The “Political Marketplace” Metaphor from a Labor-Centric Perspective

Thomas Tso
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Abstract

The use of the political marketplace analogy is common in the academic literature on the law of democracy. The analogy between a consumer and voter lies at the heart of this analogy. This article presents an alternative vision of the marketplace analogy. Instead of a consumer-voter, this article presents a marketplace framework that relies instead on an analogy between laborer and voter. Through the use of judicial opinions, discussions in labor law, labor economics, and political science, this article presents an alternative political marketplace framework with implications for how we use the marketplace analogy in policy and legal contexts.

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I. INTRODUCTION: THE “POLITICAL MARKETPLACE” ANALOGY

The term “political marketplace” is increasingly used in the academic literature and judicial opinions. The most famous and prevalent use of the “marketplace” analogy is in First Amendment jurisprudence. The First Amendment is often described as protecting a marketplace

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1 For example, out of a total of 67 federal cases using the exact term “political marketplace,” two were from the late 1970s, nine from the 1980s, and 56 from 1990 onwards. The dominance of the “marketplace” vision in First Amendment law is described by Pnina Lahav in Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech, 4 J. Law & Pol. 451, 480–81 (1987).

of ideas. Beyond the First Amendment protection of speech context, the “political marketplace” is also used as a framework for describing the interaction among democratic institutions more generally. One important example is Richard Pildes and Samuel Issacharoff’s influential work, which uses analogies between economic markets and democratic institutions to examine democratic competition between political parties. In essence, they view political markets as similar to economic consumer markets. In this “political marketplace” metaphor, parties produce candidates and voters choose these candidates based on the attractiveness of the candidates and their ideas. Candidates, along with their packaged ideas, platform, speeches, advertising and image, are the “product.” Political parties compete with each other by changing their “products” in an attempt to attract a larger number of voters willing to choose their products under heavy judicial and legislative scrutiny. Parties are thus like a heavily “regulated industry.” Voters are their consumers. The relationship between voters and parties is one of marketing and consumption. The party is a private institution and voters cast their ballot in a private

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5 This analogy is explored fully in Pildes and Issacharoff, Politics as Markets, at 674, where they compare the two political parties to two merchants selling to customers. For a straightforward explanation of the consumer-centric marketplace metaphor, see Gerald M. Pomper, The Fate of Political Parties, 2 ELECTION L.J. 69, 69-70 (2003).
6 Richard H. Pildes, Foreword: The Constitutionalization of Democratic Politics, 118 HARV. L. REV. 28, 52 (2004) (“Democracy is a ‘heavily regulated industry,’ and just as individual Contracts Clause rights are specially conditioned in such industries, so too are the rights of democracy inevitably conditioned by the entire institutional structure within which these rights exist.”). This view has origins in the theories of Anthony Downs and Joseph Schumpeter. See David Schleicher, Irrational Voters, Rational Voting, 7 ELECTION L. J. 149, 155-57 (2008).
7 Daniel R. Ortiz, Duopoly versus Autonomy: How the Two-Party System Harms The Major Parties, 100 COLUM. L. REV. 753, 774 (2000) (“Like any producer in a controlled market, [the two political parties] will serve their own interests first and as much as possible. They will exploit us as much as they can. . . . Given our rational political indifference, we truly need these institutions to do much of the work of politics. Democracy-as-consumption will not work well without independent producers. But in a two-party system, we dare not give political parties the autonomy they need to make our politics work best. To give them independence without free competition would turn these institutions against us. Right now we have a strong two-party system without strong parties. Let us hope that someday we will have the courage to have the opposite.”) (emphasis added). For an overview of the historical
transaction just as corporations are private entities and consumption decisions are private decisions. The metaphor is straightforward, persuasive, has strong rhetorical value and important implications for framing constitutional issues. While Pildes and Issacharoff offer a complete consumer marketplace vision of democracy, other scholars have emphasized different strands of this vision by focusing on the voter-consumer, the party-corporation, or the candidate-product. The “voter as a consumer” trope is more than mere description; it is framework for understanding democratic institutions with significant normative and legal implications, i.e., treating voters in the political marketplace like consumers in the economic marketplace.

In this article, I present an alternative political marketplace framework that leads to different normative conclusions for election law and policy. I distinguish the “voter-consumer” framework and this Article’s alternative framework respectively as a “consumer-centric” versus a “labor-centric” perspective. This “labor-centric” view of the political marketplace suggests that the voter is a worker, parties are corporate employers, and candidates are political managers.

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8 See generally Paul Brest, The Thirty-First Cleveland-Marshall Fund Lecture: Constitutional Citizenship, 34 CLEV. ST. L. REV. 175 (1985/1986). Justice Breyer noted recently in a dissenting opinion: “Amici . . . suggest that a political party strong enough to redistrict without the other's approval is analogous to a firm that exercises monopolistic control over a market, and that the ability to exercise such unilateral control should therefore trigger ‘heightened constitutional scrutiny.’ The analogy to antitrust is an intriguing one that may prove fruitful, though I do not embrace it at this point out of caution about a wholesale conceptual transfer from economics to politics.” Vieth v. Jubelirer, 541 U.S. 267, 358 (2004) (Breyer, J., dissenting) (citations omitted) (citing Samuel Issacharoff, Gerrymandering and Political Cartels, 116 HARV. L.REV. 593 (2002); Samuel Issacharoff & Richard Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 STAN. L. REV. 643 (1998)). For example of this use of the “voting-as-consumption” metaphor in court, see, e.g., Suster v. Marshall, 121 F. Supp.2d 1141, 1144 (N.D. Ohio 2000) (“Plaintiffs claimed that as voters, they are entitled to consume as much political campaign speech as judicial candidates might wish to express.”); see also Suster v. Marshall, 951 F. Supp. 693, 696 (N.D. Ohio 1996) (“Plaintiffs avow that, as voters, they would like to consume as much political campaign speech as judicial candidates might wish to express.”).


12 See, e.g., Brest, Constitutional Citizenship, at 189.
Political parties enter into long-term relationships with the voting electorate akin to employer-employee relationships. Political parties allocate voter-workers to maximize return on political power to the party, its managers, and its financiers-shareholders.\(^{13}\) That is not to say political markets are stagnant, but more akin to a labor market where voters can change political parties, but, unlike a consumption decision, a decision to switch parties are more deliberate and are influenced by endowment factors (geography, education, etc.).

In short, this Article suggests the party-voter relationship is more akin to an employer-employee relationship than a producer-consumer one. Accordingly, because the party-voter relationship is analogous to an employment relationship, labor scholarship, including labor law, can be a useful tool to understand political governance and voting. Moreover, by viewing the party-voter relationship from a labor-centric, rather than consumer-centric, perspective, the economic-political marketplace analogy leads to different normative conclusions for law and policy. This alternative perspective can also highlight the deficiencies in examining the political marketplace solely from a consumer-centric perspective.

