2001

Cook v. Gralike: Easy Cases and Structural Reasoning

Vicki C. Jackson

Georgetown University Law Center, jacksonv@law.georgetown.edu

<http://www.press.uchicago.edu/Complete/Series/SCR.html>

This paper can be downloaded free of charge from:

<https://scholarship.law.georgetown.edu/facpub/105>

Sup. Ct. Rev. 299-345 (2001)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.

Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

Part of the [Constitutional Law Commons](#), and the [Jurisprudence Commons](#)

GEORGETOWN LAW

Faculty Publications

January 2010

Cook v. Gralike: Easy Cases and Structural Reasoning

2001 Sup. Ct. Rev. 299-345 (2001)

Vicki C. Jackson

Professor of Law

Georgetown University Law Center

jacksonv@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: <http://scholarship.law.georgetown.edu/facpub/105/>

Posted with permission of the author

COOK v GRALIKE: EASY CASES
AND STRUCTURAL REASONING

In the spring of 2001, Charles Black died. His death occurred at a time when the Supreme Court's reliance on what Black called "structure and relationship in constitutional law" is on the ascent in many cases involving questions of federalism. In cases involving Congress's authority to require state and local officials to administer federal law and its authority to subject states to suits under otherwise valid federal laws, the Court has explicitly relied, not on text, but on basic principles it believes immanent in the structure of the United States as a federal union.¹ Frequently these decisions have been issued by narrow majorities, over strong dissents.

In *Cook v Gralike*, the Court—unanimous as to result—struck

Vicki C. Jackson is Professor of Law at Georgetown University Law Center.

AUTHOR'S NOTE: While serving as a Deputy Assistant Attorney General for the Office of Legal Counsel in the U.S. Department of Justice in the year 2000, the author had some involvement in work on the position taken by the United States in the amicus brief that it filed in the Supreme Court in *Cook v Gralike*, 121 S Ct 1029 (2001). The views expressed herein are only those of the author, and do not necessarily represent the views of the United States, Georgetown University Law Center, or any other entity. I want to thank Susan Low Bloch, Marty Lederman, Bill Treanor, and Mark Tushnet for helpful comments on earlier drafts.

¹ See, e.g., *Alden v Maine*, 527 US 706 (1999) (concluding that states have sovereign immunity in their own courts on federal claims brought by their own citizens under federal laws, notwithstanding narrower reach of Eleventh Amendment text); *Printz v United States*, 521 US 898 (1997) (establishing that Congress may not require state officials to administer federal laws); *Seminole Tribe v Florida*, 517 US 44 (1996) (holding that Congress lacks power to subject states to suit in federal court on federal laws enacted under Article I powers). A similar emphasis on structural principles can be found in recent cases on the scope of the Commerce Clause power. See, e.g., *United States v Lopez*, 514 US 549 (1995) (holding federal law prohibiting guns near schools to be outside Congress's powers under the Commerce Clause in light of the basic principle that there must be some division between the truly local and the truly national).

down a Missouri initiative amending the state constitution to require that the failure of candidates for U.S. Congress to support a particular term-limits amendment to the United States Constitution be noted on the ballot. In an opinion joined by seven Justices, the Court held that the Missouri law exceeded the scope of states' powers to regulate the "time, place and manner" of holding congressional elections.² Two other Justices concurred in the judgment but on the ground that the ballot-labeling requirement violated the First Amendment right of a political candidate "once lawfully on the ballot, to have his name appear unaccompanied by pejorative language required by the State."³ The opinions are analyzed preliminarily in Part I.

Part II below suggests that even if there were no Elections Clause, or no First Amendment, the basic structure of the Constitution of the government of the United States would require the same result as that which the Court reached under those provisions. Paying attention to the structures and relationships of structures under the Constitution, as Charles Black urged,⁴ one could say that a representative democracy—plainly contemplated by the Constitution's provisions for the federal legislature and federal elections—is dependent on the operation of elections unbiased by the existing government. Free choice in the selection of representatives is a foundational linchpin in representative democracies. Comparative constitutional experience in countries that lack obvious textual analogues to the First Amendment or the Elections Clause supports the result. Thus, even without those clauses, this case was, as Justice Kennedy suggested, not a close one for a constitutional court in a representative democracy.

Part III explores some reasons why the Court may have chosen to rely on particular constitutional text and to have crafted a narrow holding. First, there is the familiar attraction of text and precedent as bases for decision. Second, the shadow of *Bush v. Gore*⁵ may have made appeal to an explicit and discrete text more attractive. Third, anti-incumbency and ballot-labeling measures gener-

² *Cook v. Gralike*, 121 S. Ct. 1029 (2001).

³ Id. at 1042 (Rehnquist, C.J., concurring in the judgment).

⁴ See Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (LSU Press, 1969).

⁵ 531 U.S. 98 (2000).

ally pose difficult normative questions about what kind of democracy the Constitution commits us to, as well as difficult questions of the permissible range of government speech.⁶ These substantial, lurking conceptual difficulties, and their relationship to the multiple functions of elections in checking, choosing, and legitimating representatives, may help account for the narrowness of the holding.

I. THE JUSTICES' OPINIONS

In contrast to the closely divided Court of *U.S. Term Limits, Inc. v Thornton*,⁷ the nine Justices of the Court in *Cook v Gralike* were all agreed on the result.⁸ The requirement at issue was that the ballot note failures by candidates for the office of U.S. Senator or Representative to support a particular proposed term-limits amendment to the U.S. Constitution, by including the words "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS," or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" next to their names on the ballot. Justice Stevens, writing for the Court, held this requirement to be unconstitutional, and in so doing, relied on two propositions.

Most centrally, the Court held that, regardless of whether states had some reserved powers to instruct their national representatives, the states' only powers to regulate or control elections to Congress were those given in Article I, Section 4, clause 1 of the Constitution to regulate the "Times, Places and Manner" of elections, powers that did not extend to the proposed ballot labels. The so-called Elections Clause, the Court held, was "'a grant of authority to issue procedural regulations,'" not a "source of power to dictate electoral outcomes, to favor or disfavor a class of candi-

⁶ See Mark G. Yudof, *When Government Speaks: Politics, Law and Government Expression in America* (U Cal, 1983); Steven Shiffrin, *Government Speech*, 27 UCLA L Rev 565 (1980); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 NYU L Rev 675 (1992); Robert C. Post, *Subsidized Speech*, 106 Yale L J 151 (1996); Martin Redish and Daryl Kessler, *Government Subsidies and Free Expression*, 80 Minn L Rev 543 (1996); Abner Greene, *Government of the Good*, 53 Vand L Rev 1 (2000) and *Government Speech on Unsettled Issues*, 69 Fordham L Rev 1667 (2001).

⁷ 514 US 779 (1995).

⁸ See 121 S Ct at 1041 (Kennedy, J, concurring) (noting that "[i]n today's case the question is not close").

dates. . . .”⁹ The ballot-labeling requirement, the Court said, bore “no relation to the ‘manner’ of elections” in its “‘commonsense’” meaning “encompass[ing] matters like ‘notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns’.”¹⁰ The Missouri law was “plainly designed to favor candidates” willing to support the particular term limit amendment and disfavor others, by “attach[ing] a concrete consequence to noncompliance” with the voters’ wishes—the “‘pejorative’” ballot label.¹¹ Further, the “adverse labels handicap candidates ‘at the most crucial stage in the election process—the instant before the vote is cast’.”¹² And by calling attention to only one issue, the label implies that that issue is the most important.¹³

Insisting that the states had no reserved powers to regulate federal elections but only those powers specified in the Constitution, the Court also rejected the argument that the state law in question, enacted by referendum as part of the Missouri constitution, should be upheld as part of the state’s reserved power to give instructions to its representatives in the Congress. In Part III of the opinion—a portion joined by only five members of the Court¹⁴ and qualified by Justice Kennedy’s concurrence—Justice Stevens rejected the state’s argument that its law was “a valid exercise of the State’s reserved power to give binding instructions to its representatives”¹⁵ Evaluating historical evidence, Justice Stevens’s opinion stated that members of the First Congress concluded that “binding instructions would undermine an essential attribute of Congress by eviscerating the deliberative nature of that National Assembly.”¹⁶

⁹ Id at 1038, quoting *U.S. Term Limits, Inc. v. Thornton*, 514 US 779, 833–34 (1995).

¹⁰ Id at 1038 quoting *Smiley v. Holm*, 285 US 355, 366 (1932).

¹¹ Id at 1038–39.

¹² Id at 1039, quoting *Anderson v. Martin*, 375 US 399, 402 (1964).

¹³ Id.

¹⁴ Justice Thomas concurred in the judgment and in Parts I and IV of the Court’s opinion; Chief Justice Rehnquist, joined by Justice O’Connor, concurred in the judgment but on First Amendment grounds; and the Court’s opinion notes that Justice Souter does not join in Part III of the Court’s opinion. Part IV of the opinion, joined by seven Justices, addresses the Elections Clause issue.

¹⁵ 121 S Ct at 1036.

¹⁶ Id at 1037.

Justice Kennedy, who joined Part III of the Court's opinion, also wrote separately, agreeing that the ballot label was unconstitutional because states cannot "interfere with the direct line of accountability between the National Legislature and the people who elect it," but emphasizing that states may engage in more hortatory conduct requesting the Congress "to pay heed to certain state concerns."¹⁷ He sought, then, to distinguish ballot labels that seek to "interpose [the State] between the people and their National Government" from "nonbinding petitions or memorials by the State as an entity."¹⁸ Chief Justice Rehnquist, with whom Justice O'Connor joined, would have held that Missouri's Article VIII violated the First Amendment right of a candidate once lawfully on the ballot to have his name appear unaccompanied by pejorative language required by the state.¹⁹

The majority decision, then, rested on the Elections Clause. The Elections Clause appears to be a relatively narrow basis for decision. To illustrate, consider whether the holding—that the Elections Clause does not authorize states to require ballot labels, such as that required here—would apply as well to the federal government's authority to regulate federal elections pursuant to the same clause. Would a national law, requiring identical labeling for candidates who oppose amending the constitution to provide for term limits, likewise be unconstitutional? Must the limitations of the Elections Clause apply in *pari materia* to federal as well as state laws regulating congressional elections? The Court's opinion strongly suggests but does not clearly require this result.

On the one hand, since the federal government's authority is likewise derived from the Constitution, and the congressional power to set forth such rules is also most obviously based on the Elections Clause, it would be reasonable to conclude that the same

¹⁷ Id at 1041.

¹⁸ Id at 1040, 1041. Justice Thomas concurred in only a portion of the Stevens opinion, noting his continued disagreement with the premise, derived from *Term Limits*, that states lack authority to regulate congressional elections other than that expressly given to them. Id at 1041–42. Justice Thomas wrote, however, that since the parties conceded the validity of that premise, he concurred in the judgment. None of the other *Term Limits* dissenters joined Thomas's separate opinion here. Logically, it would seem that Justice Thomas agreed with the Court's analysis of the scope of the Elections Clause's recognition of states' power to determine the time, place, or manner of elections, for had he thought this ballot-label law fairly encompassed in that grant of power he would presumably have dissented.

¹⁹ Id at 1042.

limitations would apply—that is, that the federal government would lack power to make regulations that are other than procedural in character, that are designed to favor one class of candidates over another. On the other hand, *Gralike* is arguably distinguishable because the federal government may have greater powers over the scope of election regulations than do the state governments. The states, the Court's opinion was at pains to emphasize, can have no reserved powers with respect to the elections of a federal government, and "[n]o other constitutional provision gives the States authority over congressional elections."²⁰ Does the scope of Congress's enumerated powers leave room for an argument that other federal powers support a broader federal authority with respect to the conduct of congressional elections than that provided in Article I itself?²¹ While there is a strong argument that it does not, in part because of the relatively specific provisions for shared state-federal authority over the conduct of national elections,²² even this closely allied question is not thoroughly put to rest by the *Gralike* opinion.

²⁰ *Cook v Gralike*, 121 S Ct at 1038. This has been regularly asserted. See *U.S. Term Limits v Thornton*, 514 US at 805; see also *Newberry v United States*, 256 US 232, 280–81 (Pitney, J, concurring) (1921) (referring to Article I, Section 4 as "conferring" power on state legislatures subject to revision and modification by Congress and as being the only source of such authority, the states having no reserved powers over "a matter that had no previous existence"). But see Justice Thomas's dissent in *Term Limits*, 514 US at 846–52 & n 3. Note, too, that *Term Limits* relied in part on *Powell v McCormack*, 395 US 486 (1969), which held that the House of Representatives could not add to the qualifications for office set forth in Art I § 2 in "judg[ing] . . . the Elections, Returns and Qualifications of its own Members" under Art I § 5; *Powell* did not address the scope of Congress's powers to enact laws concerning the time, place, or manner of holding elections under Art I § 4.

²¹ Could Congress invoke its power over foreign commerce to enact a statute requiring that the ballots for congressional offices remind voters to consider the candidate's records on foreign affairs issues in deciding for whom to cast their vote? Evaluating such a statute would require going beyond the reasoning in *Gralike* to consider the relationship between Congress's Article I, Section 8 powers and the power granted Congress in Article I, Section 4 to otherwise direct the states as to the time, place or manner of holding elections. On the one hand, a "holistic" approach to constitutional interpretation might read the powers in these two sections together, cumulatively, or perhaps even synergistically, to support the claimed power. But see *Newberry v United States*, 256 US 232, 249 (1921) (rejecting argument that "because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from section 4"). On the other hand, as I will argue below, there is a more basic structural principle that underlies both the rule in *Gralike* and the correct resolution of the constitutionality of this hypothetical statute: that governments cannot, in their governmental capacity, try to influence voters' decisions in an election for or against particular candidates.

²² On this point, see *Smiley v Holm*, 285 US 355, 367 (1932). The availability of other powers as a basis to regulate elections outside the confines of the Elections Clause is related to a more general question whether grants of power in the Constitution should be read

Moreover, to the extent that the Court's opinion rests on conceptions of the deliberative democracy contemplated for the federal government by the Constitution, there might be even more reason to think that a different standard would apply to elections for state offices, in light of the Court's refusal to find constitutional requirements for a deliberative rather than plebiscitary democracy at the state level in the context of lawmaking by referendum.²³ Consider a state law requiring, let us say, that candidates for public state office who oppose a term-limits provision for state office be so identified on the ballot—does *Cook v Gralike* speak to the constitutionality of such a requirement? The opinion by Justice Stevens for the Court certainly does not do so directly; the holding appears limited to state authority to regulate elections for federal office. For an answer to this question, though, the separate concurrence of Chief Justice Rehnquist, joined by Justice O'Connor, speaks quite clearly.

