

**New Voices in Politics:  
Justice Marshall's Jurisprudence on Law and Politics  
(forthcoming in HOWARD L. J.)**

**Elizabeth Garrett**

**USC Center in Law, Economics and Organization  
Research Paper No. C08-18  
USC Legal Studies Research Paper No. 08-23**



**CENTER IN LAW, ECONOMICS  
AND ORGANIZATION  
RESEARCH PAPER SERIES and LEGAL  
STUDIES RESEARCH PAPER SERIES**

University of Southern California Law School  
Los Angeles, CA 90089-0071

**New Voices in Politics:  
Justice Marshall's Jurisprudence on Law and Politics**

*Elizabeth Garrett\**

When asked in 1977 which cases that he litigated for the NAACP Legal Defense Fund had “meant the most” to him, Thurgood Marshall began the list with *Smith v. Allwright*,<sup>1</sup> one of the white primary cases, which was “the first real big one I had.”<sup>2</sup> Later, he told Carl Rowan that he was not certain which case, *Smith v. Allwright* or *Brown v. Board of Education of Topeka*,<sup>3</sup> affected Americans more. “I don’t know whether the voting case or the school desegregation case was more important,” Marshall told his biographer. “Without the ballot you’ve got no goddamned citizenship, no status, no power, in this country. But without the chance to get an education you have no capacity to use the ballot effectively. Hell, I don’t know which case I’m proudest of.”<sup>4</sup>

Although the white primary cases tend to be studied as part of the larger struggle to end racial discrimination,<sup>5</sup> they also reveal the complexities of political parties and underscore the relationship between access to the vote and political change. Marshall’s work in these cases and throughout his legal career also reveals his commitment to the objective that all people, regardless of their race, ethnicity or economic class, should have an equal opportunity to participate in the political process. His notion of participation emphasized not just its instrumental value, but also

---

\* Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, Political Science and Policy, Planning and Development, University of Southern California; Co-Director of the USC/Caltech Center for the Study of Law and Politics; Law Clerk to Justice Thurgood Marshall, 1989-90. I appreciate the helpful comments of Rebecca Brown, David Levy and Andrei Marmor and the excellent research assistance of David Lourie.

<sup>1</sup> 321 U.S. 649 (1944).

<sup>2</sup> *The Reminiscences of Thurgood Marshall, Columbia Oral History Research Office (1977)*, in Thurgood Marshall: His Speeches, Arguments, Opinions, and Reminiscences 413, 426 (Mark V. Tushnet ed. 2001) [hereinafter *Thurgood Marshall Speeches*].

<sup>3</sup> 347 U.S. 483 (1954).

<sup>4</sup> Carl T. Rowan, *Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall* 129 (1993).

<sup>5</sup> See, e.g., Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 Fla. St. U. L. Rev. 55 (2001).

Marshall's belief that participation is intrinsically valuable to participants and the larger society. He saw the foremost constitutional principle as equality; "[a] related principle is participation in the governing process.... [P]articipation recognizes the moral worth of each individual, and in this way shows again that all persons are equal."<sup>6</sup> The Justice also understood, from the white primary cases and other experiences, that entrenched interests within the parties and elsewhere would use every weapon to keep new voices from being heard and would resist expanded public involvement in the political process. New voices and new voters mean uncertainty for incumbents and the possibility of disrupting the status quo that those in power work hard to maintain and protect. Justice Marshall knew concretely and personally, however, that without those new voices in politics and without that broad participation in elections and governance, lasting and profound change in a democracy is impossible.

Because so much of Justice Marshall's legacy as a litigator and jurist lies in the realm of the fight for civil rights, scholars and biographers have usually dealt with these political process issues as they relate to the struggle in the courts and legislatures for equal rights, particularly for racial minorities. However, Marshall's jurisprudence includes several important opinions concerning political parties and campaign finance regulations that are not explicitly focused on race, as the white primary cases were. In particular, the Justice authored majority and dissenting opinions related to the laws structuring political parties which reveal his distinct and compelling vision of the roles of minor parties, major parties and voters.<sup>7</sup> I believe his relatively sophisticated and very realistic view of parties was shaped in part by his involvement in the white primary cases, which may well have sparked an interest in political parties generally, leading him to write with some frequency in this realm. His support for minor parties as a way to bring new

---

<sup>6</sup> *Remarks at the Second Circuit Judicial Conference, The Judiciary and Fundamental Human Liberties (May 1980)*, in Thurgood Marshall Speeches, *supra* note 2, at 183, 184.

<sup>7</sup> See, e.g., *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1968); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (Marshall, dissenting); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

voices and change into the democratic system showed a tolerance for the “chaos” of the political process that many of his colleagues did not share.<sup>8</sup> In light of his courtroom experience and first-hand knowledge of politics, he could appreciate the positive consequences of a more open political process, while at the same time understanding the need for structure, through, among other things, the use of voting cues provided by political parties, so that voters could navigate their way through a cacophony of messages.

Just as his political party cases reveal an eagerness to ensure the engagement of many people with different views, his campaign finance cases, including the majority opinion in *Austin v. Michigan Chamber of Commerce*,<sup>9</sup> express his belief that those without access to substantial financial resources lack a meaningful voice in the political debate of campaigns and therefore are denied an equal chance to influence political outcomes. *Austin* is the most sustained articulation of concerns that are clearly about equality even though, to maintain his majority, they are (barely) dressed in the garb of corruption. Nevertheless, this case and a few other minor opinions in campaign finance cases, taken together with the political party cases, reveal a coherent, unique and important perspective on the political process.<sup>10</sup>

In Part I, I will discuss the passages of Justice Marshall’s opinions that reveal his view of the role of minor parties and other forces in ensuring that new perspectives and outsider views influence the political agenda. The key cases here are those describing the importance of minor

---

<sup>8</sup> See Elizabeth Garrett, *The Impact of Bush v. Gore on Future Democratic Politics*, in *The Future of American Democratic Politics: Principles and Practices* 141, 148-50 (G.M. Pomper & M.D. Weiner eds. 2003); Richard A. Pildes, *Democracy and Disorder*, in *The Vote: Bush, Gore, and the Supreme Court* 140, 160 (C.R. Sunstein & R.A. Epstein eds. 2001).

<sup>9</sup> 494 U.S. 652 (1990).

<sup>10</sup> These cases have not yet received sustained scholarly attention. The most comprehensive treatment of Justice Marshall’s jurisprudence is Mark V. Tushnet, *Making Constitutional Law* (1997), but Tushnet discusses only one of the cases that are my focus in this essay. He briefly touches on *Dunn v. Blumstein*, 405 U.S. 330 (1972), as an example of the Justice’s approach to equal protection cases, an approach set forth most completely in the brilliant dissent in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1972). See Tushnet, *supra*, at 98. Daniel Lowenstein provides a critical assessment of *Tashjian* and *Eu* in an article questioning the need for judicial protection of the associational rights of major political parties, but he does not analyze these cases as part of Marshall’s legacy. *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 Tex. L. Rev. 1741 (1993).

parties in the American political process, but Marshall also sounds these themes in cases dealing with residency requirements in voting registration laws as well as in a dissent in a case involving felon disenfranchisement. Of course, new voices must have access to the political process to effect change, and Marshall's commitment to equality of opportunity to take part in politics can be seen in these cases and also those to which I will turn in Part II: the campaign finance cases. *Austin* is his most significant campaign finance case, but his egalitarian approach shapes other opinions, including his concurrence in part and dissent in part in *Buckley v. Valeo*.<sup>11</sup> Finally, in Part III, I will discuss aspects of Marshall's jurisprudential approach that demonstrate his awareness that entrenched players, particularly those in the legislature and at the helm of the major parties, will resist these new voices and seek to manipulate institutions to protect the status quo. He viewed the independent judiciary as a way to ensure that the political branches are not allowed to adopt laws and institutions that shut out those with dissenting perspectives. His distrust of some actions of the major parties was balanced, however, by an appreciation of the role they play in structuring political discourse and helping voters cast votes that reflect their priorities.

### **I. Minor Parties: Expanding the Political Agenda**

The modern Supreme Court has been relatively hostile to minor parties; indeed, some decisions seem aimed at protecting the two-party system because of the stability it is seen as providing to the political process.<sup>12</sup> For Justice Marshall, stability was over-rated if it meant continuing to keep the same people and interests in power and silencing others whose views might be different. After all, he had been excluded from the political process, so he did not necessarily fear the addition of new voices and the strengthening of peaceful outlets for

---

<sup>11</sup> 424 U.S. 1 (1976) (per curiam).

<sup>12</sup> See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). See also Pildes, *supra* note 8, at 154-55 (noting the importance of preserving political "stability" for the majority in *Timmons*); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643, 686 (1998).

dissatisfaction. In his dissent in *Richardson v. Ramirez*,<sup>13</sup> he referred to that exclusionary tendency in American jurisprudence in his description of the vibrant process that allowed democratic change:

Although, in the last century, this Court may have justified the exclusion of voters from the electoral process for fear that they would vote to change law considered important by a temporal majority, I have little doubt that we would not countenance such a purpose today. The process of democracy is one of change.... The ballot is the democratic system's coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition.<sup>14</sup>

Although he welcomed reform to further open the political system, Marshall was no radical advocating abrupt or destabilizing political change. Rather, he believed that the democratic process, with institutions such as separation of powers, bicameralism, and congressional committees that make rapid change difficult, can translate voter preferences into policies in a way consistent with stability. The legitimacy of any democratic process, however, requires that all voters are involved in selecting representatives and making their voices heard.

Minor parties can facilitate this relatively orderly process of change because they provide a structure to bring new ideas into the political debate, particularly during campaigns when voters are more likely to be attentive to politics. Unlike others on the Court who viewed minor parties, like their major party counterparts, as primarily interested in electing their members to office,<sup>15</sup> Marshall understood that minor parties participate in campaigns to “disseminat[e] ideas as well as attain[] political office.”<sup>16</sup> The effect of minor parties on the content and breadth of the political

---

<sup>13</sup> 418 U.S. 24 (1974).

<sup>14</sup> 418 U.S. at 82 (Marshall, dissenting).

