it deems necessary.

Thus, there should be a hierarchical relationship between the Director, the Council, and the Assembly. The executive decisions of the Director should be subordinate to and controlled by the administrative regulations and legislative vetoes of the Council. The administrative regulations and legislative vetoes of the Council should be subordinate to and controlled by the legislation enacted by the Assembly.

This hierarchy requires further consideration of exactly what role the Council should play in the enactment of legislation as the bicameral partner of the Assembly. If the Council can effectively veto legislation passed by the Assembly by refusing to give its bicameral assent, then the Council could insulate its administrative regulations from legislative supervision, thereby making its administrative regulations essentially superior rather than subordinate to the legislation enacted by the Assembly. The way to fix this problem is to adjust the power that the Council has as one chamber of the bicameral legislature. Rather than making it a requirement that a bill passed by the Assembly receive majority support of the Council before it can become law, there can be a requirement that it takes a supermajority vote of the Council to defeat legislation enacted by the Assembly.

For example, suppose it takes a vote of seven members of the Council to block legislation enacted by the Assembly. We can imagine the Assembly has repudiated an administrative regulation promulgated by the Council. (Perhaps the Council overturned, by legislative veto, an executive decision of the Director, and now the Director has secured the assistance of the Assembly to negate the interference of the Council.) In this situation, the Council cannot simply reinstate its administrative regulation by a six-member majority vote that vetoes the Assembly's enactment. Instead, it takes a seventh member of the Council to supersede the will of the Assembly. In this way, the supermajority requirement for the Council's veto of the Assembly's legislation maintains the hierarchical superiority of the Assembly's legislation to the Council's administrative regulations.

In addition, I would give the Elections Court (discussed later) jurisdiction to invalidate regulations adopted by the Council as inconsistent with the legislation enacted by the Assembly. The Court would also have the jurisdiction to block any orders of the Director that are inconsistent with the administrative determinations of the Council. The Court, therefore, contributes to maintaining the hierarchical relationship between the Director, Council, and Assembly.

But why bother having the Assembly at all? If the Council has the authority to engage in quasi-legislative administrative rulemaking, and if the Council can block legislation enacted by the Assembly (either in the form of a supermajority veto or, under the alternative approach, simply by failing to give its assent as one house of a bicameral electoral legislature), then why not just dispense with the Assembly? Why not, in other words, simply lodge the electoral legislative power in the hands of the ten-member Council, with the electoral executive power in the hands of the single Director, and be done with it—without any additional confusion from adding the Assembly into the mix?

The reason lies in the complete displacement of the regular partisan legislature over the power to enact electoral laws for the polity. If the regular legislature were not displaced, the Council might well suffice without the need for the additional Assembly. After all, many advanced democracies around the world—including Canada, Australia, and Britain—make good use of multimember commissions to administer their election laws. The ten-member nonpartisan Council described could be seen as analogous to the nonpartisan electoral commissions in these other nations.<sup>34</sup>

These electoral commissions in other countries, however, generally do not displace the authority of the regular legislature to enact the electoral laws for the polity. These commissions, in other words, are purely administrative in nature and are subordinate to the will of the regular legislature.<sup>35</sup> Any election laws adopted by the regular legislature trump the rules promulgated by the commission and may be thoroughly partisan in motive and effect. Thus, the existence of an independent electoral commission as an administrative agency does nothing to solve the problem of partisan election laws.

Once it is viewed as desirable to displace the authority of the regular partisan legislature to enact election laws, it becomes necessary to think of an electoral legislature, like the proposed Assembly, that is much more representative of the entire populace than an expert ten-member commission. For the same reasons that it would be wrong to give the legislative power to determine the polity's election laws to a nine-member elite court, so too would it be insufficiently democratic to give the entire electoral lawmaking power to a ten-member expert commission. The legislative decisions concerning the nature of the voting process should reflect the input and wishes of the populace itself. The Assembly, as a broadly representative institution, is designed to serve that function and thus justify displacement of the regular legislature in a way that the Council cannot.

This fundamental point does not diminish the significant role of the Council in the scheme described. On the contrary, the Council is likely to exert considerable practical power, given its superior authority over the Di-

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34. For a comparative discussion of nonpartisan commissions in other advanced democracies around the world, see Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 *Ind. L. Rev.* 113, 120–121 (2010).

35. The generally well-regarded elections commissions in Canada and Australia operate this way. India's Election Commission is an exception, but it arguably has not been successful in being immune from the influence of partisanship. See Alistair McMillan, *The Election Commission of India and the Regulation and Administration of Electoral Politics*, 11 *Election L.J.* 187, 189 (2012) ("The issue of partisan influence over appointments emerged in a blaze of controversy in January 2009."). The problem lies in the method by which members of the Commission are appointed. India's president has authority to appoint Commissioners, with the consequence that there is "the potential for partisan appointments by a government." *Id.*

rector as well as its ability to veto laws enacted by the Assembly (even if only pursuant to a seven-member supermajority vote). But the ten-member Council should not have too much power, either formally or informally. It should not function as a dictatorial electoral politburo.

Instead, it should be situated in a system of checks and balances, as envisioned by longstanding republican constitutional theory. In the system described, the Council is checked and balanced by the Director and Assembly, and it in turn checks and balances these two other institutions. Thus, the Council plays an appropriately constrained, yet major, role in the separation of electoral powers, as envisioned for the administration of the electoral process in a twenty-first century democracy.

## 2. *The Appointment of the Elections Director*

We have yet to consider how the Director should be appointed, to increase the likelihood that this official will be immune from partisan influence. Because the Director will be responsible for the day-to-day operation of the electoral process, and thus will wield considerable power even if subordinate to the Council, it is especially important to take care that the method of appointing the Director insulates the office from the taint of partisanship.

One possibility is to have the regular chief executive of the polity (governor or president) nominate the Director, subject to confirmation by a seven-member supermajority vote of the Council. Since the Council is itself a nonpartisan body, this supermajority confirmation requirement should ensure that the Director is also sufficiently nonpartisan. An alternative would be to confine the appointment authority solely with the Council, leaving the regular chief executive out of it. But this alternative has the disadvantage of making the Director insufficiently independent of the Council and is therefore not enough of a check and balance. Requiring the assent of both the regular chief executive and seven members of the Council achieves both the requisite nonpartisanship and sufficient independence from the will of the Council.

One might consider having the Assembly play a role in the appointment of the Director. The problem with this idea, however, is that each Assembly sits infrequently and only for a relatively short period of time (as membership in the Assembly is akin to jury duty). An unexpected vacancy in the essential position of Director might occur after the Assembly has completed its biennial review of the state's election laws but before the next biennial election occurs, and it would be imperative to fill the position immediately. Therefore, it is better to leave the Assembly out of the process of appointing the Director.

Indeed, there needs to be a gridlock-breaking mechanism in the event that the chief executive and a supermajority of the Council cannot agree on an individual to appoint to this office within a specified period of time. For example, if there is no appointment of a new Director within a month after the vacancy occurs (or perhaps within a week if the vacancy occurs during the last three months before a major election), then a special procedure should kick in. Pursuant to this special procedure, each member of Council would nominate three candidates for the position; each member of the Council would be entitled to strike one name from the list of nominees (proceeding in a randomly selected order); and, of the remaining names, one would be randomly selected as the newly designated Director. The regular chief executive would play no role in this special gridlock-breaking procedure, giving the chief executive an incentive to nominate a candidate capable of achieving the support of seven members of the Council—in order to avoid the gridlock-breaking mechanism.

It might make sense to give the Assembly, while it is sitting, the power to remove and replace the Director. This would enable the Assembly to ensure that the Director is genuinely nonpartisan and not merely bipartisan or, in the event of random selection following gridlock, the accidental preference of one particular political party. Presumably, this removal and replacement authority would be used sparingly, only when the sitting Director has lost the confidence of the nonpartisan Assembly. Thus, it is not the same as giving appointment power to the Assembly in the first instance. It represents a reasonable balance between: (a) the need to have a Director in place on an ongoing basis, without waiting for the next Assembly to convene; and (b) giving the nonpartisan Assembly a check on the appointment process to ensure compliance with the overarching value of nonpartisanship in administration of the electoral process. Alternatively, authority to remove a sitting Director could be placed in a seven-member supermajority of the Council. Doing so would give the Council more control over the identity of the Director. For that reason alone, it might be preferable to lodge removal power in the Assembly, rather than the Council.

How long should the term of a Director be? One possibility is ten years, the same as the term of each Elections Councilor. Another possibility is four years, the same as a governor or president. I would opt for the longer term, in an effort to insulate the office from political pressures. While a ten-year term carries greater risk of mid-term vacancies, it seems more important to maximize the likelihood of nonpolitical professionalism.

*C. An Elections Court: Judicial Powers*

As already indicated, it is essential to have a nonpartisan Elections Court to adjudicate disputes over the application of a state's election laws, particularly ballot-counting disputes between two candidates. The method of appointing judges to this nonpartisan Court can differ from the method for appointing the nonpartisan Director, because vacancies on the Court do not raise the same urgent concern as a vacancy in the office of Director. Consequently, the Assembly can play a role in the appointment of the Court, whereas it is impractical for the Assembly to be involved in the initial appointment of the Director.

Thus, I would have the judges of the Court nominated by a seven-member supermajority vote of the Council, from a list of names submitted by the Director and subject to confirmation by three-fourths of the Assembly. This procedure has all three non-judicial electoral institutions—the Director, the Council, and the Assembly—participating in the selection of the judges on the Court, thereby increasing the likelihood that the judges selected will be nonpartisan consensus choices. If a vacancy occurs on the Court while the Assembly is not in session, I would permit other members of the Court to fill the vacancy temporarily until the next Assembly meets. If it ever occurs that an Assembly disbands without completing the confirmation of a judge to an open seat on the Court, either because the Assembly has not received a nomination from the Council or because the Assembly cannot garner the three-fourths supermajority necessary for confirmation, I would treat this open seat as a vacancy permitting the Court itself to select a temporary member until the next Assembly convenes.

How many members should the Court have? Three, five, seven, or nine? It should be an odd number, so there are no tie votes. It should be more than a single judge because, in contrast to the single Director, the judicial function should be exercised by a multimember body. Like any appellate or supreme court, the Court (pursuant to its jurisdiction) has power to declare what the law is. Embodying the rule of law, a court exercising this law-declaration power should be seen as acting objectively, not based on the subjective preference of an individual judge. Having several members on the Court captures the idea that the law itself is larger than any individual voice. Ideally, the several members of the Court will agree, without dissent, on what the law means and requires in each particular case.

We know, however, that this ideal cannot be achieved in all cases. Nonetheless, having several members on the Court, rather than just one, tempers the extent to which the law as defined by the Court is idiosyncratic. As a general proposition, even when a court is divided into a majority and dissent, members of the majority strive to form a single judicial opinion that

speaks for all of them, embodying the objective truth of the law as they collectively see it. Moreover, it is to be hoped and expected that, as long as the members of the Court are selected in the nonpartisan manner just described, the occasions for dissent will be kept to a minimum—and much fewer than on a court whose members are appointed by a partisan method.

I would suggest five judges on the Court, each with a ten-year term. Life tenure for the judges is not ideal, since experience has shown that it is preferable to have a defined end of the judicial term.<sup>36</sup> The five terms could be staggered so that one ends in each even-numbered year, with the Chief Judge's term ending in years divisible by ten (2020, 2030, etc.). Judges should be permitted to be reappointed for a second or even third term. Moreover, judges should be removed from office solely on grounds of serious criminality or gross malfeasance in the exercise of their official duties—and solely by the same seven-member supermajority of the Council, followed by a three-quarters vote of the Assembly.<sup>37</sup>

The jurisdiction of the Court should be defined as all disputes involving the interpretation, application, or validity of laws as enacted by the Assembly or enforced by the Director (including administrative regulations promulgated by the Council). Obviously, the classic case of a “contest” over the outcome of an election would fall within the Court's jurisdiction. So too, would a pre-election lawsuit claiming that the Director's implementation of state electoral laws was wrongful under those laws (a type of lawsuit familiar in the field of administrative law); for example, a claim that the Director's plans for allocating voting machines among precincts violates specific requirements of laws enacted by the Assembly.

Perhaps most controversially, I believe also that within the Court's jurisdiction should be any challenge to the constitutionality of legislation enacted by the Assembly, at least insofar as the state's constitution is concerned. (In a federal system, the jurisdiction of the federal courts to adjudi-

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36. Linda Greenhouse, among others, has proposed limiting the terms of justices on the U.S. Supreme Court to a fixed eighteen years. See Linda Greenhouse, *The Eighteen Year Bench*, Slate, <http://hive.slate.com/hive/how-can-we-fix-constitution/article/the-18-year-bench> (June 7, 2012). After being initially hostile to the idea, Greenhouse explains that the unpredictability of Supreme Court vacancies, with the frequent strategically partisan decisions by retiring justices on when to step down, has contributed to the poisoning of the judicial confirmation process. The reliable expectation of a new nomination every two years, by contrast, would ensure that two appointments occur in each presidential term.

37. Membership on the Court is unlikely to be a full-time job. Consequently, judges should be permitted to hold other positions and engage in other activities that are not inconsistent with the nonpartisan role they must perform on the Court. If the Director, Council, and Assembly all believe a member of the state's regular judiciary would be an appropriate member of the nonpartisan Court, existing service on the one should not preclude supplementary service on the other. In this situation, a judge on the Court would not hold that position by virtue of already being a member of the state's regular judiciary but instead as a result of the independent appointment method specifically for Court judges. Other members of the Court might not also serve on the state's regular judiciary but instead come from different backgrounds within the state's legal profession.

cate the constitutionality of a state's election laws under the paramount federal Constitution cannot be superseded by jurisdictional rules set forth in the state's constitution.) Some might think that the authority to interpret the state's constitution belongs ultimately in the state's regular supreme court, and therefore, if there is a claim that a law enacted by the Assembly contravenes the state's constitution, that claim should be resolved ultimately by the state's regular supreme court rather than the Elections Court. I take the opposite position on this issue, however. Precisely because a question concerning the constitutionality of an election law implicates what rules will govern the operation of the electoral process, it is of paramount importance that this constitutional question be resolved by a court that is designed to be as nonpartisan as possible. The special Elections Court has this maximally nonpartisan character, whereas the state's regular supreme court does not. This point is true whether the members of the state's regular supreme court are elected or appointed by conventional means. Consequently, the Elections Court and not the regular supreme court should have the last word on a question of state constitutional law concerning legislation enacted by the Assembly.

Occasions might arise, hopefully few and far between, where it is debatable whether a particular constitutional question properly lies in the exclusive jurisdiction of the Elections Court or instead in the general jurisdiction of the regular supreme court. One or the other of these institutions must have the final say on this jurisdiction-policing matter. I propose a straightforward rule: if the Elections Court says that an issue is within its jurisdiction, that determination cannot be second-guessed elsewhere, even by the regular supreme court. A required deference on the part of the regular supreme court is consistent with the vertical dimension to the separation of electoral powers: the Elections Court occupies a place in the overall system that is antecedent or superior to the regular supreme court, given the primacy of elections to the entire republican system of government that the constitution establishes.

#### IV. CONCLUSION

The separation of electoral powers, as outlined in this essay, is a progression in the evolution of republican political theory. Just as Madison improved upon Montesquieu, so too is it necessary for our generation to improve upon Madison in light of our experience with the Madisonian system since the founding of our federal republic. I harbor no illusions that the system described will be adopted anytime soon.<sup>38</sup> Yet aspects of this sys-

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38. In this respect, this essay does not address the "from here to there problem." See Gerken, *supra* n. 21, at 199–201. For the separation of electoral powers to become a reality, there would need to be



tem are already being put into place, as increasing numbers of democratic republics—both American states and others abroad—adopt nonpartisan institutions for different aspects of the electoral process (whether redistricting, election administration, or the resolution of ballot-counting disputes).

Meanwhile, there is the pressing recognition that even more needs to be done in the way of building nonpartisan electoral institutions. Thus, the separation of electoral powers in both its horizontal and vertical dimensions, as well as the system of government this principle generates, can stand as a principle by which to judge the progress of democratic republics towards this evolved—and still evolving—ideal. Whether a particular state lives up to this ideal, and how soon, remains to be seen. But what is certain is that the ideal of republican government will continue to progress, as it has over the centuries. I offer the separation of electoral powers as a useful addition to that progress.