Rehnquist articulates a First Amendment violation: the right of a political candidate once lawfully on the ballot to have his name appear “unaccompanied by pejorative language.”²⁴ Associating this right of a candidate with the right of a voter, the Chief Justice goes on to describe the nature of the evil in terms not that dissimilar, from a functional point of view, from the majority. Indeed, in the second paragraph of his opinion he links Article I, Section 4's authority to regulate the “Times, Places and Manner of holding Elections” to the scope of authority under First Amendment case

so as to avoid redundancy. Compare *Ex parte Yarbrough*, 110 US 651, 666–67 (1884) (upholding federal criminal statute relating to state officials' conduct of elections and asserting that “it is a waste of time to seek for specific sources of the power to pass these laws” because such a power is essential to sustaining a free and democratic republic and thus is well within the powers of the national government), with *Newberry v United States*, 256 US at 255–56 (quoting *Federalist Papers* to support a very limited concept of the authority of the federal government to regulate elections, pursuant only to the Elections Clause). For further discussion, see *United States v Lopez*, 514 US 549, 588–89 (1995) (Thomas, J, concurring) (arguing that enumerated powers should be construed to avoid redundancy); Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U Ill L Rev 1119 (arguing that intellectual property clause (for “Authors and Inventors”) constrains powers in ways that circumvent the limitations of that clause); see also Mark Tushnet, *The Redundant Free Exercise Clause*, 33 Loyola U Chi L J 71 (2001); John Hart Ely, *Interclausal Immunity*, 87 Va L Rev 1185 (2001).

²³ See, e.g., *Pacific States Tel. & Tel. Co. v Oregon*, 223 US 118 (1912) (holding Guarantee Clause attack to be nonjusticiable with effect of sustaining validity of state laws enacted by initiative and referendum).

²⁴ 121 S Ct at 1042.

law to regulate the time, place, and manner of speech. Importing First Amendment standards of content and viewpoint neutrality into the regulation of elections, the Rehnquist opinion seems to suggest that the First Amendment and the Time, Place, and Manner Election Clause should in some sense be read in *pari materia*—as structurally related one to the other.²⁵ More concretely, for my purposes here, under the Rehnquist opinion there is little question that the first of the hypotheticals posed above—a federal law requiring similar ballot labeling for congressional elections—would be found unconstitutional, as would a state ballot labeling law for state office with a description deemed “pejorative.”

But neither the majority opinion nor that of Chief Justice Rehnquist provides clear guidance on more general questions of ballot labeling. Consider a different kind of state ballot labeling law, one not so obviously designed to disadvantage candidates of one particular view—for example, by describing whether the candidate supported or opposed term limits for members of Congress (without language about “disregard[ing] voters” or “declin[ing] to pledge”),²⁶ or, to take another example, noting whether the candidate supported or opposed the death penalty. Would the majority consider such a label as an attempt to “favor or disfavor a class of candidates” and thus within the scope of its ruling? Would an evenhanded law requiring a ballot label for legislative candidates pass constitutional muster?²⁷

To answer this question, one needs to decide the extent to which the majority opinion rests on the concern over the ballot identifying any one issue as of central importance. It is unclear whether the Court’s conclusion that the Missouri ballot-labeling requirement was outside the scope of “Times, Places and Manner” regulations turned on the existence of *any* label on the ballot (at the

²⁵ For discussion of intratextual structural interpretation, see Akhil Reed Amar, *Intratextualism*, 112 Harv L Rev 747 (1999).

²⁶ It was widely noted that the language of the ballot label in the Missouri case was designed to invite voter dislike for the candidate based not only on the candidate’s position on term limits but on questions of the character and responsibility of a candidate who “disregards” voters instructions or “declines to pledge” to support “voters’ instruction.” See, e.g., Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Notations*, 85 Va L Rev 1533, 1576–77 (1999).

²⁷ For a helpful discussion of the relationship between viewpoint, subject matter, and motive in First Amendment law, see Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U Chi L Rev 81 (1978).

moment before voting), on the presence of a label relating to *one particular issue*, or on the finding that the label is “*pejorative*” and thus clearly intended to influence voters one way in the election. It is likewise unclear to what extent Chief Justice Rehnquist’s opinion turns on the derogatory implications of the required ballot label.²⁸ Rehnquist’s invocation of *Anderson v Martin* might suggest that any effort on the ballot to include even “evenhanded” labeling as to particular issues would meet constitutional objection. *Anderson* found an equal protection violation from the state law requiring designation of a candidate’s race on the ballot. Rehnquist suggested that *Anderson*, like *Gralike*, also presented a problem of the state choosing “one and only one issue to comment on the position of the candidates.”²⁹ Yet *Anderson* did not involve a label as to the political views of the candidate, but rather as to the candidate’s race. The designation of race could obviously be seen as an effort by the state to promote racism; in context, it had a high likelihood of being seen as “pejorative” and as fostering unconstitutional policies.³⁰ So it is not entirely clear that Rehnquist meant to hold objectionable the singling out of one and only one issue for evenhanded comment, in light of the fact that the *Anderson* precedent was one in which the “one” issue could predictably be expected to influence voters to disfavor black candidates.³¹ On an issue like whether to retain the death penalty, which the Court has held to be within the range of choices for state legislatures, a stronger

²⁸ See 121 S Ct at 1042 (Rehnquist, CJ, concurring in the judgment) (describing violation of candidate’s right to appear on ballot without a “pejorative” label).

²⁹ Id at 1042–43, discussing *Anderson v Martin*, 375 US 399 (1964). *Anderson* is also invoked by the Court. Id at 1039.

³⁰ See Laurence Tribe, *American Constitutional Law* 1481 n 9 (2d ed 1988) (suggesting that *Anderson* rested on the labeling provision’s “inevitably discriminatory” effects in light of private prejudice).

³¹ Instead, we might conclude, the Court and Justice Rehnquist would condemn only those ballot labels that are based on a constitutionally irrelevant or problematic basis—in *Anderson*, the race of the candidate, and in *Gralike*, the views and actions of a candidate with respect to a term-limits amendment. But the language of Rehnquist’s opinion suggests that, at least in *Gralike*, it was not that the activity being commented on may have been independently constitutionally protected but rather the fact that the ballot comment was pejorative that was dispositive. See 121 S Ct at 1042 (describing “First Amendment right of a political candidate, once lawfully on the ballot, to have his name appear unaccompanied by pejorative language required by the State”). His language suggests that any pejorative language on the ballot about a candidate—whether it referred to the candidate’s beliefs, partisan identity, or prior actions or job experience—would run afoul of his sense of the constitutional principles of fair elections at stake.

claim could perhaps be made that a ballot-label requirement was purely informational, rather than designed to help one side or the other.

But *Anderson* may be illustrative of a deeper proposition of “single issue” politics: it is difficult to envision the political dynamics by which a requirement of a statement on the ballot of a candidate’s position on a certain issue could come to pass without one side in a contentious debate believing that it was more to its advantage than the other. It is the relatively rare situation in which “neutral” “good government” principles can attract sufficient consensus decision making to overcome the possibility that the reforms in questions are intended, or perceived by some, as a means to particular substantive ends. A “death penalty” label would come about, on this view, only because proponents or opponents believed that requiring such a designation would be more likely to benefit one or the other view. On this view, then, any posited distinction evaporates between labels that favor or disfavor a class of candidates and labels that are “neutral.” While overtly “pejorative” labels may be identified, it is likely to be the case that an “evenhanded” label on a particular issue would have the purpose and effect of favoring or disfavoring a class of particular candidates.³²

Thus, should the case arise in which there is a less obviously pejorative ballot-label requirement about candidates on particular issues, the questions the *Gralike* Court’s opinion asked about the ballot-label rule would need to be addressed and might be difficult to answer. The Court in *Gralike* asked both whether the law was “designed to favor” or disfavor a class of candidates—that is, something akin to a “purpose” test³³—and whether the ballot label

³² For discussion of an analogous issue, see Stone, 46 U Chi L Rev at 110 (cited in note 27) (noting danger of apparently neutral, subject-matter-based restrictions on speech because, despite their facial neutrality, such “restrictions [or, by analogy, compelled disclosures of positions] will often disadvantage one ‘side’ of an issue more than the other, depending upon which ‘side’ is more likely to be affected by the restriction [or mandatory label]”); see also Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion*, 1992 Supreme Court Review 29, 66–67, 68–70 (agreeing with Stone that viewpoint restrictions are more likely to arise from impermissible motives than subject-matter restrictions and exploring difficulty in determining whether distinctions on their face about “subject matter” should be treated as viewpoint regulations). See also note 34.

³³ 121 S Ct at 1038.

in fact “handicapped” those candidates on one side of the issue, that is, an “effects” test.³⁴ In the future, single-issue ballot-labeling requirements for candidates might well fall under the weight of *Gralike*, if the Court adopts a commitment to a thorough, substantive inquiry into purpose and effect.³⁵ Alternatively, a nonpejoratively phrased single ballot-labeling requirement might survive a more formal approach that seeks to determine purpose and effect only from the language of the ballot label itself: a more formal inquiry might conclude from the absence of overtly pejorative language in a ballot label that there was no pejorative purpose, and then either conclude that no particular adverse “effects” can be anticipated or conclude that in the absence of bad purpose, adverse effects are irrelevant.³⁶

So, to recap: Both the majority opinion and the Chief Justice’s concurrence were relatively narrow opinions, resting on a confluence of circumstances, with little to guide future courts on how to decide issues relating to nonpejorative labels, or to government speech about political candidates outside the ballot box. Both the Court’s opinion and Rehnquist’s concurrence turn on (1) a label with clearly pejorative language, (2) on a single issue, (3) appearing on the official ballot that voters see in the ballot booth. The majority’s decision applies most clearly to elections for federal office, while Rehnquist’s rationale would apply as well to elections for state or local office. With this major distinction, the reach of these opinions to other, more “evenhanded” ballot labels remains unclear, as do their implications for other forms of “government

³⁴ Id at 1039. At oral argument questions from the bench sought to address whether any singling out of an issue for a ballot label would be constitutional. See Transcript of Oral Argument, *Cook v Gralike*, No 99-929 (Nov 6, 2000), 2000 WL 1673928 *9-10 (Justice’s question expressing concern for “hurt[ing] the First Amendment rights of all those who happen to think that term limits is not the most important issue in the election . . . [and would] prefer the election [to be] decided on the basis of other issues”).

³⁵ Compare *McIntyre v Ohio Elections Commission*, 514 US 334, 345 n 8 (1995) (noting possibility that facially neutral ban on anonymous electioneering pamphlets “places a more significant burden on advocates of unpopular causes than on defenders of the status quo”).

³⁶ The Court is often skeptical of the degree to which a constitutionally wrongful intent can be inferred from the existence of constitutionally suspect impact. See, e.g., *Washington v Davis*, 426 US 229 (1976), and *Employment Division v Smith*, 494 US 872 (1990). As Elena Kagan has argued, despite a formal emphasis on effects, much First Amendment law “has as its primary . . . object the discovery of improper governmental motives.” Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Law*, 63 U Chi L Rev 413, 414 (1996).

speech” related to elections, ballot propositions, or other public issues.³⁷

II. AN ALTERNATIVE APPROACH: STRUCTURE AND RELATIONSHIP

Gralike relies on the *Term Limits* conclusion that the Elections Clause is only “‘a grant of authority to issue procedural regulations, and not [a] source of power to dictate electoral outcomes [or] to favor or disfavor a class of candidates’”³⁸ This conclusion—that the government bodies running elections cannot seek to dictate electoral outcomes—would follow even if there were no “Elections Clause” or First Amendment but only provisions specifying that members of Congress were to be chosen by elections. Coercion by force—voting at gunpoint for the powers that be—is obviously a more extreme form of undue influence than last minute government propaganda on behalf of one or another candidate in the ballot booth. Yet both forms of conduct pose risks that current officeholders will act so as to prevent the election from performing its most fundamental tasks in a democracy.³⁹

³⁷ Justice Kennedy’s separate concurrence emphasized the legitimacy of forms of government speech by states, with respect to federal constitutional amendments, that are “non-binding.” See 121 S Ct at 1041. For discussion, see note 122.

³⁸ *Gralike*, 121 S Ct at 1038, quoting *Term Limits*, 514 US at 833–34.

³⁹ The short opinion in *Gralike* relies in large part on *Term Limits*. *Term Limits* was, in a sense, an opinion based on constitutional structures of federalism and representative democracy. But federalism values, rather than democracy concerns, played the most important role in the *Term Limits* opinions. Despite invocation of the “‘fundamental principle of our representative democracy’” that “‘the people should choose whom they please to govern them’” as favoring open access to the ballot by a wide range of candidates, *Term Limits*, 514 US at 819, quoting *Powell v McCormack*, 395 US 486, 547 (1969), the Court’s opinion does not treat term limits for state offices as unconstitutional. See *Term Limits*, 514 US at 837. Lower courts have generally treated *Term Limits* as applying only to federal congressional office and have upheld state term limits as against claims that they infringed the voters’ right to choose. See, e.g., *Citizens for Legislative Choice v Miller*, 993 F Supp 1041, 1048 n 8 (ED Mich) (collecting cases upholding term limits for state offices), aff’d 144 F3d 916 (6th Cir 1998); *Bates v Jones*, 131 F3d 843 (9th Cir 1997) (en banc), cert denied, 523 US 102 (1998). See also Kathleen M. Sullivan, *Dueling Sovereignities: U.S. Term Limits, Inc. v. Thornton*, 109 Harv L Rev 78, 102 n 181 (1995) (noting use of language of citizen rights in *Term Limits* but concluding that the case turned on disagreement over structural questions of federalism, because “[o]ne cannot decide whose right is prior—that of the federal citizen to reelect a popular congressman in a given election, or that of the state citizen to tie his own and his fellows’ hands against succumbing to such a representative in the future—without first deciding the structural question of which people, federal or state, ought to control this aspect of federal elections”). Moreover, the Court’s commitment to free choice by the voters on the election ballot is surprisingly tempered across election issues: the Court has upheld substantial restrictions both on ballot access by candidates having small levels of popular support and free voting, most remarkably, in sustaining Hawaii’s ban on write-in votes. See *Burdick v Takushi*, 504 US 428 (1992). See note 111

Commitments to free and fair elections are plainly entailed in the Constitution. Article I makes elections a central mechanism by which the Congress is constituted: it assumed elections for state legislatures and required elections for members of the House. By the 1880s, the Supreme Court had so interpreted Article I, describing the “right to vote for a member of Congress” as fundamental to the Constitution of the United States, and emphasizing that the government’s duty to protect that right “does not arise solely from the interest of the party concerned, but from the necessity of the government itself . . . that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.”⁴⁰

Even with no First Amendment, or no “time, place, and manner” Elections Clause, a constitution for a representative government should be interpreted to prevent undue influence by existing governments on voters’ choices in the ballots in order to assure that the choice is “free and uncorrupted.”⁴¹ The centrality of commitments to a national government based on the people’s frequently expressed and changing views led Charles Black to view the First Amendment itself as “only evidentiary of what would in

(discussing tension between free choice on ballot and free choice in designing structures of governance).

⁴⁰ *Ex parte Yarbrough*, 110 US 651, 662, 663–64 (1884); see also *Ex parte Siebold*, 100 US 371, 388 (1880) (“[t]he due and fair election of [congressional] representatives is of vital importance to the United States”).