II. MAPPING THE ELEMENTS OF LABOR-CENTRICISM

In describing political parties, the academic literature often uses V. O. Key’s tripartite conception of the party: “(1) the party-in-the-electorate, made up of ordinary party members, (2) the party-in-the-government, which includes all elected and appointed officials sharing a given party affiliation, and (3) the party organization (or ‘professional political workers’).”\(^{14}\) In contrast, this Article posits an alternative mapping of the political party as a way to introduce each component of the labor-centric framework: (A) the party employees, \(i.e.,\) ordinary party


\(^{14}\) See, \(e.g.,\) Nathaniel Persily, Candidates v. Parties: The Constitutional Constraints On Primary Ballot Access Laws, 88 GEO. L. J. 2181, 2185 (citing V.O. KEY, JR., POLITICS, PARTIES & PRESSURE GROUPS 163-65 (1964)).
voters, and low-level political workers in the party organization; (B) the party managers, i.e.,
party members in government office and high-level professional political workers; (C) the
corporate entity, i.e., the party as an individual legal person;\textsuperscript{15} and (D) the party shareholders, i.e.,
the campaign financers and donors. In the following sections, I will discuss each grouping.

A. The Voter as Party Employee

The conception of the voter as a “worker” or “employee” of a political party is reflected
in Justice Powell’s defense of patronage practices in several dissenting opinions, most notably
his opinion in \textit{Elrod v. Burns}, 427 U.S. 347 (1976) (joined by then-Chief Justice Burger and
then-Justice Rehnquist).\textsuperscript{16} Throughout these dissents, Justice Powell outlines a vision of the
party and its role in democratic practice. According to Justice Powell:

\begin{quote}
Patronage practices broadened the base of political participation by providing incentives
to take part in the process, thereby increasing the volume of political discourse in society.
Patronage also strengthened parties, and hence encouraged the development of
institutional responsibility to the electorate on a permanent basis.
\end{quote}

\textit{Id.} at 379. Under his view, patronage is ultimately concerned with the relationship between
political parties and its volunteer campaign workers; patronage practices treat this relationship as
akin to an employment relationship. The political party offers government jobs as incentives for
campaign workers to do their bidding on a permanent basis. Through the prism of patronage, a
relationship between campaign volunteers and political parties is not purely platonic; the
motivation for the volunteers’ political labor relies on much more than just ideological

\textsuperscript{15} Corporations are considered separate “legal persons.” See, e.g., Robert N. Strassfeld, Note, \textit{Corporate Standing to
Allege Race Discrimination in Civil Rights Actions}, 69 VA. L. REV. 1153, 1169-171 (1983) (describing the
“reification” of corporate entities as individual legal persons).

\textsuperscript{16} Justice Stewart later endorsed this view by concurring with Justice Powell’s dissent in \textit{Branti v. Finkel}, 445 U.S.
507, 521 (1980) (Powell, J., dissenting). Justices Scalia and Thomas have endorsed this view. See, e.g., \textit{Board of
be no dispute that, like rewarding one’s allies, the correlative act of refusing to reward one’s opponents--and at
bottom both of today's cases involve exactly that--is an American political tradition as old as the Republic. This is
true not only with regard to employment matters, as Justice Powell discussed in his dissenting opinions in \textit{Elrod} . . .
and \textit{Branti} . . . but also in the area of government contracts...”).
conviction. Parties can not and do not depend solely on ideological persuasion to recruit and motivate political workers. Instead, they pay workers with more tangible rewards. In his *Elrod* dissent, Justice Powell considers patronage as a fundamental part of the life of political parties.

Justice Powell writes:

> History and long-prevailing practice across the country support the view that patronage hiring practices make a sufficiently substantial contribution to the practical functioning of our democratic system to support their relatively modest intrusion on First Amendment interests. The judgment today unnecessarily constitutionalizes another element of American life an element certainly not without its faults but one which generations have accepted on balance as having merit.

*Id.* at 388-89.

This practice of “patronage” intrinsic to “American (democratic) life” is perhaps only the most overt practice of rewarding work in political practice. Apart from government jobs, campaign workers can also gain influence in local political organizations, employment in partisan non-profits, and general networking opportunities. Patronage reflects only a small slice of the relationship between political parties and their affiliates: rewarding its more prominent campaign workers with political appointments. Taking Justice Powell’s observations one step further, all party affiliates, including voters, who participate in the political process, may have similar relationships with the political party. Voting and participation is also work; the difference between volunteering for a campaign and casting a ballot in multiple elections for a political party is not a categorical difference -- it can be considered a difference in degree. Parties need

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17 As Justice Powell notes, “[i]t is naive to think that these types of political activities are motivated at these levels by some academic interest in “democracy” or other public service impulse.” *Elrod*, 427 U.S. at 385.


19 The difficulties in trying to the draw the line between what is a “political” activity is described by Justice Douglas’ dissent in *S. Civil Service Commission v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 595–600 (1973) (Douglas, J., dissenting); see also *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 196 (1971) (“The question is not aimed at concerted activity of whatever sort oriented to the doing of illegal acts, but at affiliations with political associations that ‘advocate’ or ‘teach’ certain political ideas. All kinds and degrees of
campaign volunteers to work the campaigns; they also need to control their affiliated voters so that they consistently work, i.e., cast ballots, in their favor. Justice Scalia, endorsing Justice Powell’s views, in a dissenting opinion, has stated “[t]he Court simply refuses to acknowledge the link between patronage and party discipline, and between that and party success.”\(^{20}\) As ideological persuasion is often insufficient to motivate campaign volunteers, it can be equally insufficient to motivate voting-work for party success. Therefore, we can extrapolate Justice Powell’s view on patronage, i.e., that an active party needs campaign volunteers who are incentivized by tangible rewards, to a broader view that all forms of participation for a political party can be considered “work” and, therefore, requires some link to a tangible “reward” and “party discipline.”\(^{21}\) In important ways, campaign volunteers and voters both can be considered akin to “employees” of the political parties.

The Supreme Court has offered this definition of “employment”: “. . . work or employment . . . as those words are commonly used . . . mean[s] physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”\(^{22}\) There are two major prongs in this definition of “employment”: a control relationship between an employer and an employee resulting primarily in some benefit to the employer. There is also usually some reward or compensation for the work performed.\(^{23}\) In other words, “employment” is: (1) a fixed, usually hierarchical, relationship between an employer and employee and (2) an employee’s work primarily benefits the employer in exchange for compensation. As I shall argue in the balance of

affiliation are covered: indifferent and energetic members alike, in well-disciplined organizations or in any transitory ‘group of persons.”’) (Marshall, J., dissenting).


\(^{21}\) See, e.g., Pomper, The Fate of Political Parties, at 75–76.


\(^{23}\) United States v. Somsamouth, 352 F.3d 1271, 1275 -76 (9th Cir. 2003).
this section, both volunteer campaign workers and voters have characteristics of being party 
“employees” by satisfying these definitional prongs: (1) they both have stable, but not 
necessarily permanent, subsidiary relationships with the party; and (2) they both do “work” 
primarily benefiting a party, which then rewards them, e.g., patronage, for effective work.

(1) A Stable Subsidiary Relationship

The relationship between a voter and a party is described by judges as “political 
affiliation.” Judges have also described “political affiliations” or party “loyalty” as similar, in 
some respects, to religious belief, race, and nativity. In other words, the voter is loyal (implying 
subservience) to the party in a stable “affiliate” relationship. “Political affiliation” is similar to 
other forms of subservient membership within a “corporate” entity, such as employment in an 
economic corporation. For example, Jonathan Macey observes how both political parties and 
economic corporations act as “mediating institutions” that manage their members, i.e., voters and 
employees, in very similar fashion. According to Macey, both political parties and corporate 
organizations encourage “loyalty,” i.e., acceptance of the mediating institutions’ role in shaping

statutes denying positions of public importance to groups of persons identified by their business affiliations, 
commonly known as conflict-of-interest statutes. In the Douds case the Court found in such statutes support for its 
conclusion that Congress could rationally draw inferences about probable conduct on the basis of political 
affiliations and beliefs, which it considered comparable to business affiliations.”).