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attention to what would be the method of constitutional reform most likely to be successful in adopting this idea. Right now, however, I am proposing the separation of electoral powers as a theory worthy of consideration.



# A CONSTITUTIONAL RIGHT TO LIE IN CAMPAIGNS AND ELECTIONS?

Richard L. Hasen\*

## I. INTRODUCTION

Election 2012 may well go down in history as the “4 Pinocchios Election.” It is perhaps no coincidence that the recent election season saw both a rise in the amount of arguably false campaign speech and the proliferation of journalistic “fact checkers” who regularly rate statements made by candidates and campaigns.<sup>1</sup> Journalistic ratings such as PolitiFact’s “Truth-o-meter” rank candidate statements from “true” and “mostly true” to “false” and even “pants on fire.”<sup>2</sup> The *Washington Post* rating system, which relies upon the judgment of its fact checker, Glenn Kessler, uses one to four “Pinocchios” for false statements.<sup>3</sup> The granddaddy of fact checking groups, FactCheck.org, while avoiding a rating system, offers analysis that regularly describes controversial campaign claims as “false” or “wrong.”<sup>4</sup>

Both the Romney and Obama 2012 presidential campaigns received stinging ratings from fact checkers. The *Washington Post*’s fact checker, Glenn Kessler, gave the Obama campaign “4 Pinocchios” for claiming that Mitt Romney, while working at Bain Capital, “outsourced” jobs and was a “corporate raider.”<sup>5</sup> Romney’s campaign similarly got “4 Pinocchios” for

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1. Michael Cooper, *Campaigns Play Loose with Truth in Fact-Check Age*, New York Times, <http://www.nytimes.com/2012/09/01/us/politics/fact-checkers-howl-but-both-sides-cling-to-false-ads.html> (Aug. 31, 2012).

2. See PolitiFact, *About PolitiFact*, Tampa Bay Times, [www.politifact.com/about](http://www.politifact.com/about) (accessed Oct. 31, 2012) (“PolitiFact is a project of the *Tampa Bay Times* and its partners to help you find the truth in politics. Every day, reporters and researchers from PolitiFact and its partner news organization examine statements by members of Congress, state legislators, governors, mayors, the president, cabinet secretaries, lobbyists, people who testify before Congress and anyone else who speaks up in American politics. We research their statements and then rate the accuracy on our Truth-O-Meter – True, Mostly True, Half True, Mostly False and False. The most ridiculous falsehoods get our lowest rating, Pants on Fire.”).

3. Glenn Kessler, *The Fact Checker: The Truth Behind the Rhetoric*, Washington Post, <http://www.washingtonpost.com/blogs/fact-checker> (accessed Oct. 31, 2012).

4. See The Annenberg Public Policy Center, *FactCheck.org*, [www.factcheck.org](http://www.factcheck.org) (accessed Oct. 31, 2012).

5. Glenn Kessler, *4 Pinocchios for Obama’s Newest Anti-Romney Ad*, Washington Post, [http://www.washingtonpost.com/blogs/fact-checker/post/4-pinocchios-for-obamas-newest-anti-romney-ad/2012/06/20/gJQAQGuVx6qV\\_blog.html](http://www.washingtonpost.com/blogs/fact-checker/post/4-pinocchios-for-obamas-newest-anti-romney-ad/2012/06/20/gJQAQGuVx6qV_blog.html) (June 21, 2012).

claiming there was an “Obama plan” to weaken federal welfare law and issue welfare checks to people who do not work.<sup>6</sup>

Romney’s campaign seemed to bear more of the brunt from the fact-checking enterprise. Based solely upon Kessler’s subjective assessment of truth, the *Washington Post* fact checker rated Romney ads and statements with an average of 2.40 Pinocchios to Obama’s 2.11.<sup>7</sup> Perhaps the greatest media attack on the truthfulness of Romney’s campaign came in response to the acceptance speech of Romney’s running-mate, Representative Paul Ryan, which the *New York Times* described as containing “a number of questionable or misleading claims.”<sup>8</sup>

Whether campaigns are resorting to lies and distortion more often than in previous elections and, if so, why are interesting questions beyond that which I can explore in this brief Article. False and misleading speech may be increasing thanks to the proliferation of the internet and a decline in uniform trustworthy sources of news, such as the national news networks and major newspapers. Political polarization also may play a role, with partisans egged on to believe unsupported claims by the modern day partisan press, in the form of FOX News, MSNBC, and liberal and conservative blogs and websites.

Fact check operations also are controversial to journalists, who always have been in the business of resolving conflicting factual claims as part of the news gathering process. Some journalists take issue with the effectiveness of fact checkers. Media critic Jack Shafer declares, “Give [candidates] a million billion Pinocchios and they’ll still not behave.”<sup>9</sup> Others defend the “fact check” process but see it losing its effectiveness.<sup>10</sup>

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6. Glenn Kessler, *Spin and Counterspin in the Welfare Debate*, Washington Post, [http://www.washingtonpost.com/blogs/fact-checker/post/spin-and-counterspin-in-the-welfare-debate/2012/08/07/61bf03b6-e0e3-11e1-8fc5-a7dcf1fc161d\\_blog.html](http://www.washingtonpost.com/blogs/fact-checker/post/spin-and-counterspin-in-the-welfare-debate/2012/08/07/61bf03b6-e0e3-11e1-8fc5-a7dcf1fc161d_blog.html) (Aug. 8, 2012). The Obama campaign scored only 3 Pinocchios for arguing that “Romney sought the same sort of [welfare law] waiver authority when he was governor, when there is little evidence that is the case.” *Id.*

7. Washington Post, *Fact or Fiction?*, <http://www.washingtonpost.com/wp-srv/special/politics/fact-checker-fact-or-fiction/> (statistics as of Nov. 18, 2012).

8. Cooper, *supra* n. 1 (“The cycle [of disregarding fact-checkers when one’s side is attacked] was on display at the Republican convention when Mr. Romney’s running mate, Representative Paul D. Ryan of Wisconsin, made a number of questionable or misleading claims in his speech. Even before he stopped speaking, some of his claims were being questioned on Twitter. Soon fact-checkers were highlighting some of the misleading statements. More partisan sites rushed to Mr. Ryan’s defense with posts finding fault with the first round of fact checks.”). See also Michael Cooper, *Facts Take a Beating in Acceptance Speeches*, New York Times, <http://www.nytimes.com/2012/08/31/us/politics/ryans-speech-contained-a-litany-of-falsehoods.html> (Aug. 31, 2012).

9. Jack Shafer, *Looking for Truth in All the Wrong Places*, Reuters, <http://blogs.reuters.com/jack-shafer/2012/08/31/looking-for-truth-in-all-the-wrong-places/> (Aug. 31, 2012).

10. Dan Balz, *President Obama, Mitt Romney Running a Most Poisonous Campaign*, Washington Post, [http://www.washingtonpost.com/politics/a-most-poisonous-campaign/2012/08/15/16715a08-e6e7-11e1-8f62-58260e3940a0\\_story\\_1.html](http://www.washingtonpost.com/politics/a-most-poisonous-campaign/2012/08/15/16715a08-e6e7-11e1-8f62-58260e3940a0_story_1.html) (Aug. 15, 2012) (“News organizations instituted fact-checking and ad watches in reaction to earlier campaigns, when candidates were getting away with half-truths and

In 2012, fact checking itself came under attack from the right, with some advancing the claim that fact checkers are a biased part of the “liberal media.”<sup>11</sup> Conservatives disagreed, for example, that Romney made a false statement about Obama’s welfare policies.<sup>12</sup> Neil Newhouse, the Romney campaign’s pollster, proclaimed that “[w]e’re not going to let our campaign be dictated by fact-checkers.”<sup>13</sup> Some Democrats viewed this as a statement that Republicans did not care about facts, while Republicans saw this as a statement that the fact-checkers were biased. As this controversy shows, in 2012 even statements about fact checking were subject to divergent interpretations.

In this highly charged partisan atmosphere, in which each side cannot agree upon the basic facts, mudslinging has become terribly common, and the media are not able to meaningfully curb candidates’ lies and distortions, it is tempting to consider federal and state legislation to deter and punish false campaign speech. Why not let courts or commissions sort out truth from fiction? Indeed, a number of states already have laws in place that provide some government sanction for false campaign speech.

Consider these recent alleged campaign lies: that a state supreme court justice running for reelection let a child rapist go free;<sup>14</sup> that a local candidate was taking bribes;<sup>15</sup> that a judicial candidate who used to be a judge but was no longer a judge was the incumbent;<sup>16</sup> and that an assisted suicide ballot measure would allow doctors to take people’s lives “without safeguards.”<sup>17</sup>

False campaign speech might trick voters into voting for the “wrong” candidate or voting the “wrong” way on a ballot measure. (By “wrong,” I

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worse, with little accountability. These have become robust and increasingly comprehensive. But they are not providing much of a check on the campaigns’ behavior.”). See also Brendan Nyhan, *Ignored Fact Checks and the Media’s Crisis of Confidence*, Columbia Journalism Review, [http://www.cjr.org/swing\\_states\\_project/ignored\\_factchecks\\_crisis\\_of\\_confidence.php?page=all](http://www.cjr.org/swing_states_project/ignored_factchecks_crisis_of_confidence.php?page=all) (Aug. 30, 2012); and Brendan Nyhan & Jason Riefler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 *Political Behavior* 303 (2010), <http://www.springerlink.com/content/064786861r21m257/fulltext.html> (Mar. 30, 2010).

11. James Taranto, *The “Pinocchio Press:” The Bizarre Rise of “Fact-Checking” Propagandists*, Wall Street Journal, <http://online.wsj.com/article/SB10000872396390444301704577631470493495792.html> (Sept. 4, 2012); *Fact Checking the Fact Checker (cont.)*, The Weekly Standard, [http://www.weeklystandard.com/articles/fact-checking-fact-checkers-cont\\_652907.html](http://www.weeklystandard.com/articles/fact-checking-fact-checkers-cont_652907.html) (Oct. 1, 2012).

12. Mark Hemingway, *Obama’s Palace Guard*, Weekly Standard, [http://www.weeklystandard.com/articles/obama-s-palace-guard\\_652895.html](http://www.weeklystandard.com/articles/obama-s-palace-guard_652895.html) (Oct. 1, 2012).

13. Cooper, *supra* n. 1.

14. Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 *Wm. & Mary Bill of Rts. J.* 1085, 1085–1086 (2012).

15. *McKimm v. Ohio Elections Commn.*, 729 N.E.2d 364 (Ohio 2000), *cert. denied*, 531 U.S. 1078 (2001).

16. *Treas. of the Comm. to Elect Gerald D. Lostracco v. Fox*, 389 N.W.2d 446 (Mich. 1986).

17. *Wash. ex rel Pub. Disclosure Commn. v. 119 Vote No! Comm.*, 957 P.2d 691, 711 (Wash. 1998) (Talmadge, J., concurring).

mean that voters would be voting inconsistently with how they would vote if they did not hear campaign lies.) Laws regulating false campaign speech could assist voters to make informed decisions about which candidate or ballot measure to support. Similarly, false election speech might trick voters into making a disenfranchising error, such as showing up at the wrong place to vote. Laws barring false election speech, such as false statements about where and when to vote, protect the right to vote and the integrity of the electoral process.

But laws regulating false election and campaign speech raise a host of potential problems, most importantly the possibility that these laws will be the subject of manipulation by government authorities who want to favor one side or the other in an election. The government also might make mistakes in ferreting out the truth and ironically lead voters to make wrong decisions. Finally, we depend upon the campaigns themselves to allow voters to separate truth from lies and decide how to vote in line with voters' preferences. Laws targeted at false campaign speech regulate political speech at the core of the First Amendment and run the risk of doing more harm than good. The key is to achieve an appropriate balance.

For many years, courts have divided on the constitutionality of laws regulating false campaign speech, with some courts upholding some false campaign speech laws and other courts striking them down. This past June, however, the Supreme Court issued an opinion in *U.S. v. Alvarez*,<sup>18</sup> a case which no doubt will cause courts to reconsider the constitutionality of such laws. Although *Alvarez* did not involve campaign speech, the Supreme Court discussed the general question whether the Constitution protects knowing lies in the context of a federal law barring false statements about military honors. The Court issued no majority opinion, but all of the opinions had something to say about laws regulating false speech generally, and Justice Breyer's opinion (for himself and Justice Kagan) cast serious doubt on the constitutionality of many laws regulating false campaign (and possibly false election) speech. The result of *Alvarez* is that laws regulating false campaign speech are in even more constitutional trouble than they were before, and any attempts to regulate such speech will have to be narrow, targeted, and careful in their choice of remedies.

Part II of this Article briefly describes the pre-*Alvarez* split in the lower courts on the regulation of false campaign and election speech and the arguments that had been advanced for and against the constitutionality of regulating false campaign speech. Part III describes the Supreme Court's fractured opinion in *U.S. v. Alvarez*. Part IV discusses how *Alvarez* may affect the constitutional calculus in the false campaign speech arena and

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18. *U.S. v. Alvarez*, 132 S. Ct. 2537 (2012), discussed *infra* pt. III.

argues that, in light of *Alvarez*, courts should hold unconstitutional most broad state laws barring false speech in campaigns. But courts should reject challenges to narrower laws that, under an actual malice/clear and convincing evidence standard, (1) bar false (though not misleading) election speech about the mechanics of voting, such as false statements about the date and time of voting; (2) give a government election authority the power to reject false campaign speech submitted for official ballot materials; and (3) allow a jury to punish defamatory speech about candidates made with actual malice. Each of these proposed laws is consistent with the plurality's and Justice Breyer's opinions in *Alvarez*, although the defamation issue is somewhat in question.

The hardest case is whether the government has authority to enjoin or punish non-defamatory false campaign speech made with knowledge of falsity (actual malice) that has the potential to trick or defraud voters into changing their votes. Consider, for example, the false statement of a judicial candidate on a campaign poster that she is an incumbent judge, or a statement that the president has endorsed her for office. While the case is close, I argue that, following *Alvarez*, courts are likely to conclude that the risks of allowing the government to punish or enjoin false campaign speech outweigh the benefits of providing voters with truthful information. Further, the narrower solution to the problem of this type of false campaign speech is counterspeech from opposing candidates and the media, as well as potentially the use of a government "truth commission" with the power to declare, before the election but subject to judicial review, that campaign speech is false.

Government proclamations of truth, like journalistic fact checks, might be ignored or attacked by the campaigns. But such proclamations will focus voter attention on the issue of the veracity of questionable campaign speech. Under the First Amendment, we have to trust voters to do their best with such information. Truth commissions pose risks as well as harms, and it may be that counterspeech is the best we can do consistent with the First Amendment and the risks of the alternatives.

## II. CONSTITUTIONAL ANALYSIS OF FALSE CAMPAIGN SPEECH LAWS BEFORE *U.S. v. ALVAREZ*

This Part briefly reviews some of the major cases considering the constitutionality of laws regulating false campaign speech. The section is brief because others have covered this ground very well in great detail<sup>19</sup> and any

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19. See e.g. Ashdown, *supra* n. 14; William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. Pa. L. Rev. 285 (2004); Becky Kruse, Student Author, *The Truth in Masquerade*:

new analysis of these issues will have to take into account the Supreme Court's new decision in *U.S. v. Alvarez*.

The Supreme Court has not spoken directly on the constitutionality of laws barring false campaign speech. The closest the Court has come to the issue is the case of *Brown v. Hartlage*,<sup>20</sup> in which the Court rejected an attempt to declare an election result void after the election winner was accused of violating a Kentucky law that barred a candidate from certain corrupt practices.<sup>21</sup> The candidate had promised not to take a salary if elected, and Kentucky courts had earlier held that promises not to take a salary violated the statute and could be grounds for voiding the election.<sup>22</sup>

The Supreme Court explained, "When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression."<sup>23</sup> It held that applying this law to the candidate's statement and voiding his election violated the First Amendment for three reasons.