⁴¹ See John Hart Ely, *Democracy and Distrust* 120 (Harvard, 1980) (“We cannot trust the ins to decide who stays out. . . .”). Determining what government influence is “undue” is enormously complex. See Part III. The “ins” inevitably have substantial access to the means to influence public opinion, even speaking only for themselves. Much of governing involves attempts to be responsive to voters, to influence them favorably in their regard for the officeholder, often with at least an eye on the next election. Judicial doctrine designed to constrain undue government influence must distinguish current holders of office speaking in their individual capacity from the “government” speaking in its magisterial voice on the ballot, both to protect the speakers’ speech rights and the interests of citizenry in hearing from their public officials. See generally *Bd of Regents of Univ. of Wisconsin v Southworth*, 529 US 217, 229 (2000): “The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.” Some scholars conclude that the factors that should be considered in distinguishing permissible from impermissible government speech are too varied to permit of any single approach, see Shiffrin, 27 UCLA L Rev at 605–22, 655 (cited in note 6) (complexity of interests in government speech require “eclectic” multicategory analysis), and in some respects too difficult for courts to manage other than by remanding to legislatures, see Yudof, *When Government Speaks* at 165–73, 259–306 (cited in note 6).

any case be reasonably obvious—that petition and assembly for the discussion of national governmental measures are rights founded on the very nature of a national government running on public opinion.”⁴² The provisions of Article I for a representative elected body, and the guarantee of a “republican” form of government, imply a government based on the periodically expressed choices of the people. Elections plainly were contemplated even in 1787 as the mechanism for constituting the federal House of Representatives; the Republican Form of Government Clause authorizes the national government to prevent states from having self-perpetuated or hereditary legislatures. Moreover, some form of state elections for parts of the state legislatures was plainly contemplated, because the qualifications for electors for federal office were linked to those for the state legislatures. This commitment to a representative democratic structure would of itself require the conclusion that elections must be free from undue influence by incumbents, fair in their processes, and open to a range of candidates to compete and offer choice to the voters. And were there any doubt as to the constitutional centrality of regular, free, and fair elections, they would be put to rest by the many amendments to the Constitution designed to expand the franchise. The centrality of voting to American citizenship and government—if uncertain in 1789—becomes only more clear when the original document is viewed through the lens of more recent amendments.⁴³

To be meaningful in securing the legitimacy of government and in checking abuses by elected officeholders, elections generally

⁴² Black, *Structure and Relationship* at 41 (cited in note 4). Indeed, he went on to argue that the voting and representation scheme of Article I and the Seventeenth Amendment—the “very structure of the relation between the national representative and his constituency”—itself gives rise to a “compelling inference of some national constitutional protection of free utterance, as against state infringement.” *Id.* at 42.

⁴³ See Ely, *Democracy and Distrust* at 123 (cited in note 41) (arguing that Fourteenth Amendment and later franchise-expanding amendments reflect “a strengthening constitutional commitment to the proposition that all qualified citizens are to play a role in the making of public decisions”); cf. Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 *Stan L Rev* 1259, 1284–95 (2001) (arguing that more recent franchise- and equality-expanding amendments should inform interpretation of earlier parts of the Constitution); but cf. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *Harv L Rev* 1457 (2001) (arguing that amendments themselves may have little effect). The right to vote is assumed in several amendments designed to prevent its being denied based on race, gender, inability to pay a poll tax, or age, and even the Twenty-Seventh Amendment might be understood to reflect the enhanced importance of elections as a check on representatives.

must be free, fair, competitive, and held at relatively frequent intervals. Regular intervals producing frequent elections help avoid reliance on the fiction that popular inertia is acquiescence. Competitive elections require that multiple people actually stand and offer a choice. Free and fair elections are those not tilted by government forces or private violence or monopoly toward any particular candidate. The need for constraint in the use of governmental authority or funds to influence elections is widely reflected in federal statutory law and has been inferred by both state courts in the United States and by constitutional courts of other nations as a basic implication from constitutional commitments to democracy.⁴⁴

A constitutionally inspired infrastructure of statutory law at both state and federal levels prohibits the use of government monies or resources for the purpose of supporting a particular candidate for election or reelection.⁴⁵ Restrictions are also found on the use of government funds to engage in grassroots lobbying, though a distinction is sometimes drawn between such prohibited lobbying and the permissible provision of information.⁴⁶ Such statutes may be

⁴⁴ This is not to say that elections are themselves sufficient for constitutionally legitimate government, but that they are necessary. See Robert Dahl, *On Democracy* 37–38, 95–96 (Yale, 1998) (describing why democracy requires “free, fair and frequent elections”). On the importance of heightened judicial review of efforts by current governments to entrench themselves as against changing views (and demographics) of the people, see Ely, *Democracy and Distrust* at 109–25, 157–70 (cited in note 41); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *Georgetown L J* 491 (1997).

⁴⁵ See, e.g., Ala Code Ann § 17-1-7(b) & (c) (1995) (prohibiting use of official authority to influence votes or use of public money for political purposes); Alaska Stat Ann § 15.13.145 (2000) (prohibiting state bodies from spending public money to influence the outcome of the election of candidates to state or local office); Conn Gen Stat Ann § 9-333f (West 1989) (prohibiting any incumbent candidate in three months before election in which he is a candidate to use public funds to mail flyers intended to bring about his election); Fla Stat Ann § 106.15(2) (West 1992) (prohibiting candidate from using state-owned aircraft or motor vehicle solely for purpose of furthering candidacy); Iowa Code Ann § 56.12A (West 1999) (barring expenditure of public moneys for advocacy of election issues); N D Cent Code § 16.1-10-02 (1997) (prohibiting use of public funds, property, or services to support a candidate); SC Code Ann § 8-13-1346 (1986, Supp 2001) (prohibiting use of public funds or property to influence election outcome); Tex Election Code Ann § 255.003 (Vernon 1986, Supp 2002) (prohibiting use of public money for political advertising); Wash Rev Code Ann § 42.17.128-130 (West 2000) (prohibiting use of public funds or facilities for political campaigns). See also Yudof, *When Government Speaks* at 170–71, 186–87 (cited in note 6) (citing older New York and Texas laws). Compare 5 USC § 1501 et seq & 7321 et seq (1996) (“Hatch Act” restrictions on political activities of federal employees and on some state and local employees on federally financed activities).

⁴⁶ See, e.g., Ill Stat ch 10, § 5/9-25.1(b) (Smith-Hurd 1993, Supp 2001) (“No public funds shall be used to urge any elector to vote for or against any candidate or proposition. . . . This section shall not prohibit the use of public funds for dissemination of factual

thought of as a kind of “invisible constitution,” reflecting, and supporting, constitutional values though not in their specific terms necessarily constitutionally required.⁴⁷ The Constitution does not require criminal sanctions for breach of such rules, but it does suggest that bans on electioneering uses of government money are consistent with basic constitutionalism commitments.⁴⁸ Of course, relying on the presence (or absence) of statutory commitments to prove a constitutional proposition is a tricky business.⁴⁹ Yet in at

information relative to any proposition appearing on an election ballot. . . .”); Iowa Code Ann § 56.12A (West 1999) (stating that ban on expenditure of public moneys for political purposes, expressly including advocacy on ballot issue, shall not be construed to prohibit state or political subdivision from expressing an opinion on a ballot issue through passage of a resolution or proclamation); La Const, Art 11, § 4 (West 1996) (“No public funds shall be used to urge any elector to vote for or against any candidate or proposition. . . . This provision shall not prohibit the use of public funds for dissemination of factual information relative to a proposition appearing on an election ballot”); Tex Election Code Ann § 255.003 (Vernon 1986, Supp 2002) (providing that “communication that factually describes the purpose of a measure” is not barred by prohibition on spending public funds for political advertising “if the communication does not advocate passage or defeat of the measure”); Utah Code Ann § 20A-11-1203 (1998) (exempting from prohibition of public expenditures to influence election the provision of “factual information about a ballot proposition. . . . so long as the information grants equal access to both the opponents and proponents of the ballot proposition”).

⁴⁷ Compare Owen M. Fiss, *The Irony of Free Speech* 48 (Harvard, 1996) (suggesting that government subsidy programs, though perhaps not constitutionally obligatory, “may be more than merely permissible,” and may be “constitutionally favored—an intermediate category lying between the permissible and the obligatory”).

⁴⁸ It might be argued, however, that the widespread adoption of laws restricting the use of public funds for political, election-related purposes coexists with other laws, like the one at issue in *Gralike*, that could be understood to establish a competing tradition. See Brief of Amicus Curiae State of Nebraska in Support of Petitioner, in *Cook v Gralike*, No 99-929 (June 23 2000), 2000 WL 864210, at *3 (stating that following the *Term Limits* decision, ten states adopted similar ballot-label laws concerning term limits). Although this spate of term-limits ballot labels (and the earlier use by some states of arguably similar methods to encourage adoption of the Seventeenth Amendment) can be distinguished in scope and longevity from the kinds of statutes generally prohibiting political uses of public funds, their presence points out that identifying the content of any statutorily embodied constitutional principle is difficult and risks arbitrary distinctions between old and new that might improperly freeze development of constitutional understandings. I explore these ideas further in a work in progress, *The Invisible Constitution*.

⁴⁹ See note 48 *supra*. Statutes are sometimes invoked, though often over dissent, to establish that a constitutional power, or right, exists. See, e.g., *Dames & Moore v Regan*, 453 US 654 (1981) (power); *Coker v Georgia*, 433 US 584, 592 n 4 (1977) (right). Their absence has also been invoked to establish that a power, *Printz v United States*, 521 US 898 (1997) (commandeering), or right, *Stanford v Kentucky*, 492 US 361 (1989) (execution of minors), does not exist, again often over dissent. Some argue that “framework” statutes in particular may reflect constitutional understandings, often seeking to resolve tensions between different constitutional commitments. See, e.g., Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, *Constitutional Law* 390 (Little, Brown, 2d ed 1991) (citing works of Casper and Dam to consider whether the Impoundment Control Act, or War Powers Resolution, or Gramm-Rudman-Hollings are “framework statutes” of a quasi-constitutional nature). For related discussion of U.S. statutory law, see William N. Eskridge,

least one Western constitutional system, France, the Conseil Constitutionnel has relied on well-established statutory regimes as evidence of a “fundamental principle” of associational freedom sufficient to declare invalid a later-enacted statute,⁵⁰ and in Britain the constitution is embodied in a mix of practices and statutory provisions subject to change (at least until recently) by simple act of Parliament. As renewed interest in the constitution outside the courts reflects, constitutional meaning can at least sometimes be found in the work, and output, of legislative branches.⁵¹

State courts have been deeply skeptical of uses of government money to directly sway voters in elections.⁵² Even where legisla-

Jr. and John Ferejohn, *Super-Statutes*, 50 Duke L J 1215, 1267–76 (2001) (defining super-statutes as those which “successfully penetrate public normative and institutional culture in a deep way” and discussing their value in allowing constitutional norms to evolve).

⁵⁰ See the descriptions of the French Associations Case (1971) in Alec Stone, *The Birth of Judicial Politics in France* 64–69, 257–60 (Oxford, 1992); John Bell, *French Constitutional Law* 272–73 (Oxford, 1992).

⁵¹ See, e.g., David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829* (Chicago, 2001); *The Constitution in Congress: The Federalist Period, 1789–1801* (Chicago, 1997). Enthusiasm for crediting nonjudicial constitutional interpretation ranges widely and varies with context, cf., e.g., Mark Tushnet, *Taking the Constitution Away from the Court* (Princeton, 1999), with, e.g., Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv L Rev 1359 (1997), but many scholars acknowledge some role for constitutional understandings reflected in the practice and output of other branches of government. For a recent challenge to judicial “sovereignty” over constitutional interpretation, see Larry D. Kramer, *Foreword: We the Court*, 115 Harv L Rev 4 (2001) (arguing for legitimate authority of political branches in constitutional interpretation in spirit of “popular constitutionalism”).

⁵² See, e.g., *Stanson v Mott*, 17 Cal 3d 206, 217 (1976) (referring to “uniform judicial reluctance to sanction the use of public funds for election campaigns”); *Anderson v Boston*, 380 NE2d 628 (Ma), stay granted, 439 US 1389 (1978), appeal dismissed, 439 US 1060 (1979); *Stern v Kramarsky*, 375 NYS 2d 235 (NY Sup Ct 1975); see also *Mountain States Legal Foundation v Denver School Dist.*, 459 F Supp 357 (D Colo 1978); *District of Columbia Common Cause v District of Columbia*, 858 F2d 1 (DC Cir 1988); *Carter v City of Las Cruces*, 915 P2d 336, 338–40 (NM App 1996); cf. Ark Op Atty Gen No 98-204, 1998 WL 709534 (Ark A G) (discussing permissible and impermissible uses of public funds and forms of government speech); but see *Alabama Libertarian Party v Birmingham*, 694 F Supp 814 (ND Ala 1988) (upholding city’s promotional campaign to encourage passage of taxes and charges to improve public library and emergency 911 services). Note the possible evolution of Justice Brennan’s views. In *Citizens to Protect Public Funds v Board of Education*, 98 A2d 673 (NJ 1953), sitting on the New Jersey Supreme Court, Justice Brennan held impermissible municipal expenditures for a pamphlet on an upcoming local referendum issue. Although the presentation of factual material in such a pamphlet was permissible, Brennan held, the pamphlet went too far in advocating a yes vote and in predicting dire consequences from voting no on the referendum issue. See also *Stanson v Mott*, 17 Cal 3d at 216–17 (approving distinction drawn in *Citizens to Protect* between permissible provision of information and impermissible advocacy of votes). Yet in *Boston v Anderson*, 439 US 1389 (1978), Justice Brennan as Circuit Justice issued a stay of a decision of the Massachusetts Supreme Judicial Court, which had held impermissible a municipality’s expenditures of funds to advocate voter passage of a state-wide referendum. The Court had recently, in *First National Bank of Boston v Bellotti*, 435 US 765 (1978), invalidated another Massachusetts law restricting

tures have authorized government bodies in unmistakable terms to promote a view on controversial issues, courts have been reluctant to extend this authority to activity directed at the government unit's voters as to how they should vote in an election.⁵³ As the Supreme Court of Oregon wrote,

It hardly seems necessary to rely on the First Amendment, at least when government resources are devoted to promoting one side in an election on which the legitimacy of the government itself rests. The principles of representative government enshrined in our constitutions would limit government intervention on behalf of its own candidates or against their opponents even if the First Amendment and its state equivalents had never been adopted.⁵⁴

State courts have not only distinguished between informational and electioneering activities, but also between lobbying another governmental body at a different level of government and "lobbying" one's own voters,⁵⁵ between advocacy of policies and advocacy of particular candidates,⁵⁶ and between advocacy by govern-

corporate power to speak on a referendum issue in a decision to which Brennan dissented. Justice Brennan's opinion granting the stay referred to the *First National Bank of Boston* decision. See 439 US at 1390.

⁵³ See *Miller v California Commission on the Status of Women*, 198 Cal Rptr 877, 883 (1984) (upholding commission's activities, explicitly authorized by state law, to promote passage of Equal Rights Amendment, including lobbying the legislature, but distinguishing such activities from attempts to influence the voters in a matter "submitted to a vote of the people").