<sup>15</sup> See, e.g., *Timmons*, 520 U.S. at 363 (majority stating that “[b]allots serve primarily to elect candidates, not as forums for political expression”). See also Adam Winkler, *Expressive Voting* 68 N.Y.U. L. Rev. 360, 358-63 (1993) (critiquing Court’s instrumentalist approach).

<sup>16</sup> *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979). See also Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, *Third Parties in America* 8 (2d ed. 1996) (“Minor parties, historically, have been a source of important party innovations.”).

agenda has been an important part of the nation's political development, even if such parties have not always succeeded in electing their members to office. As examples of such influential parties, Marshall listed, in unsurprising order, Abolitionists, Progressives and Populists.<sup>17</sup> In some ways, minor parties are more like organized interest groups than major political parties: they are collections of individuals with intense preferences who seek to influence the policy debate without enough clout to dominate institutions of governance. Unlike most interest groups, however, they field candidates and use other forms of political action like lobbying, organizing rallies, and encouraging grassroots activism.<sup>18</sup> Some minor parties may actually hope to elect officials, particularly on the local or state level, but for many "getting votes is merely a sideline"<sup>19</sup> as they use campaigns primarily to gain public attention for their policy positions.

Marshall's defense of minor parties is articulated most thoroughly in his powerful dissent in *Munro v. Socialist Workers Party*.<sup>20</sup> Under Washington's blanket primary system, candidates of minor parties could appear on the ballot for the general election only if they had been nominated at their parties' conventions and had received at least one percent of all the votes cast in the primary election. Before 1977, minor party candidates who had been nominated by their conventions, held on the same day as the state's primary elections, could appear on the general election ballot if they filed a certificate with the signatures of at least 100 registered voters who had participated in the convention but had not voted in a primary. Under this earlier ballot access law, minor party candidates appeared regularly on the ballot, with 12 on the ballot in 1976; after 1977, only one of 12 minor-party candidates qualified for the general election ballot for statewide office. The Socialist Workers Party nominee for the U.S. Senate and two voters argued that the

---

<sup>17</sup> *Illinois State Board of Elections*, 440 U.S. at 185-186.

<sup>18</sup> See Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 Sup. Ct. Rev. 95, 136 (2003). See also Rosenstone, *supra* note 16, at 222 (noting that minor parties are one form of aggregating and promoting citizen preferences and that they may be used to check major parties when other forms of action have not succeeded).

<sup>19</sup> Marjorie Randon Hershey, *Party Politics in America* 39-40 (13th ed. 2009).

<sup>20</sup> 479 U.S. 189 (1986).

more restrictive ballot access provision violated their rights under the First and Fourteenth Amendments.

Exhibiting its usual reaction to laws burdening minor parties, the Court was not sympathetic to these claims, and the restrictive ballot access law survived attack. Justice Marshall, however, took vigorous exception to the majority's cursory treatment of the associational rights of members of minor parties. In his dissent, he defended of the role of minor parties in the American political system, demonstrating his generally supportive view of their traditional role in opening up the system to new voices:

The minor party's often unconventional positions broaden political debate, expand the range of issues with which the electorate is concerned, and influence the positions of the majority, in some instances ultimately becoming majority positions. And its very existence provides an outlet for voters to express dissatisfaction with the candidates or platforms of the major parties.<sup>21</sup>

This vision includes the two vital communicative roles minor parties play. First, they have historically been voices of dissent by providing an outlet for those dissatisfied with the lack of responsiveness of the major parties but still engaged enough to participate politically.<sup>22</sup> More positively, they have also been able to elevate issues to prominence on the political agenda, thereby forcing the major party candidates and officials to address them. Marshall attacked the majority's "fundamental misconception of the role minor parties play in our constitutional scheme," that is, by believing that their sole objective is to elect their candidates.<sup>23</sup> Instead, minor parties serve to "expand and affect political debate,"<sup>24</sup> and to do so effectively, they must have the ability, in some significant number of campaigns, to participate in the general election.<sup>25</sup>

---

<sup>21</sup> Id. at 200 (Marshall, dissenting).

<sup>22</sup> Rosenstone, et al., *supra* note 12, at 9. 216.

<sup>23</sup> Id. at 202.

<sup>24</sup> Ibid.

<sup>25</sup> Id. at 201-02.



Marshall recognized that some minor parties will reflect extreme dissenting views, and those parties may face backlash from opponents, as well as from government efforts to undermine them. He was particularly aware that the FBI engaged in surveillance and other tactics to monitor and destabilize groups with views J. Edgar Hoover questioned. After all, Marshall himself had been the subject of the FBI's scrutiny.<sup>26</sup> Moreover, some opponents of civil rights had sought to undermine the movement, the NAACP, and Marshall's achievements through accusations of communist and other "subversive" influences. This experience, coupled with his first-hand knowledge of the hostility that NAACP members sometimes faced during the civil rights era,<sup>27</sup> made him a natural to write the majority opinion in *Brown v. Socialist Workers '74 Campaign Committee*.<sup>28</sup> Marshall's opinion affirmed the need to protect from disclosure the names of those who contributed to the Party and those who received expenditures from it. His opinion detailed not only the negative reaction that the Socialist Workers Party sparked in some citizens, including hate mail, shots fired into Party offices, and destruction of members' property, but also the systematic and "massive" government harassment aimed at the Socialist Workers Party and the affiliated Young Socialist Alliance.<sup>29</sup> Three of his colleagues were not willing to go as far as Justice Marshall, seeing an insufficient threat posed to people who received contributions from the Socialist Workers Party; they therefore would have required disclosure with regard to recipients of expenditures from the Party. However, Marshall's own familiarity with the situation of groups espousing unpopular views doubtlessly contributed to his support for the broad protection necessary to allow this Party to survive. His opinion is noteworthy because Justice Marshall was not sympathetic to the views of any relatively radical political movement; nonetheless, his commitment to the survival of a set of diverse minor parties as part of a robust

---

<sup>26</sup> See Thurgood Marshall Speeches, *supra* note 2, at 440-41 (excerpt from interview where Marshall discusses his reaction to the surveillance); Rowan, *supra* note 4, at 115-23.

<sup>27</sup> See NAACP v. Alabama, 357 U.S. 449 (1958). Although Marshall did not argue this case, he appeared on the brief for the NAACP.

<sup>28</sup> 459 U.S. 87 (1982).

<sup>29</sup> *Id.* at 98-100.

democracy inevitably led him to the view that anonymity must be provided to the Socialist Workers Party's supporters and others associated with it.

Marshall's objective of structuring the political process so that new views are heard was not limited to his resisting laws that weakened, and perhaps eviscerated, minor parties. It is also a theme sounded in some of his opinions in cases dealing with rules determining who can vote. In the case upholding the constitutionality of California's ex-felon disenfranchisement law, Marshall dissented, arguing that the law violated the Fourteenth Amendment by depriving ex-felons of their fundamental right to vote without a sufficiently compelling state interest.<sup>30</sup> He was particularly outraged by the state's argument that former felons were likely to vote in ways that were "subversive of the interests of an orderly society"<sup>31</sup> and that this somehow justified excluding them from the voting booth. He strongly rejected the notion that people's right to vote could be conditioned on the substance of the views that were likely to inform their votes. He likened the state's argument to discredited Supreme Court precedents that had allowed the disenfranchisement of people who had been part of bigamous or polygamous marriages on the ground that they were likely to oppose laws criminalizing such behavior.<sup>32</sup> Instead, Marshall argued that people who opposed certain criminal laws – for example, those who favored legalizing marijuana – could not be deprived of their fundamental right to vote merely because they might vote for people who shared their view and would work within the democratic process to achieve change.<sup>33</sup> Similarly, ex-felons, who might have certain views about criminal laws and the severity of sanctions imposed on lawbreakers, could not be disenfranchised because they might support parties and candidates sympathetic to those views.

---

<sup>30</sup> *Richardson*, 418 U.S. at 77-78.

<sup>31</sup> *Id.* at 81.

<sup>32</sup> *Id.* at 81-82 (referring to *Murphy v. Ramsey*, 114 U.S. 15 (1885) and *Davis v. Beason*, 133 U.S. 333 (1890)).

<sup>33</sup> *Id.* at 82-83.

For Marshall, the relevant precedents in the ex-felon disenfranchisement cases were not the old cases allowing discrimination against some Mormons, but the cases drawing into question requirements that voters be residents of an area for a relatively long time before they could register to vote. In *Dunn v. Blumstein*,<sup>34</sup> Marshall authored the unanimous decision striking down Tennessee's requirement that only people who had lived in the state for a year and in the county for three months could register to vote. The state justified this durational residency requirement in part because it furthered the goal of having only "knowledgeable" voters participate in elections. Although the Court accepted that the state could legitimately require that voters be residents of the geographic divisions in which they sought to vote, it was not convinced that the durational requirement was necessary to achieve this goal. More troubling for Marshall was the state's argument that requiring a relatively lengthy residency ensured that voters were aware of and influenced by the "local viewpoint."<sup>35</sup> This state interest was just another way to condition the right to vote on the viewpoints and opinions that might be expressed through that vote: people were being excluded from the franchise because they might have opinions different from the majority of voters in an area.<sup>36</sup> To Marshall, the infusion of new residents is one way to increase the breadth of perspectives represented in the polity, to bring new issues to the forefront, and to allow for local political change that better reflects developments in other parts of the nation.

Of course, Marshall was well aware that the new voices that the state wished to muffle were often those of "undesirables, immigrants and outsiders with different ideas."<sup>37</sup> Marshall rejected the argument that a voter must live in an area for a relatively lengthy time in order to be knowledgeable and engaged. As he noted:

---

<sup>34</sup> 405 U.S. 330 (1972).

<sup>35</sup> Id. at 334-35.

<sup>36</sup> Id. at 355-56.

<sup>37</sup> Id. at 355 n. 27 (quoting David Cocanower & David Rich, *Residency Requirements for Voting*, 12 Ariz. L. Rev. 477, 484 (1970)).