First, the Court held that Kentucky could not penalize general comments like this one made in a campaign: "a candidate's promise to confer some ultimate benefit on the voter, *qua* taxpayers, citizen, or member of the general public, does not lie beyond the pale of First Amendment protection."<sup>24</sup> Second, the Court rejected the idea that Kentucky could impose such a law on grounds that "emphasis on free public service might result in persons of independent wealth but less ability being chosen over those who, though better qualified, could not afford to serve at a reduced salary."<sup>25</sup> Third, although the Court agreed that "demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements,"<sup>26</sup> there was no evidence in this case that the candidate made the statement in anything other than good faith. He also withdrew the statement after learning it could violate state law.<sup>27</sup>

This statement in *Brown* about lesser protection for false speech, which the Supreme Court analogized to its treatment of defamation law, gave some credence to the idea that states could regulate false campaign

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*Regulating False Ballot Proposition Ads through State Anti-False Speech Statutes*, 89 Cal. L. Rev. 129 (2001); Carlton F.W. Larson, Student Author, *Bearing False Witness*, 108 Yale L.J. 1155 (1999).

20. *Brown v. Hartlage*, 456 U.S. 45 (1982).

21. *Id.* at 62.

22. *Id.* at 47-48.

23. *Id.* at 53-54.

24. *Id.* at 58-59.

25. *Id.* at 59-60.

26. *Brown*, 456 U.S. at 60.

27. *Id.* at 61-62.



speech. On the other hand, the rest of the Court's opinion extolled the virtues of free and robust campaign speech, in which candidates could engage in unfettered discussion of political issues. Perhaps unsurprisingly, courts since *Brown* had divided on the constitutionality of regulating false campaign speech.

In *Washington ex rel. Public Disclosure Commission v. 119 Vote No! Committee*,<sup>28</sup> the Supreme Court of the state of Washington divided sharply on the constitutionality of a law barring any person from sponsoring with "actual malice" a political advertisement containing a false statement of material fact. The statement would have to be material, and proof of a violation required "clear and convincing evidence." The term "actual malice" means that the statement was made either with knowledge of its falsity or reckless disregard as to its truth or falsity.<sup>29</sup>

The case arose out of a claim that opponents of a ballot measure concerning assisted suicide made false claims about what the ballot measure would do, including that the measure would allow doctors to take patients' lives "without safeguards." The Washington State Public Disclosure Commission referred the complaint to prosecutors, asking that the Committee and individual defendants be fined up to \$10,000 plus costs, attorney fees, and treble damages. The trial court held that the advertisement criticizing the ballot measure did not contain material false statements. The intervener, the American Civil Liberties Union, sought a declaration that the statute was invalid. The trial court denied the relief, holding the statute constitutional.<sup>30</sup>

On appeal, the state Supreme Court divided bitterly, issuing four opinions. Justice Sanders, speaking for himself and two other Justices, held that the law violated the First Amendment of the United States Constitution, which protects freedom of speech. Justice Sanders stressed that the First Amendment has its "fullest and most urgent application" in political campaigns.<sup>31</sup> He rejected the idea that the State has "an independent right to determine truth and falsity in political debate."<sup>32</sup> Even the high standard of proof contained in the statute would not prevent "the chilling effect of possible government sanction."<sup>33</sup> Justice Sanders recognized that the state may have an interest in punishing malicious *defamatory* speech about a candidate but held the law went more broadly than simply targeting such defamatory speech. "Ultimately, the State's claimed compelling interest to shield

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28. *119 Vote No! Comm.*, 957 P.2d 691.

29. *Id.* at 703 (Talmadge, J., concurring).

30. *Id.* at 693–694 (majority).

31. *Id.* at 694 (quoting *Brown*, 456 U.S. at 53).

32. *Id.* at 695.

33. *Id.* at 696.

the public from falsehoods during a political campaign is patronizing and paternalistic . . . . It assumes the people of the state are too ignorant or disinterested to investigate, learn and determine for themselves the truth or falsity in political debate, and it is the proper role of the government itself to fill this void.”<sup>34</sup>

Justice Madsen, speaking for herself and one other Justice, agreed with the majority that the Constitution forbids laws punishing false speech concerning ballot measures, which the Justice saw as pure political speech. But relying upon U.S. Supreme Court cases holding it constitutional to award damages for defamatory statements made about public officials with actual malice, Justice Madsen concluded there was no constitutional impediment to broader laws covering false campaign speech concerning candidates.<sup>35</sup>

Justice Guy, speaking for himself and one other Justice, agreed that the advertisement at issue in the case did not violate the statute but disagreed strongly about the constitutionality of the Washington law on its face. “Calculated lies are not protected political speech. The elected representatives of the people have the right to pass laws which make malicious lying illegal in political campaigns; we have no constitutional duty to strike down such laws.”<sup>36</sup>

Justice Talmadge, speaking for himself and one other Justice, issued a blistering opinion concurring in the judgment but disagreeing with the court on the constitutionality of the statute. Calling the Court “the first Court in the history of the Republic to declare First Amendment protection for calculated lies,”<sup>37</sup> he criticized the “sweep” of the majority’s “encompassing” rhetoric. He accused the majority of being “shockingly oblivious to the increasing nastiness of modern American political campaigns” with their “‘win-at-any-cost’ attitude involving vilification of opponents and their ideas.”<sup>38</sup> Justice Talmadge rejected the argument that the statute would chill political speech, saying it would only stop “malicious prevarication, not honest, robust political debate.”<sup>39</sup> Relying on a number of Supreme Court and Washington state precedents, Justice Talmadge concluded that the First Amendment did not protect maliciously false statements. He concluded the state had a compelling interest in preserving the “sanctity of the electoral process.”<sup>40</sup> He agreed with the majority only on the point that the trial court was correct in concluding that the challenged statement did not

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34. *119 Vote No! Comm.*, 957 P.2d at 698–699.

35. *Id.* at 700 (Madsen, J., concurring).

36. *Id.* at 699 (Guy, J., concurring).

37. *Id.* at 701 (Talmadge, J., concurring).

38. *Id.*

39. *Id.* at 701–702.

40. *119 Vote No! Comm.*, 957 P.2d at 707–708.

involve a deliberate lie, but instead contained “traditional political hyperbole.”<sup>41</sup>

The Washington Supreme Court divided once again on the question of the constitutionality of laws barring false campaign speech in the 2007 case *Rickert v. Washington Public Disclosure Commission*.<sup>42</sup> In light of the *119 Vote No!* case, the Washington legislature had modified the statute to cover only false statements about a candidate in a campaign, but not false statements a candidate made about herself. In this case, unlike *119 Vote No!*, there seemed no question that someone, in this case a candidate, made a deliberately false statement. The candidate claimed that her opponent, an incumbent state Senator, voted to close a facility for the developmentally disabled.<sup>43</sup>

Four Justices wrote an opinion holding that the statute failed to survive strict scrutiny analysis under the First Amendment. Aside from the same arguments made by the plurality in the *119 Vote No!* case, the majority found this statute not narrowly tailored because it did not cover false statements made by a candidate about himself or herself. The remedy for the false speech was more speech:

In the case at bar, Ms. Rickert made knowingly false or reckless statements about Senator Sheldon, a man with an outstanding reputation. Senator Sheldon and his (many) supporters responded to Ms. Rickert’s false statements with the truth. As a consequence, Ms. Rickert’s statements appear to have had little negative impact on Senator Sheldon’s successful campaign and may even have increased his vote.<sup>44</sup>

Four Justices, in an opinion by Justice Madsen reiterating the points in her earlier *119 Vote No!* opinion, dissented, stating that the Constitution gave the state of Washington the right to punish false campaign speech aimed at candidates.<sup>45</sup> Chief Justice Alexander, writing only for himself in a controlling opinion, held in a single-paragraph concurrence that the new false political speech law was unconstitutional because it covered non-defamatory false statements about candidates. But Justice Alexander stated that a law aimed solely at defamatory false political speech would be constitutional.<sup>46</sup>

False campaign speech laws fared somewhat better in Ohio. In *Pesttrak v. Ohio Elections Commission*,<sup>47</sup> the United States Court of Appeals for the Sixth Circuit upheld a portion of Ohio’s law allowing a state board

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41. *Id.* at 710.

42. *Rickert v. Wash. Pub. Disclosure Comm.*, 168 P.3d 826 (Wash. 2007).

43. *Id.* at 827.

44. *Id.* at 832.

45. *Id.* at 833 (Madsen, J., dissenting).

46. *Id.* at 833 (Alexander, C.J., concurring).

47. *Pesttrak v. Ohio Elections Comm.*, 926 F.2d 573 (6th Cir. 1991).

to reprimand candidates for false campaign speech statements made with actual malice but struck down provisions allowing the board to impose fines and cease and desist orders. “[Supreme Court] cases indicate that false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth.”<sup>48</sup> But the fines were being imposed by a commission and not a court, without any guarantee that the commission would use a “clear and convincing” evidence standard. The cease and desist orders were an unconstitutional prior restraint of speech.<sup>49</sup>

The court upheld the “truth declaring” reprimand function of the Commission:

What is happening in this case, with regard to the ‘truth declaring’ function of the Commission, is that the Commission is making judgments, and publicly announcing those judgments to the world, as to the truth or falsity of the actions and statements of candidates and others intimately involved in the political process. These activities are closely comparable to those now carried on by many agencies of government.<sup>50</sup>

Following *Pesttrak*, the Ohio Supreme Court in *McKimm v. Ohio Elections Commission*<sup>51</sup> upheld the reprimand of a candidate who published a cartoon depicting his opposing candidate holding a bundle of cash underneath a table along with accompanying words that the court held connoted to the reasonable reader that the candidate had taken a bribe or kickback.<sup>52</sup>

Most recently, in *281 Care Committee v. Arneson*,<sup>53</sup> the Eighth Circuit rejected a number of procedural arguments against a challenge to a Minnesota law that made it a crime to engage in false campaign speech with actual malice. Three groups opposed to school board funding initiatives sought a declaration striking down the Minnesota law after a number of the groups’ opponents allegedly threatened litigation under the statute for allegedly false statements the groups made in earlier campaigns.<sup>54</sup>

The court rejected the argument that false speech was entitled to no constitutional protection under the First Amendment, and it held that false campaign speech was quintessential political speech at the core of the First Amendment:

We do not, of course, hold today that a state may never regulate false speech in this context. Rather, we hold that it may only do so when it satisfies the

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48. *Id.* at 577.

49. *Id.* at 578.

50. *Id.* at 579.

51. *McKimm*, 729 N.E.2d 364.

52. *Id.* at 366.

53. *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2012).

54. *Id.* at 625–626.

First Amendment test required for content-based speech restrictions: that any regulation be narrowly tailored to meet a compelling government interest.<sup>55</sup>

It remanded the case for a consideration of whether the Minnesota law satisfied strict scrutiny.<sup>56</sup> After deciding *U.S. v. Alvarez*, the Supreme Court denied certiorari in the *281 Care Committee* case, leaving open the possibility that the case could return to the Supreme Court after further proceedings in the lower courts.

What to make of these cases? First, the judges hearing these cases seem to agree that any law regulating false campaign speech must—at the very least—be targeted at speech made with actual malice<sup>57</sup> and probably be decided under a heightened evidentiary standard, such as a clear and convincing evidence standard. Prior restraints—or injunctions barring false statements—appear to be off the table. Beyond that, the judges have disagreed on whether false speech generally is entitled to any protection and, if it is, how to strike the First Amendment balance. Further, the kinds of cases that come before the judges are anything but clear-cut on the facts; it may be hard to tell fact from opinion and to know when innuendo is close enough to a lie to count under a state’s false campaign speech statute.

The clear message from the collection of cases seems to be that there are important interests on both sides of the equation and that judges and others have struck the balance differently. Professor Bill Marshall canvassed the area, identifying four arguments in favor of laws regulating false campaign speech. “First, and most obviously, false statements can distort the electoral process.”<sup>58</sup> “Second, false statements can serve to lower the quality of campaign discourse and debate.”<sup>59</sup> “Third, false statements can lead or add to voter alienation by fostering voter cynicism and distrust of the political process.”<sup>60</sup> “Fourth, false statements against an opponent’s character can inflict reputational and emotional injury upon the attacked individual.”<sup>61</sup>

Professor Marshall also identified four arguments against enactment of false campaign laws. “First, as an introductory matter, the arguments in favor of regulation may overstate the harms. For example, the regulatory

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55. *Id.* at 636.

56. *Id.*

57. See e.g. *Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1122 (D. Haw. 2001). But see Lee Goldman, *False Campaign Advertising and the Actual Malice Standard*, 82 Tul. L. Rev. 889 (2008) (arguing instead for liability under a “negligence” standard for false campaign speech).

58. Marshall, *supra* n. 19, at 294. Marshall based his anti-distortion arguments on a line of campaign finance cases that have since been overturned by the Supreme Court in *Citizens United v. Fed. Election Commn.*, 129 S. Ct. 2893 (2009). But see *Ashdown*, *supra* n. 14, at 1104–1111 (arguing that anti-distortion interest survives *Citizens United*).

59. Marshall, *supra* n. 19, at 294.

60. *Id.* at 295.

61. *Id.* at 296.

concern of preventing candidates from deceiving voters may miss the point that voters often do not believe what they hear in campaigns anyway.”<sup>62</sup> “Second and more importantly, restricting campaign speech, including even false campaign speech, is in tension with basic free speech principles. The discussion of political affairs lies at the heart of the First Amendment.”<sup>63</sup> “Third, authorizing the government to decide what is true or false in campaign speech opens the door to partisan abuse.”<sup>64</sup> “Fourth, regulating campaign speech is problematic because it allows the courts and/or other regulatory bodies to be used as political weapons.”<sup>65</sup>

With strong arguments on both sides, it is no surprise that courts had divided on the constitutionality of false campaign speech laws. As we shall see, however, last June in *U.S. v. Alvarez* the Supreme Court put a thumb on the First Amendment side of the scales, making it much harder to sustain the constitutionality of many false campaign speech laws in the future.

### III. A QUICK REVIEW OF *U.S. v. ALVAREZ*

While some of the false campaign speech cases described in the last Part raise debatable questions about whether a statement really was a false statement of fact, falsity was not in question when it came to Defendant Xavier Alvarez’s lie about winning the Congressional Medal of Honor. As Justice Kennedy explained in the Supreme Court’s plurality opinion in *U.S. v. Alvarez*: “Lying was his habit. [Alvarez] lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, [Alvarez] ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005.”<sup>66</sup> Justice Kennedy described Alvarez’s statement:

In 2007, [Alvarez] attended his first public meeting as a board member of the Three Valley Water Board District. . . . He introduced himself as follows: ‘I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy.’ None of this was true. For all the record shows, respondent’s statements were a pathetic attempt to gain respect that eluded him. The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.<sup>67</sup>

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62. *Id.* at 297.

63. *Id.* at 298.

64. *Id.* at 299.

65. Marshall, *supra* n. 19, at 300.

66. *Alvarez*, 132 S. Ct. at 2542 (plurality opinion). Citing 18 U.S.C. § 704, Justice Kennedy noted that “Respondent’s claim to hold the Congressional Medal of Honor was false. There is no room to argue about interpretation or shades of meaning.” *Id.* at 2543.

67. *Id.* at 2542 (citation omitted).

The Ninth Circuit held that the Stolen Valor Act violated the First Amendment, but the Tenth Circuit, in a separate case, upheld it.<sup>68</sup> The Supreme Court granted certiorari to resolve the split. But the Court split badly in its decision, 4–3–2, issuing no majority opinion.

Justice Kennedy’s opinion for four Justices rejected the argument that the First Amendment categorically did not protect false statements, the way the First Amendment categorically does not protect other types of speech, such as obscenity and fighting words. “This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”<sup>69</sup>

Justice Kennedy’s opinion distinguished cases upholding liability for fraud or defamation against First Amendment challenge, as well as laws prohibiting false statements to the government. As to fraud and defamation, Justice Kennedy stressed that the Court on First Amendment grounds had imposed additional important limits on liability, including the actual malice standard.<sup>70</sup> As to false speech made to the government, and laws that prohibit impersonating a government officer, Justice Kennedy said these laws “protect the integrity of Government processes, quite apart from merely restricting false speech.”<sup>71</sup> Laws barring false testimony under oath were justified on a similar basis.<sup>72</sup>

Justice Kennedy declared that the Stolen Valor Act did not implicate the interests at issue in these other kinds of cases. It barred false speech which was not made “to effect a fraud or secure money or other valuable considerations, say offers of employment.”<sup>73</sup> The law also was quite broad;<sup>74</sup> the Court held it was not narrowly tailored to protect the “integrity of the military honors system.”<sup>75</sup> “There must be a direct causal link between the restriction imposed and the injury to be prevented.”<sup>76</sup> “The Government has not shown, and cannot show, why counterspeech would not

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68. *Id.* at 2542 (citing *U.S. v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010), 638 F.3d 666 (9th Cir. 2011) (seven Ninth Circuit judges dissenting from denial of rehearing en banc), and *U.S. v. Strandlof*, 667 F.3d 1146 (10th Cir. 2012)).