25 See e.g. Rogers v. Lodge, 458 U.S. 613, 650 (1982). (“Thus, the Court has considered challenges to discriminations 
based on ‘differences of color, race, nativity, religious opinions [or] political affiliations,’ to redistricting plans that 
serve ‘to further racial or economic discrimination,’ to biases ‘tending to favor particular political interests or 
geographic areas.’”) (citations omitted) (Stevens, J., dissenting); Elrod, 427 U.S. at 380 (“They are employees 
seeking to avoid discharge not citizens desiring an opportunity to be hired by the county without regard to their 
political affiliation or loyalty.”) (Powell, J., dissenting).

26 Affiliations have been considered, in some circumstances, as a type of “employment,” in the broad sense, under 
the law. See Bama Tomato Co. v. U.S. Dept of Agriculture, 112 F.3d 1542, 1546 – 47 (11th Cir. 1997); see also Brown, at 465; Am. Comm’n’s Ass’n, C.I.O., v. Douds, 339 U.S. 382, 390-92 (1950) (analogizing political affiliations 
with business affiliations in the employment conflict-of-interest context).

27 Jonathan R. Macey, Packaged Preference and the Institutional Transformation of Interests, 61 U. CHI L. REV. 
1443, 1444 (1994) (“Mediating institutions actually define the preferences of their constituents, both by making 
decisions for them and by changing their priorities over time. Studies of this transformative role are best developed 
in the case of the modern corporation, but the transformation of preferences occurs in other social institutions as 
well.”). One example he gives is the transformation of attitudes towards tobacco by Philip Morris employees, see id. 
at 1443 n.2. Another is the transformation of attitudes in the voting context, see id. at 1476.
members’ (e.g., employees, voters) interests and actions. For example, political parties provide voters heuristics for choosing candidates by identifying candidates as representatives of the party and thereby guide voting behavior. Thus, strong affiliation with a party often overpowers transitory and independent influences on a voters’ choice.

In his dissents in the patronages cases, Justice Powell equally viewed political parties as a “mediating” institution; moreover, to him, for voters, like workers, corporate (party) affiliation is an act of self-definition. In Elrod, Powell observed that voters stick with their self-identified party loyalties despite misgivings over the slate of candidates. In other words, their selection of candidates is mediated through their corporate loyalty. As one commentator notes:

[Justice Powell] contended that the act of choosing to participate in one party's primary is tantamount to affiliating with the party. Powell viewed party membership as an act of individual self-definition, not merely as alignment with a particular party ideology. If an individual believes himself to be a Democrat and registers with the party, he joins the party regardless of whether his beliefs run counter to the party platform.

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28 There are many real life examples of such effects resulting from corporate membership. For company loyalty, see, e.g., HarperCollins San Francisco, a Div. of HarperCollins Publishers, Inc., 79 F.3d 1324, 1330 (2d Cir. 1996) (describing how a corporation enlisted its employees in a “war” against labor unions); for dramatic example of tests of political party loyalty, see, e.g., Canton v. Todman, 259 F. Supp. 22, 24 (D. V.I. 1966) (describing a statutory requirement of an “oath of allegiance to the political party” before any member of the party can submit his name as a candidate in the primary elections.).

29 See Michael Kang, Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,” 50 UCLA L. REV. 1141, 1162 (“A normative endorsement of heuristic reasoning thus flows from a realistic acknowledgment of the central role that political elites play in American politics. It is a wishful endeavor to pray that citizens can become better individual democrats, without also considering the powerful function of politicians, activists, interest groups, and other elites. Political scientist John Zaller has demonstrated persuasively that an overwhelming amount of public opinion is shaped by heuristic cuetaking from political elites, on issues ranging from racial toleration to military spending. In short, citizens depend on political elites to gather political information and synthesize deliberative judgments for them.”).

30 See id. at 1149-51 (“Instead of carefully considering all relevant information about the candidates, citizens leverage their knowledge about the major political parties as an organizing heuristic for understanding who the candidates are, whether the candidates are credible, and which candidate best represents them.”).

31 Justice Powell writes in Elrod: “[i]t is naive to think that [local] political activities are motivated at these levels by some academic interest in ‘democracy’ or other public service impulse. For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties... Parties generally are stable, high-profile, and permanent institutions. When the names on a long ballot are meaningless to the average voter, party affiliation affords a guidepost by which voters may rationalize a myriad of political choices. Voters can and do hold parties to long-term accountability, and it is not too much to say that, in their absence, responsive and responsible performance in low-profile offices, particularly, is difficult to maintain.” Elrod v. Burns, 427 U.S. 347, 388 (1976) (Powell, J., dissenting) (citations omitted).

In addition to the party’s mediating role, political affiliation is fundamentally stable, *i.e.*, an act of “self-definition.” 33 Employees in corporations also self-identify with their employer-corporations; employees continue to remain loyal to their corporation despite misgivings about current management. 34 The party, like the corporation, has a significant role to play in fostering corporate loyalty through the voter’s a stable and long-term commitment to partisan party politics and also the political process. As a recent political science study of electoral turnout in numerous democracies concludes, “[t]he decision to vote . . . is like the decision to support a particular party. Just as support for political parties is established for most people early in adult life, so with [voter] turnout.” 35

Implicitly, the plurality in the *Elrod* case also acknowledges the power of party affiliations to command individual behavior for long periods of time. One of the plurality’s rationales for criticizing the patronage system relied on the idea that as employees of the administrative state, party volunteers would have a conflict of interest. 36 They feared government would become “partisan government.” 37 Federal employees are thus prohibited from working on campaigns, because they would be serving two masters. 38 In other words, the plurality believed

33 However, Powell does not see political parties as of a clear ideological persuasion. See Democratic Party of the United States *v.* LaFollete, 450 U.S. 107, 132-33 (1981). Nevertheless, this does not run counter to the observation that voters are employed and influenced by the current dominant ideological persuasion as enforced by the current presiding political managers. Corporations often change hiring patterns, strategic visions, etc., however these changes, like in the political context, are not sudden nor common.

34 Even with high mobility across corporate jobs, organizational behavior scholars have argued that “commitment” to the corporate organization (i.e. corporate loyalty) can still be strong among mobile workers. See Todd L. Pittinsky & Margaret J. Shih, Knowledge Nomads: Organizational Commitment and Worker Mobility in Positive Perspective, 47 AM. BEHAVIORAL SCIENTIST 791, 802–804 (2004). The purpose of “change management” in business school is the challenge of winning over the employees from a previous management; there is an assumption that the employees will not exit after the entrance of new management. See generally JANICE A. KLEIN, TRUE CHANGE: HOW OUTSIDERS ON THE INSIDE GET THINGS DONE IN ORGANIZATIONS (2004). Economist Amartya Sen has also described voters as “committed” to political parties. See Amartya Sen, Rational Fools, 6 PHIL. & PUB. AFFAIRS 317, 333-34 (1977).

35 FRANKLIN, ET AL., VOTER TURNOUT, AT 12.

36 *Elrod*, 427 U.S. at 355-57.