[R]ecent migrants who take the time to register and vote shortly after moving are likely to be those citizens ... who make it a point to be informed and knowledgeable about the issues. Given modern communication, and given the clear indication that campaign spending and voter education occur largely during the month before an election, the State cannot seriously maintain that it is “necessary” to reside for a year in the state and three months in the county [to be a knowledgeable voter].<sup>38</sup>

Marshall continued to fight against significant durational requirements for voting registration, which he believed were designed mainly to keep new voices with a more national or unorthodox regional perspective from being heard, even when the rest of the Court was willing to accept restrictions shorter than those in *Dunn*.<sup>39</sup> Another aspect of his jurisprudence also reflects his commitment to designing democratic institutions to maximize the number of different opinions heard, even at the cost of restraining some voices that are disproportionately loud. These cases are his campaign finance opinions, most notably his majority opinion in *Austin v. Michigan Chamber of Commerce*.

## **II. Campaign Finance: Equality Interests Disguised as Corruption**

Dissatisfaction with Supreme Court jurisprudence in the campaign finance arena is widespread (perhaps universal) and expressed both by those who advocate for more room for regulation and by those who object to virtually any regulation of campaign spending. In part, the problem lies in the tension between the liberty values embedded in the Bill of Rights and the principles of equality sounded in the Declaration of Independence and articulated to some extent in the Fifth and Fourteenth Amendments.<sup>40</sup> If liberty interests are paramount, then the state arguably should be loath to restrict the ability of individuals or groups to spend money to make their political views known and to express the intensity of those views. A problem of political

---

<sup>38</sup> Id. at 358 (footnotes omitted).

<sup>39</sup> See, e.g., *Hall v. Beals*, 396 U.S. 45 (1969).

<sup>40</sup> See L.A. Powe, Jr., *Mass Speech and the First Amendment*, 1982 Sup. Ct. Rev. 243, 279-84 (1983) (pointing out the tension in cases including campaign finance cases).

inequality arises, however, when those with access to wealth are able to exert influence over political outcomes, and others with fewer financial resources cannot. Unless we think economic resources correlate to political views that should be privileged in some way, this inequality of opportunity to be heard leads to the appearance of a corrupt democratic system.

**A. Marshall’s Embrace of Equality in *Buckley v. Valeo***

Justice Marshall departed from the views of most of his colleagues in the campaign finance cases because he tended to resolve the tension between liberty and equality principles in favor of the latter. In contrast, the Supreme Court has consistently rejected any explicitly egalitarian argument that campaign restrictions are necessary to amplify the voices of those without substantial economic resources. In *Buckley v. Valeo*,<sup>41</sup> the majority opined about provisions limiting campaign expenditures:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’ ” and “to assure unfettered interchange of ideas for bringing about of political and social changes desired by the people.” The First Amendment’s protection against governmental abridgement of free expression cannot properly be made to depend on a person’s financial ability to engage in public discussion.<sup>42</sup>

Similarly, the Roberts Court was not sympathetic to an egalitarian rationale for campaign finance regulation when it overturned the provision of the Bipartisan Campaign Reform Act that raised contribution limits for candidates facing self-financed millionaire.<sup>43</sup> Supreme Court

---

<sup>41</sup> 424 U.S. 1 (per curiam).

<sup>42</sup> Id. at 48-49 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964), which in turn quotes *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

<sup>43</sup> *Davis v. Federal Election Commission*, 128 S.Ct. 2759 (2008). See also *infra* text accompanying notes 111 through 117.

jurisprudence has limited the acceptable compelling state interests supporting regulation in this realm to combating actual *quid pro quo* corruption or the appearance of such, or arguments that can be framed as targeting some sort of similar political corruption that undermines public confidence in government.<sup>44</sup>

Justice Marshall approached campaign finance cases with his view that equality of opportunity is the foremost constitutional principle, and that differences in wealth should not affect the ability to participate in politics. When Marshall considered the country's democratic framework he began with the Declaration of Independence's "self-evident truth" that all people are created equal.<sup>45</sup> Because he was well aware that the original Constitution departed from this egalitarian commitment in its acceptance of slavery, he viewed the Constitution as an evolving document – evolving to better exemplify the primary democratic principle of equality. When he helped draft the Kenyan Constitution's Bill of Rights, he insisted that "the starting point, upon which other rights were built, was equality, not liberty."<sup>46</sup> Marshall's commitment to equality of opportunity to participate was not necessarily a commitment to equal influence over political outcomes.<sup>47</sup> Those with greater intelligence or rhetorical ability are apt to exert disproportionate influence over political outcomes, for example, and those with more time to take part may have a greater ability to promote their views. These are not necessarily illegitimate differentiating factors, and they can appropriately affect the ability to influence, although they should not play a role in the opportunity to participate. Although it is not articulated in these terms, the main disputes in the campaign finance cases are whether inequality of economic resources is a legitimate or illegitimate factor as it relates to political access, and if it is illegitimate, what the

---

<sup>44</sup> David Strauss argues that the *quid pro quo* corruption rationale boils down to a concern about political equality. See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369, 1371-75 (1994).

<sup>45</sup> See, e.g., Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv. L. Rev. 1 (1987); *The Judiciary and Fundamental Human Liberties*, *supra* note 6, at 183-84.

<sup>46</sup> Mary L. Dudziak, *Thurgood Marshall's Bill of Rights for Kenya*, 11 Green Bag 2d 301, 311 (2008).

<sup>47</sup> See Andrei Marmor, *Law in the Age of Pluralism* 74-75 (2007).

state can do to redress the inequality. Few justices other than Marshall have been willing to use equality to frame the debate, however, perhaps because of their fears that any remedy to unequal economic resources would inevitably require some sort of redistribution of economic resources among participants. Many justices would oppose such measures because of their interpretation of the liberty principles set out in the Constitution.

In *Buckley v. Valeo*, Justice Marshall took issue with the Court's rejection of a compelling state interest based on equality. He approved of the state's interest to promote "the reality and appearance of equal access to the political arena."<sup>48</sup> Accordingly, he dissented from the majority's decision to invalidate restrictions on how much of a candidate's own money he could spend in a campaign. He understood that if the contributions that others could provide to a candidate were restricted while the wealthy candidate could spend as much private money as he wanted, then "immediate access to a substantial personal fortune may give him an initial advantage that his less wealthy opponent can never overcome."<sup>49</sup> Not only does that lead to a political environment that discourages people without great wealth from running for political office, but it also "undermine[s] public confidence in the integrity of the electoral process."<sup>50</sup>

Memos relating to *Buckley* in Justice Marshall's papers suggest that he always accepted equality of opportunity as a rationale for state regulation, but he changed his thinking about how egalitarian principles should be applied to some provisions of the Federal Election Campaign Act during deliberations. In his conference notes, he underlined a statement that he appeared to attribute to Potter Stewart: "Limitation on personal money of candidate – is OK – to equalize ability."<sup>51</sup> It seems unlikely that this was Stewart's position in conference given what we know

---

<sup>48</sup> 424 U.S. at 287 (Marshall, concurring in part and dissenting in part). See also Cass R. Sunstein, *On Marshall's Conception of Equality*, 44 Stan. L. Rev. 1267, 1269 (1992) (noting that Marshall's concern was not equalizing resources or outcomes, but providing all a "fair chance").

<sup>49</sup> *Id.* at 288.

<sup>50</sup> *Ibid.*

<sup>51</sup> Thurgood Marshall Papers, Manuscript Division, Library of Congress, Box 173, Folder 6.

from other notes;<sup>52</sup> in my view, it is more likely to have been a statement of Marshall's thoughts during conference deliberations. However, when he returned from conference, he told his clerks that he was "closer to holding [the limitation on expenditures by candidates from personal resources] unconstitutional than constitutional."<sup>53</sup> A memo from his clerks after Potter Stewart's draft of this portion of the *Buckley* opinion had been circulated reflects internal discussions in Marshall's chambers that apparently caused him to change his mind and convinced him to write separately about the use of a candidate's own resources. According to this memo, the clerk KTB<sup>54</sup> argued that the limitations were constitutional because they "serve the vital governmental interest of equalizing access to the political process."<sup>55</sup> By striking down the limitation, "P[otter] S[tewart] 'constitutionalizes' the gross inequalities in wealth that characterize our society."<sup>56</sup> The memo notes that this argument is only KTB's view, not shared by other clerks, but KTB clearly felt strongly about these view since these sentences are underlined for emphasis. Ultimately, KTB was able to convince the person whose opinion mattered the most: these arguments form the backbone of Marshall's dissent in *Buckley*.

When the *Buckley* opinions were released, Marshall revealed his disagreement with the Court only on the permissibility of restrictions on the candidate's use of her own money. Internal Court documents reveal that he indicated in the conference on *Buckley* that he believed the limitation on independent expenditures was constitutional, but he finally joined the majority opinion striking them down.<sup>57</sup> It seems likely that Marshall was never entirely comfortable with this aspect of the decision, and nearly a decade later, he publicly rejected the idea that any difference between contributions and expenditures has constitutional significance. In *Federal Election Commission v. National Conservative Political Action Committee*, Marshall's dissent

---

<sup>52</sup> See Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 Election L.J. 241 (2003).

<sup>53</sup> Thurgood Marshall Papers, *supra* note 51, Folder 3.

<sup>54</sup> KTB is Kevin T. Baine, now an attorney with Williams & Connolly.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



began with his acknowledgment that he had changed his view and now joined Justice White's long-held position that the government should be allowed to regulate both campaign contributions and expenditures.<sup>58</sup> He explained this shift largely because experience since *Buckley* demonstrated that the bifurcated regime led to the use of independent expenditures to gain disproportionate influence over candidates. Strategic political actors had reacted to the regulatory regime and were using the avenues open to them to try to circumvent restrictions on campaign contributions. As Justice Marshall pragmatically observed:

It does not take great imagination ... to see that, when the possibility for direct financial assistance is severely limited, [an individual seeking a special benefit like an ambassadorship] will find other ways to financially benefit the candidate's campaign. It simply belies reality to say that a campaign will not reward massive financial assistance in the only way that is legally available.... Surely an eager supporter will be able to discern a candidate's needs and desires; similarly, a willing candidate will notice the supporter's efforts.<sup>59</sup>

However, Marshall's view was not only based on his common-sense understanding of the ways those seeking access and influence can circumvent restrictions on contributions to spend as much as they want in the political arena. It was also supported by his willingness to consider as ample justification for regulation the desire to promote equality of political access, a state interest that he saw as separate from the traditional one of preventing *quid pro quo* corruption and its appearance.<sup>60</sup>

**B. *Austin v. Michigan Chamber of Commerce*: Hiding Equality behind the Mask of Corruption**

It should come as no surprise, then, that Justice Marshall's most significant campaign finance opinion has been understood by most commentators to be an opinion driven by equality

---

<sup>58</sup> 470 U.S. 480, 518-519 (1985) (Marshall, dissenting).