69. *Alvarez*, 132 S. Ct. at 2544–2545 (rejecting the government’s reliance on earlier cases that appeared to hold to the contrary).

70. *Id.* at 2545.

71. *Id.* at 2546.

72. *Id.*

73. *Id.* at 2547–2548.

74. *Id.* at 2547 (“The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.”).

75. *Alvarez*, 132 S. Ct. at 2549.

76. *Id.*

suffice to achieve its interest.”<sup>77</sup> Justice Kennedy suggested that public ridicule might be enough, as well as the government creating a database of medal recipients.<sup>78</sup>

Justice Breyer, writing for himself and Justice Kagan, rejected the plurality’s “strict categorical analysis.”<sup>79</sup> Instead, Justice Breyer said that in evaluating a law barring false speech it was necessary to engage in balancing, taking into account:

the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision’s countervailing objectives, the extent to which the provision will tend to achieve these objectives, and whether there are other, less restrictive ways of doing so. Ultimately, the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.<sup>80</sup>

Justice Breyer then applied what he termed “intermediate scrutiny” to determine whether the Stolen Valor Act was constitutional. He agreed with the three dissenting Justices that “there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech.”<sup>81</sup> He pointed to laws “restricting false statements about philosophy, religion, history, the social sciences, [and] the arts.”<sup>82</sup> He stated that the danger is lower when the regulations “concern false statements about easily verifiable facts that do not concern such subject matter.”<sup>83</sup> Further “[f]alse factual statements can serve useful human objectives.”<sup>84</sup>

Like the plurality, Justice Breyer stressed that laws regulating some false speech are narrower and tend to require “proof of specific harm to identifiable victims.”<sup>85</sup> Fraud statutes require proof of materiality, defamation focuses on statements which are likely to harm reputation, perjury focuses on materiality and a subset of statements made under oath.<sup>86</sup> Statutes

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77. *Id.*

78. *Id.* at 2550–2551.

79. *Id.* at 2551 (Breyer, J., concurring in judgment).

80. *Id.* at 2551–2552.

81. *Alvarez*, 132 S. Ct. at 2551–2552 (quoting dissent at 2564). But Justice Breyer never directly explains why he fails to apply strict scrutiny to a content-based restriction.

82. *Id.* at 2552.

83. *Id.*

84. *Id.* at 2553 (“False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child’s innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates’ methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.”).

85. *Id.* 2554.

86. *Id.*



prohibiting lying to the government are limited to “particular and specific harm by interfering with the functioning of a government department.”<sup>87</sup>

Justice Breyer then turned to the statute at hand. He found its breadth fatal: “As written, it applies in family, social or other private contexts, where lies will often cause little harm. It also applies in political contexts where although such lies are likely to cause harm, the risk of censorious selectivity by prosecutors is also high.”<sup>88</sup> He suggested a “more finely tailored statute,” perhaps aimed at only a subset of military awards, might be constitutional.<sup>89</sup>

Justice Breyer then added the following paragraph, which is most pertinent to the issue in this Article:

I recognize that in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve. In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas. Thus, the statute may have to be significantly narrowed in its applications. Some lower courts have upheld the constitutionality of roughly comparable but narrowly tailored statutes in political contexts. See, e.g., *United We Stand America, Inc. v. United We Stand, America New York, Inc.*, 128 F.3d 86, 93 (C.A.2 1997) (upholding against First Amendment challenge application of Lanham Act to a political organization); *Treasurer of the Committee to Elect Gerald D. Lostracco v. Fox*, 150 Mich. App. 617, 389 N.W.2d 446 (1986) (upholding under First Amendment statute prohibiting campaign material falsely claiming that one is an incumbent). Without expressing any view on the validity of those cases, I would also note, like the plurality, that in this area more accurate information will normally counteract the lie. And an accurate, publicly available register of military awards, easily obtainable by political opponents, may well adequately protect the integrity of an award against those who would falsely claim to have earned it. And so it is likely that a more narrowly tailored statute combined with such information-disseminating devices will effectively serve Congress’ end.<sup>90</sup>

Justice Alito, for the three dissenters, voted to uphold the Stolen Valor Act’s constitutionality. He wrote that laws prohibiting false statements have “no intrinsic First Amendment value”<sup>91</sup> and that “[l]aws prohibiting fraud, perjury and defamation . . . were in existence when the First Amendment was adopted, and their constitutionality is beyond question.”<sup>92</sup> Justice Alito cited these laws as well as laws barring false statements to govern-

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87. *Alvarez*, 132 S. Ct. at 2554.

88. *Id.* at 2555.

89. *Id.* at 2555–2556.

90. *Id.* at 2556 (citation omitted).

91. *Id.* at 2560 (Alito, J., dissenting).

92. *Id.* at 2561.

ment officials as consistent with the general right of the government to punish false speech about military honors. Justice Alito rejected the idea that the law was overbroad and criticized both the plurality opinion and Justice Breyer's opinion for failing to offer any meaningful way that the statute might be narrowed.<sup>93</sup>

Importantly for our purposes, the dissenters talked about the circumstances under which laws barring false speech could create an unconstitutional chill. When it comes to matters of public concern, Justice Alito explained, the First Amendment required the Court to impose the actual malice requirement on defamation claims and tort claims for intentional infliction of emotional distress.<sup>94</sup> Justice Alito also relied upon that part of *Brown v. Hartlage*,<sup>95</sup> in which the Supreme Court rejected the voiding of an election based upon a statement where there was no proof of actual malice.<sup>96</sup> He stated:

These examples by no means exhaust the circumstances in which false factual statements enjoy a degree of instrumental constitutional protection. On the contrary, there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth . . . .

Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. Statements about history illustrate this point. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation? While our cases prohibiting viewpoint discrimination would fetter the state's power to some degree, see *R.A.V. v. St. Paul*, 505 U.S. 377, 384–390, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (explaining that the First Amendment does not permit the government to engage in viewpoint discrimination under the guise of regulating unprotected speech), the potential for abuse of power in these areas is simply too great.<sup>97</sup>

Concluding that the Stolen Valor Act had no potential to create such a chill, Justice Alito would have upheld the Act and the instant prosecution.<sup>98</sup>

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93. *Alvarez*, 132 S. Ct. at 2565. The dissenters also claimed the government did not have the information to create an accurate database of medal holders.

94. *Id.* at 2563.

95. *Brown*, 456 U.S. at 61–62.

96. *Alvarez*, 132 S. Ct. at 2563 (Alito, J., dissenting).

97. *Id.* at 2564.

98. *Id.*

#### IV. WHAT CAN AND SHOULD BE DONE WITH FALSE CAMPAIGN AND ELECTION SPEECH LAWS AFTER *U.S. v. ALVAREZ*?

The Supreme Court's decision in *U.S. v. Alvarez* no doubt will be the central case in future court proceedings considering First Amendment challenges to false campaign and election speech laws. Gone is the argument, accepted by some courts before *Alvarez*, that false speech (including false campaign or election speech) is entitled to no constitutional protection and in a category with obscenity and fighting words. In its place is a regime in which broad laws targeting false speech stand little chance of being upheld regardless of the topic. A court undoubtedly would strike down a broad statute prohibiting false campaign statements made in any place and at any time.

Although the Court's decision in *Alvarez* is badly fractured, there seems unanimous skepticism of laws targeting false speech about issues of public concern and through which the state potentially could use its sanctioning power for political ends. Especially dangerous are criminal laws punishing false speech that could lead to selective criminal prosecution. Thus, at the very least it seems that to survive constitutional review, any false campaign speech law would have to be narrow, targeted only at false speech made with actual malice, and likely proven under an elevated level of proof, such as clear and convincing evidence. Although not directly discussed in *Alvarez*, the Court would be unlikely to accept any law which allowed an injunction to bar the utterance of false campaign speech, viewing that as an unconstitutional prior restraint of speech.

Beyond these points, it is much harder to determine how the Court would address specific laws targeting false campaign speech. Justice Breyer's opinion in particular noted both the significant harm of false campaign speech (leading voters to make the wrong decision) as well as the dangers of campaign speech laws, including selective prosecution motivated for political reasons and government censorship.

Justice Breyer cited two false campaign speech cases. In one case, a court upheld a trademark infringement case against the offshoot of 1992 Presidential candidate Ross Perot's "United We Stand" group. Donors confused by the similar names might have donated to the wrong political group.<sup>99</sup> In the other case, a court upheld a First Amendment challenge to a law barring someone from misrepresenting himself as an incumbent judge.<sup>100</sup> The candidate had previously served as a judge, and campaigned

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99. *Id.* at 2556 (Breyer, J., concurring in judgment) (citing *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 93 (2d Cir. 1997)).

100. *Alvarez*, 132 S. Ct. at 2556 (citing *Treas. of the Comm. to Elect Gerald D. Lostracco*, 389 N.W.2d at 449).

using phrases such as “Elect Judge Bruce A. Fox to Circuit Court.” After citing these cases, Justice Breyer then cast doubt upon them by stating: “Without expressing any view on the validity of those cases, I would also note, like the plurality, that in this area more accurate information will normally counteract the lie.”<sup>101</sup>

While the other Justices did not speak as directly on the issue of false campaign speech, it would not be surprising to find all of the Justices agreeing with Justice Breyer on this point—both the plurality, which applied a strict approach to considering the constitutionality of laws barring false campaign speech, and the dissenters, who expressed doubts about false speech laws aimed at matters of public concern in which laws barring false speech could chill legitimate and protected speech.

But deciding exactly where to draw the line between permissible and impermissible laws aimed at false campaign and election speech is hard. Right after the Court’s decision in *Alvarez*, First Amendment scholar Eugene Volokh wrote of his uncertainty. He opined that some laws targeting false campaign speech by a candidate might be upheld because they involve candidates using a falsehood to get a job, and therefore in a sense they are “closer to financial fraud.” Further, he wrote that the government’s interest in preventing voter deception is “quite strong,” likely to pass Justice Breyer’s “intermediate scrutiny test,” although he noted that Justice Breyer also expressed concern about selective prosecutions.<sup>102</sup>

Professor Volokh added:

My guess is that general bans on lies in election campaigns would be struck down, because they cover a wide range of territory in which the truth may be hard to uncover, and in some measure in the eye of the beholder. But narrower bans on, say, knowingly false statements about when or where people should vote, knowingly false claims that some person or organization has endorsed you, knowingly false claims that you are the incumbent (see, e.g., *Treasurer of the Committee to Elect Gerald D. Lostracco v. Fox*, 389 N.W.2d 446 (Mich. Ct. App. 1986)), knowingly false claims about your own job experience—including military experience—and the like might be constitutional. It’s just hard to tell, given both the limited scope of the opinions and the 4-2-3 split.<sup>103</sup>

I agree with part, although not all, of Professor Volokh’s analysis, as will be clear from my analysis below of four types of election-related false

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101. *Id.*

102. Eugene Volokh, *Freedom of Speech and Knowing Falsehoods*, The Volokh Conspiracy, <http://www.volokh.com/2012/06/28/freedom-of-speech-and-knowing-falsehoods/> (June 28, 2012). Professor Volokh also co-wrote an amicus brief in the *Alvarez* case arguing that false speech is not deserving of constitutional protection. See Br. of Profs. Eugene Volokh & James Weinstein as *Amici Curiae* in Support of Petr., *U.S. v. Alvarez*, 2011 WL 6179424, also available at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs/11-210\\_petitioneramcu2profs.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-210_petitioneramcu2profs.authcheckdam.pdf).

103. Volokh, *supra* n. 102.

speech laws. For each type, I assume that a state (or Congress) has imposed in its law an actual malice requirement and required proof by a heightened evidentiary standard, such as clear and convincing evidence.

A. *Laws Barring False (But Not Deceptive) Election Speech*

The strongest case for constitutionality is a narrow law targeted at false election speech aimed at disenfranchising voters. While a senator, President Obama introduced just such a bill, the Deceptive Practices and Voter Intimidation Act of 2007.<sup>104</sup> Consider the false statement that “Republicans vote on Tuesday, Democrats vote on Wednesday.” A state should have the power to criminalize such speech. The law would be justified by the government’s compelling interest in protecting the right to vote. Such speech, which could be distributed in the days before the election, could be very difficult to counter with truthful speech about election rules. Following the *Alvarez* dissenters, there is no conceivable chill of legitimate speech that such a law would deter.<sup>105</sup> The risk of selective prosecution for false election speech seems relatively low, and the falsity of such speech would be easily verifiable. Courts are likely to uphold narrowly drawn false campaign speech laws.

Along similar lines, a state should be able to stop a person from falsely representing identity in an election context with the aim of defrauding donors of their money. For example, a group cannot falsely claim it is raising money for a candidate’s campaign but then use the money for a different purpose.<sup>106</sup> Falsely representing yourself as a representative of a candidate, party or committee for financial gain seems well within the type of anti-financial fraud law that it appears all on the Court accept as constitutionally permissible.

In contrast, a law targeted at “deceptive” or “misleading” election speech would face greater constitutional hurdles, in part because such a law could chill legitimate speech given the elasticity of the terms “deceptive”

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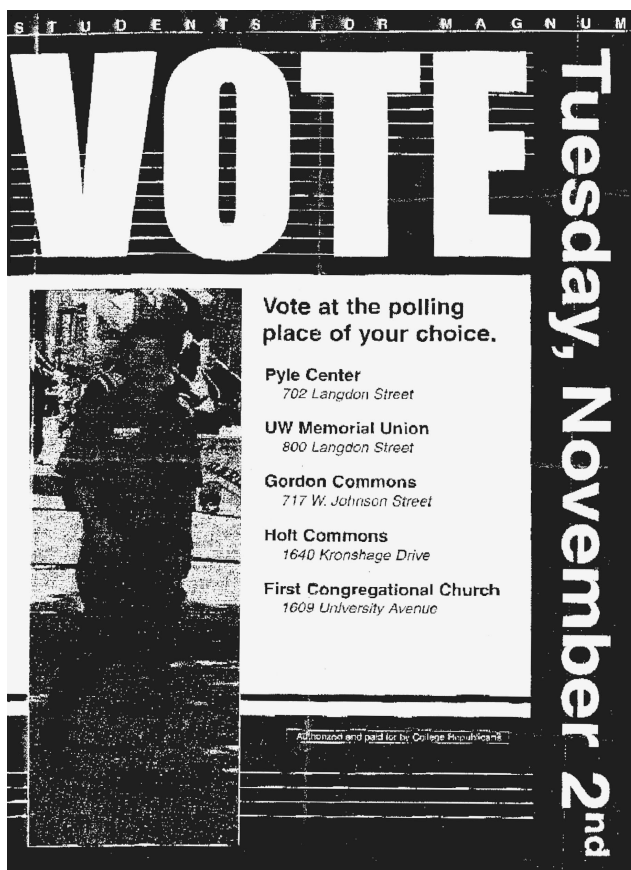
104. Sen. 453, 110th Cong., 1st session, available at <http://www.opencongress.org/bill/110-s453/text> (Jan. 31, 2007). The bill also targeted false endorsements, an issue I return to below. On the topic of false and deceptive election speech, see Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 Harv. Civ. Rights-Civ. Liberties L. Rev. 1 (2009) and Gilda R. Daniels, *Voter Deception*, 43 Ind. L. Rev. 343 (2010).

105. Of course, anyone who negligently gave incorrect information about the casting of a ballot would not be subject to liability thanks to the actual malice requirement.