37 *Elrod*, 427 U.S. at 362 (Powell, J., dissenting).

38 This rationale has been extended by Circuit Courts. For example, the Third Circuit writes: “[t]he constitutional prohibition against patronage derives from the coercive aspects of the spoils system which inhibit the rich political
the major problem with patronage is that political campaigners will be “employed” by two different “employers”-- the informal employer (the party) and the formal employer (the government).\textsuperscript{39} Even after the campaign, campaign workers employed by the government will be affected by his previous (and possibly continuing) employment as a party affiliate.\textsuperscript{40} The plurality position suggests that these dual affiliations have, on balance, negative effects on the political marketplace.\textsuperscript{41} Justice Powell’s dissent is in agreement with the plurality that workers may serve two masters, but disagrees that this situation would have, on balance, deleterious effects. Instead, Powell argues that patronage merely formalizes what is already an informal permanent and necessary relationship among parties, party workers, voters, and government.\textsuperscript{42}

For Powell, parties need government positions to reward the labor required for party operations; this incentive increases political participation and political partisanship, thereby developing stronger relations between government and the voting electorate. In short, party “employment” is rewarded with government employment, and the carrot of government employment encourages more party “employment” and activity. They are somewhat translatable and mutually reinforcing.

This description of the voter-party relationship as stable and subservient accords with a school of thought in political science called the “Michigan Model.” The main tenet of the Michigan model is the centrality of commitment to partisanship in the determination of electoral discourse protected by the First Amendment. Without the protection afforded by the Constitution, employees might forgo the expression of their political beliefs or artificially change their political association to avoid displeasing their supervisors. Such coercion, whether direct or indirect, is incongruent with a free political marketplace.” \textit{Robertson v. Fiore}, 62 F.3d 596, 600 (3d Cir. 1995) (citations omitted).

\textsuperscript{40} See \textit{Douds}, 339 U.S. at 390-92.
\textsuperscript{41} \textit{Elrod}, 427 U.S. at 373 (“More fundamentally, however, any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms.”).
\textsuperscript{42} \textit{Elrod}, 427 U.S. at 384.
outcomes and in predicting voter attitudes and behaviors. As one political scientist describes this model:

Few factors are of greater importance for our national elections than the lasting attachment of tens of millions of Americans to one of the parties. These loyalties establish a basic division of electoral strength within which the competition of particular campaigns takes place... Most Americans have this sense of attachment with one party or the other. And for the individual who does, the strength and direction of party identification are facts of central importance in accounting for attitude and behavior.  

From the 1970s, political scientists have attacked the Michigan Model arguing that trends projected the demise of partisanship and a rise in the new “independent voter.” The classical independent voter paradigm considers voters as free and relatively open to distinguish between competing parties; partisan labels do not determine the voters’ eventual private voting decisions. The independent voter paradigm accords with the “voter-as-consumer” trope; voters, like consumers, make private decisions with limited constraints; they rationally and independently assess the attractiveness and benefits of each product-candidate. However, Larry Bartels and many other contemporary political scientists have suggested that the Michigan Model’s demise was inaccurate. Partisan affiliations are fairly important and powerful in predicting voter behavior. There are other reasons than “voter independence” that may explain

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45 See, e.g., Eu v. San Francisco County Democratic Cent. Committee, 489 U.S. 214, 228 n.18 (1989) (“In States where parties are permitted to issue primary endorsements, voters may consider the parties' views on the candidates but still exercise independent judgment when casting their vote.”)
46 For the classic and influential take on these analogies, see Charles Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416, 418-420 (1956).
47 Bartels, Partisanship, at 44 (“In the meantime, a significant revision of the conventional wisdom of political scientists, journalists, and other observers regarding ‘partisan decline’ in the American electorate seems to be long overdue. References to ‘the weak hold of the two major political parties’ and the ‘massive decay of partisan electoral linkages’ would have been mere exaggerations in the 1970s; in the 1990s they are outright anachronisms. In the current political environment, as much or more than at any other time in the past half-century, ‘the strength and direction of party identification are facts of central importance in accounting for the voting behavior of the American electorate.’”) (citations omitted). Citing these “references” that Bartels now criticizes, Justices Souter and Thomas have concluded that party loyalty has declined, see Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (Souter, J., dissenting); see also Federal Election Com’n v. Colorado Republican Federal Campaign, 533 U.S. 431, 473 n. 4 (2001) (Thomas, J., dissenting). For further evidence supporting Bartels’ position, and an interesting
why partisan affiliations appear to be weaker. At the very least, political affiliation constitutes a long-term ideological “self-definition” that influences and prods political activity, such as voting. Amartya Sen has similarly described economic workers and voters as both behaving out of “commitment.” In essence, voting, like working, is an activity that grows out of a subservient and stable relationship with a corporate body.

Voting for a political party has certain characteristics in common with working for a corporate body. Like employment, voting does not signal an immutable loyalty to a political body, but also does not involve detached independence exemplified by typical consumer-corporate relationships. Voting encourages a self-definitional relationship that can be severed but not easily so. The Court has recently observed that “[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold.”

Neither labor-centric nor consumer-centric models argue for the two extremes identified by the Court: either voters as completely independent without partisan constraints or

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48 Perhaps the perceived decline in the power of partisan commitment has more to do with the decline in the intensity of the commitment to parties rather than the increasing “independence” of voters; voters are still affiliated, but they are generally less motivated (or have less opportunity) to participate/labor, and thereby identify with party politics. In the language of Robert Putnam’s work, while political parties are influential in voting decisions, its members may invest less social capital into these organizations (in line with the global decline in social capital investments). See ROBERT PUTNAM, BOWLING ALONE 37–38 & n.19 (2000) (noting the decline in commitment and noting the correlation between “independence” with less political participation); see also James A. Gardner, Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns, 54 BUFF. L. REV. 1413, 1456 n.169 (2007).


51 See Nancy Rosenblum, Political Parties as Membership Groups, at 843 (“[P]olitical officials typically cultivate their own constituencies and personal loyalty, not party activism.”).

52 Id.

voters as having immutable political affiliations. However, shading towards one pole or the other does affect one’s perception of the fluidity of voter movement from one political party to an opposing political party. Viewing voters as consumers implies voters can change with limited constraints from each election to election depending on the attractiveness of the products provided (i.e., when a party provides an “utterly incompetent candidate”); viewing voters as employees implies changes in party affiliation is a fairly uncommon phenomenon and any change to this stable and self-definitional preference can only occur after some deliberative process. In this sense, viewing voters as laborers is consistent with views that geographic boundaries and other endowment factors correlate with voting behavior, because, implicitly, voting behavior, like employment, is relatively stable, changes only in the long-term, and such changes are controlled by other stable and open endowment factors like geography and mobility. Similar factors are not as obvious or transparent in relatively fluid consumer markets. In this sense, political markets like labor markets are less fluid than what is assumed in an analogy of political markets to consumer markets. From the foregoing discussion, I present a basis for arguing that voters engage in a stable and subsidiary working relationship with a political party; the party prods the voter to work for certain positions or support candidates despite misgivings.