<sup>59</sup> Id. at 519-20.

<sup>60</sup> Id. at 521 (quoting his opinion in *Buckley*).

considerations, albeit disguised in the language of “political corruption” and without any explicit statement that egalitarian principles are the foundation for this campaign finance regulation.<sup>61</sup> *Austin v. Michigan Chamber of Commerce*<sup>62</sup> concerned the constitutionality of a Michigan law prohibiting corporations from making, directly from their general treasury funds, contributions or independent expenditures in connection with state candidate races. Corporations could use segregated funds for such purposes; money for these segregated funds was solicited expressly for political purposes. The Michigan Chamber of Commerce, a nonprofit corporation with 8,000 members, three-quarters of them for-profit corporations, sought to use its general treasury funds to pay for an ad supporting a particular candidate. The Court held that the regulation was constitutionally permissible, and that the Chamber of Commerce had to use a segregated fund to pay for such an advertisement.

Justice Marshall identified a different sort of political corruption, not the traditional *quid pro quo* corruption, to support the state law prohibiting this type of expenditure: “the corrosive and distorting effect of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>63</sup> He emphasized that the purpose of the segregated fund was to ensure that the money used by a corporation to fund political speech accurately reflected the support of its shareholders for those political positions.<sup>64</sup> He further clarified that the justification is limited to regulation of corporations and cannot be applied to any wealthy entity because “the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.”<sup>65</sup> Justice Marshall framed his majority opinion so that it did not

---

<sup>61</sup> See, e.g., Gerald G. Ashdown, *Controlling Campaign Spending and the “New Corruption”*: *Waiting for the Court*, 44 Vand. L. Rev. 767 (1991); Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 Sup. Ct. Rev. 105 (1991).

<sup>62</sup> 494 U.S. 652 (1990).

<sup>63</sup> 494 U.S. at 660.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

explicitly rely on equality arguments, but rather on the political corruption that occurs when the amount of money spent in campaigns by corporations distorts the political dialogue because it does not accurately reflect the intensity of the views held by those who created the wealth.

As I will discuss below, and as others have pointed out, this idea of corruption caused by the potentially “corrosive” and “distorting” effects of campaign expenditures of corporations from their general treasury funds is hard to understand sensibly as anything other than an equality argument. However, the Justice had no choice but to draft the opinion as he did, even if he might have been comfortable with more openly embracing equality of access as the compelling interest, for two related reasons. Before describing those reasons, let me be clear: I am not claiming that the Justice considered, and then rejected, writing an opinion finding the Michigan law constitutional because it furthered the legitimate democratic interest in equality of opportunity to participate in the political process, regardless of a person’s economic resources.<sup>66</sup> Rather, I am arguing that the Justice would not have been disturbed by the observation that the corruption rationale in *Austin* was merely the wolf of equality dressed in sheep’s clothing. Moreover, had Marshall thought that *Austin* might someday lead the Court to embrace an equality of opportunity rationale explicitly – a development that has yet to occur and seems less likely with the current Court – he would likely have approved.

One reason the opinion is drafted as it is stems from a lesson we all teach in first-year courses: majority opinions are written using reasoning from precedent and prior analysis and seldom are presented as abrupt breaks with the past. In the campaign finance arena, the primary controlling precedent was *Buckley*, with its firm rejection of the idea that some voices could be muffled in the political process in order to enhance the voices of those with less economic resources. Instead, only some notion of political corruption, not substantially different from *quid*

---

<sup>66</sup> I was the clerk with primary responsibility to work with Justice Marshall on this opinion. This description of the negotiations about the various drafts is based on my recollections and personal notes, as well as on documents available from the Marshall papers at the Library of Congress.

*pro quo* corruption used by the *Buckley* court, could support state regulation of the campaign process. *Austin* was particularly tricky because it concerned independent expenditures; the Court had been much less willing to allow restrictions of independent expenditures than of contributions. For example, in *Federal Election Commission v. National Conservative Political Action Committee*,<sup>67</sup> the Court had struck down a federal law limiting to \$1,000 the annual independent expenditures a political action committee (PAC) could make to a presidential candidate receiving public funds. A PAC is a segregated fund raised for political purposes, so in this respect the context was different than in *Austin*, which dealt with general treasury funds. In *First National Bank of Boston v. Bellotti*,<sup>68</sup> the Court struck down a rule prohibiting corporations from directly making expenditures in ballot measure campaigns that did not materially affect their business or assets. The case established that corporate spending for political speech triggers the same First Amendment scrutiny as spending by individuals in campaigns. *Austin* differed from *Bellotti* in that it arose in the context of candidate elections, where more regulation had been allowed, and provided corporations the outlet of spending through a segregated fund rather than prohibiting expenditures entirely. Finally, in *Federal Election Commission v. Massachusetts Citizens for Life*,<sup>69</sup> the Court had struck down a segregated-fund requirement as applied to nonprofit ideological corporations that are formed for the express purposes of promoting political ideas. In the case of these particular nonprofit corporations, their general treasury funds are accurate reflections of the political views of those who provide the funds. One question in *Austin* was whether the Chamber of Commerce was more like the pro-life nonprofit corporation or more like a traditional for-profit corporation. This was the jurisprudential landscape Marshall faced; in all these opinions, the Court had refused to make the argument that regulation could be justified on the ground that some corporations are wealthy and therefore have a relative advantage in

---

<sup>67</sup> 470 U.S. 480 (1985).

<sup>68</sup> 435 U.S. 765 (1978).

<sup>69</sup> 479 U.S. 238 (1986).

funding political communications that disseminate their perspectives on candidates or ballot measures.<sup>70</sup>

Second, as he drafted his opinion, Justice Marshall found that keeping his majority was challenging, so he had to recast and redraft to keep his colleagues – who had different views about the best way to approach the case – from defecting and writing separately. In the days following the initial circulation of the draft, only two justices signaled unambiguously that they would join his majority. Justice White was perhaps most firmly on board; he had dissented in *Buckley*, *NCPAC* and *Bellotti* and had long been a proponent of allowing states to regulate independent expenditures as well as campaign contributions.<sup>71</sup> Moreover, White’s dissent in *Citizens Against Rent Control v. City of Berkeley*<sup>72</sup> expressed his view that regulation of corporate spending in ballot measure campaigns can be justified by a showing that substantial spending by corporations in political campaigns has distorted the political debate. “Recognition that enormous contributions from a few institutional sources can overshadow the efforts of individuals may have discouraged participation in ballot measure campaigns and undermined public confidence in the referendum process.”<sup>73</sup> Chief Justice Rehnquist was also a certain vote as long as the opinion was drafted to apply only to corporations; he had taken the position in *Bellotti* that corporate political speech did not trigger the same strict scrutiny as political speech by individuals,<sup>74</sup> and he continued to hold that view. In the days following the circulation of the first draft of *Austin*, White joined immediately.<sup>75</sup> Rehnquist joined a day later, after first asking for a change in the opinion’s discussion of labor unions.<sup>76</sup>

---

<sup>70</sup> See, e.g., *NCPAC*, 470 U.S. at 498-99; *Bellotti*, 435 U.S. at 789-92; *MCFL*, 479 U.S. at 257-60.

<sup>71</sup> Not only had Marshall come to agree with this position, but Justice Stevens’ concurrence in *Austin* suggests that he also saw no distinction between the two kinds of expenditures when a corporation was involved. *Austin*, 494 U.S. at 678 (Stevens, concurring).

<sup>72</sup> 454 U.S. 290 (1981).

<sup>73</sup> *Id.* at 308 (White, dissenting).

<sup>74</sup> 435 U.S. at 822 (Rehnquist, dissenting).

<sup>75</sup> Memo from Justice Byron White to Justice Thurgood Marshall, copied to the Conference, Dec. 11, 1989.

<sup>76</sup> Memo from the Chief Justice to Justice Thurgood Marshall, copied to the Conference, Dec. 11, 1989, Thurgood Marshall Papers, *supra* note 51, Box 502, Folder 7 (asking for a discussion of the line of cases

Although Brennan, Blackmun and Stevens directly and through their clerks indicated to the Marshall Chambers that they were likely to sign on to the opinion, they also continued to raise issues for the majority opinion to address. Justice Stevens' initial reaction was that "[a]lthough I am presently disposed to join your opinion, I think I shall wait to see what the dissenters have to say before actually doing so."<sup>77</sup> Justice Blackmun's memo of the same day mirrored this reaction: "I am about where John is. I am presently disposed to join, but I would like to see what is produced by other writings."<sup>78</sup> Both chambers signaled through the clerks that it was likely their bosses would ultimately join the opinion.<sup>79</sup> Indeed, the memo that Justice Stevens sent to Justice Marshall a few days after he indicated he was waiting to see the dissent, strongly indicated that he would join the majority. He was concerned that the draft suggested that *Buckley's* holding with respect to independent expenditures by individuals should be extended to corporations, an issue that the *Austin* opinion did not need to resolve.<sup>80</sup> Instead, his memo offered language that left open the possibility that corporate spending in elections might pose a special danger of *quid pro quo* corruption that could support restricting independent expenditures, an argument he made explicitly in his short concurrence.<sup>81</sup>

Perhaps the most frustrating negotiation from Justice Marshall's perspective was with Justice Brennan, the author of the majority opinion in *MCFL* and a justice who should have been sympathetic to the concept of equality of access that *Austin* furthered, albeit silently. Marshall's *Austin* opinion was drafted to follow the reasoning in *MCFL* and to make clear why the Michigan

---

stemming from *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that requires labor unions to let members opt out of the part of their dues going to political activities); Memo from the Chief Justice to Justice Thurgood Marshall, copied to the Conference, Dec. 12, 1989 (joining after paragraph had been added).