106. See Shane Goldmacher, *Look-Alike Sites Funnel Big Money to Mystery PAC*, National Journal, <http://www.nationaljournal.com/daily/look-alike-sites-funnel-big-money-to-mystery-pac-20120909?> page=1 (Sept. 11, 2012).

and “misleading.”<sup>107</sup> Consider, for example, a statement such as “bring identification with you to the polls” made in a state that does not have a voter identification requirement. While such speech could be misleading, suggesting to some voters that identification is required and perhaps deterring voters without the right i.d. from voting, what counts as “misleading” is unconstitutionally vague and in the eyes of the beholder. A statute aimed at barring such misleading speech would open up prosecutorial discretion and the potential for political gamesmanship beyond that which the courts likely would tolerate.

Some cases will no doubt be close to the line. Consider this poster circulated in student dorms at the University of Wisconsin:<sup>108</sup>



Election flyer, University of Wisconsin–Madison, 2004

107. Despite the name of Obama’s bill, *see supra* n. 104, it targeted only knowingly false statements made with the intent to prevent someone from exercising the right to vote in an election and not merely “deceptive” speech.

108. The flyer is reprinted in Richard L. Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown* 94 (Yale Univ. Press 2012).

A vote in the wrong precinct would be a vote cast via a provisional ballot, which would not count. Is the statement “vote at the polling place of your choice” literally false, or only misleading? It might be literally false because one cannot “vote” a ballot that will count (one can cast a provisional ballot that will not count) at the wrong polling place. Or the statement merely might be misleading because it does not describe the consequences of voting in the polling place of one’s choice.

*B. Laws Allowing the Government to Reject False Campaign Speech in Official Ballot Materials from the State*

Even if, as I suggest below, the state might be powerless to stop a candidate from falsely claiming to be an incumbent or from having received the endorsement from someone else, the state is not required to print ballot materials that contain false statements. In *Alvarez*, all of the Justices agreed that laws barring false statements made to the government were constitutional. Such laws ensure that government processes continue and that the government provides accurate information to the public. The government has its own interest in assuring the accuracy of information it issues. For example, when the state allows candidates to list a profession on the ballot, the state should have the authority to vet those statements and to reject false statements. Further, the Court in *Alvarez* indicated that laws barring false speech to the government are constitutional, and providing false information for purposes of government election materials should be no different.

To be sure, giving the government this power does create a risk of censorship and political manipulation that does not seem present in laws outlawing false election speech. However, the possibility of pre-election judicial review, as is common with fights over the accuracy of ballot materials submitted in California, assures that a judge protective of the First Amendment will have ultimate control over any state decision to reject campaign speech as false.

*C. Laws Barring Defamatory Campaign Speech*

All of the Justices in *Alvarez* agree that general laws punishing defamation survive the First Amendment, provided they meet the heightened First Amendment rules created by the Supreme Court, such as the actual malice requirement. The question is whether defamatory statements *made in the context of a campaign* might be treated differently and be unconstitutional despite the general constitutionality of defamation laws otherwise meeting Supreme Court standards.

Courts are likely, but by no means certain, to uphold the constitutionality of defamation laws used in the context of political campaigns. On the

one hand, candidates like anyone else should have the right to a reputation not ruined through malicious lies. Further, post-election civil damage suits for defamation do not present the risk of selective prosecution, which might come in pre-election civil actions. On the other hand, the law of defamation could have some chilling effect on robust debate during intense election periods. Further, as the saying goes, “politics ain’t beanbag.” Anyone running for office today in the rough-and-tumble world of politics perhaps assumes the risk of being defamed or at least regularly insulted. It would be unsurprising if courts go further and bar even defamation suits arising out of statements made in candidate elections.

*D. Laws Regulating False Public Statements about Candidates or Ballot Measures*

The hardest case under *Alvarez* is whether the government has authority to enjoin or punish non-defamatory malicious false campaign speech, such as a statement by a candidate that she is the incumbent or has been endorsed by the President. Professor Volokh wrote that such laws as applied to candidates might be constitutional on grounds that a candidate would be making the false statement for financial or tangible gain—to keep (or obtain) her own job. As in *Alvarez*, where the plurality distinguished laws punishing fraud for financial gain, which survived First Amendment challenge, with laws punishing fraud for non-financial or non-tangible reasons, which did not, false candidate speech might be seen as false speech made for financial gain.

To begin with, I am not so sure that it is right to conceive of candidates as running for office primarily for financial or tangible gain. Many candidates have political rather than financial motivations of running for office. It is not clear from *Alvarez* if political motivations fall closer to financial motivations or motivations to achieve affection, or how to deal with mixed motive cases.

Further, the speech of a “campaign” is not simply the speech of the candidate: it is the speech of the group of individuals associated with the campaign. Many people associated with the campaign would not be making the false statements for financial gain but rather to see their candidate prevail in the election. For this reason, a law barring only false speech made maliciously by the candidate himself (and not his campaign) at best would be partially effective. It would be underinclusive, pushing false campaign speech to independent individuals and groups who would make the false claims on the candidate’s behalf. It would also not apply to false statements made by independent groups in candidate election or made in ballot measure campaigns.



Most importantly, even given a candidate's financial or tangible incentives to run for office, a law targeting malicious false candidate speech still could be unconstitutional. Political speech remains at the core of the First Amendment, and candidate speech is the *most likely* type of speech to prompt selective prosecution as well as political manipulation of government authorities.

One possible way to save the constitutionality of a law aimed at false campaign statements would be to limit it to statements made directly by candidates that are easily verifiable, such as a statement about whether a candidate is an incumbent. (Even that is problematic: is a person who used to be a judge referring to himself as a "Judge" in an ad making a false statement?) Excluded would be murkier statements such as whether a candidate supports tax increases. Sticking to verifiable statements limits the amount of prosecutorial discretion. But it is a double-edged sword: if the allegedly false statements are easily verifiable, then there is less of a need for the state to come in and punish such speech. As Justice Kennedy explained in *Alvarez*, the better remedy for easily-checked false speech might be counterspeech, or a database of truthfulness. Thus, even if there is a constitutional right to lie<sup>109</sup> in campaigns, the remedy is for opponents of a lying candidate to credibly call that candidate a liar.<sup>110</sup>

While the matter is unclear, there are substantial arguments that state laws barring or punishing false malicious campaign speech even by candidates violates the First Amendment after *Alvarez*. Professor Marshall's constellation of interests supporting false campaign speech laws—preventing "distortion" of election outcomes, a lower quality of election content, voter alienation—is unlikely to trump the courts' concerns about censorship and partisan manipulation of these processes in speech at the core of the First Amendment.<sup>111</sup>

If the state likely cannot ban or punish false campaign speech, it probably still could establish a "truth-declaring" commission as in Ohio. The Sixth Circuit in *Pesttrak* upheld such a commission structure before *Alvarez*. Its reasoning seems to survive *Alvarez*. A government statement declaring that a candidate has lied is a narrower alternative to the state barring or

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109. Erwin Chemerinsky, *The First Amendment and the Right to Lie*, ABA Journal, [http://www.abajournal.com/news/article/the\\_first\\_amendment\\_and\\_the\\_right\\_to\\_lie](http://www.abajournal.com/news/article/the_first_amendment_and_the_right_to_lie) (Sept. 5, 2012).

110. The majority may be overly optimistic about the chances that counterspeech could change minds, especially given evidence that voters—even informed voters—respond to emotional appeals in campaign advertising. See Daniel H. Lowenstein, Richard L. Hasen, & Daniel P. Tokaji, *Election Law—Cases and Materials* 536–537 (5th ed., Carolina Academic Press 2012).

111. There is no doubt some tension here with the position of Justice Breyer on this issue and on the issue of the constitutionality of campaign finance regulation. See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Alfred A. Knopf 2005). In the campaign finance arena, Justice Breyer has recognized First Amendment concerns on both sides of the issue.

punishing the lie directly; indeed, the government statement is somewhat equivalent to the “database” of military medal winners that Justice Kennedy discussed in *Alvarez*. Like the database, a government statement provides a source of government information that at least a portion of the public is likely to view as objective. The truth commission differs from the database in that government officials must exercise a subjective judgment about truth and falsity.

Although a truth commission is likely constitutional, it is not clear that it is a desirable approach to the problem of false campaign speech. A government truth-declaring function is subject to selective enforcement and political manipulation. In Ohio, prosecutions are rare,<sup>112</sup> opponents bring claims to the commission for political gain, and the results of commission findings may be haphazard.

Consider a recent Ohio hearing over whether the Ohio Republican Party lied in a Republican mailer about a pending redistricting initiative. The bipartisan panel split 2-2 along party lines regarding the alleged falsity of two statements in the mailer, but agreed 4-0 that there was probable cause to believe that one statement in the mailer—that members of a proposed redistricting commission would be chosen in secret—was false.<sup>113</sup> No doubt supporters of the initiative can use the Ohio commission’s findings of probable cause that the Ohio Republican Party made a false statement to try to influence voters in the weeks before the election. In some ways, the cure of injecting the government into the political process right during the elections may be worse than the disease.

## V. CONCLUSION

It is disheartening to think that the Constitution contains within it a right to lie in political campaigns. In an era in which it appears that political consultants have no compunction about running campaigns filled with

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112. Aaron Marshall, *Despite laws against lying, tall tales have become the norm on the campaign trail, experts say*, Cleveland Plain Dealer, [http://www.cleveland.com/open/index.ssf/2012/10/despite\\_laws\\_against\\_lying\\_tal.html](http://www.cleveland.com/open/index.ssf/2012/10/despite_laws_against_lying_tal.html) (Oct. 27, 2012) (“While most observers see lying in campaigns on the upswing, [Ohio Elections Commission Executive Director Philip] Richter said that complaints about alleged campaign falsehoods are actually down this year compared to previous years with just 38, compared to as many as 98 in 2010. . . . Records supplied by Richter show the commission has heard 176 complaints involving allegations of false and misleading statements in the past three years and found violations in 14 cases—which is 8 percent of the time. . . . But the punishments barely redden a wrist. In 13 of the 14 cases, the commission just let the violation stand as the only penalty in the matter. The only fine levied in the past three years came in a 2010 case against a township trustee candidate whose complaint the board considered to be ‘frivolous’ and rang up a \$5,775 fine.”).

113. Joe Guillen, *Does GOP campaign literature contain a false statement? Ohio Elections Commission to decide*, Cleveland Plain Dealer, [http://www.cleveland.com/open/index.ssf/2012/09/state\\_elections\\_commission\\_fin.html](http://www.cleveland.com/open/index.ssf/2012/09/state_elections_commission_fin.html) (Sept. 20, 2012).

lies,<sup>114</sup> and in which the media's descriptions of campaign falsity are themselves attacked as biased, it is tempting to think of a legal solution to this political problem. The Supreme Court's decision in *U.S. v. Alvarez*, while fractured, points out the dangers of this approach, especially the dangers of censorship and political manipulation.

Narrow laws aimed at stopping maliciously false speech about the conduct of elections and those laws targeting defamatory false statements about candidates likely would survive constitutional challenge. The state also does not have to be a party to false campaign statements: it has the power to bar false statements from official ballot materials and probably to establish a "truth-declaring" commission to make pronouncements about campaign lies. Even if the commissions are constitutional, they may not be desirable.

After *Alvarez*, the state may no longer have the power to ban or punish malicious false campaign speech, whether made by candidates or others. The result of this conclusion is that we are likely to see more false campaign speech in elections, including some brazen lies. With candidates' pants increasingly on fire, and with the wooden noses of campaign consultants growing ever longer, the question is whether counterspeech—from opposing candidates, the media, and perhaps the government—will be enough to give voters the tools they need to make intelligent choices. I take solace in Jack Shafer's depressing observation that most voters don't expect honesty from their politicians,<sup>115</sup> and therefore they are less likely to be misled by them.

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114. See Jill LePore, *Lie Factory: How Politics Became a Business*, The New Yorker, [http://www.newyorker.com/reporting/2012/09/24/120924fa\\_fact\\_lepore?currentPage=all](http://www.newyorker.com/reporting/2012/09/24/120924fa_fact_lepore?currentPage=all) (Sept. 24, 2012) (tracing history of political consultants).

115. Shafer, *supra* n. 9.



# EVIDENCING A REPUBLICAN FORM OF GOVERNMENT: THE INFLUENCE OF CAMPAIGN MONEY ON STATE-LEVEL ELECTIONS

Edwin Bender\*

## I. INTRODUCTION

The National Institute on Money in State Politics (“Institute”), located in Helena, Montana, provides insight into the forces at work in state elections by compiling comprehensive information about who funds the election campaigns of state-level candidates.<sup>1</sup> This detailed, highly credentialed information provides evidence for determining how we—public officials, policy experts, and the public—might think about adjusting our democratic system of government for the better at a time when most voters<sup>2</sup> in the country feel that campaign donors have irreparably corrupted the system.

While the Federal Election Commission has compiled campaign finance information for presidential and congressional candidates since 1975, information from all the state disclosure agencies wasn’t available in one place until the Institute completed its first 50-state database in 2002.<sup>3</sup>

The data reveal hard facts about elections in each state, such as the number of races that are contested; the amounts raised by winning, losing, and incumbent candidates; and who is making major and strategic donations.<sup>4</sup> The data also enable comparisons of the campaign-finance patterns

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1. The National Institute on Money in State Politics makes its data available to the public at [www.followthemoney.org](http://www.followthemoney.org). The donor information is compiled from contribution and expenditure reports filed by more than 16,000 candidates and committees with official disclosure agencies in each of the 50 states. The information from the more than 100,000 reports filed result in databases of nearly four million records for every two-year election cycle, documenting upward of \$3.5 billion raised by all candidates and committees involved in state legislative, judicial, statewide or ballot question elections, and major state party committees.

2. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119 (2004).

3. National Institute on Money in State Politics, [www.followthemoney.org/database/nationalview.phtml?l=0&f=0&y=2002&abbr=0](http://www.followthemoney.org/database/nationalview.phtml?l=0&f=0&y=2002&abbr=0) (accessed Jan. 22, 2013).

4. National Institute on Money in State Politics analyses, such as Peter Quist, *Monetary Competitiveness in 2009–2010 State Legislative Races*, [www.followthemoney.org/press/ReportView.phtml?r=490](http://www.followthemoney.org/press/ReportView.phtml?r=490) (July 3, 2012) and Linda Casey, *The Role of Money and Incumbency in 2009–2010 State Elections*,

of states with no contribution limits with those that have high contribution limits, low contribution limits, or public-funding programs. This allows for examination of how limits or the lack thereof may affect the number of contested races, amounts raised, and the advantages of incumbency. The detailed donor information allows further analyses of the number of contributors who give up to the maximum amount allowed by law in each individual state, how many donors give above a reporting threshold but below the maximum, and the amount given that is less than a reporting threshold.<sup>5</sup> From this latter data set, a range can be calculated of the possible number of people who have given “small donations,” which are often correlated with competitive elections.<sup>6</sup> From the facts, comparisons, and analyses of the campaign-finance systems in the 50 states regarding the candidates and donors, we are beginning to see patterns that can help inform larger questions confronting the country and its legal system.

Federal and state courts are now considering major questions about the campaign finance systems in the states. The Institute’s data has been cited before the United States Supreme Court on three occasions: in an amicus curiae brief in *Caperton v. A.T. Massey Coal Co., Inc.*,<sup>7</sup> by Justice Souter in *Federal Election Commission v. Wisconsin Right to Life, Inc.*,<sup>8</sup> and in an

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[www.followthemoney.org/press/ReportView.phtml?r=489](http://www.followthemoney.org/press/ReportView.phtml?r=489) (July 3, 2012), provide overviews of data compiled in each election cycle. Contested races are those in which two candidates run for one office. Institute staff audit candidates’ contribution reports where possible to ensure totals on its website match those reported by candidates and other committees. The Institute considers contributing to be strategic in nature when it favors legislative incumbents first and winning candidates second, that is, those candidates who most likely will have a seat in legislative committee deliberations. Institute data show some organizations or PACs give upward of 90 percent of their contributions to incumbents and/or winning candidates.

5. A reporting threshold is the donation level below which donations are aggregated and reported as Unitemized Contributions. In most states, candidates are required to report contributions in more detail once a donor gives more than the reporting threshold. In Montana, for example, the reporting threshold is \$35.00. So, all donors who give \$34.99 or less to a candidate are not reported by name, and the total amount raised by a candidate below the threshold is reported in a single unitemized line item. Reporting thresholds range from \$20.00 in Colorado and Wisconsin to \$300.00 in New Jersey, with \$25.00, \$50.00, \$100.00 and \$200.00 thresholds being most common. The Campaign Disclosure Project, <http://disclosure.law.ucla.edu/> (accessed Dec. 19, 2012).