(2) Rewarding Work

55 Davis v. Bandemer, 478 U.S. 109 (1986) is but one instance of how one’s perception about the fluidity in voting patterns is actively debated with legal ramifications. In a concurring opinion, Justice O’Connor observes that “while membership in a racial group is an immutable characteristic, voters can-and often do-move from one party to the other or support candidates from both parties. Consequently, the difficulty of measuring voting strength is heightened in the case of a major political party. It is difficult enough to measure ‘a voter's or a group of voters' influence on the political process as a whole’ . . . when the group is a racial minority in a particular district or community. When the group is a major political party the difficulty is greater, and the constitutional basis for intervening far more tenuous.” Id. at 156 (O’Connor, J., concurring) (emphasis added). Justice Powell writes in dissent that “[f]or example, the mapmakers split Fort Wayne, a city with a demonstrated tendency to vote for Democratic candidates, and associated each of the halves with areas from outlying counties whose residents had a pattern of voting for Republican candidates.” Id. at 180 (Powell, J., dissenting) (emphasis added).
The first half of this section dealt with the fairly similar member-institution relationship found in both employee-employer and voter-political party relationships. The essential element that moves these relationships beyond merely “membership” within a corporate entity is the member’s “work” and its corresponding reward. Courts have defined “work” in fairly broad terms, so voting can be considered as some form of rewarded work. A recent study suggests that voting is a “habit” -- once one starts voting, one continues to vote. Courts also acknowledge the important direct trade-off between working at a corporate job and political activity, including voting. Some have linked the qualification and ability to work with the qualification and ability to vote. Commentators equally describe voting as “work.” For example, Donald Keim and Benjamin Barber base their visions of a “strong democracy” on citizen action “in the form of common work.”

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57 E.g., United States. v. Somsamouth, 352 F.3d 1271, 1275-76 (9th Cir. 2003).
59 See, e.g., Day-Brite Lighting, Inc. v. State Of Missouri, 342 U.S. 421, 424-25 (1952) (“[Missouri’s law] is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. . . . The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision.”).
61 Benjamin R. Barber, Strong Democracy: Participatory Politics for a New Age 151 (1984). See also Donald W. Keim, Participation in Contemporary Democratic Theories, NOMOS XVI 20–21 (1975) (“Action is the mode of activity characteristic of the political realm.”); see also Melvin I. Urofsky, Introduction: The Root Principles of Democracy, Democracy Papers (Nov. 2001) (“Democracy is hard, perhaps the most complex and difficult of all forms of government. It is filled with tensions and contradictions, and requires that its members labor diligently to make it work.”), available at http://usinfo.state.gov/products/pubs/democracy/. This view is also consistent with Justice Brandeis’ view. See Whitney v. California, 274 U.S. 357, 375 (1927) (J. Brandeis, dissenting); see also Vincent Blasi, The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California, 29 WM. & MARY L. Rev. 653, 675 (1988) (“To Brandeis, public discussion is a ‘duty.’”) It is a
themselves generally see voting and politics as “work.” For example, labor-related issues are important barriers to voting. In other words, while people may want to vote, situational obstacles prevent them from carrying out their voting work. One study found that the location of the polling place can cause significant differences in voter turnout. Out of the reasons offered for not voting, 58.5% are clearly labor-centric. In 2002, according to a U.S. Census survey, two of several “labor-centric” reasons that constituted the 58.5% were: no time to vote due to being “too busy” or was “with conflicting schedule.” These two reasons constituted the top reason why people did not vote at 27%. Consumer-centric reasons that focus on the personal preferences against voting and the candidates are relatively minor reasons. These reasons were limited to only 19.3% (i.e., because they were “not interested” in the election (12.0%) or “did not like the candidates” (7.3%)). 22.2% of non-voters offered no reason or unrelated reasons (“Don’t know or didn’t answer” (7.5%), “Other Reason” (9.0%), and “Forgot”
(5.7%). Why do voters sacrifice the time and energy to vote? In other words, what motivates the voters to overcome these labor-related barriers? An analogy to judicial theories concerning democracy through the lens of patronage practices may again be useful to answer this question. Underlying the debate in the patronage cases was: what is the real motivation for helping out on political campaigns?

The history of patronage practices, as Justice Powell suggests, indicates that the lure of some tangible reward may be the real incentive behind motivating party workers to overcome the labor costs associated with voting. Powell suggests that the “work” of local political parties can only be sustained through patronage practices. Powell writes:

Patronage hiring practices . . . enable party organizations to persist and function at the local level. Such organizations become visible to the electorate at large only at election time, but the dull periods between elections require ongoing activities: precinct organizations must be maintained; new voters registered; and minor political “chores” performed for citizens who otherwise may have no practical means of access to officeholders.  

Justice Scalia, after citing this quote approvingly, adds in a subsequent dissenting opinion that:

“[e]ven the most enthusiastic supporter of a party's program will shrink before such drudgery, and it is folly to think that ideological conviction alone will motivate sufficient numbers to keep the party going through the off years.”

Equally, I posit the “chore” and “drudgery” of actually voting for political parties cannot be sustained without some tangible reward. As Pamela Karlan notes:

I make this suggestion tentatively. A serious objection to paying voters to cast their ballots, parallel to a convincing argument against paying for blood donations, is that current voters will feel deprived of their civic virtue if voting becomes an activity done for money. But it is hard to imagine many voters, in contrast to many blood donors, for whom the hardship or expense of voting actually increases the utility they receive from going to the polls. In any case, I think it likely that the potential increase in the number of

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68 “Voting and Registration,” at 14.
Americans participating in the electoral process would outweigh the risk of devaluing voting by paying for it.71

Ideological conviction may be insufficient to sustain voting work done for parties particularly for elections for less important posts and over the long run.72 Powell suggests local patronage practices are a permissible means to reward party work done for candidates running for unimportant posts. Powell notes, “[i]n short, the resource pools that fuel the intensity of political interest and debate in ‘important’ elections frequently ‘could care less’ about who fills the offices deemed to be relatively unimportant.”73 In other words, political workers see patronage as the culmination and the reward for political work in the form of campaign-volunteering, monetary donations or for publicly affiliating and endorsing a candidate. The work ultimately benefits the party. As Powell notes, “[p]atronage appointments help build stable political parties by offering rewards to persons who assume the tasks necessary to the continued functioning of political organizations.”74

The reward for political labor could encompass less visible forms of “work” and “chores” that help perpetuate political institutions, such as affiliation, advocacy, participation, polling, and voting.75 In Tashjian v. Republican Party of Connecticut, the Court acknowledged a “broad spectrum of roles in [political] organization’s activities” and “[c]onsidered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any

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72 See Gerber, et. al., Voting May Be Habit Forming, at 548-549 (suggesting that continued voting and apprehensiveness about voting may result less from ideological preferences but more from cognitive attitudes towards the work itself – i.e. “the act of voting itself”).
73 Elrod, at 384.
75 “[F]ederal and territorial election statutes prohibit[ ] a candidate from promising public employment for an individual in consideration for the individual’s vote, support, or work in a candidates’ election campaign.” de Vera v. Blaz, 851 F.2d 294, 295 (9th Cir. 1988).
sense the most important.” Voting should be no different from other forms of political participation. Ultimately, voting, like campaign volunteering, is also a task necessary to the continued functioning of political organizations; equally parties and candidates will seek to reward and motivate voters to work for them under a continued relationship.