<sup>77</sup> Memo from Justice John Paul Stevens to Justice Thurgood Marshall, copied to the Conference, December 11, 1989.

<sup>78</sup> Memo from Justice Harry A. Blackmun to Justice Thurgood Marshall, copied to the Conference, December 11, 1989.

<sup>79</sup> See, e.g., Memorandum re. *Austin* from bg (Dec. 18, 1989) ("JPS's clerk assured me that his vote was secure and he is waiting for the dissent as a courtesy.").

<sup>80</sup> Memo from Justice John Paul Stevens to Justice Thurgood Marshall, Dec. 19, 1989, Thurgood Marshall Papers, *supra* note 51, Box 502, Folder 1.

<sup>81</sup> See *Austin*, 494 U.S. at 678.

Chamber of Commerce, with its many dues-paying for-profit corporate members, is more like a for-profit corporation than a nonprofit ideological corporation. There were intense discussions at the clerk level between the two chambers, with memos exchanged in mid-December explaining concerns that had been discussed with Justice Brennan and the responses that Justice Marshall's clerks hoped would be persuasive.<sup>82</sup> By December 18, Brennan had still not joined the opinion, and Brennan's clerk told the Marshall chambers that Justice Kennedy had convinced Brennan to wait to see his dissent before joining, something Brennan's clerk learned about only when preparing the join memo to circulate.<sup>83</sup> Thus, the draft opinion was changed slightly during these weeks as Marshall learned of some of the concerns of Brennan, Stevens and Blackmun and worked to accommodate them.

In the end, all three joined the opinion, although with some separate opinions, shortly after Kennedy's dissent was circulated to the full Court.<sup>84</sup> While assisting the Justice with this opinion and others from that Term, I grew to admire his political skill and ability to make pragmatic changes in opinions to preserve his majority. *Austin* was an example of this; Justice Marshall would have viewed it as irresponsible to write an opinion that boldly staked out a rationale based on equality that no one other than perhaps Justice White would have even considered joining. But, as often occurs when compromise is necessary to achieve a result, the rationale of the opinion which ultimately garnered six votes is unsatisfactory and at times

---

<sup>82</sup> See, e.g., Memorandum to Jonathan from Marshall clerks, undated. For example, Marshall changed his opinion slightly in early December to accommodate Brennan's request for a change to "state more clearly that the special elements conferred by the corporate structure provide a unique basis for State regulation that is not immediately applicable to all types of aggregations of money (wealthy individuals and groups, for example)." Memo from Justice William J. Brennan, Jr., to Justice Thurgood Marshall, stamped Dec. 18, 1989, Thurgood Marshall Papers, *supra* note 51, Box 502, Folder 1.

<sup>83</sup> Memorandum re. *Austin* from bg (Dec. 18, 1989). Nonetheless, Brennan's clerk assured his colleagues in the Marshall chambers that "WJB's vote is still solid – don't worry about that." *Ibid.* (quoting message that WJB clerk sent to TM clerk).

<sup>84</sup> Brennan joined January 23, but wrote Marshall a private memo explaining that he felt he had to write a separate concurrence "emphasizing my feeling that this case is controlled by *Massachusetts Citizens for Life, Inc.*" Memorandum from Justice William J. Brennan, Jr. to Justice Thurgood Marshall, January 23, 1990. Justice Stevens, who also wrote separately, joined January 31, and Justice Blackmun joined the majority formally on February 6.

incoherent. To understand why this is so, it is necessary to probe the reasoning supporting the political corruption that Marshall's opinion introduced into the campaign finance jurisprudence.

Marshall's majority opinion identified a "different type of corruption" from *Buckley's* *quid pro quo* corruption: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."<sup>85</sup> It is interesting – and not coincidental<sup>86</sup> – that "corrosive" and "distorting" were adjectives used several times by Judge J. Skelly Wright in his often-cited article *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*<sup>87</sup> Wright's argument was unabashedly egalitarian. "Concentrated wealth ... threatens to distort political campaigns and referenda. The voices of individual citizens are being drowned out in election campaigns."<sup>88</sup> "The corrosive influence of money blights our democratic processes."<sup>89</sup> The *Austin* opinion does not cite Wright and eschews the enhancement theory also rejected in *Buckley*, but the adjectives used throughout Marshall's opinion draw from Wright's article and seem best suited to describe reform efforts designed to provide equality of access to the political arena for all citizens, regardless of their wealth.

Thus, Marshall appropriated the language used to describe an egalitarian justification for campaign finance regulation, but he expressed that state interest in the acceptable corruption terminology. The corruption described in *Austin* has two related parts: it is tied to wealth

---

<sup>85</sup> 494 U.S. at 660. Scholars have observed that "corruption" is a strange word to use for this situation; certainly, it is not the typical meaning of corruption. See Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comm. 127, 136 (1997).

<sup>86</sup> See Brief for the Center for Public Interest Law as Amicus Curiae Supporting Appellee, *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), 1989 WL 1126839 (citing Judge Wright's article for proposition that spending during a campaign can be constitutionally regulated to ensure that the values of self-government are maintained).

<sup>87</sup> 82 Colum. L. Rev. 609 (1982).

<sup>88</sup> Id. at 609.

<sup>89</sup> Id. at 645 (quoting *Buckley v. Valeo*, 519 F. 2d 821, 897 (D.C. Cir. 1975), rev'd in part, 424 U.S. 1 (1976)). The lower court in *Buckley* had been willing to accept an equality rationale to justify provisions of the campaign finance law. See, e.g., 519 F. 2d at 841 ("By reducing in good measure disparity due to wealth, the Act tends to equalize both the relative ability of all voters to affect electoral outcomes, and the opportunity of all interested citizens to become candidates for elective federal office. This broadens the choice of candidates and the opportunity to hear a variety of views.")



amassed through the corporate form, and it is framed as a way to protect shareholders who disagree with the political views funded by a corporation from having their investment used for political expenditures. Neither part of this corruption rationale is particularly persuasive as a concern apart from an equality-based argument that some groups with economic wealth have disproportionate political power solely by virtue of their access to money.

First, the *Austin* opinion tried to limit its conception of corruption to corporate wealth, an unsurprising move since concern about corporate involvement in candidate elections and the use of corporate funds to dominate political campaigns has historically undergirded campaign finance laws at the federal and state levels.<sup>90</sup> Marshall's opinion consistently linked the immense aggregations of wealth to corporate war chests facilitated by state-conferred benefits, and he also clarified that the relevant state-conferred benefits were those that encouraged the formation of corporate wealth, such as limited liability for corporate shareholders.<sup>91</sup> Yet this limitation is not persuasive. As Justice Scalia's stinging dissent pointed out, wealthy individuals and unincorporated groups often thrive because of state-conferred benefits like tax expenditures, government subsidies, and the like.<sup>92</sup> These are designed to facilitate the creation and accumulation of economic wealth just like laws providing benefits to corporations. Not all people who are eligible for such state-conferred benefits become rich; similarly, not all corporations that enjoy the benefit of the corporate form are able to amass substantial political war chests. Moreover, if the majority in *Bellotti* was right and corporate political speech should receive the same protection as other political speech, it is not clear why one sort of state-conferred benefit triggers restrictions on independent political expenditures and another does

---

<sup>90</sup> See, e.g., Adam Winkler, *Other People's Money: Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L.J. 871 (2004).

<sup>91</sup> The only formal request from Justice Brennan for a change in the majority opinion was to make clear that the reasoning of the opinion could not be applied to wealthy individual and groups. See *supra* note 82.

<sup>92</sup> 494 U.S. at 680 (Scalia, dissenting).

not.<sup>93</sup> It seems to turn on the nature of the entity benefitted, yet *Bellotti* ruled that difference is not constitutionally significant for purposes of First Amendment protection, and *Austin* cites that aspect of *Bellotti* with approval.<sup>94</sup>

Second, the *Austin* corruption rationale was based on the argument that corporate expenditures from general treasury funds in candidate campaigns “have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>95</sup> As Brennan wrote in his concurrence, people invest in corporations to make money, and “a shareholder might oppose the use of corporate funds drawn from the general treasury – which represents, after all, *his* money – in support of a particular political candidate.”<sup>96</sup> The requirement of using a segregated fund for political expenditures operates to ensure that the money collected accurately reflects the donors’ *political* views. Thus, the Michigan law could be seen as a protection of minority shareholders who valued the return from their investment but disagreed with the corporation’s political stances. This is the crucial difference between a for-profit corporation and the kind of nonprofit ideological corporation identified in *MCFL*; those who contribute to the latter presumably do so because they share the political aspirations and purposes of those who manage the nonprofit.<sup>97</sup> Thus, the general treasury funds of an ideological nonprofit are an accurate indicator of the views of those who provide the money.

The main weakness in the shareholder protection rationale is that it is not clear why shareholders receive special protection here, but not in other arenas of corporate activity, even corporate political activity, where there is likely to be similar agency problems. For example, corporations often lobby elected officials, and it is possible that some shareholders will not support such lobbying efforts but nonetheless still choose to retain ownership in the firm.

---

<sup>93</sup> See Eule, *supra* note 61, at 115.

<sup>94</sup> 494 U.S. at 657.

<sup>95</sup> 494 U.S. at 660.

<sup>96</sup> *Id.* at 670 (Brennan, concurring).

<sup>97</sup> *MCFL*, 479 U.S. 238 at 264.

Similarly, corporations make charitable contributions to a variety of cultural and educational institutions; it would not be surprising if some shareholders either disagreed with the need for such expenditures or with the choice of the recipients. Yet the law does not require corporations to form segregated funds for these activities. No special protection is provided, because presumably the managers and board of the company believe that the lobbying or charitable contribution serves the greater economic interest of the firm and its owners. In the same way, political contributions by corporations must be consistent with the corporation's economic interest, or management will face questions by board members and disgruntled shareholders. Why the need for additional protections against principal-agent slack in only the latter circumstances? Again, Scalia's dissent is persuasive in his treatment of this argument.<sup>98</sup>

Finally, it is clear that Marshall was really articulating an equality rationale in *Austin*'s formulation of corruption when one thinks about the force of his argument as a justification for similar regulation in initiative campaigns. In his majority opinion, Marshall was careful to emphasize that *Austin* arose in the context of candidate campaigns because the Court had been more willing to allow regulation of campaign finance in candidate elections than in ballot measure campaigns. But the rationale in *Austin* simply cannot logically be limited to expenditures related to candidates. Unlike the traditional *quid pro quo* corruption, which responds to the reality that elected officials are susceptible to unseemly or disproportionate influence by large donors, the corrosive and distorting effects of money described in *Austin* do not hinge on the presence of candidates. Direct democracy can be "corrupted" in the *Austin* sense by corporations deploying substantial wealth to fund political communications that may be unrelated to the views of the people who provided the money.<sup>99</sup>

---

<sup>98</sup> 494 U.S. at 685-87.