6. Michael J. Malbin, founder and executive director of the Campaign Finance Institute, and professor of political science at the State University of New York at Albany, has studied the role of small-dollar donors extensively. See The Campaign Finance Institute, [www.cfinst.org/smalldonors/state.aspx](http://www.cfinst.org/smalldonors/state.aspx) (accessed Dec. 19, 2012).

7. Amicus Curiae Br. of the Brennan Ctr. for Just., *Caperton v. A.T. Massey Coal Co.*, 2009 WL 45972 (Jan. 5, 2009) (No. 08-22, 556 U.S. 868 (2009)). In *Caperton*, the Supreme Court ruled that it was unconstitutional for a state supreme court justice to sit on a case involving the financial interests of a major donor to the judge’s election campaign.

8. *Fed. Election Commn. v. Wis. Right to Life, Inc.*, 551 U.S. 449, 504 (2007) (Souter, J., dissenting). Justice Souter cited the Institute’s reports, *The New Politics of Judicial Elections, 2006* and *State Elections Overview 2004*, as evidence in his dissenting opinion.

amicus curiae brief in *Citizens United v. Federal Election Commission*.<sup>9</sup> In addition, the Montana Attorney General presented the Institute’s analyses in *Western Tradition Partnership, Inc. v. Attorney General of Montana*.<sup>10</sup> Most recently, the Institute provided expert witness testimony in a challenge to Montana’s contribution limits brought by American Tradition Partnership.<sup>11</sup> Justice Breyer is quoted as saying that courts have “‘no scalpel to probe’ each possible contribution level.”<sup>12</sup> The Institute’s data and analyses, however, are sharpening our understanding of the effects of contribution limits and informing key questions about the First Amendment and political speech.

The Institute’s unique resources are also broadening and deepening reporters’ coverage of: state elections; the candidates who take part; the donors who give to those candidates; and the tension that naturally results when donors’ interests surface in public policy discussions.<sup>13</sup> National news outlets, including *The New York Times*, *The Washington Post*, *The Wall Street Journal*, *Bloomberg Businessweek News*, *U.S. News & World Report*, *NBC News*, *CBS News*, *National Public Radio*, *USA Today*, and the *Los Angeles Times*, routinely cite the Institute and its data in national and state election stories. The Institute’s website also affords local news organizations, from the *Ravalli Republic*, *Missoula Independent*, and *Billings Gazette*, to *The Dickinson Press*, *(SC) Free-Times*, and *Charleston Daily Mail*, access to information that helps inform citizens in specific districts about candidates who want to represent them and the interests that are helping them get elected. The rise of the internet is rapidly changing how news is disseminated and has spawned a new type of news outlet in the form of online news organizations and bloggers, such as *Alternet*, *Center for Public*

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9. Amicus Curiae Br. of the Sunlight Found., the Natl. Inst. on Money in St. Pol., and the Ctr. for Responsive Politics, *Citizens United v. Federal Election Commn.*, 2009 WL 2365228 (July 31, 2009) (No. 08-205, 558 U.S. 310, 130 S. Ct. 876 (2010)). Additionally, Campaign Legal Center and Justice at Stake relied on Institute data in preparing their briefs to the Court.

10. Institute evidence was presented in an affidavit that was cited in the Montana Supreme Court opinion. *W. Tradition Partn., Inc. v. Atty. Gen. of Mont.*, 271 P.3d 1, 9–10 (Mont. 2011), *cert. granted, judgment rev’d sub nom. Am. Tradition Partn., Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (the Court ruled in favor of Montana’s ban on corporate spending in elections, overturning a previous decision by the district court).

11. *Lair v. Murry*, 846 F. Supp. 2d 1116 (D. Mont. 2012) (held that the contribution limits were unconstitutional and enjoined their enforcement). On appeal, the Ninth Circuit granted the State of Montana’s motion for a stay pending appeal in *Lair v. Bullock*, 697 F.3d 1200 (9th Cir. 2012). In a one sentence memorandum opinion in *Lair v. Bullock*, 133 S. Ct. 498 (2012), the U.S. Supreme Court refused to vacate the stay: “The application to vacate the stay entered by the United States Court of Appeals for the Ninth Circuit on October 16, 2012, presented to Justice Kennedy and by him referred to the Court, is denied.”

12. *Randall v. Sorrell*, 548 U.S. 230, 248 (2006).

13. The Institute maintains a daily log of press citations where the Institute’s data and/or analyses were cited or staff experts were quoted. See National Institute on Money in State Politics, [www.followthemoney.org/Newsroom/whos\\_using\\_data.phtml](http://www.followthemoney.org/Newsroom/whos_using_data.phtml) (accessed Dec. 19, 2012).

*Integrity*, *Investigative News Network*, *Iowa Watchdog.org*, *MyBayCity.com*, *iWatch News*, *California Watch*, and *MinnPost*. The Institute's open-access website frees reporters with limited resources from the tedious task of compiling data<sup>14</sup> in their states so they can focus on investigations and reporting.

The curated data compiled by the Institute enables scholars who study both state elections and public policy processes new opportunities to quicken and expand their inquiries.<sup>15</sup> Some analyses focus on the relationships between campaign-finance regulation and participation, such as the June 2010 article by Professor Thomas Stratman, "Do Low Contribution Limits Insulate Incumbents from Competition?,"<sup>16</sup> and the 2010 collaboration between Professors Anthony J. Corrado, Michael J. Malbin, Thomas E. Mann, and Norman J. Ornstein, "Reform in an Age of Networked Campaigns: How to Foster Citizen Participation through Small Donors and Volunteers."<sup>17</sup> Other articles focus on the links between donors and candidates, such as Professors David Lowery, Virginia Gray, and Jennifer Benz's April 2008 publication, "Understanding the Relationship Between Health PACs

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14. As noted above, the Institute compiles detailed contributor information from disclosure agencies in all 50 states. To do so, its staff of more than 20 people works full time to download electronic files from the agencies and upload the information to [www.followthemoney.org](http://www.followthemoney.org). While more and more disclosure is available electronically, 13 states still offer their citizens access to candidate and committee reports via paper or PDF documents. For those states, Institute staff and contractors input the information into databases that are integrated with other data. In a majority of states, the Institute must carefully track which campaign reports are filed electronically and which are not, and input the latter, to ensure that the Institute's data accurately matches the final report totals filed by candidates and other committees. The accuracy of the Institute's data has been independently verified by scholars who have used it for detailed analyses. See *The Campaign Finance Institute Citizen Activist Tool*, [www.cfinst.org/state/CitizenPolicyTool.aspx](http://www.cfinst.org/state/CitizenPolicyTool.aspx) (accessed Dec. 19, 2012). In early 2003, the Institute hired the RAND Corp. to evaluate its procedures and systems. See *Rand Process Evaluation on the National Institute for Money on State Politics*, [www.followthemoney.org/Institute/rand.phtml](http://www.followthemoney.org/Institute/rand.phtml) (accessed Dec. 19, 2012).

15. For a sampling of scholarly articles that relied on Institute data for their analyses, see *National Institute on Money in State Politics*, [www.followthemoney.org/research/special\\_topics.phtml](http://www.followthemoney.org/research/special_topics.phtml) (accessed Dec. 19, 2012). Universities whose faculty and/or students have made use of the Institute's resources include: Arizona State University, Sandra Day O'Connor College of Law; City University of New York, Baruch College School of Business; Columbia University, School of Journalism; Emory University; George Mason University, Dept. of Economics; Harvard University, Business School, Safra Center for Ethics and Investigative Reporting, School of Finance, and School of Law; Loyola Law School; New York University, School of Law and Brennan Center for Justice; Rice University, Harlan Program/State Elections; Stetson University, School of Law; UC Berkeley, Haas School of Business; University of Michigan, Dept. of Political Science; University of Missouri, School of Journalism and School of Social Sciences; University of Paderborn, Business Administration and Economics; University of Southern California, Annenberg School of Communication; and Yale Law School.

16. Thomas Stratman, *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 *Election L.J.* 125 (2010).

17. Anthony J. Corrado, Michael J. Malbin, Thomas E. Mann & Norman J. Ornstein, *Reform in an Age of Networked Campaigns: How to Foster Citizen Participation through Small Donors and Volunteers*, Campaign Finance Institute, [www.cfinst.org/about/events/2010\\_01\\_14.aspx](http://www.cfinst.org/about/events/2010_01_14.aspx) (Jan. 14, 2010).



and Health Lobbying in the American States,”<sup>18</sup> or Professors Robert E. Hogan, Keith E. Hamm, and Rhonda Wrzenski’s April 2006 article, “Factors Affecting Interest Group Contributions to Candidates in State Legislative Elections.”<sup>19</sup> Until the Institute built the first comprehensive 50-state donor database a decade ago, scholars and students of state politics and elections worked with single-state or one-dimensional data sets with narrow focuses, such as votes cast in a particular state or total contributions raised. The depth and breadth of the Institute’s data now allow multi-state, multi-election cycle analyses of multiple variables, from votes cast and totals raised to specific interest group or donor interactions with different types of candidates (i.e., incumbents, incumbent challengers, or newcomers to open seats).

National and state policy and advocacy organizations—liberal, conservative, libertarian, and many in between—use the Institute’s open-access website and data to sharpen their issue analyses and deepen their memberships’ understandings of the role money plays in elections and public policy processes.<sup>20</sup> It should come as no surprise that the Institute’s data informs the efforts of campaign-finance reform advocates. Those pressing for what has been called “Clean Money Reform,” where a state sets up a fund of public money from which qualified candidates can draw once they hit a specific threshold of qualifying contributions, have used the Institute’s data to argue that the policy has significant benefits.<sup>21</sup> Others have argued for campaign reforms that provide participation incentives for more small-donation<sup>22</sup> contributors.<sup>23</sup> A broader group of organizations has developed

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18. David Lowery, Virginia Gray, Jennifer Benz et al., *Understanding the Relationship Between Health PACs and Health Lobbying in the American States*, available at [www.followthemoney.org/press/SpecialReportView.phtml?r=318](http://www.followthemoney.org/press/SpecialReportView.phtml?r=318) (Apr. 3, 2008).

19. Robert E. Hogan, Keith E. Hamm & Rhonda Wrzenski, *Factors Affecting Interest Group Contributions to Candidates in State Legislative Elections*, available at [www.followthemoney.org/press/SpecialReportView.phtml?r=265](http://www.followthemoney.org/press/SpecialReportView.phtml?r=265) (Apr. 20, 2006).

20. A sampling of reports and articles written by policy and advocacy organizations that relied on Institute data for their analyses is available at National Institute on Money in State Politics, [www.followthemoney.org/research/special\\_topics.phtml](http://www.followthemoney.org/research/special_topics.phtml) (accessed Dec. 19, 2012). Organizations that have made use of the Institute’s resources include: AARP, ACLU, AFSCME, Alliance for Justice, American Enterprise Institute, American Lung Association, California Center for Public Health Advocacy, CATO Institute, Center for American Progress, Common Cause, Consumer Watchdog, Justice Policy Institute, Heritage Foundation, League of Women Voters, Midwest Democracy Network, OMB Watch, People for the American Way, Pew Trusts’ Center for the States, PICO National Network, Project On Governmental Oversight, Public Campaign, SEIU, Texans for Public Justice, and U.S. Public Interest Research Group.

21. Marc Breslow, Janet Groat & Paul Saba, *Revitalizing Democracy: Clean Election Reform Shows the Way Forward*, Money and Politics Implementation Project, available at [www.followthemoney.org/press/Reports/200201011.pdf](http://www.followthemoney.org/press/Reports/200201011.pdf) (Jan. 2002).

22. Small-donation contributors are generally considered to be those who make one, two, or three donations below the reporting threshold to candidates in their local districts. In theory, increases in small-donor participation can level off the advantages of those donors who make major and/or strategic donations. In Montana, Institute analyses have found that legislative candidates who raised the most in

a hybrid policy option that encourages small-dollar donors, raises contribution limits, and expands voter-education efforts.<sup>24</sup> Issue advocates battling prison privatization efforts in the states provide excellent examples of how organizations have used the Institute's early analyses<sup>25</sup> to understand the issues and, more recently, its data to build their movement.<sup>26</sup> While the Institute's campaign-finance information is important to the efforts of these groups—and those working on myriad other issues—it represents more of an exclamation point to arguments they are making about what they feel is poor public policy and how campaign money has influenced that policy.

Money's influence on elections and public policy can result in an appearance of impropriety by lawmakers in debate and voting situations.<sup>27</sup> But proving impropriety is difficult. What good data enables—data like that developed each cycle by the Institute—are different ways of correlating campaign-donor relationships with lawmakers and policy outcomes that benefit donors. But perhaps more important, quality data gives public officials, policy experts, and the public reliable information that can help them explore larger systemic policy options that can de-emphasize the role of money in our elections and emphasize voter involvement.

## II. COMPETITIVENESS

Elections are at the heart of our democratic system of governing. The Institute's data offers evidence with which public officials, policy experts,

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small donations won their races 67 percent of the time, an indication that the door-to-door contact required to raise these types of donations results in broad candidate support.

23. David Rosenberg, *Broadening the Base: The Case for a New Federal Tax Credit for Political Contribution*, American Enterprise Institute, available at [www.followthemoney.org/press/Reports/200201013.pdf](http://www.followthemoney.org/press/Reports/200201013.pdf) (2002).

24. Corrado, Malbin, Mann & Ornstein, *supra* n. 17.

25. See Edwin Bender, *Private Prisons, Politics & Profits*, National Institute on Money in State Politics, [www.followthemoney.org/press/ReportView.phtml?r=81](http://www.followthemoney.org/press/ReportView.phtml?r=81) (July 1, 2000) (detailing how Corrections Corporation of America and Wackenhut International began offering to take over state corrections services, saving the states taxpayer money, through enabling policy pushed by the American Legislative Exchange Council).

26. See e.g. David Shapiro, *Banking on Bondage: Private Prisons and Mass Incarceration*, ACLU, [www.aclu.org/files/assets/bankingonbondage\\_20111102.pdf](http://www.aclu.org/files/assets/bankingonbondage_20111102.pdf) (Nov. 2, 2011); Public Campaign & PICO National Network, *Unholy Alliance: How the Private Prison Industry Is Corrupting Our Democracy and Promoting Mass Incarceration*, [http://publiccampaign.org/sites/default/files/PICO\\_Report\\_Private\\_Prisons\\_Final.pdf](http://publiccampaign.org/sites/default/files/PICO_Report_Private_Prisons_Final.pdf) (Nov. 15, 2011); Paul Ashton & Amanda Petterutti, *Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies*, Justice Policy Institute, [www.justicepolicy.org/uploads/justicepolicy/documents/gaming\\_the\\_system.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf) (June 2011). These articles and more are available at [www.followthemoney.org/Research/special\\_topics.phtml](http://www.followthemoney.org/Research/special_topics.phtml).

27. *But see Citizens United*, 130 S. Ct. at 908 (“[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”).

and the public can examine the relative health<sup>28</sup> of elections in their state and compare their state to others with different sets of donor regulation. For example, California was among the states with the least-competitive elections in 2010, with just 4 of 100 races competitive and 6 uncontested.<sup>29</sup> Following close behind were Georgia (14 of 236 races competitive and 154 uncontested)<sup>30</sup> and South Carolina (9 of 123 races competitive and 76 uncontested).<sup>31</sup> California races almost always have two or more candidates running, but because many challengers do not raise enough money to wage effective campaigns against incumbents, the Institute considers the elections uncompetitive. In Georgia and South Carolina, data tells us that a majority of incumbents are never challenged in their re-election bids and those who do face a challenger are able to vanquish him or her through superior fundraising capabilities.<sup>32</sup>

Comparing the median fundraising by winning candidates and losing candidates demonstrates the disparity. In California in 2010, winning legislative candidates raised a median of \$625,470, while losing candidates raised only a median of \$31,517.<sup>33</sup> In Georgia, winning candidates raised a median of \$50,425, and losing candidates raised \$9,478.<sup>34</sup> South Carolina winning candidates raised a median of \$30,845, and losing candidates raised \$8,604.<sup>35</sup> All three states have relatively high contribution limits for legislative candidates.<sup>36</sup>

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28. The Institute considers an election competitive—and thus healthy—if two candidates are competing for the position and if one does not have an overwhelming fundraising advantage. A fundraising advantage is considered “overwhelming” if one candidate raises more than twice as much money as any other candidate. The Institute created an online data-analysis tool that allows comparisons of elections in the states, “(m)c<sup>50</sup>” for Monetary Competitiveness in 50 States, available at National Institute on Money in State Politics, [www.followthemoney.org/database/graphs/competitive/index.phtml](http://www.followthemoney.org/database/graphs/competitive/index.phtml) (accessed Dec. 19, 2012). Figures for contested, uncontested, and competitive races in California, Georgia, and South Carolina, as well as Maine, Arizona, and Minnesota, can be found by using the (m)c<sup>50</sup> tool.