There is some evidence of an incentive less tangible, but akin to patronage, connected with voting work. Paul S. Martin, a political scientist, has demonstrated that higher participation rates measured solely by voter turnout triggered an increased reward of federal, state, and local financial support to that jurisdiction. “Pork barreling” is an effective and highly used electoral strategy. The difference between patronage and “pork” is a matter of degree in the type of reward. The latter comes in the form of general budgetary allocations to a voting bloc within a jurisdiction, while the former is a specific job to a specific campaign volunteer. The per capita value of each reward is probably quite apt for the amount of labor (whether votes or campaign volunteering). Moreover those most invested in the possibility of a penalty or reward from electoral outcomes also vote more often. Evidence shows that for, at least the past decade, public employees, as a bloc, vote at significantly higher rates than private employees. They may vote at higher rates, because they are invested in possible rewards from a change or lack of change in administration.

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78 See Paul S. Martin, Voting’s Rewards, at 111.
79 In 1991, the Census noted that 63 percent of public employees versus 41 percent of private employees voted, available at http://www.census.gov/population/socdemo/voting/SB91-23.pdf. In 2004, similar and even more disproportionate numbers are found.
The reason why voting is less of a hobby and more work is accentuated by where the “benefit” of the voting labor or time “primarily and necessarily” itself really lies.\(^8^1\) The academic literature is skeptical that there is some intrinsic value from the voting act for the voter.\(^8^2\) Under a “labor-centric” perspective, the labor or use of time for voting does not benefit voters directly. The anticipated rewards come only indirectly, if at all, when their candidate wins and then decides to reward certain voters.

(3) Critiquing the Voter-Party Relationship as an Employment Relationship

In previous section, I described how the voter has more of an “employment”-like relationship with political parties. An independent question is whether such a relationship is normatively “good.” Justice Powell acknowledges patronage practices can be a “corruptive” employment relationship but also concludes that such practice is a necessary to democratic processes;\(^8^3\) there is some similarity to the general perspectives regarding pork, which is often considered a necessary, even if undesirable, part of political tradition.\(^8^4\) According to Powell and those who agree with him, patronage practices and also pork may galvanize lower level political work like grass-roots organizing and democratic action. For example, rewards can be offered to “historically excluded” groups. These groups can obtain historically excluded political rewards

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\(^8^2\) See, e.g., Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 76-79 (1990) (summarizing views on voting); see also Benjamin Highton, *Registration and Voting in the United States*, 2 PERSPECTIVES ON POLITICS 507, 512 (2004) (“There is now little room for enhancing turnout further by making registration easier . . . [C]ontinued nonvoting by substantial numbers of citizens suggests that for many people, voting remains an activity from which there is virtually no gratification – instrumental, expressive, or otherwise. Consequently, for those whose goal is a democracy where most people engage in the fundamental act of political participation, a pessimistic conclusion cannot be avoided.”); see also Benny Geyys, ‘Rational’ Theories of Voter Turnout: A Review, 16 POLITICAL STUDIES REVIEW 16, 27 (2006).

\(^8^3\) *Elrod*, 427 U.S. at 379 (Powell, J., dissenting). “Long experience teaches that at this local level traditional patronage practices contribute significantly to the democratic process.” *Elrod v. Burns*, 427 U.S. at 384–5 (Powell, dissenting)

\(^8^4\) See, e.g., Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1340 (2000) (“But no doubt part of the reason for the lack of reported prosecutions is that society (or at least prosecutors) may see legislative logrolling as beneficial, or at least as ubiquitous legislative behavior that is not worthy of punishment. Indeed, some states so tolerate legislative logrolling that they expressly exempt the practice from their anti-bribery laws.”).
by offering to do voting work. Judge Becker, former Chief Judge of the Third Circuit, citing Powell’s dissent, writes:

[T]he patronage system historically has been critical to the survival and strength of political parties by allowing party leaders to reward their party faithful. Strong parties have, in turn, played a crucial democratizing role: they have stimulated political activity and encouraged meaningful political debate; they have enabled local candidates for office to attract attention to their candidacies and galvanize grass-roots organizing; and they have facilitated the political participation of historically excluded groups . . .

While the First Amendment protects political parties’ promises of rewards for voting, the courts and the public opinion continue to have misgivings about such political behavior despite its alleged benefits; there is a general sentiment that this party “employment” of voters is too corruptive of democratic processes and good government. The perception of corruption derives not necessarily from the fact that voters are working to benefit political parties for a reward. The current system accepts the fact that some political work, like high-level political activity, can be rewarded by high-level political appointments. Nor is the unease sourced purely in the possible corruptive influence of monetary exchange to cloud decision-making in democratic institutions. Political practice has always accepted some form of pork barreling even if it is a necessary evil. While the public may be concerned with direct vote-buying in a pure sense, there is some accepted toleration for low-level influence-buying of powerful voters in different contexts (although it is not certain why) — i.e., voters in administrative boards, Congress, corporate

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85 *Carver v. Foerster*, 102 F.3d 96, 106 (3rd Cir. 1996) (Becker, J., concurring).
86 “A State may insist that candidates seeking the approval of the electorate work within the framework of our democratic institutions, and base their appeal on assertions of fitness for office and statements respecting the means by which they intend to further the public welfare. But a candidate's promise to confer some ultimate benefit on the voter, qua taxpayer, citizen, or member of the general public, does not lie beyond the pale of First Amendment protection.” *Brown v. Hartlage*, 456 U.S. 45, 58-9 (1982).
87 See, e.g., *Elrod*, 427 U.S. at 379 (Powell, J., dissenting).
88 As an example, see *Home Placement Serv., Inc. v. Providence Journal Co.*, 739 F.2d 671, 675 (1st Cir. 1984) (“It is common knowledge, or at least public knowledge, that the first step to the federal bench for most judges is either a history of active partisan politics or strong political connections or ... both.”).
control, etc., though in less crass manifestations: lobbying, campaign donations, pork barreling, and the purchase of corporate shareholder proxy votes.\footnote{\footnote{Some argue for the acceptance of direct vote-buying if it allays the labor costs of voting. Pamela S. Karlan, \textit{Not By Money But By Virtue Won? Vote Trafficking and The Voting Rights System}, 80 VA. L. REV. 1455, 1472–473 (1994). For actual vote-buying in the market for corporate control, see Thomas J. Andre, Jr., \textit{A Preliminary Inquiry Into The Utility of Vote Buying in The Market for Corporate Control}, 63 S. CAL. L. REV. 533, 636 (1990) (“Nevertheless, while it is evident that some caution should be exercised whenever corporate funds might be used to disenfranchise public stockholders, vote buying does not differ fundamentally from some other recent restructuring transactions. Thus, allowing firms to purchase the votes of their own public stockholders could provide those stockholders with a financial alternative that they cannot presently be offered.”). There is no firm legal consensus: \textit{Compare} CAL. ELEC. CODE § 18522(a) (West 1996) (permitting vote-buying) \textit{with United States v. Garcia}, 719 F.2d 99, 102 (5th Cir. 1983) (banning incentives for voting only for federal candidates).}}