⁵⁴ *Burt v Blumenauer*, 699 P2d 168, 175 (Or 1985). The Court held that it was impermissible under state statutory law to expend public monies to persuade members of the public to vote for water fluoridation during an election period but also held that if the expenditures were for informational health purposes, rather than electioneering purposes, they would be permissible.

⁵⁵ See, e.g., *Burt*, 699 P2d at 176-77; *Mott*, 17 Cal3d at 218 (approving "clear distinction" drawn in state statutes between legislative lobbying activities and use of public funds to influence voters in election campaigns); cf. 44 Or Op Atty Gen 448, 1985 WL 200063, *7-8 (Or A G) (student fees cannot be used to fund organization that advocates positions on ballot measures before Oregon voters but may be used under some circumstances to fund groups that take positions on legislation before the state assembly and issues before state or federal courts).

⁵⁶ See, e.g., *Alabama Libertarian Party*, 694 F Supp at 817 (distinguishing between municipal support for "a particular candidate, doctrine or ideology" and municipal support for voter approval of tax increase and levy to improve existing public services). Although this court upheld municipal use of funds to influence voters to approve a tax increase, other courts in the United States and elsewhere have reached quite different conclusions on similar issues. See, e.g., *Burt v Blumenauer*, 699 P2d at 175-81; *Carter v City of Las Cruces*, 915 P2d at 338-39 (raising doubts about federal constitutionality of use of municipal funds to advocate for voter approval of utility acquisition); see text at notes 70-73.

ments themselves and advocacy by individual members of the government.⁵⁷ As the Oregon Supreme Court also said, “Certainly, at a minimum, governments must refrain from supporting a particular candidate for office.”⁵⁸

That this conclusion can be derived from basic structure even in the absence of more particularized text is suggested by constitutional decisions in several other countries, each of which has a history of reliance on regular elections and representative democracy, and in which propositions derived from general constitutional commitments to representative government were found to constrain legislative schemes deemed to favor or disfavor particular candidates in elections or particular viewpoints on public referendum.

Consider first *Bergman v Minister of Finance* (1969),⁵⁹ an early effort at judicial review of legislation by the Israeli Supreme Court. At this time, it was unclear whether Israel had an entrenched constitution that could be relied on by the court to invalidate statutes. As a result of the Harari settlement, Israel’s legislative body, the Knesset, enacted a series of so-called Basic Laws that over time addressed different major subjects. The Knesset also enacts other laws, and until 1969 the High Court had not held that a Basic Law could be relied on to invalidate a subsequently enacted statute; indeed, in a system of parliamentary supremacy the ordinary rule would be that the later enactment trumps the earlier one. Bergman challenged a campaign finance law as discriminating against new political parties because it provided election-related funding only for political parties already represented in the Knesset. The Israeli Supreme Court interpreted an earlier-enacted Basic Law on the Knesset to require equal opportunity in the political process and thus to prohibit funding only those parties that had previously had electoral success,⁶⁰ and enforced the prior statute’s requirement for

⁵⁷ See, e.g., *Anderson v Boston*, 380 NE2d at 641 (noting plaintiffs’ agreement that mayor and others in policy-making positions of government may advocate for proposed amendment and stating that other individual city employees may also have rights to speak even during work hours).

⁵⁸ *Burt v Blumenauer*, 699 P2d at 176.

⁵⁹ For an English translation, see 8 *Selected Judgments of the Supreme Court of Israel* 13 (1992). I am in debt to Gary Jeffrey Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton, 1993), especially at 124–32, for much of my understanding of this case.

⁶⁰ Section 4 of the Basic Law: The Knesset, provided: “The Knesset shall be elected by general, country-wide, direct, equal, secret and proportional elections, in accordance with

a special majority to overcome its provisions to invalidate the later-enacted campaign finance law. The Court did so, notwithstanding that Basic Laws are initially enacted by the same ordinary majority voting rule as other laws. It did so, moreover, even though, as the Court itself acknowledged, there was some ambiguity in the Basic Law and despite the Attorney General's argument that there was no written principle prohibiting the particular financing law.⁶¹ In the face of statutory ambiguity, the Court held, it would choose an interpretation that advances a more general principle of equality.

The decision was notable in two respects: First, it treated the entrenching provisions of the Basic Law as trumping a later-enacted statute, thus taking a step toward the constitutionalization of (at least portions of) the Basic Laws and the institution of judicial review of the validity of laws in Israel; and second, it interpreted the Basic Law to provide an expansive equality principle used to invalidate incumbency-protecting legislation. Significantly, the first time the Israeli Supreme Court held an act of the Knesset invalid was one in which it acted to protect the integrity of the election campaign process.

Similarly, notwithstanding the absence of any clause guaranteeing freedom of speech or expression, the Australian Supreme Court invalidated a statute that made free television time available to incumbents and political parties already represented in the parliament but that did not automatically make funding available to most other challengers.⁶² Chief Justice Mason's opinion described

the Knesset Elections Law; this section shall not be varied save by a majority of the members of the Knesset." See Jacobsohn (cited in note 59) at 126. It was the first part of this sentence that the Court interpreted as prohibiting a later law funding only those political parties already represented in the Knesset, as inconsistent with the commitment to equality. Although the Court's treatment of the second part of the sentence as validly "entrenching" this law as against the later-enacted Election Law was of considerable moment, for my purposes here I want to emphasize the Court's willingness to elaborate from this commitment to general, direct, equal elections a ban on funding only incumbent parties, notwithstanding the government's argument that the equality guaranteed by this clause meant only that each voter's vote should be of equal weight. See Jacobsohn, *Apple of Gold* at 126-27 (cited in note 59).

⁶¹ See Jacobsohn, *id* at 127-28.

⁶² *Australian Capital Television Pty, Ltd. v Australia*, 177 CLR 106 (High Court of Australia, 1992). The case involved a constitutional challenge to a campaign finance law that generally prohibited paid political advertising on television, but that also required broadcasters to make free time available to incumbent candidates and political parties "represented . . . in the [preceding] Parliament or legislature," *id* at 126, while other challengers had to seek free time from a government tribunal.

the statute, which allocated 90 percent of the total free time to incumbent candidates and parties, as “manifestly favour[ing] the status quo.” Notwithstanding the absence of any textual analogue to the First Amendment, the Chief Justice’s analysis rested on the implications of representative democracy for freedom of speech on political issues. He concluded that the Australian constitution contained an “implied guarantee of freedom of communication, at least in relation to public and political discussion,” derived, he argued, as a matter of logic and practical necessity from the constitutional principle of responsible and representative government as an integral element of the constitution. The Australian constitution, he observed, embodied a fundamental decision not to “place fetters” on legislative action through a bill of rights. Rather it reflected the view that “the citizen’s rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy.” But, he concluded, freedom of expression in relation to public and political speech is “an essential concomitant of representative government,”⁶³ and thus necessarily implied in the prescription of that system, and required broader access to television time for political campaigning. Justice McHugh reasoned similarly, concluding that “in conferring the right to choose their representatives by voting at periodic elections, the Constitution intended to confer on the people of Australia[] more than the right to mark a ballot paper with a number The ‘share in the government which the constitution ensures’ would be but a pious aspiration unless [the provisions] carried with them more than the right to cast a vote. The guarantees . . . could not be satisfied by the Parliament requiring the people to select their representatives from a list of names drawn up by government officers.” The words “directly chosen by the people” in the constitution, then, “interpreted against the background of the institutions of representative government and responsible government, are to be read, therefore, as referring to a process . . . [that] includes all those steps which are directed to the people electing their representatives—nominating, campaigning, advertising, debating, crit-

⁶³ For this and the preceding quotations from the Chief Justice’s opinion, see *id.* at 132, 133, 136, 138; see generally *id.* at 136–42. For other opinions likewise finding the statute unconstitutional, see *id.* at 174–75 (Deane, J., and Toohey, J.); *id.* at 208–17 (Gaudron, J.). Note that the use of *seriatim* opinions is found in both Australia’s and Ireland’s high courts.

icizing and voting.” From this it followed that “the people have a constitutional right to convey and receive opinions, arguments and information concerning matter intended or likely to affect voting in an election”⁶⁴ Even dissenting Justice Dawson agreed that although “the Australian Constitution, unlike the Constitution of the United States, does little to confer upon individuals by way of positive rights those basic freedoms which exist in a free and democratic society,” nonetheless when the constitution provided for a parliament whose members were to be chosen by the people, in providing a choice, “that must mean a true choice.”⁶⁵

Finally, consider decisions of both the German Constitutional Court and the Irish Supreme Court on government “propaganda” designed to support a particular political party in an election and approval of a government-supported referendum, respectively. In a proceeding that might be difficult to bring in the United States because of standing rules,⁶⁶ officers of one political party chal-

⁶⁴ For the source of this and the preceding quotations from Justice McHugh’s opinion, see *id.* at 230–32. With McHugh’s emphasis on the words “directly chosen by the people,” compare US Const., Art I, § 2 (members of House to be “chosen every second Year by the People . . .”).

⁶⁵ *Australian Capital Television*, 177 CLR at 182, 187 (Dawson, J). Whether the freedom to communicate information extends beyond the election period, he said, was something it need not decide, but emphasized the importance of ensuring that freedom of speech is not unduly restricted during an election period. Accepting that an act might intrude on such necessary freedom, Dawson concluded that the act was consistent with the demands of representative government. See *id.* at 149–50, 157–62. (Justice Brennan also wrote separately, recognizing the principle of freedom for political speech, *id.* at 149, but arguing that these provisions were, for the most part, constitutional as a reasonable and proportional effort to prevent the “covert influences [which] flow from financial dependence,” *id.* at 157–64.) For a later and more cautious treatment of implied constitutional rights in Australia, see *Lange v Australia Broadcasting Corp.*, 189 CLR 520 (High Court of Australia, 1997).

⁶⁶ Standing rules in Article III federal courts are at least episodically more restrictive than those found in some state courts and in some foreign jurisdictions. Unless a taxpayer challenges an expenditure of public funds as violating the Establishment Clause, standing to sue as a taxpayer over misuse of federal funds or property is likely to be denied. See, e.g., *United States v Richardson*, 418 US 166 (1974); see also *Valley Forge Christian College v Americans United for Separation of Church and State, Inc.*, 454 US 464 (1982). In addition, standing is sometimes withheld where a party claims injury from a government action where the injury is caused by effects on third parties, see *Allen v Wright*, 468 US 737 (1984), as would often be the case where government speech is claimed to impermissibly skew debate. See also Erwin Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 Ohio St L J 773, 774 (1988) (lamenting that “most courts have held that it is not the role of the federal judiciary to resolve challenges to improper actions by incumbents”); Thomas Emerson, *The System of Freedom of Expression* 708 (Vintage, 1971) (“it is plain that judicial restriction can hardly be . . . a viable device for . . . [protecting] private expression against abridgment by government expression”). By contrast, in many state and local jurisdictions taxpayers are authorized to sue public officials for unauthorized government expenditures. See, e.g., Oregon Rev Stat § 294.100(2) (authorizing taxpayer suits against public officials who expend public funds for purpose not authorized by law), relied on in *Burt*,

lenged expenditures during the 1976 election campaign made by the German Press and Information offices to buy advertisements in newspapers and magazines to identify the accomplishments of the incumbent administration.⁶⁷ Invoking Article 20 of the German Basic Law—which describes Germany as a “democratic” state—the Court held that “Elections can confer democratic legitimation in the sense of Article 20(2) only if they are free.” This requires not only freedom in the casting of ballots but also freedom to form opinions freely. The organs of government, the Court concluded, “may not in their official capacity [try to] influence the formation of the popular will by employing additional special measures during elections in order to gain control over these organs. . . . the constitutional principle that limits the tenure of the [legislature and the government] does not permit the current federal government in its capacity as a constitutional organ to seek reelection, as it were, and to promote itself as the ‘future government,’” although individual members of the federal government may campaign in a nonofficial capacity.⁶⁸ Notwithstanding the Basic Law’s guarantees of freedom of thought (Art. 4) and expression (Art. 5), and of equality (Art. 3), according to Professor Donald Kommers the Court’s decision invalidating the expenditures was based on their offending the idea of democracy under Article 20, the principle of equality among political parties found in Article 21, and the principle of free and equal elections found in Article 38.⁶⁹

The Irish case arose out of a series of efforts to amend the Irish Constitution to permit divorce. Under Articles 46 and 47 of the

699 P2d at 169–70; *Stern v Kramarsky*, 375 NYS 2d at 240 (upholding standing of taxpayer to seek injunction against expenditure of public funds to urge voters to support a proposed state constitutional amendment); *Schulz v State*, 654 NE2d 1226 (NY Ct App 1995) (upholding taxpayer’s right to challenge use of public funds to print “New York, New York brochure” that served private partisan interests of incumbent governor and his campaign committee).

⁶⁷ See Donald P. Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany* 177–79 (Duke, 2d ed 1997) (describing and translating the *Official Propaganda Case*, 1977, 44 BverfGE 125). For historic examples in the United States, see Yudof, *When Government Speaks* at 8–9 (cited in note 6) (discussing franking privileges of incumbents); *id* at 123 (describing controversy over printing in 1943 by Office of War Information of pamphlet entitled “Roosevelt of America—President, Champion of Liberty, United States Leader in the War to Win Lasting and Worldwide Peace”). As Yudof notes, governments spend moneys on “advertising” campaigns designed to influence public opinion not only in electoral contexts, or about particular political leaders, but about a wide range of issues.

⁶⁸ For this and the preceding quotations from the case, see Kommers, *Constitutional Jurisprudence* at 178–79 (cited in note 67).

⁶⁹ *Id* at 178.

Irish Constitution, such a proposal, once passed by both houses of the national legislature, must go to the public for a vote in a referendum whether to make the proposed change to the constitution. Article 47 says that the referendum shall be conducted in accordance with a law, and the referendum law in question specifically provided that the legislature could provide a statement to accompany the referendum. A four to one majority held that it was impermissible for the government to expend public monies to campaign for ratification (with a suggestion that individual members of the government could speak in favor of it).⁷⁰ Stating that neither the Constitution nor the 1994 act was explicit on how the government was to carry out its duty to submit the referendum to the people, Justice Blayney was “satisfied that constitutional justice requires that the executive should act fairly in discharging it, not favouring any section of the people at the expense of any other section,” and that the government here “has not held the scales equally between those who support and those who oppose the amendment.”⁷¹ Justice Denham identified three constitutional rights infringed by such expenditures of public funds: equality, freedom of expression, and right to democratic process in referenda. The Denham opinion explained, “Ireland is a democratic State. The citizen is entitled under the Constitution to a democratic process. The citizen is entitled to a democracy free from governmental intercession with the process no matter how well intentioned. No branch of the government is entitled to use taxpayers’ monies . . . to intercede with the democratic process either as to the voting process or as to the campaign prior to the vote.