29. National Institute on Money in State Politics, [www.followthemoney.org/database/graphs/competitive/index.phtml](http://www.followthemoney.org/database/graphs/competitive/index.phtml) (accessed Dec. 19, 2012).

30. *Id.*

31. *Id.*

32. *Id.*

33. The Institute’s PULSE scatterplot tool provides medians for winning and losing general-election candidates in all 50 states and arranges the candidates on a scatterplot graph that shows incumbents and challengers as well as whether they are Democrat or Republican. The tool also lets viewers click through to the candidate’s individual campaign-finance details. Median figures for all six states cited are available at the PULSE tool. See National Institute on Money in State Politics, *PULSE*, [www.followthemoney.org/database/graphs/meta/meta.phtml](http://www.followthemoney.org/database/graphs/meta/meta.phtml) (accessed Dec. 19, 2012).

34. *Id.*

35. *Id.*

36. National Conference of State Legislatures, [www.ncsl.org/legislatures-elections.aspx?tabs=1116,114,800#800](http://www.ncsl.org/legislatures-elections.aspx?tabs=1116,114,800#800) (accessed Jan. 22, 2013).

At the opposite end of the competitiveness scale are Maine, with 139 of 186 races competitive in 2010 and only 8 uncontested;<sup>37</sup> Arizona, with 46 of 90 races competitive and only 16 uncontested;<sup>38</sup> and Minnesota, with 101 of 201 races competitive and only 6 uncontested.<sup>39</sup> Candidates in Maine had fundraising medians of \$5,844 for winners and \$4,914 for losers;<sup>40</sup> Arizona had \$32,911 for winners and \$31,488 for losers;<sup>41</sup> and Minnesota had \$32,532 for winners and \$14,558 for losers.<sup>42</sup> All three show more balanced fundraising and nation-high contested-race statistics. All three also have public financing of one type or another for their elections.<sup>43</sup>

From this data, money appears to influence success in the general election and also competitiveness before the elections even begin. Evidence shows that states with high or no contribution limits have less competition in their elections compared to states that do utilize some type of public funding program.

### III. CONTRIBUTION LIMITS

Contribution limits may be considered the foundation of our democracy's regulation of elections.<sup>44</sup> Their effect on campaigns and elections has been analyzed extensively.<sup>45</sup> The Institute's data provide further evidence that contribution limits lead to more robust participation in elections by low-dollar donors.

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37. National Institute on Money in State Politics, [www.followthemoney.org/database/graphs/competitive/index.phtml](http://www.followthemoney.org/database/graphs/competitive/index.phtml) (accessed Dec. 19, 2012).

38. *Id.*

39. *Id.*

40. National Institute on Money in State Politics, [www.followthemoney.org/database/graphs/meta/meta.phtml](http://www.followthemoney.org/database/graphs/meta/meta.phtml) (accessed Dec. 19, 2012).

41. *Id.*

42. *Id.*

43. National Conference of State Legislatures, [www.ncsl.org/legislatures-elections.aspx?tabs=1116,114,800#800](http://www.ncsl.org/legislatures-elections.aspx?tabs=1116,114,800#800) (accessed Jan. 22, 2013).

44. *See e.g. Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (holding contribution limits and disclosure provisions "serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion").

45. *See e.g.* Thomas Stratmann, *Contribution Limits and Effectiveness of Campaign Spending*, available at [www.chicagobooth.edu/research/workshops/AppliedEcon/archive/WebArchive20032004/stratman.pdf](http://www.chicagobooth.edu/research/workshops/AppliedEcon/archive/WebArchive20032004/stratman.pdf) (2006) (uses the Institute's data to examine this point and concludes that "the findings are consistent with the hypothesis that contribution limits reduce the perception of corruption").

Juxtaposing a state with very few or no contribution limits,<sup>46</sup> like Texas with Colorado, which has low limits, illustrates this point.<sup>47</sup> Nearly unlimited contributing in Texas correlates to huge gaps between medians raised by winning and primarily incumbent candidates compared to that of losing candidates (\$278,215 vs. \$22,897).<sup>48</sup> This indicates that the advantage held by incumbent candidates in Texas—who win more than 80 percent of the time—is nearly overwhelming for challengers and may be a barrier to participation by other candidates. An analysis of the distribution of contributions by amount in Texas in 2010 shows that just 4 percent of the contributions were between \$0 and \$249, excluding unitemized small donations.<sup>49</sup> At the other end of the scale, fully 17 percent of the donations were made in contributions of \$50,000 or more, 42 percent was raised in amounts of \$10,000 or more, and another 32 percent was raised in amounts of \$1,000 to \$9,999.<sup>50</sup> Rough math—dividing the total by the limit maximum—tells us that around 3,000 separate donations were made to produce the 42 percent figure. Knowing that the donors in Texas at this level likely gave more than one donation<sup>51</sup> leads to the conclusion that nearly half the money raised during the 2010 campaigns likely came from a few hundred donors. Colorado, in contrast, is a state with fairly low contribution limits: \$525 per individual to gubernatorial and other statewide candidates and \$200 to legislative candidates.<sup>52</sup> The fundraising medians for legislative races are much closer in Colorado than in Texas, at \$42,632 for winners and \$15,193 for losers.<sup>53</sup> Fully 37 percent of the donation total came in amounts under \$249.<sup>54</sup> In fact, 80 percent of the donations were under

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46. National Conference of State Legislatures, *Campaign Contribution Limits: An Overview*, www.ncsl.org/legislatures-elections/elections/campaign-contribution-limits-overview.aspx (updated Oct. 3, 2011).

47. Many other factors may also influence the flow of money in these states' elections.

48. National Institute on Money in State Politics, *PULSE*, www.followthemoney.org/database/graphs/meta/meta.phtml; *select* Texas 2010 (accessed Nov. 15, 2012). Incumbents represent 122 of 150 winners.

49. National Institute on Money in State Politics, *Texas 2010 Contribution Distributions*, www.followthemoney.org/database/state\_overview\_distribution.phtml?s=TX&y=2010 (accessed Nov. 15, 2012).

50. *Id.*

51. Texans for Lawsuit Reform, for example, gave 797 donations in 2010, giving candidates donations totaling nearly \$5.7 million: 86 percent to Republicans and 90.8 percent to winning candidates. See www.followthemoney.org/database/StateGlance/contributor.phtml?d=1005079386 (accessed Nov. 26, 2012).

52. Colorado Secretary of State, *Campaign Finance*, www.sos.state.co.us/pubs/elections/CampaignFinance/files/QuickReferenceChart.pdf (accessed Nov. 15, 2012).

53. National Institute on Money in State Politics, *PULSE*, www.followthemoney.org/database/graphs/meta/meta.phtml; *select* Colorado 2010 (accessed Nov. 15, 2012).

54. National Institute on Money in State Politics, *Colorado 2010 Campaign Contributions*, www.followthemoney.org/database/state\_overview\_distribution.phtml?s=CO&y=2010 (accessed Nov. 15, 2012).

\$1,000, 13 percent were in amounts between \$1,000 and \$1,999, and just 6 percent were \$2,000 or above.<sup>55</sup> This puts the number of donations—dividing the total by the limit maximum—at around 70,000. Very likely, many more donors were involved in Colorado because donors at the lowest levels often give just one donation per election season.

While unscientific, the juxtaposition of these two states with widely differing regulation of campaign donations illustrates the point that contribution limits play a critical role in narrowing the fundraising gap between candidates in political campaigns and increasing the participation rate by small-dollar donors.

#### IV. PUBLIC FUNDING

Public funding<sup>56</sup> of campaigns in the states has a major effect on electoral competitiveness, whether in full public funding states like Maine or Arizona, or modified public funding states like Minnesota, which provides a \$50 rebate from the state's Political Contribution Refund program<sup>57</sup> to those who make a contribution.<sup>58</sup>

Arizona adopted full public funding of legislative campaigns in 1998, going into effect in the 2000 cycle. A before-and-after view of legislative campaign funding shows that the policy resulted in a dramatic shift in the electoral landscape. The greatest observable impact was seen in the amounts raised by candidates before and after public funding was established. Before public funding in 1998, medians for winners and losers were \$27,641 and \$9,545 respectively.<sup>59</sup> In the next election, medians shifted to \$28,400 for winners and \$18,771 for losers.<sup>60</sup> Ten years later, the medians

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55. *Id.*

56. Twenty-four states currently have some form of public funding of elections or party committees. National Conference of State Legislatures, *Campaign Finance Reform: An Overview*, [www.ncsl.org/legislatures-elections/elections/campaign-finance-an-overview.aspx#Public\\_Financing](http://www.ncsl.org/legislatures-elections/elections/campaign-finance-an-overview.aspx#Public_Financing) (updated Oct. 3, 2011); see also Benjamin J. Wyatt, *The Origins of State Public Financing of Elections*, available at [www.octobernight.com/bwyatt/chap1.htm](http://www.octobernight.com/bwyatt/chap1.htm) (accessed Nov. 15, 2012).

57. Campaign Finance Institute, *New Research by CFI on the States: Minnesota's \$50 Political Contribution Refunds Ended on July 1. The Refunds Helped Stimulate Unparalleled Participation by Small Donors*, [www.cfinst.org/press/PRelases/09-07-08/CFI\\_s\\_Comments\\_on\\_Minnesota\\_s\\_50\\_Political\\_Contribution\\_Refunds.aspx](http://www.cfinst.org/press/PRelases/09-07-08/CFI_s_Comments_on_Minnesota_s_50_Political_Contribution_Refunds.aspx) (accessed Jan. 22, 2013) ("Under the PCR, individuals got rebates of up to \$50 per year (\$100 for a married couple filing jointly) for political contributions to a state or local political party or to a candidate for state office. To be eligible, a candidate had to participate in the state's system of partial public financing with spending limits. Unlike a tax credit, the PCR came back within four to six weeks, making it more effective than a tax credit for low income donors.").

58. Minnesota House of Representatives Public Information Services, *Session Daily*, [www.house.leg.state.mn.us/hinfo/sessiondaily.asp?storyid=2740](http://www.house.leg.state.mn.us/hinfo/sessiondaily.asp?storyid=2740) (published May 16, 2011).

59. National Institute on Money in State Politics, *PULSE*, [www.followthemoney.org/database/graphs/meta/meta.phtml](http://www.followthemoney.org/database/graphs/meta/meta.phtml); select Arizona 1998 (accessed Nov. 15, 2012).

60. National Institute on Money in State Politics, *PULSE*, [www.followthemoney.org/database/graphs/meta/meta.phtml](http://www.followthemoney.org/database/graphs/meta/meta.phtml); select Arizona 2000 (accessed Nov. 15, 2012).

remained closer than before public funding with \$39,439 for winners and \$24,792 for losers.<sup>61</sup> Public funding advocates<sup>62</sup> argue that public funding initiatives increase candidate participation by lowering barriers to election entry, and before-and-after numbers do show an increase in the number of candidates running for office since 1998:

*Number of Candidates in Legislative Campaigns*<sup>63</sup>

Arizona House	1998	2000	2002	2004	2006	2008	2010
	120	153	155	135	137	135	166
Arizona Senate	1998	2000	2002	2004	2006	2008	2010
	55	79	73	58	65	60	84

Although term limits, 2000 redistricting, a gubernatorial campaign, or a presidential campaign may have influenced the shift in candidate numbers, it appears that one factor may be public funding. While it is apparent that public funding quickly shifts the campaign-finance landscape in a state, it remains extremely difficult to know if this has an effect on the way legislation is developed, considered, and voted on.

## V. IS THERE A CORRUPTING INFLUENCE?

That money influences the outcome of elections is a widely accepted theory, but how money influences the outcomes of public policy debates and votes is much less clear. In some cases it clearly does, as exposed by FBI investigations.<sup>64</sup> Most of the time, however, how special interests influence public policy and the spending of taxpayer dollars is a fuzzier picture that involves campaign donations, lobbyists, committee testimony, and personal relationships with lawmakers. Correlating votes to donations is fraught with problems—such as which floor vote on a bill is most meaningful—despite its satisfying simplicity. Often it is what does not happen in a legislature—votes that are never taken—that is most important. We know

61. National Institute on Money in State Politics, *PULSE*, [www.followthemoney.org/database/graphs/meta/meta.phtml](http://www.followthemoney.org/database/graphs/meta/meta.phtml); *select* Arizona 2010 (accessed Nov. 15, 2012).

62. Advocates of different types of campaign-finance reform have used the Institute's data extensively. The Institute does not advocate one reform over another. It often cites the work of the Campaign Finance Institute as an example of how its comprehensive data allows robust analyses of different state campaign-finance systems and development of multiple policy options. The Institute does, however, advocate for broader transparency in elections and public policy processes.

63. National Institute on Money in State Politics, *Arizona 2010*, [www.followthemoney.org/data/base/state\\_overview.phtml?y=2010&s=AZ](http://www.followthemoney.org/data/base/state_overview.phtml?y=2010&s=AZ); *change* year for earlier figures as the page displays 2010 numbers (accessed Nov. 15, 2012).

64. Mike Allen, *Treasurer's Downfall in Kickback Scheme Shakes Connecticut Political Establishment*, N.Y. Times, [www.nytimes.com/1999/10/25/nyregion/treasurer-s-downfall-kickback-scheme-shakes-connecticut-political-establishment.html?pagewanted=all&src=PM](http://www.nytimes.com/1999/10/25/nyregion/treasurer-s-downfall-kickback-scheme-shakes-connecticut-political-establishment.html?pagewanted=all&src=PM) (Oct. 25, 1999).

from academic research<sup>65</sup> that a majority of legislative decisions are made in committees that are assigned to introduce, debate, amend, re-introduce, re-debate, delay, amend, vote, and vote again on important public policy questions.

Texas and Colorado again offer good examples of the potential for the appearance of impropriety between lawmakers and campaign donors.<sup>66</sup> In 2011, the eleven members of the Texas House Natural Resources Committee, which considers legislation that could benefit natural resource companies, raised more than \$2.5 million in their campaigns.<sup>67</sup> More than \$376,775 of it came from donors in the Energy & Natural Resources sector.<sup>68</sup> The top 20 donors to the 2011 Committee reads like a Who's Who of international, national, and state energy companies.<sup>69</sup> With committee members receiving \$229,100 from oil and gas companies alone, the public may question whose interests the committee will represent in their decision-making.

In contrast, the 2011 Colorado House Agriculture, Livestock and Natural Resources Committee's members received just \$32,245 of their collective \$420,761 campaign total from the Energy and Natural Resources sector, with just \$12,700 from oil and gas industries.<sup>70</sup> Although the mix of industry donors is similar to that seen in Texas, as is the pattern of giving to multiple committee members, the sheer number and amounts donated are much lower. Unlike Texas, the remaining top 20 donors to the committee were donors who made \$200 or \$400 donations to one or two committee members.<sup>71</sup>

In both states, companies and individuals with an interest in policy questions being debated in these committees supported multiple candidates

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65. Lynda W. Powell, *The Influence of Campaign Contributions in State Legislatures: The Effects of Institutions and Politics* 153 (U. of Mich. Press 2012) ("Campaign contributions do influence the behavior of individual legislators and, consequently, influence the policy choices of legislative institutions. This clear result can be contrasted with the conflicting, often null, findings that have emerged from a very large literature relating roll call votes to campaign donations.").