Setting the monetary question aside, the greater public and court concern is arguably with the establishment of a fixed and direct relationship between a select few – an “employment” of certain effective voters (\textit{i.e.}, political machines\footnote{Even in modern democracies like Japan’s democracy, there are \textit{explicit} political machines, and described as such. One example is Japan’s Liberal Democratic Party. \textit{See}, e.g., Ethan Scheiner, \textit{Democracy Without Competition In Japan} 3-6 (2006) (describing the dominance of Japanese LDP party as based on clientist model); \textit{see also Carver v. Foerster}, 102 F.3d 96, 109 n.9 (3d Cir. 1996) (Becker, J., concurring) (noting the critiques of patronage practices focus on the corrupt “political machines.”). For a description of political machines in American history wherein voters were paid, see, e.g., Richard P. McCormick, \textit{The History of Voting in New Jersey: A Study of the Development of Election Machinery} 1664 – 1911 160–62 (1953).}) to exclusion of other voters – the creation of a “partisan” government. This would contradict the idealistic view of voters and the government as politically autonomous, politically distant, and independent from political parties. This underlying concern is manifested in “conflict of interests” restrictions on the influence of political parties on other political realms where political autonomy in deliberation is valued. For example, the Hatch Act\footnote{For discussion and links to the Hatch Act, see \texttt{http://www.osc.gov/ha\_fed.htm}.} restricts our bureaucrats’ political activities, and statutory schemes also create transparency in decision-making so we can have confidence that any vote in decision-making bodies are autonomous, \textit{i.e.}, voters in judiciaries, Congress, and other deliberative bodies have public disclosure obligations.\footnote{\textit{See}, e.g., \textit{U.S. v. National Treasury Employees Union}, 513 U.S. 454, 470-71 (1995).} As the patronage cases bear out, these demands for political autonomy are normative decisions, \textit{e.g.}, what is the \textit{normative role} of the government official when selecting his staff. In other words, \textit{should} government officials use political affiliation in
their deliberative decisions? This normative question is distinct from whether there is evidence government officials actually use political affiliation in their deliberative decision as a matter of political practice. In this sense, two separate issues are often intertwined but should remain distinct: (1) how do voters make deliberative decisions and (2) what should voters do to further the ultimate goals of voting, i.e., to sustain democratic ideals.

Labor-centricism offers perspectives on both levels in contrast with a consumer-centric view. For the first issue, the Michigan model of voting, political science, and Census data offers evidence that voters may not be the ideal “independent voter” and decisions are mediated by patronage practices, pork-barreling, and party membership. For the second issue, Powell argues that patronage practices along with the formalization of rewards for political work can ultimately strengthen parties, democratic government and the political process. Labor-centricism merely extrapolates Powell’s observation as equally applicable to rewards for voting if voting is seen as a form of political work. However, as I noted earlier, the evidence about how voters actually behave is distinct from the normative gloss on this behavior. For example, one can agree with Justice Powell’s observations about the power of patronage in strengthening political parties in practice and reject his normative embrace of patronage as a pillar of a vibrant democracy. Equally, one can agree that, as practice, parties employ voters but normatively reject the implications of such employment on democratic ideals.

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93 See supra note 42, though he never explicitly considers the idea that rewards for voters may also strengthen democratic processes.

94 See, e.g., Horn v. Kean, 796 F.2d 668, 684 (3d Cir. 1986) (Gibbons, J., dissenting), abrogated by Board of County Com'mrs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668 (1996) and O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996); Jimenez-Fuentes v. Torres Gastambide, 807 F.2d 230, 232 (1st Cir. 1986). In both opinions, accept Powell’s positive description of the effect of patronage on political parties, but dispute the normative value of Powell’s positive description in comparison to other First Amendment values in accord with the Elrod's plurality, and controlling, opinion. “It is difficult not to share in the views expressed by Justice Powell, dissenting in Elrod, which we have crudely reflected . . . in speaking of politics as the life-blood of the body politic. However, it is also impossible to dismiss the plurality opinion views, not only as to personal rights, but as to the ‘inefficiency’ of ‘wholesale’ turnovers.” Id.
In fact, throughout the rest of the paper and in the final section, I posit that by accepting the view of the voter as having a stable and subservient relationship with the party, labor-centric perspectives may offer fresh perspectives on how to normatively improve democratic institutions. For example, labor-centric perspectives may highlight some of the problems political laborers can face that are analogous to problems faced by economic laborers, such as unemployment (which I will address in a later section). Such a perspective may also highlight the positive contributions of political work, such as those highlighted by Justice Powell, including stable political parties and increased political participation. Moreover, this framework provides a positive account of the political marketplace to better understand voting problems; understanding these problems allows us to better fulfill the participatory and deliberative democrat’s normative ideals: voters ought to work and participate.\textsuperscript{95}

In sum, different views of the marketplace analogy can result in conflicting policy recommendations. For example, the consumer-voter vision sees patronage as a threat to the political marketplace, because it serves to “bribe” otherwise independent voters, thereby creating a motivation to vote unrelated to the candidate’s policy stances; patronage also obligates voters into a stable partisan relationship that threatens voter independence. In contrast, the labor-centric model posits that voters are in practice “employed” by large political parties.\textsuperscript{96} Rather than avoid this reality, patronage and other rewards, if utilized in a proper fashion, can counteract voter alienation by compensating for labor costs of voting and incentivizing political activities.\textsuperscript{97}

\textbf{B. The Party As Corporate Employer}

\textsuperscript{95} E.g., AMY GUTMANN \& DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 146, 227 (1997).
\textsuperscript{96} See Shakman \textit{v. Democratic Organization of Cook County}, 435 F.2d 267, 270 (7th Cir. 1970).
\textsuperscript{97} Richard L. Hasen, \textit{Vote Buying}, 88 CAL. L. REV. 1323, 1357 (2000). There are distributional issues when considering who can vote and work within political parties – those with more leisure time and/or can afford these labor costs without compensation are now favored for political rewards. By compensating for labor costs, perhaps more people, not just those who can afford it, can participate.
In many respects, the party acts similar to a corporate employer. First, I will examine conceptualization of the party as an economic corporation from both a labor and consumer-centric perspective. Next, from the labor-centric perspective, I will examine how the political party utilizes, in practice, employer-like powers over voters. Finally, the labor-centric view of the party as corporate employer also provides a place for voter unions within the political marketplace.

(1) Employee Voice

Viewing the political party as a corporation is not ground-breaking. First of all, the political party is legally registered as a nonprofit corporate body; both academics and courts have treated the party as akin to an economic corporation. Under a voter as consumption view, the parties are corporations, but the view focuses on how parties, as corporations, sell ideas in the political marketplace to voter-consumers like economic corporations. As a result of this focus, the internal mechanisms that create these products are not relevant for voters. Conceptualizing the political party as analogous to private economic corporation is an incomplete picture. Corporate entities have characteristics of both public political associations and also as private corporations.
Under a voter as consumer model, voters are outsiders to the parties’ major decision-making processes, since they are only consumers of what political parties package and present to them. Voters have no role within party mechanisms unless the party decides to allocate responsibility. For example, parties can make budgeting decisions private. The Supreme Court notes: “whether they like it or not, [political parties] act as agents for spending on behalf of those who seek to produce obligated officeholders and to coordinate disbursement of financing from donors who may wish to support any candidate who will be obliged to the contributors.”