⁷⁰ See *In re Bunreacht na hÉireann, McKenna v An Taoiseach*, 1995 Nos 361 & 366, [1996] 1 ILRM 81 (Supreme Court, Ireland) (Nov 17, 1995). In addition to the opinions discussed in text, see *id* at 102 (Hamilton, CJ) (“Once the bill has been submitted for the decision of the people, the people were and are entitled to reach their decision in a free and democratic manner,” and the government use of public funds for a campaign to influence the referendum is “an interference with the democratic process,” and with the constitutional process of amendment and also “infringes the concept of equality which is fundamental to the democratic nature of the State”); *id* at 103 (O’Flaherty, J) (stating that while it was “unrealistic” that government remain neutral on a topic that its own initiative brought to the people, “the government must stop short of spending public money in favour of one side which has the consequence of being to the detriment of those opposed to the constitutional amendment” and describing this proposition as “bordering on the self-evident”; clarifying that the decision against use of public funds to prepare advertising materials urging a yes vote does not affect rights to speak as ministers to public media to put forward their point of view).

⁷¹ See *id* at 109.

This is an implied right . . . in keeping with the democratic nature of [the Constitution].”⁷²

These decisions are obviously interpretations of other constitutions, each of which differs in important respects from the American Constitution. Yet each reflects a resort to fundamental understandings of democracy, and popular sovereignty, as a basis to constrain the government from disfavoring particular candidates (in the case of Australia and Israel, candidates from nonincumbent parties) or from favoring an incumbent-party position or one side of a controversial matter up for a public vote. The structural method of reasoning from the basic relationships of a representative democracy is striking.⁷³ And the reasoning in each suggests how the Court might have come to the result it did in *Gralike* (given the plainly pejorative language about particular candidates on the state-sponsored ballot) in light of the constitutional provisions of Article I and Amendment 17 structuring relationships between voters and representatives by requiring popular election of members of Congress on a periodic basis.

The provisions that the Court does rely on are, of course, closely related to the fundamentality of elections. As Charles Black observed, there is a “close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inferences drawn from them must surely be controlled by the text.”⁷⁴ He argues that being more clear about the structural bases for decisions is based on the proposition that “clarity about what we are doing . . . is both a good in itself, and a means to sounder decision.”⁷⁵ Let me illustrate the possible benefits of more clearly identifying the Constitution’s commitment to the structures of popular voting for representatives as fundamental to this decision by returning to Chief Justice Rehnquist’s opinion.

Although Chief Justice Rehnquist relies on the First Amendment, there is a sense in which the opinion is even more centrally

⁷² For the source of this and the preceding quotations from Justice Denham’s opinion, see *id.* at 111–12, 113.

⁷³ With respect to outcomes on particular issues (perhaps especially the Irish referendum case), arguments from such basic relationships might work in different directions. See text at note 123.

⁷⁴ Black, *Structure and Relationship* at 31 (cited in note 4).

⁷⁵ *Id.* at 32.

concerned with elections than it is with free speech. First, like the Court, the Chief Justice relies on *Anderson*, a case involving not the First Amendment but the Equal Protection Clause in an election context. His reliance on *Anderson* suggests that the speech component of the *Gralike* label was perhaps less important than the place where the pejorative labeling occurred.⁷⁶ Consider also his assertion that the problem is not only content nonneutrality but “discriminat[ion] on the basis of viewpoint,” with the “result . . . that the State injects itself into the election process at an absolutely critical point—the composition of the ballot, which is the last thing the voter sees before he makes his choice—and does so in a way that is not neutral as to issues or candidates.”⁷⁷ In other words, Rehnquist seems to be saying, when governments regulate the conditions for elections, they are regulating a centrally important phenomenon consisting of the election (not speech)—an area in which concerns for equality, and for government “fairness” in the sense of impartiality, join with concerns arising directly from the character of the government as a representative democracy.⁷⁸

⁷⁶ On the other hand, one could think of *Anderson* as a case about racial discrimination rather than as an election case. One could readily imagine a constitutional rule prohibiting the government from requiring disclosure of information about a person’s race in any setting in which any individual or public benefit or detriment (including attracting votes vel non) turns on that designation. Thus, one could perhaps read both *Anderson* and *Gralike* as forbidding the government from requiring any form of labeling, whether in a ballot setting or not, that has the purpose or effect of penalizing a candidate or a citizen for a constitutionally protected, or constitutionally irrelevant, activity or status (one’s speech or one’s race)—a theory that does not crucially depend on the label being a condition for ballot access. As discussed below, I do not believe this was Rehnquist’s theory in *Gralike*. See text at notes 77–86.

⁷⁷ *Gralike*, at 1042 (Rehnquist, CJ, concurring in the judgment). Note the possible ambiguity in meaning of the idea of “neutrality as to issues”—as between a “neutral” choice of issues on which to focus or neutrality as to the approved view of the particular issue.

⁷⁸ I do not mean to suggest that government-required labels for speakers, in contexts other than elections, would not raise First Amendment free speech concerns—clearly, they would. If, for example, a municipal government were to require those who wished to speak in parks, or other traditional public fora, to identify themselves, or to follow some state-specified formula for designating what kind of issues or views they were promoting (e.g., with respect to the bombing of Afghanistan), it is not difficult to imagine the Court holding such provisions unconstitutional. Compare *Buckley v American Constitutional Law Foundation, Inc.*, 525 US 182 (1999) (invalidating requirement that paid petition signature gatherers wear name-identification badge); *McIntyre v Ohio Elections Comm’n*, 514 US 334 (1995) (holding unconstitutional a ban on anonymous pamphleteering on election issues or candidates); *Talley v California*, 362 US 60 (1960) (finding unconstitutional a local law prohibiting all anonymous leafleting). Mandatory labeling of persons’ views in any setting risks harm to First Amendment principles and warrants serious scrutiny. Yet the election context poses specialized concerns: it is one in which some mandatory labeling is permitted, for example, of political party affiliation, when comparable identification requirements on a driver’s license would be plainly impermissible. Compare Post, 106 Yale L J at 186–87 (cited in

Reflection on Rehnquist's articulation of the kind of First Amendment issue here supports this conclusion.⁷⁹ Rehnquist identifies a "First Amendment" right not to be pejoratively identified on the ballot.⁸⁰ Under *Paul v Davis*,⁸¹ there is no general constitutional right to be free from pejorative government description. *Paul v Davis* did not involve pejorative labeling based on First Amendment protected activities, and so it might be contended that where the label concerns a person's speech activities, the government is more constrained. Yet despite his invocation of the First Amendment, what Rehnquist finds objectionable seems to be more that the description is pejorative than that it is a pejorative characterization of speech. A comparison of this case with *Meese v Keene* suggests that the election context played a critical role in Rehnquist's willingness to see a constitutional violation.⁸² *Keene* in-

note 6) (suggesting a distinction between specifically political conceptions of fairness and commitments to vigorous freedom of speech).

⁷⁹ Chief Justice Rehnquist explains that he disagrees with the lower court, which had found a problem of compelled speech. 121 S Ct at 1042 n *. Rehnquist argues persuasively that the ballot label is not likely to be thought of as issuing from the candidate. In so doing, however, he simply ignores the lower court's conclusion that the candidate's speech was compelled *prior* to the election by the specter of the negative ballot label; the lower court believed that in both senses the candidate's speech was being compelled. *Gralike v Cook*, 191 F3d 911, 917 (8th Cir 1999).

⁸⁰ Note that in some circles being a "democrat" or a "republican" or a "socialist" or a "liberal" would be seen as "pejorative." The kind of "pejorative" designation that concerns Rehnquist is evidently one not based on a voluntary association by the candidate with a party—one that is in some sense more a matter of what the government requires than what the candidate voluntarily associates himself or herself with in the course of seeking office. Compare *Burdick v Takushi*, 504 US 428 (1992), where Rehnquist joined the Court's opinion upholding a ban on write-in voting, a ban that arguably reinforced the significance of party-affiliated candidacies.

⁸¹ See *Paul v Davis*, 424 US 693 (1976) (rejecting constitutional challenge to unwarranted posting of person's name as a shoplifter because reputation by itself was not a form of liberty constitutionally protected from government action by the Due Process Clause). The state had expressly relied on *Paul v Davis* in defending its statute, arguing that the ballot label should not be seen as impermissible coercion of speech merely from potential reputational effects. See Reply Brief for the Petitioner, in *Cook v Gralike*, No 99-929 (filed Sept 13, 2000), 2000 WL 1339202, *12, *13. *Paul v Davis* involved a procedural due process challenge to the allegedly false listing and identification of the plaintiff as a shoplifter. Its holding that such false identification was not constitutionally actionable absent a more concrete legal harm, such as loss of employment, suggests that the Court would not see the Constitution generally as constraining government speech that is pejorative about individuals, though it would not necessarily be inconsistent with *Paul v Davis* to argue that the Constitution nonetheless constrains pejorative government labels based on a person's speech or other constitutionally protected activities.

⁸² 481 US 465 (1987) (concluding that although designation of film as "propaganda" created injury sufficient to establish plaintiff's standing to challenge labeling requirement, "propaganda" could be regarded as a "neutral" and not pejorative designation and thus did not offend the First Amendment). The label required for the film stated, in essence,

volved a claim that a government-required label and statutory designation of a film violated the First Amendment. Outside of the election context, the *Keene* Court concluded that the designation of a film as “political propaganda” was not pejorative and did not offend the First Amendment. It is hard to credit what the Court says in *Keene* about the term “propaganda” not being pejorative, given the Court’s concession that the phrase had pejorative meanings, and that 49 percent of the voters would be less inclined to vote for a candidate who distributed a film so identified.⁸³ But if the labeling and designation in *Keene* were not pejorative even though they would adversely affect voters’ views, it is a harder question to see why Rehnquist believes the label in *Gralike* is pejorative.

Although at a very formal level *Keene* is not inconsistent with the claim that the First Amendment is violated by pejorative labeling,⁸⁴ the best way to understand these decisions is that the government has wider latitude to engage in pejorative labeling in settings outside the ballot booth. The more restricted latitude of the government to engage in pejorative labeling within ballot booths is, I would suggest, related to the far greater latitude the government has to impose conditions on the ballot—including prohibiting anonymous candidacies (even though anonymous speech is permitted in other settings) and discouraging independent candidates

that the material was circulated by an entity registered under the Foreign Agents Registration Act, which in turn described material required to be registered as “political propaganda.” Id at 470–71 (citing 22 USC § 614). The Court reasoned that because the statutory definition of “political propaganda” included not only misleading statements, as in the popular pejorative sense of the term, but also accurate material intended to influence foreign policy, the Act’s use of the term in connection with the mandatory labeling was a “neutral and evenhanded” rule with “no pejorative connotation.” Id at 484. But see Justice Blackmun’s dissent, id at 485–96 (criticizing majority for avoiding inquiry into actual history and real effect of designation as political propaganda and asserting that “[i]t simply strains credulity for the Court to assert that ‘propaganda’ is a neutral classification”).

⁸³ See id at 473–74 & nn 7, 8 (describing survey data supporting claim of injury for standing purposes); id at 484 (stating that predictions of adverse consequences are sufficient for standing but “fall far short of proving” that public perceptions have had any adverse impact on distribution of materials subject to scheme). The Court’s decision in *Keene* is better accounted for by its discussion of the label and designation as forms of government-provided information and the opportunity for the film distributor to provide more information to dispel any negative effects of the government-required label. See id at 480–81.

⁸⁴ That is, because *Keene* found the designation “political propaganda” not to be pejorative for First Amendment purposes (though sufficiently harmful and injurious to meet Article III standing requirements), it is not inconsistent with a rule that the government cannot require pejorative labels for First Amendment protected activities.

(even though independence of speech and thought is generally highly valued).⁸⁵ It is something about elections in particular, rather than freedom of speech, or government speech, in general, that explains *Gralike*.

What underlies Rehnquist's concern with the government speaking in a pejorative way about a person is that the person is a political candidate and the pejorative speech is a condition for appearing on the ballot.⁸⁶ This case is at least as centrally about the government's role in elections as it is about First Amendment free speech values. It is the ballot that constrains government from speaking pejoratively, not necessarily citizens' more general rights. While the discussion may be framed in terms of a candidate's "right," that right is a proxy for the public right to free and fair elections. The deeper concern here, I suggest, is with the permissible role of government speech in the context of an election. Opinions that make central the role of elections in a representative democracy would better capture this underlying intuition.

III. SOME SPECULATIONS ON WHY THE COURT WROTE AS IT DID: HABIT, PRUDENCE, AND AVOIDANCE

Although a more structural opinion could well have been written in this case, there are a number of possible reasons why the Court did not do so. First, habit. As Charles Black noted long

⁸⁵ As to anonymity, virtually every state election code requires that the candidate's name appear on the ballot. See, e.g., Ala Code § 11-46-25 (1996) (requiring name of candidate together with title of office to which the candidate seeks election); Cal Elec Code § 13211 (West 1996) (requiring name of candidate to be printed on ballot in roman capital boldface type). In contrast, the First Amendment has been held to protect the right of political pamphleteers to circulate their political writings anonymously. *McIntyre v Ohio Elections Comm'n*, 514 US 334 (1995) (invalidating ban on anonymous pamphleteering). As to discouraging independent candidacies, see e.g., *Burdick v Takushi*, 504 US 428 (1992) (upholding state ban on write-in voting); *Storer v Brown*, 415 US 724 (1974) (upholding state limits on independent candidacies by those recently having been affiliated with a political party); *Jenness v Fortson*, 403 US 431 (1971) (upholding requirement that independent candidates, to appear on the ballot, gather signatures of 5 percent of total registered voters in last election). A hallmark of First Amendment law in other settings is to protect independent, even lonely voices.

⁸⁶ As noted above, *Paul v Davis* may be distinguished by the argument that there are core First Amendment interests in play where a pejorative label is determined by a candidate's speech. Yet Rehnquist's reliance on *Anderson*—where the "pejorative" information was not about the candidate's speech but the candidate's race—suggests that the "speech" component of what motivates the label may have been less important than *where* the pejorative labeling occurred. Cf. note 76 *supra*.

ago, “in dealing with questions of constitutional law, we have preferred the method of purported explication or exegesis of the particular textual passage considered as a directive of action, as opposed to the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part.”⁸⁷ Although the Court has been hospitable to structural reasoning in several federalism cases, in part this has been the result of apparent necessity: In *Printz*, there was simply no text that plausibly could be interpreted in any particularly specific level to preclude commandeering. In the area of sovereign immunity, the available text of the Eleventh Amendment could most plausibly be read to permit federal jurisdiction over states in a large class of cases (suits by citizens against their own state) that the Court believed was inconsistent with more basic constitutional postulates. So the style of the opinions in *Gralike* could be in part mere reversion to habit. It might also arise in part from the tradition of associating election law and voting cases to First Amendment rights (of both association and speech).⁸⁸

Another possibility worth noting is the shadow of the most high profile “election” case of the Term—the litigation over the November 2000 presidential election. The unanimity of the Court in *Gralike* may be contrasted not only with its division in the federalism cases but also its division in *Bush v Gore*. Anchoring the *Gralike* decision firmly in a discrete portion of the oldest text of the Constitution may have been attractive to a Court whose legitimacy had come under attack. The substantial scholarly criticism of *Bush v Gore* might have made resting decision in *Gralike* on something more concrete—a portion of the Constitution text that feels more like a specific text (in contrast to structural arguments or the Due Process and Equal Protection Clauses) but with an available body of precedent with which the decision can be linked—attractive as

⁸⁷ Black, *Structure and Relationship* at 7 (cited in note 4). See also *id.* at 8 (the “preference for the particular-text style has been a decided one, leading not only to the failure to develop a full-bodied case-law of inference from constitutional structure and relation but even to a preference, among texts, for those which are in form directive of official conduct, rather than for those that declare or create a relationship out of the existence of which inference could be drawn.”).