66. The Institute's Legislative Committee Analysis Tool (L-CAT) groups winning candidates by their legislative committee assignments using an Application Programming Interface with data put together by Project Vote Smart. The L-CAT displays who gave donations, and how much, to legislators sitting on a specific committee. This data snapshot reveals an intersection of those seeking to influence a policy outcome with lawmakers who decide those policy questions. National Institute on Money in State Politics, *L-CAT*, [www.followthemoney.org/pvs/index.phtml](http://www.followthemoney.org/pvs/index.phtml) (accessed Nov. 15, 2012).

67. National Institute on Money in State Politics, *L-CAT*, [www.followthemoney.org/pvs/index.phtml?State=TX&c=1&CType=H&Committee=11383&Sector=0](http://www.followthemoney.org/pvs/index.phtml?State=TX&c=1&CType=H&Committee=11383&Sector=0) (accessed Nov. 15, 2012).

68. National Institute on Money in State Politics, *L-CAT*, [www.followthemoney.org/pvs/index.phtml?State=TX&c=1&CType=H&Committee=11383&Sector=5](http://www.followthemoney.org/pvs/index.phtml?State=TX&c=1&CType=H&Committee=11383&Sector=5) (accessed Sept. 23, 2012).

69. *Id.*

70. National Institute on Money in State Politics, *L-CAT*, [www.followthemoney.org/pvs/index.phtml?State=CO&c=2&CType=H&Committee=9938&Sector=5](http://www.followthemoney.org/pvs/index.phtml?State=CO&c=2&CType=H&Committee=9938&Sector=5) (accessed Sept. 22, 2012).

71. National Institute on Money in State Politics, *L-CAT*, [www.followthemoney.org/pvs/index.phtml?State=TX&c=1&CType=H&Committee=11383&Sector=5](http://www.followthemoney.org/pvs/index.phtml?State=TX&c=1&CType=H&Committee=11383&Sector=5) (accessed Sept. 23, 2012).



on both sides of the partisan aisle, often with multiple donations, in an effort to gain the ear of committee members. While these patterns may be excused as the way the system works, the size of the donations in Texas serves as an exclamation point to concerns about a system already battling public perceptions of corruption, if not actual corruption. And these patterns are repeated time and again in state legislative committees in all 50 states, as campaign donors with legislative strategies attempt to influence public policy development at its most basic level.

## VI. SMALL-DONOR REVOLUTION

Small-dollar donors, those individuals who give \$10, \$20, or \$50 donations to their favorite candidate, which are reported as lump sums by the candidates, are increasingly getting attention from national campaigns, and for good reason. They are a good indicator of broad support for candidates. Small donations to state-level candidates in the 2009–2010 election cycle amounted to more than \$84 million, which is about 3 percent of the overall total raised, and a rate that has been fairly consistent for the past five election cycles.<sup>72</sup> While minimum reporting thresholds vary state-to-state, from \$25 in some states (\$35 in Montana) to \$300 in New Jersey (\$100 is common), the amount raised by candidates from small-dollar donors nonetheless represents thousands of people who are presumed voters. In Montana, for example, our analysis shows that from 2004 to 2010, state-level candidates who raised the most in small-dollar donations won their races 67 percent of the time.

The Campaign Finance Institute (“CFI”) notes that “[i]n almost every state in the country, most candidates raise the bulk of their campaign money from a few individual donors who give them \$1,000 or more, or from non-party organizations (such as corporations and labor unions), and political parties. It doesn’t have to be that way . . . .”<sup>73</sup> CFI has developed a campaign-finance reform strategy based on cultivating small-dollar donors. The strategy includes three basic methods: first, consider adjusting contribution limits; second, allow public matching funds for the first \$50 a donor gives; and third, commit to increasing the donor pool to 4 percent of the adult population.<sup>74</sup> CFI’s analysis shows that in Texas, for example, less than 1 percent of the voting age population donates to campaigns. Furthermore, contributions of \$1,000 or more account for more than 80 percent of

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72. National Institute on Money in State Politics, *National Overview Map*, [www.followthemoney.org/database/nationalview.phtml?l=0&f=0&y=2010&abbr=1&g\[\]=16](http://www.followthemoney.org/database/nationalview.phtml?l=0&f=0&y=2010&abbr=1&g[]=16); change the year selection to see percentages for previous election cycles (accessed Nov. 15, 2012).

73. Campaign Finance Institute, *Interactive Tool for Citizen Policy Analyst*, [www.cfinst.org/State/CitizenPolicyTool.aspx](http://www.cfinst.org/State/CitizenPolicyTool.aspx) (accessed Nov. 15, 2012).

74. *Id.*

the money donated to candidates, while small-dollar donors account for about 1 percent. CFI's proposed changes result in an estimated rise in small-dollar donors to 29 percent of the total contributions, while donations of \$1,000 or more drop to 24 percent from 51 percent.<sup>75</sup> In 2010 in Colorado, small-dollar donors comprised 8 percent of the total contributed in state elections and donations of \$500 to \$999 made up 25 percent. Implementing CFI's proposal in Colorado could see small-dollar donors rise to 36 percent of the total and contributions of \$500 to \$999 drop to 17 percent.<sup>76</sup>

Fundamental to CFI's strategy is shifting incentives for both candidates and donors. With a match on \$50 donations, candidates would have an incentive to reach out to more small-dollar donors for support, thus increasing their support base and potentially their support at the polls. That same \$50 match lets small-dollar donors feel like they have a larger stake in the outcome of the election and increases the percentage of candidates' funds that comes from small-dollar donors.<sup>77</sup>

## VII. MONTANA: A CASE STUDY

Elections in Montana are relatively inexpensive affairs,<sup>78</sup> offering citizens low barriers to meaningful participation but also leaving the elections vulnerable to strategic low-dollar giving or large contributions from individuals, PACs, or political party committees. In 2012, the Montana Attorney General asked the Institute to provide several analyses for use in a case<sup>79</sup> where the Attorney General was defending several of Montana's election laws. Those analyses gave ample evidence of a healthy representative system of government. The analyses of donation patterns over the past four election cycles reveal that Montana's elections are among the most competitive in the country, due in part to Montana's rural and inclusive

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75. *Id.*

76. Campaign Finance Institute, *Interactive Tool for Citizen Policy Analyst*, [www.cfinst.org/State/CitizenPolicyTool/CO.aspx](http://www.cfinst.org/State/CitizenPolicyTool/CO.aspx) (accessed Nov. 15, 2012).

77. Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 *Election L.J.* 3, 9 (2012) ("[The information] shows a substantial increase not only in the proportional role of small-dollar donors but in their absolute numbers per candidate. Incumbents raised money from a 27 percent larger number of \$1-\$250 donors in the 2000s, competitive challengers went up by 56 percent and competitive open seat candidates went up by 20 percent. This, combined with the data in Table 1, provides strong support for the claim that multiple matching funds focused on small-dollar donors brought more low-dollar donors into the system, both more per similarly situated candidate as well as more overall.").

78. The average house/assembly candidate in 2010 elections, for example, raised just \$7,022, and the average senate candidate just \$14,684; totals that have increased very slowly over the past decade. National Institute on Money in State Politics, *Montana 2010*, [www.followthemoney.org/database/state\\_overview.phtml?s=MT&y=2010](http://www.followthemoney.org/database/state_overview.phtml?s=MT&y=2010) (accessed Nov. 15, 2012).

79. The first reported decision was *Lair v. Murry*, 846 F. Supp. 2d 1116 (D. Mont. 2012). See *supra* n. 11 for further proceedings.

political culture where participation is valued and its low contribution limits that allow even small-dollar donors to feel like they are making a difference.

Montana's elections are among the most competitive in the country, year after year. As explained above, the Institute considers an election competitive when at least two candidates vie for a seat and neither candidate raises more than twice as much money as his or her closest opponent. In 2010, 34 percent of the legislative races were contested in the general elections and had fairly balanced campaign donation levels.<sup>80</sup> The rates in other years were even higher, with 2008 at 42 percent contested, 2006 at 43 percent contested, 2004 at 38 percent, and 2002 at 37 percent contested. Between 14 percent and 25 percent of the races saw unopposed candidates in this period. This contrasts sharply with California where competitiveness by the same measures was only 4 percent in 2010 and more than 90 percent of the legislative races saw gross imbalances in finances.<sup>81</sup>

Individual donors play a significant role in funding the races for public offices in Montana. In the 2008 elections in Montana, for example, candidates reported receiving donations from more than 26,600 individuals (5 percent of voting age population) who donated a total of \$6.7 million to state candidate campaigns.<sup>82</sup> That amounts to 88 percent of the total raised by candidates, with the rest coming from PACs and party committees. The comparable 2004 elections saw similar numbers, with more than 28,000 individuals giving \$6.6 million, which represented 90 percent of the total.<sup>83</sup> By contrast, in 2008 elections, 146 institutional<sup>84</sup> donors gave \$218,000 to candidates, amounting to only 3 percent of the total the candidates raised.<sup>85</sup> The comparable 2004 cycle saw 115 institutional donors giving \$161,995, which amounted to 2 percent of the money raised by candidates.<sup>86</sup>

Many Montanans give donations below the \$35 threshold. For example, in 2010 elections, \$245,207 reported as lump sums came from thousands of small-dollar donors, accounting for 4.8 percent of the total

80. National Institute on Money in State Politics, *Tools and Features: (m)c*<sup>50</sup>, [www.followthemoney.org/database/graphs/competitive/index.phtml](http://www.followthemoney.org/database/graphs/competitive/index.phtml); *select* Montana (accessed Nov. 15, 2012).

81. National Institute on Money in State Politics, *Tools and Features: (m)c*<sup>50</sup>, [www.followthemoney.org/database/graphs/competitive/index.phtml](http://www.followthemoney.org/database/graphs/competitive/index.phtml); *select* California (accessed Nov. 15, 2012).

82. Expert Disclosure of Edwin Bender at 3, U.S. District Court, District of Montana, 6:12-cv-00012-CCL (figures updated Nov. 5, 2012). Figures may be lower than those displayed on [www.followthemoney.org](http://www.followthemoney.org) because they exclude non-contribution income.

83. *Id.*

84. To simplify how different types of donors are characterized across all 50 states, the Institute uses "individuals" to denote actual people who donate and "non-individual" or "institutional" donors for PACs, labor unions, corporations, and associations.

85. Bender, *supra* n. 82, at 3.

86. *Id.*

raised by candidates.<sup>87</sup> It is reasonable to assume that each such donor donated between \$5 and \$34.99, which means that between 7,005 and 49,041 separate small contributions were made in 2010.<sup>88</sup> Small-donor percentages from earlier cycles are similar.

Deeper analysis of small-dollar donors suggests that their value is greater than their donation amounts: 67 percent of the time, Montana candidates between 2004 and 2010 who raised the most from small-dollar donors won their elections, suggesting that outreach to constituents resulted in donations and votes.<sup>89</sup> Thus, individual donors have played a consistent, upwardly trending role in financing legislative campaigns in Montana elections, which have seen inflation-adjusted<sup>90</sup> total giving grow from \$2,139,081 in 2004 to \$2,647,364 in 2010, with individuals' donations representing 56 and 70 percent of those totals, respectively.<sup>91</sup>

Montana's contribution limits<sup>92</sup> have shifted upward over the past decade, but the number of donors hitting those limits has remained low. For example, in general election house races in 2004 and 2006, where the candidate had no primary opponent and thus a limit of \$130, just 1,000 and 2,169 individuals, respectively, hit the limit, and just 54 and 68 PAC/organizations, respectively, hit the limit.<sup>93</sup> In 2008 and 2010, when the limit rose to \$160 in uncontested house races, 1,285 and 1,402 individuals, respectively, hit the limit. Furthermore, in 2008 and 2010, only 67 and 68 PAC/organizations, respectively, hit the limit.<sup>94</sup> The analysis of contribution limits is starker when primary elections are contested, and the limits rise. In 2004 and 2006, when contested house race contribution limits were \$260, just 42 and 82 individuals, respectively, hit the limits, and just 3 and 14 PACs/organizations, respectively, hit the limits.<sup>95</sup> In 2008 and 2010, when the limits rose to \$320, just 9 and 97 individuals, respectively, hit the limits, and 7 and 15 PAC/organizations, respectively, hit the limits.<sup>96</sup> Overall, the number of donors who give to candidates at the maximum level represent a small fraction of those who have given to politics in Montana, while those who give below the maximum amounts and the thousands more who give below the \$35 reporting threshold comprise a larger share of Montana's population and the vast majority of the funds raised.

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87. *Id.*

88. *Id.* at 4.

89. *Id.*

90. Totals adjusted for inflation to 2010 dollars.

91. Bender, *supra* n. 82, at 4, Chart 1-1, 2004–2010 Legislative Campaign Contributions.

92. Mont. Code Ann. § 13–37–216 (2011).

93. Bender, *supra* n. 82, at 5.

94. *Id.*

95. *Id.*

96. *Id.*

While institutional donors—associations and PACs/organizations—play a smaller role than individual donors in individual candidates’ fundraising, they play a much greater role in funding Montana’s political party committees. In 2008, for example, 50 institutional donors gave \$1.7 million, or 28 percent, of the total raised by party committees, while 4,200 individual donors gave more than \$2.2 million, or 36 percent.<sup>97</sup> In 2004, just 37 institutional donors gave 41 percent, or \$600,580, of the total raised by parties, while 3,816 individuals gave 34 percent of the total, or \$493,575.<sup>98</sup> Donations from other party committees and candidates make up the difference in both cases. Donations from Montana political parties to all candidates consistently ranged from 3 to 4 percent of the total raised by candidates in each of the last four election cycles, despite increasing aggregate contribution limits, with the number of candidates who received the maximum amount from party committees ranging from 21 percent in 2004 to 32 percent in 2006.<sup>99</sup> Donations to state party committees peaked at \$6.1 million in 2008, an open presidential cycle, and at \$7.4 million in 2000, another open presidential cycle.<sup>100</sup> Other cycles saw far lower funding levels: just \$960,000 in 2010; \$889,000 in 2006; \$1.46 million in 2004; and \$4.2 million in 2002.<sup>101</sup>

While the larger political environment clearly plays a role in the state-level campaign donations to state party committees, Montana’s inexpensive races, low contribution limits, \$35 reporting threshold, and high participation rates by candidates and individual donors indicate many Montana citizens are exercising their right to participate.

### VIII. CONCLUSION

Evidence compiled by the Institute over the last decade from all 50 states demonstrates that understanding the role money plays in elections and public policy development, and specifically how campaign-finances are regulated, can improve the representative forms of government in the states. If a state wants more inclusive elections—contested as well as monetarily competitive—then data shows that adjusting contribution limits or funding mechanisms can have a dramatic effect. Offering incentives for donors to participate and for candidates to seek out more small-dollar donors can also have a positive effect on both the number of candidates who run<sup>102</sup> and the

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97. *Id.* at 6.

98. *Id.*

99. Bender, *supra* n. 82, at 5.

100. *Id.* at 6.

101. *Id.*

102. Megan Moore, *Clean Elections, Arizona 2006*, National Institute on Money in State Politics, [www.followthemoney.org/press/Reports/Clean\\_Elections\\_Arizona\\_2006.pdf](http://www.followthemoney.org/press/Reports/Clean_Elections_Arizona_2006.pdf) (Dec. 11, 2008).

number of people who donate (and presumably vote). CFI offers one strategy to move the debate in the right direction and the hard data to support its argument.

Evidence also tells us that Montana, compared to many other states, has the underpinnings of a healthy democracy. At its most basic level, the amount of donations needed to run a competitive campaign is relatively low in most districts, so cost is not a huge barrier if someone wants to run for elective office. Small-dollar donors in Montana play a large role in campaigns. And, even with Montana's low contribution limits, donors who want to give more in donations seldom reach the maximum, indicating the comfort with levels at which campaigns are funded in Montana.

We've just begun to document the complex relationships that make up the body politic. In the future, the Institute will look more deeply at the role of lobbyists in elections and the public policy process. It will link lawmakers with legislation they introduce, delve into who drafted and who will benefit from the policy, and correlate that with campaign-donation strategies implemented by the donors. In the end, the Institute's work will hopefully produce greater accountability.