<sup>99</sup> Thus, *Austin* is in considerable tension with *Bellotti*, and the majority does not do much to distinguish the two, other than to refer to a footnote in *Bellotti* where the Court referred back to *quid pro quo* corruption as a possible motive for regulating corporate expenditures in candidate campaigns. 435 U.S. at 788 n.26. *Austin* correctly cited this footnote for the proposition that the appearance of *quid pro quo* corruption might

Marshall was unlikely to have been disturbed by a broader application of *Austin* to direct democracy because his primary concern in ensuring equality of opportunity in the political realm, and the illegitimacy of wealth influencing equality of access, would apply in both kinds of elections. He made this point in a concurring opinion in *Citizens Against Rent Control v. City of Berkeley*,<sup>100</sup> the case that ruled contribution limits in direct democracy unconstitutional. Marshall indicated that, with the appropriate showing by the state, he would be willing to accept as a legitimate state interest the argument that large corporate spending undermines the purpose animating the adoption of the initiative process in the early 20th century – to reduce the influence of corporations in the electoral sphere.<sup>101</sup> His votes and opinions in *Austin*, *Bellotti*, and *City of Berkeley*, coupled with his longstanding commitment to equality of opportunity as the fundamental constitutional principle, strongly suggest that he would have viewed some regulation of campaign spending in initiative and referendum elections as constitutionally permissible on the ground that it reduces the relative power of wealthy corporations to influence electoral debate and outcomes, compared to the power of individuals who may not have access to financial war chests. Only in this way can new voices be heard in the context of direct democracy.

In short, in *Austin* Marshall valiantly tried to articulate a state interest supporting the regulation of corporate expenditures in candidate elections that was somewhat consistent with the traditional *quid pro quo* corruption accepted by a majority of the Court. Close examination of the *Austin* corruption rationale demonstrates that it is not persuasive on its own terms, but it is coherent if understood as an argument supporting regulation to better ensure equality of participation in campaigns for all Americans, no matter what their economic resources. Marshall masked this equality principle in order to maintain his majority, but it clearly animated his

---

justify regulation of corporate independent expenditures in candidate but not issue campaigns, 494 U.S. at 659, but the opinion did not address whether the corruption described in *Austin* can be so limited. It merely asserted the limitation.

<sup>100</sup> 454 U.S. 290 (1981).

<sup>101</sup> 454 U.S. at 301-02 (Marshall, concurring) (referring to White's dissent which accepts this justification for the challenged regulation).

decision, and it flowed naturally from his conviction that the preeminent constitutional value was equality of opportunity.

### C. The Influence of *Austin* on Subsequent Campaign Finance Jurisprudence

No doubt in part because *Austin*'s corruption rationale was not entirely disguised and its commitment to egalitarian principles rested uneasily with *Buckley*'s rejection of them, Marshall's opinion did not have much influence on succeeding Supreme Court cases, although it has been cited by lower courts in their consideration of city and state election laws.<sup>102</sup> *Austin* burst back on the jurisprudential landscape when it served as one of the major precedents supporting the Court's decision to uphold the provisions of the Bipartisan Campaign Reform Act (BCRA) that require corporations and labor unions to fund electioneering communications only through segregated accounts.<sup>103</sup> In *McConnell v. Federal Election Commission*, the Court identified the corruption rationale articulated by Marshall in *Austin* as a state interest supporting BCRA's segregated-fund requirement. It also noted that new restrictions were required because gaps in the rules applying to corporations in elections had allowed circumvention of contribution limits.<sup>104</sup> Just as he had in *Austin*, Justice Scalia took aim again at this rationale justifying restrictions on corporate speech; he also disagreed with any regulation seeking to eliminate "distortions" in the electoral realm that burdens the speech of entities with access to wealth.<sup>105</sup> "Given the premises of democracy," he wrote in dissent, "there is no such thing as *too much* speech."<sup>106</sup> He did not, however, consider whether there might be too little speech by those without sufficient economic resources;

---

<sup>102</sup> Before *McConnell*, the Supreme Court cited *Austin* only six times. The most significant use of the *Austin* precedent during this time occurred in *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003), where language from *Austin* was used in the argument that the special benefits accorded to corporations allowing them to amass wealth justified campaign finance regulation. *Id.* at 154. Lower courts have relied on *Austin* more frequently, citing it over 150 times, and in some cases using it as a primary authority to justify campaign finance restrictions on corporations. See, e.g., *Mariani v. United States*, 212 F.3d 761 (3d Cir. 2000) (upholding ban on corporations from using general treasury funds in campaigns).

<sup>103</sup> *McConnell v. Federal Election Commission*, 540 U.S. 93, 204-05 (2003).

<sup>104</sup> *Id.* at 205.

<sup>105</sup> *Id.* at 257-59 (Scalia, concurring in part and dissenting in part).

<sup>106</sup> *Id.* at 259.

nonetheless, because of his view of the liberty interest embedded in the Constitution, he is unlikely to be any more sympathetic to enhancing the speech of some than he is to restricting the speech of others.

*Austin*'s resurgence in *McConnell* was short-lived, as the Roberts Court has demonstrated substantially greater hostility toward campaign finance regulation than the Burger or Rehnquist Courts. In *Federal Election Commission v. Wisconsin Right to Life (WRTL II)*,<sup>107</sup> the Court made clear that *Austin* should not be understood broadly but should be restricted to campaign speech by corporations. It pointedly quoted language from the concurrences in *Austin* that provided limiting language, including a passage from Brennan's concurrence stating that *Austin* cannot be used to restrict corporate spending in issue campaigns.<sup>108</sup> Moreover, rather than emphasizing that the law merely channeled corporate spending into segregated accounts, as *Austin* and *McConnell* did, Roberts repeatedly described the regulation as a ban on corporate speech.<sup>109</sup> Thus, the framing of the discussion signals that the authors of the three opinions had very different perspectives on essentially the same provision. Scalia again took the opportunity to attack *Austin* as "flawed" and "wrongly decided"<sup>110</sup> and a jurisprudential outlier; time has not lessened Justice Scalia's outrage about *Austin*.

The Court recently considered a provision of BCRA explicitly justified with an equality of opportunity rationale when it struck down the "millionaire's amendment" that increased contribution limits applied to opponents of candidates who spend more than \$350,000 of their own money in their campaigns.<sup>111</sup> The professed congressional objective was to "level electoral opportunities" for candidates facing wealthy, self-financing opponents.<sup>112</sup> The majority's main

---

<sup>107</sup> 127 S. Ct. 2652 (2007).

<sup>108</sup> *Id.* at 2673-74.

<sup>109</sup> See Richard Briffault, *WRTL II: The Sharpest Turn in Campaign Finance's Long and Winding Road*, 1 Albany Gov't L. Rev. 101, 125 (2008). See also Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 Minn. L. Rev. 1064, 1092 (2008).

<sup>110</sup> *Id.* at 2679.

<sup>111</sup> *Davis v. Federal Election Commission*, 128 S.Ct. 2759 (2008).

<sup>112</sup> *Id.* at 2773 (quoting brief for appellee).

precedents are, not surprisingly, *Buckley* and *Bellotti*. *Austin* is mentioned only as one of many precedents requiring strict scrutiny in this context;<sup>113</sup> Justice Kennedy's dissent in *Austin* is also cited for a passage underscoring the rejection of any provision that restricts the quantity of political speech in the pursuit of egalitarian objectives.<sup>114</sup> It is not difficult, reading *Davis*, to imagine Justice Marshall's very different reaction to arguments that campaign finance reform is required to allow average people without great wealth a real chance to compete for elected office. This was the point he made when he wrote separately in *Buckley* and indicated his support for the first attempt to level the electoral field by limiting the amount of a candidate's personal wealth that could be spent in the quest for political office.

In dissent in *Davis*, Justice Stevens relied on *Austin* as support for protection of the political system from the "undue influence of aggregations of wealth."<sup>115</sup> Most significantly, he stated clearly what scholars have said of *Austin* for years: although *Austin* and other precedents have been limited to corporate wealth, there is no principled reason to restrict the reasoning because the concern is with the malign effects on democratic institutions of concentrated wealth deployed in a political campaign.<sup>116</sup> Stevens embraced equality as a legitimate goal of campaign finance regulation, noting the "clear truth" that there is no "good reason to allow disparities in wealth to be translated into disparities in political power."<sup>117</sup> At long last, *Austin* has been linked to Justice Marshall's conception of equality of access in the pages of the *United States Reports*, a development that the Justice would likely have welcomed.

Although it seems likely that *Austin* will fall back into disuse as a precedent, it will not be wholly forgotten, nor is it without continuing relevance. Marshall's egalitarian vision has some similarities to the approaches of Justices Breyer and Stevens in campaign finance opinions and

---

<sup>113</sup> *Id.* at 2772.

<sup>114</sup> *Id.* at 2773.

<sup>115</sup> *Id.* at 2781 (Stevens, concurring and dissenting in part).

<sup>116</sup> *Id.* at 2781-82.

<sup>117</sup> *Id.* at 2782 (quoting Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 *Colum. L. Rev.* 1390 (1994)).

other writings. Justice Breyer has identified encouraging participatory self-governance as a persuasive state rationale for some campaign finance regulation. Campaign finance laws can “seek to democratize the influence that money can bear upon the electoral process, broadening the base of a candidate’s meaningful financial support, and encouraging greater political participation.”<sup>118</sup> Breyer has specifically diagnosed one of the problems of campaign finance as equality-based: rising campaign costs coupled with “the vast disparity in ability to make a campaign contribution.”<sup>119</sup> Breyer’s emphasis on broad participation in self-governance and his argument that government can intervene in the political process to enhance the scope and breadth of grassroots political activity are consistent with Marshall’s view of a normatively attractive democratic process that facilitates broad participation as it is a concrete signal that all members of society are accorded equal respect.<sup>120</sup> This notion of participatory democracy also promises to change electoral outcomes by wresting power away from the wealthy and entrenched interests and opening the process to new voices.