⁸⁸ Reinforcing the role of habit is the relative dearth of federal case law on the nature of and limits on government speech in elections. For a possible explanation, see Chemerinsky, 49 Ohio St L J (cited in note 66) (describing obstacles to federal court resolution of challenges to incumbent-favoring legislation).

a prudential matter. Moreover, a Court whose quick remedial intuitions on a 5–4 vote (as to remedy) decided a close presidential election might well seek to express other election decisions in the most conventional, and narrow, terms possible.⁸⁹

The sequence of decisions may also shed light on Chief Justice Rehnquist's decision to rest on the First Amendment rather than the Elections Clause in *Gralike*. Respondent Gralike argued, in support of the judgment below, that the ballot-labeling law was an invalid exercise of state authority under Article I, Section 4, because the constitutional powers given to state legislatures could not be exercised by popular referendum (at least absent authorization by Congress).⁹⁰ Article I, Section 4 (at issue in *Gralike*) and Article II, Section 1 (at issue in *Bush v Gore*) both specifically refer to the role of the state legislature in determining the conditions for selecting, respectively, members of Congress and presidential electors.⁹¹ In his separate opinion in *Bush v Gore*,⁹² the Chief Justice argued that the state court's interpretations of Florida election laws were inconsistent with the special constitutional role of the state legislature contemplated by Article II's "exceptional" language by "which the Constitution imposes a duty or confers a power on a particular branch of a State's government."⁹³ This position, though perhaps hospitable to the respondent's argument against the role of popular initiative in the exercise of state powers under Article

⁸⁹ The Court's decision in *Bush v Gore* has already been the subject of fierce criticism. See, e.g., Elizabeth Garrett, *Leaving the Decision to Congress*, in Cass R. Sunstein and Richard A. Epstein, eds, *The Vote: Bush, Gore and the Supreme Court* 38 (2001); Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in Sunstein and Epstein, supra at 77; David A. Strauss, *Bush v Gore: What Were They Thinking*, id at 184; Jack M. Balkin and Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va L Rev 1045 (2001). Other academics have been more supportive. See, e.g., Richard A. Epstein, "In Such Manner as the Legislature Thereof May Direct": *The Outcome in Bush v Gore Defended*, in Sunstein and Epstein, supra at 13; Michael W. McConnell, *Two and a Half Cheers for Bush v Gore*, id at 98.

⁹⁰ See Brief for Respondents in *Cook v Gralike*, No 99-929 (Aug 14, 2000), 2000 WL 1409741, at *12, n 8 (distinguishing *Ohio ex rel Davis v Hildebrandt*, 241 US 565 (1916), involving use of a referendum in congressional redistricting, because Congress had by statute contemplated state use of referenda for those purposes).

⁹¹ See Art I, § 4, cl 1 (the "Times, Places and Manner" of holding elections for Representatives "shall be prescribed in each State by the Legislature thereof . . ."); Art II, § 1, cl 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct . . ." presidential electors).

⁹² 531 US 98, 111 (2000) (Rehnquist, CJ, concurring).

⁹³ Id at 112.

I, Section 4, is in some tension with cases interpreting this clause to afford wide latitude to state constitutions in structuring the exercise of state power to regulate the manner of holding congressional elections.⁹⁴ Avoiding the Elections Clause ground in *Gralike* avoided the need to attempt to reconcile his *Bush v Gore* opinion with the role of the popular initiative in establishing the ballot label in light of those earlier cases on Article I, Section 4.⁹⁵

Whatever may account for the form of the opinion, it is important to explain why I think it likely that a structural opinion would have been just as narrow as these opinions were. It might, however, have called for more of an effort to acknowledge the very real conceptual difficulties that lie just a short distance beyond the facts presented in this case. It is relatively simple, as Justice Kennedy indicated, to decide that overtly pejorative statements imposed under state law on the ballot offend the Constitution. But the structural principle, that no existing government can use the machinery

⁹⁴ For cases rejecting arguments that Article I, Section 4's reference to the state legislature limited states from authorizing other forms of lawmaking under state constitutions, see *Smiley v Holm*, 285 US 355, 367–68 (1932) (upholding authority of state to decide that governor participates through veto in state lawmaking and finding “no suggestion in the Federal constitutional provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted”); *Davis v Hildebrandt*, 241 US 565 (rejecting challenge to reapportionment plan adopted by referendum and upholding state's power in its constitution to vest part of the legislative power in the people; describing the authority of the state to act by way of referendum in apportioning congressional seats as a question of state law not reviewable by the Supreme Court). Although *Davis* relied in part on the proposition that the challenge to lawmaking by referendum must rest in part on the Guarantee Clause, which was nonjusticiable, the challenge was described as specifically based on the idea that for purposes of Article I, Section 4, a referendum was not part of the “legislative authority” of the state required to act. *Id.* at 567.

⁹⁵ It is possible that Chief Justice Rehnquist could have reconciled these cases to his views in *Bush v Gore* by arguing that the reference to legislatures implies a commitment to state lawmaking (whether understood to include the governor, or popular referendum) up to the moment of creating binding state law, but not to extend to the “judicial” task of interpreting the law once given. But compare *Kimble v Swackhammer*, 439 US 1385, 1387 (1978) (Rehnquist, as Circuit Justice, denying motions for interim relief), explaining that the objection there to citizen participation in the Article V role of state legislatures, through an advisory referendum on whether the state should ratify a proposed federal constitution amendment, was without substance “because of the nonbinding character of the referendum.” In *Cook v Gralike*, the initiative by which the ballot-label requirement was enacted was apparently binding on the state officials charged with preparing the ballot. My point, though, is not that the cases are impossible to reconcile, but rather that, had he focused centrally on the role of elections under Article I, Section 4 in *Gralike*, he might have felt called on to harmonize his *Bush v Gore* position with an opinion addressing whether Missouri's ballot-label law, enacted through an initiative rather than by the state legislature, was consistent with the Elections Clause.

of government to influence an election in favor of incumbency or any particular party or position, though rhetorically appealing in its simplicity, requires considerable qualification, perhaps especially in the setting of proposed term limits.

As I discuss below, that general principle, if taken to its limits, would intrude on many areas of government speech that are plainly beneficial to electoral processes in democracies.⁹⁶ Moreover, evaluating whether ballot labels are consistent with the role of elections in a democracy is complex and requires more than rhetorical resort to first principles, because concerns for democracy point in conflicting directions—not so much for “pejorative” labels but for more evenhanded, or informational, labeling. Although ballot labels can pose a threat to the legitimating purpose of elections, they may enhance the “checking” functions of elections by providing information about whether incumbent representatives have been sufficiently responsive to their constituents.⁹⁷ Finally, preserving electoral choice by invalidating the results of a popular initiative might seem paradoxical: overcoming a “democratic” decision in the name of democratic principles poses dilemmas at the heart of the tensions between constitutionalism and democracy and among competing conceptions of democracy. Examining these concerns in related but harder cases may help explain both the attraction of specific texts and the narrowness of the Court’s opinion and Chief Justice Rehnquist’s concurrence.

Free and fair elections in a democracy serve at least three functions. First, as noted above, elections play a “checking function,” acting as an accountability mechanism on current officeholders and

⁹⁶ For discussions of the difficult constitutional issues posed by government speech, see sources cited in note 6. Treating the *Gralike* ballot label as a form of government speech can be contested; why not treat the label as the voters’ speech, not the government’s? My intuition is that when a position is represented as that of “the voters,” the position assumes the governmental quality of purporting to bind those who disagreed but were in the minority. In this sense, the act of placing a label expressing the “voters’ instruction” is governmental, both from the perspective of those voters in the minority at the prior referendum and for purposes of evaluating the freeness of the choices made by the next set of voters who come to the ballot booth at a different election. If one were to look at the ballot label as posing a “state action” question, there could be little doubt that a label enacted into law, enforced by a state official, as a condition for appearing on the official state ballot, is a form of “state” action.

⁹⁷ For elaboration on different understandings of the role of a representative and, in particular, for an argument that a representative must be responsive to the represented, see Hanna Fenichel Pitkin, *The Concept of Representation* (U Cal, 1967).

their policies.⁹⁸ Second, elections have operative significance (beyond “expression”) in that they *choose* who will hold office in, enact, and implement policies and conduct the government for some period of time into the future. Third, elections function to confer *legitimacy* on that choice as flowing from the voters’ decisions, rather than from the existing government’s. Although elections play other important roles (as occasions for expressive and associational activity of a high order), these three functions—checking, choosing, and legitimating elected government officials—are uniquely performed by public elections.⁹⁹

Consider the implications of the decision in *Cook v Gralike* for a state law, enacted by initiative, requiring candidates for state legislative position to proffer their own 250-word statement on term limits for members of legislative bodies.¹⁰⁰ Although this proposal might eliminate the state’s use of pejorative language to align itself

⁹⁸ See Ely, *Democracy and Distrust* at 78 (cited in note 41) (desire for reelection as “insurance policy” against unreasonable behavior by elected representatives); see also Rebecca L. Brown, *Accountability, Liberty and the Constitution*, 98 Colum L Rev 531, 565 (1998) (arguing that political accountability in the Constitution was not designed to maximize satisfaction of preferences but to minimize the risk of tyranny, and that elections “provide the people with an opportunity to punish those who have violated” people’s trust). As Pitkin has noted, being a representative may entail both “descriptive” and “symbolic” purposes that do not necessarily fulfill the substantive aspects of political representation in the sense of acting for and responsively to the represented. In a political democracy, though, part of what people can choose to vote on are the descriptive, demographic, or symbolically “representational” characteristics of representatives. Whether over time the representative is found sufficiently responsive to constituents is one, but only one, factor determining whether people continue to vote for the representative at elections.

⁹⁹ In *Burdick*, the Court insisted that it could not treat elections as simply a form of expression without undermining the ability of states to hold effective elections. *Burdick v Takushi*, 504 US at 438 (“Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.”); see also *Munro v Socialist Workers Party*, 479 US 189, 193 (1986) (“States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters”). But cf. Adam Winkler, Note, *Expressive Voting*, 68 NYU L Rev 330 (1993) (distinguishing instrumental from expressive aspects of voting and criticizing the Court for focusing only on the former).

¹⁰⁰ This hypothetical is intended to (1) eliminate the major federalism concerns discussed in *Term Limits v Thornton* and relied on as well in *Gralike*, (2) remove the distorting effects of having a state official decide on a candidate’s compliance with a particular term-limits proposal, and (3) avoid “pejorative” language on the ballot by allowing each candidate to explain his or her position in their own words. Obviously some of these difficulties cannot be overcome: in any plausible scheme such as this a state official of some sort would have to review the candidate statement for conformity to standards of both length and possibly accuracy, which might pose insuperable obstacles to such a scheme being constitutional on other grounds. The use of a candidate’s own statement is one device suggested *inter alia* by Professor Garrett’s very helpful analysis of the ballot-labeling requirement. See Garrett, 85 Va L Rev at 1584–85 (cited in note 26).

with a particular position, it does involve a single-issue ballot-label requirement. It will cause voters to focus on this issue, out of many others, and place pressure on candidates to say something so as not to have a blank near their names. Yet such a ballot label may be consistent with the checking functions of elections. As supporters of the Missouri term-limits labeling requirement noted, term-limits proposals are unlikely to emerge from representative bodies because current representatives are unlikely to act against their own interest in continuation in office.¹⁰¹ Data show that in the period 1990–94, only one term-limits provision emerged from a state legislature, but over twenty emerged from initiative and referendum efforts.¹⁰² One might think, then, that a concern for democracy¹⁰³ would support an “exception” to a general ban on ballot labeling for issues like term limits (and like the earlier effort to amend the Constitution to provide for direct election of senators) which would be so contrary to the immediate self-interest of representative bodies as to make it unlikely that they would be enacted.¹⁰⁴

The Court did not analyze whether a less pejoratively phrased ballot label concerning the candidate’s position on term limits might survive. No party argued for a principled distinction between term-limits ballot labeling and ballot labeling about any other single issue,¹⁰⁵ even though amici argued that the state had

¹⁰¹ See Brief Amicus Curiae of USPIRG Education Fund in Support of Petitioner, *Cook v Gralike*, No 99-929 (filed June 23, 2000), 2000 WL 1852445, *20–21. Similar arguments have been discussed in scholarly comment. See, e.g., Garrett, 85 Va L Rev at 1539–40 (cited in note 26).

¹⁰² See Klarman, 85 Geo L J at 510–13 (cited in note 44).

¹⁰³ By “democracy” here I mean a system that generally provides mechanisms by which the views of majorities of the people over some period of time can be effected into law (provided that they do not violate other democratic commitments, e.g., against invidious discrimination). I take no position here on whether, on the whole, term limits for members of Congress would be a good thing. For discussion of different kinds of arguments for term limits, compare, e.g., Einer Elhauge, *Are Term Limits Undemocratic?* 64 U Chi L Rev 83 (1997) (arguing that term limits for members of Congress would be pro-democratic by solving collective-action problem for voters who would prefer to elect challenger but hesitate to vote incumbent out because of loss of advantages of seniority under non-term-limits system), with Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 Cornell L Rev 623 (1996) (disputing claim that term limits will produce “citizen legislators”).

¹⁰⁴ See generally Klarman, 85 Geo L J (cited in note 44) (arguing that courts should not strike down term-limits laws because of their fundamentally anti-entrenching character).

¹⁰⁵ Compare Sullivan, 109 Harv L Rev at 99–100 (cited in note 39) (noting possible argument that term limits are consistent with the anti-entrenchment, equality-enhancing purposes the majority in *Term Limits* attributed to the Qualifications Clauses and should thus

a compelling interest in the ballot label because of the corrupting effect of long congressional terms on incumbents.¹⁰⁶ Even had such an argument been made, however, there are reasons why the Court might have rejected it (apart from the presence of pejorative language in the ballot label implicitly going to the candidate's trustworthiness).

First, support for term limits might be regarded as a partisan issue that, even if neutrally presented, would discernibly tend to favor a class of candidates associated not only with that issue but with a host of other issues that begin to look a good deal like the platform of one of the two major political parties in terms of retrenching on the powers of the national government. Data suggest that of the several groups most likely to support term limits, one of the two major national political parties was well represented and the other was not.¹⁰⁷ Term limits, then, is an issue, like many, with partisan freight.¹⁰⁸

Second, it is not clear that no threat to the "checking" function is posed because of the uniquely anti-incumbency effect of a term-limits proposal. Representatives are required to address a range of issues in their elected offices, and thus are often evaluated on fac-

be upheld despite their formal inconsistency with prior interpretations of the Qualifications Clauses).

¹⁰⁶ See Brief of Amicus Curiae The Initiative and Referendum Institute in Support of Petitioner, in *Cook v Gralike*, No 99-929 (June 23, 2000), 2000 WL 864205, *24. At oral argument, counsel for the state agreed, in response to a question from the Court, that there was no distinction between the ballot label concerning a term-limits amendment and a ballot label concerning abortion "or any other hot button issue." See Transcript of Oral Argument, *Cook v Gralike*, No 99-929 (Nov 6, 2000), 2000 WL 1673928, **15-16.

¹⁰⁷ See, e.g., Robert Kurfirst, *Term-Limit Logic: Paradigms and Paradoxes*, 29 Polity 118, 135-36 (1996).

¹⁰⁸ On possible reasons for government to refrain from speech on (or funding for private speech on) "controversial" issues, see, e.g., Cass Sunstein, *Democracy and the Problem of Free Speech* 229-31 (Free Press, 1993) (suggesting that viewpoint discrimination may be permissible in funding arts if done in a tightly limited context "not involv[ing] taking sides in a currently contested political debate," in light of likelihood that shared, nonpartisan values support the prohibition); Kagan, 1992 Supreme Court Review at 75 (cited in note 32) (suggesting that government funding of speech on one side of issue is permissible where debate has answers subject to verification, harm on other side of debate is great, and society has reached consensus on the issue); Post, 106 Yale L.J at 186-87 (cited in note 6) (distinguishing funding limitations based on "shared values," e.g., decency, from funding limitations of a partisan nature); but see Greene, 69 Fordham L. Rev (cited in note 6) (arguing that government should be free to participate in social debate so long as it is one voice among many and not establishing or proscribing ideas); Greene, 53 Vand L. Rev (cited in note 6) (arguing that government may advocate a particular vision of the good so long as government does not have monopoly power over debate, engage in coercion, or mask the governmental source of messages through "ventriloquism").

tors beyond any single issue.¹⁰⁹ Having the ballot label on the ballot might “crowd out” other checking functions of the election for representatives.¹¹⁰

Third, an “evenhanded” term-limits ballot label may still threaten the legitimation function of elections. Regardless of the procedure by which such labels appear on the ballot, the labels would address issues that some persons or collective entity at some prior point in time found important. An election serves a legitimating role only if it is perceived to reflect the views of the voters *in that election*—freely formed, uncorrupted by fear of violence, and not subject to undue influence from any source. On this standard, it must be acknowledged that many of our elections are a long way from this ideal. Parties and candidates with more money have many more means to influence voters prior to the actual vote. And voters’ choices on election day itself are not entirely free and unconstrained: the Court has concluded that states have legitimate interests in fostering a two-party system (i.e., in encouraging the voters on election day to choose between only two candidates for each office), and has upheld state laws that exclude write-in votes from the ballot.¹¹¹

In the face of the rather substantial legal and economic constraints on voters’ choices as they enter the ballot booth, preserving the integrity of the ballot itself from efforts to influence the already highly constrained choices voters have—whether by state legislative messages or by messages generated by initiative pro-

¹⁰⁹ See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 Harv L Rev 434 (1998).

¹¹⁰ But cf. Klarman, 85 Geo L J at 530–31 (cited in note 44) (criticizing *Term Limits* decision, though concluding that reasonable people could disagree on merits of term limitations).

¹¹¹ See *Timmons v Twin Cities Area New Party*, 520 US 351, 367 (1997) (“The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.”); *Burdick v Takushi*, 504 US 428 (1992). Part of the complexity of analysis is that democratic values of self-governance may also be served by enforcing a polity’s decision by majority vote to prescribe qualifications for elected public office. Cf. *Gregory v Ashcroft*, 501 US 452, 463 (1991), quoting *Bernal v Fainter*, 467 US 216, 221 (1984) (stating that “authority of the people of the states to determine the qualifications of their” government officials “lies at ‘the heart of representative government’”) (internal citation omitted). Democracy over time, then, is in tension with democracy at the moment of particular electoral decisions. Somewhat paradoxically, then, while statutes regulating elections may be necessary to permit the democratic process to go forward (and may be the product of previously elected legislators), to the extent that they unduly constrain choices of later electorates, they might be understood to impair the capacity of elections to choose legitimately.

cesses—may help preserve the legitimating effects of elections.¹¹² Allowing ballot labels can be seen to provide further opportunities for those who already hold public or private power to influence the most fundamental public act of the citizenry. Yet they can also be seen as helpful devices to educate voters, enhancing the “essential” “ability of the citizenry to make informed choices among candidates for office.”¹¹³ The question of characterization here is surely a difficult one, from normative, symbolic, and empirical standpoints.¹¹⁴ For the effect of a ballot label necessarily gives pri-

¹¹² Notwithstanding the many cases upholding ballot access restrictions—that is, on who is legally allowed to appear on the ballot—once a candidate is legally entitled to appear on the ballot there is substantial support in the lower courts to invalidate laws that favor incumbents, or nominees of preferred parties, by allocating them preferred places on a ballot. See, e.g., *Gould v Grubb*, 536 P2d 1337 (Cal 1975) (invalidating automatic top-ballot placement for incumbent seeking reelection); *Sangmeister v Woodard*, 565 F2d 460, 465–67 (7th Cir 1977) (invalidating practice of election officials of placing their own political party in top position on the ballot); *McLain v Meier*, 637 F2d 1159, 1167 (8th Cir 1980) (invalidating “incumbent first” rule for ballot placement); *Graves v McElderry*, 946 F Supp 1569, 1573, 1579–82 (WD Okla 1996) (invalidating state law requiring that “[f]or each ballot for which there are partisan candidates, the candidates of the Democratic party shall be printed in the first position . . .”). For a contrary view, see, e.g., *Clough v Guzzi*, 416 F Supp 1057 (D Mass 1976) (upholding state laws requiring “incumbent first” ballot placement and labeling incumbents as such on the ballot).

¹¹³ *Buckley v Valeo*, 424 US 1, 14–15 (1976) quoted with approval, *McIntyre*, 514 US at 346–47.

¹¹⁴ For an excellent argument in favor of educative ballot labels, see Garrett, 85 Va L Rev at 1540–55, 1576–77 (cited in note 26) (exploring capacity of ballot notations to increase voter competence). At oral argument, at least one member of the Court drew a distinction between the state’s expressing a pejorative judgment, as in *Gralike*, and simply providing information to the voters. See Transcript, 2000 WL 1673928 *7 (“the voters are being given something more than information”). Although there may well be room for the government to provide evenhanded and impartial information about matters on the ballot, see, e.g., Cal Govt Code §§ 88001–02 (West 1993) (requiring ballot pamphlets that voters receive before the election to contain, inter alia, “arguments and rebuttals for and against each state measure” and “the official summary prepared by the Attorney General”), greater concerns would exist about government efforts to “educate” the people in the “moment of choice” setting of election day—when there is neither room nor time for other voices. See Shiffrin, 27 UCLA L Rev at 637–40 (cited in note 6) (arguing that California Legislative Analyst’s “impartial statement” concerning the economic impact of each California ballot proposition and which appears on the ballot itself is an unconstitutional form of government speech because it singles out a particular feature for comment, but supporting the constitutionality of informational summaries of ballot measures appearing on the actual ballot, and of sample ballots including arguments pro and con ballot propositions). Cf. Cole, 67 NYU L Rev at 716, 736–38 (cited in note 6) (describing features of institutional settings that require government neutrality, which include that the institutions play an “important role in public debate or in the formation of individual opinion”). In *McIntyre* the Court was unwilling to accept the state’s argument that its informational interest in providing to prospective voters information on the identity of those publishing pamphlets was sufficient “to support the constitutionality of its disclosure requirement.” *McIntyre*, 514 US at 348–49. See also *Buckley v American Constitutional Law Foundation, Inc.*, 525 US 182 (1999) (invalidating Colorado requirement that ballot initiative circulators wear name-identification badge

ority to a particular issue, no matter how “impartial” and fair the descriptive labels are. In this sense, the educational function of ballot labeling would at the same time serve an agenda-setting role as well.

Now let me focus on the derivation of the ballot label from a popular initiative to amend the state constitution. Again, assuming we were not to deal with a term-limits pledge for federal but for state office, does representative democracy provide us an answer to whether the label is permissible? Does the fact of the initiative suggest that concerns about the availability of voting as the people’s check on the government are not in play? The proposition that they are not at issue depends on an opposition between the vote of the people in the prior initiative and the current government. In other words, one could see the ballot label, not as an act of the “government” that challenges the checking or legitimation functions, but rather as an act of sovereignty of the people.¹¹⁵ However, even if so characterized, there remain problems of democratic checking and legitimation. The vote of the people in the prior initiative was an act of governance, rather than simply election, in the sense that it was an effort to constrain future elections, not simply to fill a seat for a particular term. Not everyone agreed with the vote on the initiative, and even among those who did, two years later a different balance of opinion on that issue—or on

or that information about their names and how much they were paid be provided to the state notwithstanding state’s argument that such measures helped inform voters).

¹¹⁵ See note 96; cf. *West Virginia State Board of Education v Barnette*, 319 US 624, 641 (1943) (in striking down compelled flag salute: “We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority”). Query whether the required ballot labels in Missouri are an expression of “public opinion” or of “authority” seeking to control public opinion. For skepticism that “direct democracy” is less subject to the control of special interests, see Elizabeth Garrett, *Who Directs Direct Democracy*, 4 U Chi L School Roundtable 17 (1997) (identifying the role of money and organization in initiative and referendum campaigns); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L J 1503, 1517 (1990) (noting “innovation in obfuscation” by some proponents of ballot propositions). For other objections to direct democracy, see Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 Wash L Rev 1 (1978); Hans Linde, *When Initiative Lawmaking Is Not “Republican Government”*: *The Campaign Against Homosexuality*, 72 Or L Rev 19 (1993); cf. David Magleby, *Governing by Initiative*, 66 U Colo L Rev 13 (1995) (describing the role of “initiative industry” and arguing that voting on ballot propositions “amplifies the social class bias” in voting generally, and that the “issue agenda of direct legislation” rarely reflects those issues most important to voters); Clark, 112 Harv L Rev (cited in note 109) (arguing that even when fairly conducted, initiatives do not allow people to make as effective use of political power across an array of issues and different intensities of preference as does voting for representatives).

the importance of that issue as a basis for decision—may be present.¹¹⁶ Reification of the prior vote in the new election, then, in setting a one-issue agenda for the future might pose some threat to both checking and legitimation functions.¹¹⁷

And yet, the same could be said more generally about constitutions: the U.S. Constitution, for example, prohibits a twenty-four-year-old from serving in the House of Representatives, even though current voters might prefer this; New York City's charter prevented Rudolph Giuliani from running for another term despite overwhelming public regard. If the people of a state (or city) could enact term limits for their own legislatures, governors, councils, or mayors, why could they not decide to bind themselves to think hard about imposing such a term limit rule by requiring candidates for state office to provide information on the ballot about their views? To move to familiar federal constitutional issues, if we allow people to bind themselves to the two-senators-per-state rule, why should we not allow them to bind themselves to term limits—as the Twenty-Second Amendment does for the office of president? And if we are prepared to concede that a good democratic constitution might include term limits, then does the “greater” power to constitutionalize the rule imply a “lesser” power to include information about candidates’ positions with the

¹¹⁶ Professor Garrett has proposed that using a governmentally sponsored public opinion poll (the poll perhaps consisting of questions identified by groups petitioning with requisite signatures) to identify the several major issues of concern for voters that would then appear as ballot labels might avoid some of the distorting effects of campaigns for initiatives drafted by private groups seeking requirements for single-issue ballot labels. See Garrett, 85 Va L Rev at 1581–84 (cited in note 26). There is much to commend Garrett's proposal, perhaps as a new means to identify issues that could be the subject of ballot propositions with informational pamphlets prepared by government bodies. But one might still stop short of permitting ballot labels for candidates in a polling place, where there is no opportunity for other voices to be considered within the same forum. Cf. Post, 106 Yale L J at 164–65 (cited in note 6) (distinguishing managerial domains in which government speech is subject to less scrutiny from domains of public discourse); Cole, 67 NYU L Rev at 704–12 (cited in note 6) (arguing for focus on whether government function requires neutrality and relying importantly on whether government has a monopoly or domination over information and captive audience and the need to avoid risks of government propaganda and indoctrination).

¹¹⁷ Compare Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U Colo L Rev 1109 (1993) (arguing that agenda control by government, to improve quality of democratic self-government, is inconsistent with serious commitment to self-governance), with Fiss, *The Irony of Free Speech* at 23–24 (cited in note 47) (arguing that the power of determining substantive agenda must be placed “in agencies that are removed from the political fray”); id at 55 (noting that much of First Amendment law involves “protecting democracy from itself”).

intent to encourage adoption of such a rule?¹¹⁸ Why not allow the people to make some lesser form of “precommitment” to an issue, as part of a multi-stage, multi-election process of reconstituting their basic laws?¹¹⁹

If there is a fundamental objection here, it may come from some pre- or meta-constitutional idea of the autonomy of voting in an election. One might say that an essential characteristic of a fair election is that if something is to be voted on, the vote itself must not be skewed. In this sense, there may be an intuition like that behind the idea of unconstitutional conditions: one may not need to hold an election on term limits, but if one does put the question on the ballot, it should be done in a “fair” way.¹²⁰ Pejorative lan-

¹¹⁸ One possibly important kind of difference is suggested by Bruce Ackerman’s distinctions between ordinary and constitutional politics. See Bruce Ackerman, *We The People: Foundations* (Harvard, 1991). On this view, most people are—perhaps healthily—not that engaged in or attentive to public issues most of the time. They show up for elections in small numbers, and with ignorance of major issues. Elections held during such times are necessary to keep government going and to maintain political accountability, but cannot be relied on to provide evidence of the kind of public thinking to constitute binding commitments for a future beyond the time for the next election. In other words, given the instability of preferences over time, ordinary politics should not be allowed to bind the electorate for more than one election. This view, however, constitutes a major challenge to the use of initiative and referendum to amend state constitutions, which has a long history in many parts of the United States but which might equally be viewed as a form of “ordinary politics,” especially to the extent that they do not require special majorities or authorization in consecutive elections or by special bodies to be approved. Whatever one might conclude about the legitimacy of amending constitutions by ordinary voting, one’s answer may be influenced if the result of an amendment by way of initiative or referendum can be undone through the same mechanism. To the extent that a ballot label, enacted by initiative, were seen as an attempt to forestall future elections from acting as a check to undo the prior results (e.g., by privileging an issue, like term limits, in the different context of an election for representatives), it may pose special legitimacy concerns not present with respect to other form of initiatives.