Justice Souter seems also to be pursuing an *Austin*-like approach to campaign finance jurisprudence, to the point that Richard Hasen has called him the Court’s “emerging egalitarian” in the area.<sup>121</sup> In his dissent in *WRTL II*, Souter embraced the corruption rationale of *Austin*, noting that distortion of campaigns caused by expenditures of large wealth can serve as a compelling interest supporting a requirement like that in BCRA that certain independent expenditures be made from a segregated fund.<sup>122</sup> Much of his dissent discussed the particular dangers posed by corporate spending and the long history of regulation of corporations with respect to their campaign activities.<sup>123</sup> However, the problem that Souter identified – the effect of

---

<sup>118</sup> Stephen Breyer, *Active Liberty* 47 (2005).

<sup>119</sup> *Id.* at 43.

<sup>120</sup> See *supra* text accompanying note 6.

<sup>121</sup> Richard L. Hasen, *Justice Souter: Campaign Finance Law’s Emerging Egalitarian*, 1 *Albany Gov’t L. Rev.* 169 (2008).

<sup>122</sup> 127 S. Ct. 2696 (Souter, dissenting).

<sup>123</sup> See, e.g., 127 S. Ct. at 2689-90.



large aggregations of wealth on the integrity of our democratic institutions – is not limited to corporate war chests. Indeed, he explicitly expanded it to labor unions (also a target of regulation by BCRA, but not the Michigan law in *Austin*), acknowledging that “the value of democratic integrity justifies a realistic response when corporations and labor organizations commit the concentrated moneys in their treasuries to electioneering.”<sup>124</sup> Like the majority in *Austin*, Justice Souter’s dissent offered no good reason why his interest in democratic integrity would not also be implicated by the deployment of large amounts of money by wealthy individuals<sup>125</sup> – or at least he provided no better reason than Marshall did in *Austin* seventeen years earlier.

### III. Combating Entrenched Players that Seek to Silence New Voices

As the previously-discussed cases indicate, Justice Marshall was very aware that entrenched political players would work assiduously to maintain their influence over the status quo and to marginalize new voices and perspectives. He also understood that sophisticated political players seeking to preserve their positions and power could manipulate institutions that were designed to open the democratic system. His experience with the white primary cases had forcefully demonstrated that reality. In an article discussing how the Democratic Party in Texas structured the primaries to exclude black voters, he noted:

It is one of those little ironies of which Southern politics is full, that the primary movement which was motivated, at least in part, by democratic motives and a desire for wider participation in the representative process was turned into a device for eliminating millions of Negroes from participation in government.<sup>126</sup>

Aspects of his approach to the law and politics cases reflect his realistic appraisal of the political process and those who dominate it. In this section, I will first describe how his skepticism about the motives of those who seek to regulate the political process affected his opinions in the

---

<sup>124</sup> *Id.* at 2697.

<sup>125</sup> See Hasen, *supra* note 121, at 186-87.

<sup>126</sup> Thurgood Marshall, *The Rise and Collapse of the “White Democratic Primary,”* 26 J. Negro Ed. 249, 250 (1957).

political process cases, perhaps most notably the majority opinion in *Tashjian v. Republican Party of Connecticut*.<sup>127</sup> This skepticism led Justice Marshall to support aggressive judicial intervention in both inter- and intra-party disputes, an unsurprising response given his own history of using litigation as a way to promote equality and to reform institutions. Nothing in Justice Marshall's experience with political parties or election laws would have convinced him that the courts had a different role in these cases than he believed they should play in cases designed to ensure equality of opportunity in education, housing or other arenas.

Notwithstanding his unwillingness to trust established political players to support structures that welcome new voices, Marshall understood the important role that major political parties play in our political system, most notably in providing information to voters. Given Marshall's objective to transform campaigns and elections so that they include significantly more parties and candidates in, voting cues like those of partisan affiliation and party endorsement are particularly important to help voters cast their ballots competently. Again, his jurisprudence reveals his support for rules that allow the major parties to better serve their informative function.

When the state seeks to regulate political activity, First Amendment jurisprudence requires that it articulate some significant interest to justify the regulation and that it demonstrate a close and logical connection between the justification and the method of regulation. In many political process cases, justices have been willing to accept legislative assertions of the facts used to support the regulation without much by way of proof – rigorous or otherwise – that the assumptions are accurate. For example, in ballot access cases, claims that voters will be confused by too many candidates on the ballot or by institutions like fusion candidates are often accepted by the Court as valid without any proof of actual confusion.<sup>128</sup> In contrast, Marshall was not

---

<sup>127</sup> 479 U.S. 208 (1986).

<sup>128</sup> See, e.g., *Munro*, 479 at 195-96 (“To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the ‘evidence’

willing to defer so readily to legislative pronouncements – which he understood to be made by partisan actors who may be working for their own interests rather than the public interest, particularly when it comes to structuring the system that affects their political careers.<sup>129</sup> Although his opinions do not use the language of “partisan lockup” or “conflict of interest” that now characterizes some law and politics scholarship that shares the Justice’s skepticism,<sup>130</sup> Marshall’s jurisprudence sounds some of the same themes relating to competition in the political realm. Several Marshall opinions question the quantum of evidence adduced by the state to support a particular regulation of the political process. By insisting on more persuasive evidence, the Justice clearly implied that the regulators’ objective might be less public-minded than they claim.

There are several examples of Marshall’s demand for evidence. In his dissent in *Richardson*, he discounted California’s assertion that ex-felon disenfranchisement is required to prevent vote fraud, noting that “there has been no showing that ex-felons generally are more likely to abuse the ballot than the remainder of the population.”<sup>131</sup> In sharp contrast to the majority opinion, his dissent in *Munro* relied on empirical arguments that the less restrictive ballot access regulation in place before 1977 did not result in ballot overcrowding or voter confusion.<sup>132</sup> Moreover, he noted that the evidence clearly showed that the limitation enacted in 1977 “acts as an almost total bar to minor-party access to statewide general election ballots.”<sup>133</sup> A footnote in *Tashjian* hinted that the difficulty in showing any evidence of party raiding that is

---

marshaled by a State to prove a predicate.”). See also Elizabeth Garrett, *supra* note 18, at 124-25 (making this point in the context of fusion candidacies).

<sup>129</sup> See *Tashjian*, 479 U.S. at 224 (describing the state as “to some extent ... one political party transiently enjoying majority power”).

<sup>130</sup> See, e.g., Issacharoff & Pildes, *supra* note 12; Richard H. Pildes, *The Theory of Political Competition*, 85 Va. L. Rev. 1605 (1999); Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 Sup. Ct. Rev. 331 (1997). See also Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 Colum. L. Rev. 775, 788-91 (2000) (describing the political markets paradigm).

<sup>131</sup> 418 U.S. at 79.

<sup>132</sup> 479 U.S. at 200-201.

<sup>133</sup> *Id.* at 206.

often a rationale for ballot access restrictions might “attenuate[] the asserted state interest in preventing the practice.”<sup>134</sup> Marshall’s majority opinion in *Eu v. San Francisco County Democratic Central Committee*,<sup>135</sup> striking down a ban on party endorsements of candidates during primaries, repeatedly pointed out that the asserted state interests were not sustained by any evidence of voter confusion or undue influence by political parties.<sup>136</sup> He noted that the support of a legislator for the ban might have been motivated by “her understanding of the public good *or her interest in reelection*.”<sup>137</sup> Whether the court can competently assess empirical arguments can be debated,<sup>138</sup> but Marshall’s repeated insistence on better evidence was one way he sought to unmask the state’s true anti-competitive objectives in some regulatory schemes.

Marshall’s majority opinion in *Tashjian* is informed by his unwillingness to accept at face value the benign motives that the state legislature articulated. Connecticut required that only registered members of a political party be allowed to participate in the party’s primary. The Republican Party adopted a rule that allowed independent voters also to vote in its primary; the Party hoped that the addition of independent voters, an increasingly important part of the electorate in the state, would increase the chance that the Republican nominee would appeal to those voters in the general election. Although Republicans, a minority in the legislature, proposed to amend the laws regulating primaries to allow independents to vote in party primaries when allowed by party rules, the bill was defeated in a party-line vote. Justice Marshall’s opinion ruled that the legal restriction on who could participate in party primaries unconstitutionally burdened the members’ right of political association.

---

<sup>134</sup> 479 U.S. at 219 n.9.

<sup>135</sup> 489 U.S. 214 (1989).

<sup>136</sup> *Id.* at 228-29; 232-33.

<sup>137</sup> *Id.* at 225 n.15 (emphasis added).

<sup>138</sup> I have been skeptical of the judicial capacity to make these determinations. See Garrett, *supra* note 18. See also Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law after Randall v. Sorrell*, 68 Ohio St. L.J. 849 (2007) (arguing that using evidence to determine the effectiveness and necessity of campaign finance laws is often speculative and subjective).

Although such a holding could have been supported by a view of political parties as largely private organizations that should be free of state interference,<sup>139</sup> Justice Marshall's experience with the white primary cases and with politics generally led him to reject this characterization of parties and primaries. In another case, he observed:

The State is intertwined in the [primary election] process at every step, not only authorizing the primary but conducting it, and adopting its result for use in the general election. In these circumstances, the primary must be regarded as an integral part of the general election....<sup>140</sup>

Instead of viewing political parties as essentially private groups, Marshall looked to see if those with power in the political system were impermissibly manipulating rules and institutions to maintain their power and exclude new voices and perspectives. In *Tashjian*, the partisans in the state legislature – the Democrats in the majority – were seeking to retain rules that they hoped would allow them to continue to dominate the Republican Party in elections. Republicans' best chance of wresting power in the state lay in appealing to the significant block of independent voters, and the Party was more likely to do that with a candidate selected with some input by independents in the primary election.