¹¹⁹ For thoughtful argument in favor of using serial referenda in different elections as a mechanism for constitutional amendment that may, inter alia, overcome the deficiencies in one-time referenda lawmaking, see Bruce Ackerman, *The New Separation of Powers*, 113 Harv L Rev 633, 664–68 (2000); Bruce Ackerman, *We The People: Transformations* 403–14 (Harvard, 1998).

¹²⁰ In part this insight may assume that ballot labels might disguise a “decision under the influence” from one that is in some sense freer—at least of organized last-minute inputs. See Yudof’s excellent discussion over concern for government speech creating a manufactured or “falsified” consent. Yudof, *When Government Speaks* at 174–99 (cited in note 6); Cole, 67 NYU L Rev (cited in note 6) (noting danger of indoctrination through government speech). And I do not mean to minimize the other possible objections to identifying a body and a process that can be trusted to provide accurate and “fair” information on all sides of a controversial issue. One would need to have trust in some body to fairly do or supervise the labeling. Cf. Magleby, 66 U Colo L Rev at 24–25 & n 47 (cited in note 115) (noting that official summaries of initiatives, prepared by government bodies, are often challenged in court).

guage interferes with the fairness of the vote and hence with the legitimacy of the result.

But what about a nonpejorative label of a candidate's position on an issue? Even assuming that it were possible to write a description that most people agreed was "neutral" and not pejorative, there is a second objection that may be made to affixing such a label to a candidate for office. To the extent that the selection of candidates is for a general function legislative body,¹²¹ even a nonpejorative ballot label on a particular issue arguably skews the checking and choosing functions with respect to other aspects of what representatives do. If one is thoroughly committed to a deliberative conception of representation in a democracy, such a result is particularly troublesome. Even if one believes in a more "instructional" concept of representation (in which the representative is to reflect the views of constituents), in a general legislative body representatives reflect views on a range of issues that may require compromise or inconsistent treatment in order for the legislature to actually reach decisions; pointing electors to a single issue in the selection of a member of a general legislative body risks diverting voters from considering that broad range of functions at the moment of decision.¹²² Whether these concerns are sufficient to condemn as unconstitutional even neutral ballot labels for candidates is a hard question.

For the government to mandate (and pay for) a ballot label designed to influence public decisions on candidates in an election, then, is arguably—but only arguably—inconsistent with the check-

¹²¹ Query whether there is a difference in principle, or only in degree, between instructions to delegates to a single-issue assembly (e.g., whether to ratify a proposed amendment, or whom to select as President) and instructions on a particular issue to a member of a general legislative body. Statutory provisions for apparently binding instructions of members of single-issue bodies are not uncommon. See, e.g., Cal Elec Code § 6906 (Deering 2000) (presidential electors); Ariz Rev Stat Ann § 16-705 (West 1996) (delegates to ratifying convention on proposed amendment).

¹²² The expression of voters' views on a specific issue—unattached to a candidate—could be a source of important expressive information, provided in a way that poses smaller risks to the political process. This function may lie behind the distinction emphasized in Justice Kennedy's opinion between "nonbinding petitions or memorials by the State as an entity" and the ballot labels required by the Missouri law at issue. See 121 S Ct at 1041 (Kennedy, J., concurring). Cf. Brief for the United States as Amicus Curiae Supporting Affirmance in *Crosby v National Foreign Trade Council*, 530 US 363 (2000), No 99-474, at 28 (Feb 2000) (noting permissibility of States petitioning Congress or enacting resolutions of disapproval of foreign government while arguing against permissibility of legal sanctions amounting to regulation of foreign commerce).

ing, choosing, and legitimation functions of elections. Whatever role there may be for government use of funds to provide information (or even take positions) on issues in pamphlets prepared prior to an election, the polling place and ballot box itself are fora in which the government arguably ought to be highly constrained in the way in which it presents choices to the voters, with elections for candidates held distinct from votes on ballot propositions, or on expressions of opinion on resolutions, and the like.¹²³ This position does not necessarily preclude “instruction”; it does not take a position on deliberative or instructive democracy; but rather it claims that voting for candidates for ongoing government posts is sufficiently distinctive in a complex democracy that the choice—in each election—of what matters most must be one that voters make, generally, on a slate as clean from government support as possible.

Although Rehnquist anchored his opinion in the First Amendment, he did not frame the issue as involving questions of government speech.¹²⁴ Government speech poses genuinely difficult problems. Frequently it is motivated by efforts to influence elections and to retain the power of incumbents—but it is often a good idea for government to be responsive to those it represents, at least most of the time on most issues. Moreover, as many have noted, citizens have “an interest in knowing the government’s point of view,” and there are legitimate interests in using speech to advance government programs and policies.¹²⁵ Yet to allow unrestricted use

¹²³ Ballot labeling for referendum and initiative, in the sense of information providing, poses distinctive issues for constitutional analysis of what forms of government speech or influence are undue. Although the choice presented on a ballot initiative is typically binary, it is possible to explore some of the nuances of concern in competing ballot statements. And the lower courts have been more divided on the permissibility of government advocacy for referenda than government advocacy for particular candidates. See note 56 *supra*.

Ballot labeling by candidates themselves, in the form of a short candidate statement, would also require further separate analysis. See Garrett, 85 Va L Rev at 1584–86 (cited in note 26) discussing this proposal. Such self-labeling has the advantage of allowing the candidate herself to decide what issues or values to focus on in providing “last minute” information to voters; in this sense it is not “government speech” and does not bear the risks of allowing a government in power to control the agenda or information flow to voters on the ballot unduly. Such self-labeling, however, retains the potential for having an undue impact on voters in the absence of response time, a concern mediated somewhat by the presence of statements of competing candidate; it also presents concerns about the accuracy of the descriptions and state processes for judging accuracy.

¹²⁴ See note 96 for brief discussion of whether the ballot label should be regarded as government speech.

¹²⁵ Cole, 67 NYU L Rev at 681 (cited in note 6).

of government speech resources to influence elections could threaten the legitimacy of elections and lead to authoritarian (or worse) governments. Thus, as David Cole writes, government speech “is both necessary to and potentially subversive of democratic values.”¹²⁶

Had the issue in *Gralike* been framed as one of permissible government speech, I think the answer would be the same: that the one-sided ballot label in this case was impermissible. The ballot is a government-monopolized forum in no sense involving “managerial” domains but rather a public discourse and decision forum in which government neutrality is central.¹²⁷ What does our knowledge of “government speech” tell us about our hypothetical evenhanded ballot label? I think that humility should make us skeptical of even evenhanded ballot labels in this setting. The monopoly over speech in the ballot marks this arena as one very different from arts funding, the subsidized provision of medical services, or legal services.¹²⁸ It makes it different from many other settings in which government speech occurs (including statutory preambles, congressional reports, speeches from executive branch officials or individual members of Congress, official task force reports, judicial opinions or dissents) when the government itself frequently speaks with fragmented voices—the “official report” being subject to disagreement by minority members of Congress, or by sources in the executive branch.¹²⁹ No other voice can enter the ballot other than by being printed on it. Yet cacophonous and seriously multivoiced ballot labeling would defeat any effort at clarity on the ballot for

¹²⁶ *Id.*

¹²⁷ See Post, 106 Yale L J (cited in note 6); see also Cole, 67 NYU L Rev 675, 680–82, 702–17 (cited in note 6) (noting dangers not only of government coercion but of the “indoctrinating effect of a monopolized marketplace of ideas” and arguing for a “spheres of neutrality” approach that would require “public institutions central to a system of free expression” (or, presumably, democracy) to maintain independence from government views and neutrality as among views).

¹²⁸ See Emerson, *The System of Freedom of Expression* at 697–99 (cited in note 66) (emphasizing the value of government speech in democracy, but not where government holds monopoly or near-monopoly on expression).

¹²⁹ On the value of decentralization and fragmentation of “governmental” power to speak, see Yudof, *When Government Speaks* at 179–88 (cited in note 6) (noting decentralization of congressional speech as helping to avoid risks of government propaganda to “falsify” majority consent), 216 (noting that “fragmentation of responsibility for education among governments reduces the potential danger of a thoroughgoing indoctrination,” as does the autonomy of classroom teachers).

voters.¹³⁰ While government speech in other settings may plausibly be understood to increase expressive activities, without suppressing critique or difference, inside the ballot or polling booth the absence of other voices, and the absence of “response” time,¹³¹ caution against reliance on information-providing as a justification for ballot labeling of candidates. Yet there are many jurisdictions that provide far greater information in connection with the ballot than that proposed in my hypothetical,¹³² and thus it may to some extent be an empirical question whether on particular issues on particular ballots the provision of “evenhanded” information would enhance the reliability of the vote or instead de-legitimate election results or interfere with the checking function of elections.

A more basic difficulty in approaching the issue as one of government speech is that the judicial doctrine lacks any coherent theory of a positive role for the government in the protection of freedom of speech. The Constitution generally has been interpreted not to require affirmative government action but rather to impose limits or conditions on the government when it does act. Without some constitutional framework for determining what the purpose of affirmative government action should be, it is easy to criticize as unsatisfactory and ad hoc efforts to distinguish permissible from impermissible government speech.¹³³ And yet the intuition that one

¹³⁰ For a vivid description of the California ballot pamphlet, see Eule, 99 Yale L J at 1508–09 (cited in note 115).

¹³¹ On the importance of response time in evaluating, under the First Amendment, government speech or government restrictions on speech, see *McIntyre*, 514 US at 352 n 16 (distinguishing *Burson v Freeman*, 504 US 191 (1992) because the state’s interest in preventing voter intimidation and election fraud was “enhanced by the need to prevent last minute misinformation to which there is no time to respond”); see also *Buckley v American Constitutional Law Foundation, Inc.*, 525 US 182, 198–99 (1999) (agreeing with the 10th Circuit’s concern that requiring paid initiative circulators to wear name badges operates when reaction to the message is most intense, emotional, and unreasoned, exposes them to unpleasantness, and diminishes their willingness to circulate possibly unpopular positions). Information on the ballot, though generally made public before the voting, is probably read by voters (if at all) at the last minute with no response time. Cf. Magleby, 66 U Colo L Rev at 38 (cited in note 115) (reporting that most voters face “informational vacuum” on noncontroversial ballot measures and that “most voters make snap judgments on the measure in the voting place”); but cf. Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 Yale L J 107, 117–24, 130–44 (1995) (describing studies showing that mass media reporting and political advertising were the most important influences on voters’ understanding of initiatives on ballot, in contrast to the materials courts relied on to interpret voters’ intent in enacting those initiatives, including statutory language and official ballot material).

¹³² See note 130 *supra*.

¹³³ See, e.g., why a leading scholar on government speech approves of the Court’s rejection in *Wickard v Filburn*, 317 US 111, 117–18 (1942), of an effort to invalidate wheat

can draw such a line is reflected in lower court rulings, for example, distinguishing providing information on ballot issues from engaging in advocacy, or in the distinctions between government officials speaking for themselves or speaking for the whole government,¹³⁴ or in the possible constitutional significance of whether the government is speaking on “controversial” or noncontroversial areas.¹³⁵

The larger point here is that once one gets past the pejorative language of this particular term-limits provision, resolving how, on representative democracy grounds, one should think of a ballot label designed to focus attention on term limits and itself enacted by popular initiative is a difficult one—whether one reasons from basic structural principles of representative government, from the Elections Clause, or from the First Amendment’s commitment to the protection of expressive activities.

So if a structural approach was likely to yield a holding not that different in scope from the approach taken either by the Court or by Rehnquist, why does the form of reasoning matter? First, it matters because the core of the argument here is deeply structural, and to treat the issue as if it turned on the particularities of the Elections Clause, and of whether the ballot-labeling law can be shoehorned into the word “Manner,” is to miss the point of repre-

production quotas because the referendum that adopted the quota was the subject of an assertedly inaccurate and misleading speech by the Secretary of Agriculture. “Drawing the line in terms of what is ‘good’ or ‘bad’ executive advocacy; of what distorts judgment and what is public leadership; and of government versus private speech by a public official is so difficult that it is preferable to rely upon the pluralistic character of the system of freedom of expression.” Yudof, *When Government Speaks* at 292 (cited in note 6). Yudof argues that if the secretary’s speech was inaccurate, those opposed should engage in more, or counter-speech, and, more generally, that the problems of government speech should be redressed by legislatures and not courts. A number of scholars have sought to develop a more affirmative framework for defining the work of the government in light of the First Amendment, which in turn may provide a basis for developing more complete understandings of government-funded private speech and of the many forms of more direct “government” speech. See, e.g., Sunstein, *Democracy and the Problem of Free Speech* 81–92 (cited in note 108) (arguing for active government intervention in, e.g., media regulation in order to foster a more deliberative democracy); Fiss, *The Irony of Free Speech* at 44 (cited in note 47) (arguing for active government subsidy for unorthodox ideas); Greene, 53 Vand L Rev (cited in note 6) (arguing for permissibility of governmental advocacy of concepts of the good in many settings).

¹³⁴ See notes 41, 57.

¹³⁵ See note 108; Fiss, *The Irony of Free Speech* at 44 (cited in note 47) (suggesting that the least-known unorthodox ideas may have best claim to public funding).

sentative democracy.¹³⁶ Basic principles bear repeating. The Court has not been loath to do so in the area of federalism, and with respect to contested versions of those first principles. The Court should be no more loath (and possibly more willing) to do so where the basic significance of elections in a democracy is at stake.¹³⁷

Second, it matters as a matter of intellectual clarity. As I hope to have shown above, both the majority and the Rehnquist opinions are driven more by assumptions about elections than by more generalized assumptions about government speech, or individual rights to be free from adverse labeling. Rehnquist's assumptions about the injury caused by pejorative government speech are centrally defined and limited by the electoral ballot context.

Third, it matters because an approach grounded in the constitutional commitment to representative democracy would engage our Court in a transnational discourse with other constitutional courts around the world that, with respect to some matters, is finding much basic agreement on foundational principles. It is not the case that we "happen" to have an Elections Clause, or a First Amendment, that just "happens" to yield results similar in principle to those reached by constitutional courts operating in other representative democracies, sometimes interpreting specific language but oftentimes not. Recognizing the deep structural source of the decision in *Gralike*—the constitutional commitment to representative democracy—would place our Court's decision in the same conversational domain as the robustly developing comparative constitutional discourse among the great constitutional courts of the world, positioning the United States better to influence and be influenced in the future by the reasoned decisions of other representative democracies.¹³⁸

¹³⁶ Justice Stevens's argument about the meaning of the term "Manner" is ultimately unpersuasive. See 121 S Ct at 1038, quoted in text at note 10 *supra*. The term "manner" is sufficiently open-ended to embrace almost any form of regulation of the ballot. The term alone does not distinguish the common requirement to list party affiliations on the ballot from the novel requirement to list candidates' positions on particular issues.

¹³⁷ For a foundational work on the importance of elections and opposition ("public contestation"), see Robert Dahl, *Polyarchy, Participation and Opposition* (Yale, 1971).

¹³⁸ For further discussion of comparative constitutional understandings, see Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 Duke L J 223 (2001).