Of course, one problem with these cases is that political parties are complicated; each major party encompasses numerous interests that it seeks to reconcile into an effective governance organization. Consider the complexities of the situation in *Tashjian*. Although Marshall was concerned that those in the Republican Party who wished to shape the party to be more inclusive of independents and thus more centrist in its platform had been silenced by the competing major party, Justice Scalia saw a different sort of silencing. He worried that the party

---

<sup>139</sup> Some analyses of the majority in *Tashjian* have viewed it in this light. See Lowenstein, *supra* note 10, at 1751 (concluding that “in *Tashjian* the party was treated as a bearer of First Amendment rights and therefore presumably private rather than public”).

<sup>140</sup> *O'Brien v. Brown*, 409 U.S. 1, 13 (1972) (application for stay granted) (Marshall, dissenting). See also Marshall, *supra* note 126, at 249 (indicating that he disagreed with the notion that the political party is a “voluntary association of citizens” because of its public role in elections).

elite, eager to seize the reins of power at any ideological cost, were squelching the voices of party activists who might value policy purity over electoral success.<sup>141</sup> Given the complexities of parties with their many diverse interests, and the possibility that the political process may allow interests that lose today's battle to win tomorrow, I have contended that courts should be hesitant to intervene in political party cases.<sup>142</sup> Similarly, Lowenstein has argued against intervention in intraparty cases and even in many interparty cases, including *Tashjian*.<sup>143</sup>

Marshall, however, advocated for judicial intervention when necessary to combat the self-interest of established political players. He supported judicial involvement to protect new voices in cases of regulations burdening minor parties, in interparty disputes like *Tashjian*, and also in intraparty disputes where members of the party-in-government disagreed with members of the party-organization<sup>144</sup> (as in *Eu*). In his dissent in *O'Brien v. Brown*,<sup>145</sup> he took issue with the majority's decision to stay out of an internal party squabble about which delegates to seat at the 1972 Democratic convention. Characterizing the party as a "voluntary association[] of individuals," the Court had determined that the convention was the appropriate forum to determine intraparty disputes about credentialing delegates. Although it did not rule out subsequent intervention, the majority understood that its decision "may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee."<sup>146</sup> In contrast, Marshall would have allowed the case to go forward because the allegations implicated the rights of the voters who elected the delegates to "full participation in the electoral process as guaranteed by the United States Constitution."<sup>147</sup> He was not hesitant about judicial intervention even in this very internal matter of a political party

---

<sup>141</sup> 479 U.S. at 236 (Scalia, dissenting). See also Garrett, *supra* note 18, at 119.

<sup>142</sup> See Garrett, *supra* note 18, at 143-52 (also identifying factors that would overcome judicial restraint).

<sup>143</sup> See Lowenstein, *supra* note 10, at 1789.

<sup>144</sup> These designations of the aspects of a political party are taken from Key's classic study of political parties that identified three elements of a political party: party-in-the-electorate, party-organization, and party-in-government. V.O. Key, *Politics, Parties, and Pressure Groups* 163-64 (5th ed. 1964).

<sup>145</sup> 409 U.S. 1 (1972).

<sup>146</sup> *Id.* at 5.

<sup>147</sup> *Id.* at 6-7 (Marshall dissenting).

because of the importance of the convention, as well as the primaries that selected the convention delegates, to the election of the president. He advocated for a quick resolution of the controversy because delay was untenable. Unless the Court ruled quickly, it would be faced with halting the convention before a nominee was selected to review the credentialing decision or, if it found a constitutional infirmity in the selection process after the nominee had been determined, requiring that the convention be held again. He rejected the notion that the case would become moot through the passage of time because of the important interest at stake: “the right to *participate* in the machinery to elect the President of the United States.”<sup>148</sup>

Although he was comfortable with aggressive judicial intervention in the affairs of political parties and he saw them more as public than private institutions, Marshall was not hostile toward the major parties, and he did not support regulation that would substantially weaken them. Rather, he understood that they played an important role in shaping the political process. Indeed, because he acknowledged the public benefits that parties provide, he was adamant that there should be an equal opportunity for all citizens to participate in these democratic institutions. His dissent in *Renne v. Geary*,<sup>149</sup> which dealt with party endorsements in nonpartisan elections, includes a sophisticated discussion of the importance of political party voting cues.<sup>150</sup> He rejected the state’s argument that partisan endorsements in nonpartisan campaigns would allow parties to exert disproportionate influence over outcomes in such races. He noted that parties were inevitably influential in our system, even in nonpartisan races, because “voters look to others, including parties, for information relevant to exercise of the franchise.”<sup>151</sup> As long as the state chooses to use elections to select officials (rather than appointing them), it cannot then enforce an environment of “state-imposed voter ignorance.” He concluded:

---

<sup>148</sup> Id. at 10 (emphasis in original).

<sup>149</sup> 501 U.S. 312 (1991).

<sup>150</sup> For a description of the literature in law and politics about voting cues, see Elizabeth Garrett, *Voting with Cues*, 37 Rich. L. Rev. 1011 (2003).

<sup>151</sup> Id. at 349 (Marshall dissenting).

If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process – voters, candidates, *and* parties – the First Amendment rights that attach to their roles.<sup>152</sup>

Marshall’s dissent in *Renne* is also interesting because the state had relied on his opinion in *Austin* to equate political parties with corporations and had argued that party involvement in nonpartisan elections resulted in corruption of the political process. Marshall strongly rejected that reading of *Austin*. Unlike corporations, which build their resources as people make economic decisions to invest, political parties accumulate political capital through voter support that the parties then expend through their endorsements.<sup>153</sup> “In sum,” Marshall wrote, “the prospect that voters might be persuaded by party endorsements is not a *corruption* of the democratic political process; it *is* the democratic political process.”<sup>154</sup> This passage demonstrates that while Marshall supported a more robust political system with stronger minor parties and more candidates in each election, he also understood the vital role major parties play in structuring elections and government and providing informational shortcuts to voters.

*Renne* was not a difficult case in Marshall’s view because it was controlled by *Eu v. San Francisco Democratic Central Committee*, a unanimous decision by the Court penned by Marshall.<sup>155</sup> The California law at issue in *Eu* prohibited parties from endorsing candidates in primary elections, and some county committees of both major parties and some organizations of minor parties attacked this regulation as unconstitutional. Marshall claimed he saw this as censorship of the party that hindered its ability to spread its message, but this cannot be his main reason for opposing the law. This line of argument in *Eu* cannot be reconciled with his willingness to limit speech in the campaign finance cases in order to improve the overall political discussion and debate. Although he did not cite those campaign finance cases for this

---

<sup>152</sup> *Id.* (emphasis in original).

<sup>153</sup> *Id.* at 348-49.

<sup>154</sup> *Id.* at 349 (emphasis in original).

<sup>155</sup> 501 U.S. at 347 (“In my view, this case is directly controlled by *Eu*.”).



proposition, he warned that “a State’s claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.”<sup>156</sup> This sentiment is not consistent with his view that campaign finance laws could restrict the money that well-heeled corporations, groups and individuals spend in political campaigns when that spending distorts the dialogue to reduce the influence of ordinary voters. Moreover, if protecting the political party was the main impetus of the Court’s decision in *Eu*, it is not clear that striking down the law is the response the leaders of the parties or even a majority of party members would want. *Eu* is the quintessential intraparty dispute where some active in the parties, including those in the legislative branches, supported the endorsement ban while others in some party committees sought the ability to endorse candidates in the primary.<sup>157</sup>

Instead, the primary reason that Marshall disapproved of the ban on party endorsements is that he believed this information is crucial for voters to cast informed ballots. Although Marshall thought that broad participation in democracy is important to demonstrate that all citizens are worthy of equal respect, he was also intensely pragmatic. Only if voters know what they are doing on Election Day can their votes result in policy change that a majority prefers. He was aware that voters do not develop encyclopedic knowledge about each of their electoral choices, but that they rely on shortcuts like party affiliation and endorsements by trusted sources of information. Thus, in *Eu*, Marshall indicted the endorsement ban as “hamstring[ing] voters seeking to inform themselves about the candidates and the campaign issues.”<sup>158</sup> He was especially concerned because of evidence that other groups had been appropriating the party label in order to mislead voters who sought to rely on this generally credible voting cue.<sup>159</sup> He understood that major parties worked to develop meaningful political capital that could then

---

<sup>156</sup> 489 U.S. at 228 (quoting *Tashjian*, 479 U.S. at 221, which in turn is quoting *Anderson v. Celebrezze*, 460 U.S. 780, 798 (1983)).

<sup>157</sup> See Lowenstein, *supra* note 10, at 1783-85.

<sup>158</sup> 489 U.S. at 223.

<sup>159</sup> *Eu*, 489 U.S. at 228-29 and 228 n.18.

provide voters credible and accurate information.<sup>160</sup> It is not sufficient that a candidate in the general election would carry the party's affiliation on the ballot; trustworthy information that can serve as the basis for a voting cue is important in primary elections which Marshall consistently characterized as vital parts of the electoral process. If democratic institutions are properly designed and open to broad participation by many citizens, then the integrity of political parties and voting cues must be protected to ensure that they can vote in ways that influence policy in directions they support.

#### **IV. Conclusion**

Thurgood Marshall's life – as a litigator and a jurist – is a testament to his commitment to the words engraved above the entrance to the Supreme Court building: Equal Justice Under Law. His jurisprudence relating to law and politics – elections, campaigns, and political parties – provides his vision of a well-functioning democracy where all citizens have the equal opportunity to participate, and change occurs in a somewhat orderly, but also somewhat chaotic, process through political institutions, overseen by an active independent judiciary. Regulation of the political process is necessary, he believed, to ensure that the voices of all Americans, even those without substantial economic resources, are heard by our elected officials and can play a role in influencing policy change. Although the country has fallen short of Justice Marshall's aspirations in this realm, as we have in other realms where he worked toward equality of opportunity, the arguments he made in these cases can continue to guide us as we work to design democratic institutions that allow opportunities for the full diversity of America's voices to be heard.

---

<sup>160</sup> See *Renne*, 501 U.S. at 349-50; *Eu*, 489 U.S. at 227-28.