Most importantly, the “voter as consumer” model does not present normative justifications for voter-consumer input into the political party. In the private realm, consumers are likewise not represented within corporations for business decisions, but remedied for harms after the fact under tort law. Similarly, decisions of the political party do not allow for ex ante input, but rely on ex post judicial remedies if any. The two remedies are to exit the market (i.e. chose...
not to purchase/vote) or to sue for damages after the fact. In the corporate realm, if consumers and employees want input, they should convert to shareholders by purchasing stocks even though they may have little concentrated power. This option is not plausible for private companies. Political parties are, in many respects, more akin to private companies as they are without any transparent system of public shareholding. Thus, justifying ex ante input for the voter appears to run into a dead-end under mainstream corporate law theory if the voter is considered analogous to the consumer.105

However, these conclusions may change if the voter is instead analogized to labor. Instead of exit or post-hoc litigation, ex-ante voice within the corporate entity is a justifiable option for voters (as laborers). The labor-centric model begins with the fact that “the voter is an employee of the corporation.” Voters are part of the corporate entity and have stable relationships with the party for significant periods of time. Under a labor-centric view, voters become party/corporate “insiders” just like campaign workers. If campaign workers can have voice in party politics, the voter should equally have a claim to some voice. Analogously, in the private realm, employers have fiduciary duties to prevent harm and protect active employee “voice” within their corporate institution (such as those imposed under a variety of labor and employment statutes, such as the NLRA, FLSA, OSHA, ERISA, Title VII, etc.). At the very least, employer decisions must preserve and protect employee “dignity.”106 Thus, under a labor-
centric view, voters, as party employees, have greater claims to management voice when compared to voters framed as consumers. In similar respects, minority views in corporate law literature argue that consumers should have input into business decisions by relying on comparisons between the consumer and laborer.\textsuperscript{107} By analyzing voters to laborers as both internal to their respective corporate bodies, the state has an interest in promoting voter welfare just as it has in promoting employee welfare. This interest can then justify regulatory entrance into the party’s “internal affairs,” an interest “in the democratic management of the political party’s internal affairs” dismissed by the Supreme Court in \textit{Eu v. San Francisco County Democratic Central Committee}, 489 U.S. 214, 232 (1989). In \textit{Eu}, the Supreme Court struck down a California statute barring endorsement by the party of a candidate in the primaries and other attempts to regulate party structure because it interfered with the party’s associational rights under the First Amendment.\textsuperscript{108} One of the justifications presented by the State was the state interest in protecting the “primary voters from confusion and undue influence.”\textsuperscript{109} Turning to the state’s efforts to “democratize” the party’s internal structure, the unanimous Court did not find a compelling interest unless the state can prove their efforts were necessary to protect the integrity of elections.\textsuperscript{110} The role of the state is therefore only to protect the political marketplace as viewed from a consumption model. The voter needs protection only against fraudulent and corrupt products or a party’s violation of the integrity of the “purchase” exchange itself. The corporate activity prior to that exchange is otherwise “private”. The Supreme Court in


\textsuperscript{108} \textit{Eu}, 489 U.S. at 229, 233.

\textsuperscript{109} Id. at 229.

\textsuperscript{110} Id. at 232-33.
Eu dismissed the state’s argument for any enlarged role in regulating the party’s relationship with the voter. The Court reasoned that the “State has no interest in ‘protect[ing] the integrity of the Party against the Party itself.’” Once we peer through a labor-centric view, we consider voters as more akin to lower-level party “employees.” Through these lenses, the internal dynamics of a political party does not look like a simple “Party against the Party itself” dispute but, instead, an examination of the power distribution between a “managerial” class within parties and its “employees” just as we have done within the labor and employment law framework as a very “public” issue and problem. From a labor-centric perspective, a “democratic” management of voter-employees and employee “voice” may be more easily justifiable compelling state interest.

(2) Parties’ Employer Powers

Political parties, as employers, have significant powers over voters’ employment environment. “[T]raditional party behavior” includes “ensuring orderly internal party governance.” The party’s first significant power is sourced in the party’s control over primaries, which is analogous to determining who can be employed. States delegate to political parties the power to define primaries according to their private decisions. These decisions are made internal to their “corporate bodies” much akin to a corporation’s state-delegated power to

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111 Id. at 232 (quoting Tashjian, 479 U.S., at 224); see, e.g., Arizona Libertarian Party v. Schmerl, 28 P.3d 948, 955 (Ariz. Ct. App. 2001) (approving state intervention when it does not “implicate[] the internal workings of political parties”).

112 Eu, 489 U.S. at 232-33; see also California Democratic Party v. Jones, 530 U.S. 567, 593 (2000) (Stevens, J., dissenting) (“As District Judge Levi correctly observed in an opinion adopted by the Ninth Circuit, however, the associational rights of political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations.”); Michael Kang, The Hydraulics and Politics of Party Regulation, 91 IOWA L. REV. 131, 181 (2005) (“Once we view political parties in terms of political conflict and cooperation among different factions of party actors, the Court's doctrine of party autonomy in the party primary cases can be reframed as an implicit choice in favor of political resolution of disagreement.”).


determine who votes in shareholder meetings. The political parties also have another power: the valuation of and improvement of human capital and the voters-employees’ working environment.

(a) Control over Employment Primaries

If parties are permanent “corporations” with its own “employees,” then they would have the discretion to hire and keep new voters-employees in pursuit of their goals. For example, in a District of Connecticut case, Nader v. Schaffer, the plaintiffs filed a complaint challenging, in essence, the party’s powers over hiring and retaining voters-employees. The plaintiff argued that:

. . . [T]he alternative avenues of political activity open under Connecticut law [unless they participate in primaries] are ineffectual and unrealistic, since in most general elections, only the Democratic and Republican nominees have reasonable probabilities of success . . . any dominant position enjoyed by the Democratic and Republican parties is not the result of improper support, or discrimination in their favor, by the State. Rather the two Parties enjoy this position because, over a period of time, they have been successful in attracting the bulk of the electorate, so that they now have substantial followings.

Under a labor-centric model, Democratic and Republican parties’ voter-workforce pool is essentially a restricted labor-force maintained and contained through primaries and party registration—i.e. a “following.” The two dominant political parties also dominate the local

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115 Pildes, Foreword, at 110- 111 (“States can mandate closed primary elections, in which only party members can participate. Closed primaries, like districts that concentrate voters with ‘common interests’ and like the parties that PR elections produce, concentrate participation among voters who begin with more shared interests or preferences. States can instead require open primaries, in which independents, and sometimes voters registered with another party, can vote. The design of primary elections influences the types of candidates, and hence officeholders, likely to be elected. Primaries tend to be dominated by the most intensely engaged voters, who typically have more extreme views than median party members. Closed primaries accentuate these effects and are therefore likely to reward candidates more at the extremes of the distribution of office seekers. Open primaries produce candidates closer to the median voter’s views, or in more common language, more moderate candidates (and officeholders).”) For the possibility of allowing the voting of other constituencies possibly allowing employees a stake in board decisions on management, see Frank H. Easterbrook & Daniel R. Fischel, Voting in Corporate Law, 26 J.L. & ECON. 395, 403 (1983).


legislatures that craft election policies further restricting the labor-pool. Some argue that voter registration policies, crafted by local and state political parties, have deliberately restricted the turnout and types of people who vote after considering strategies and policies that favor the party. Essentially, party leaders are deciding who to employ for a vote. The Court in *Burdick v. Takushi* acknowledged two state interests in restricting who can vote in primaries, both of which are related to the protection (or entrenchment) of the party structure. The two state interests are: preventing “party raiding” and protecting against “unrestrained factionalism.”

Increased competition from independent third parties or parties splintered from the major parties is framed as the threat of “unrestrained factionalism.” The goal of political party primaries is therefore to “channel[] expressive activity at the polls.” As the *Nader* plaintiffs noted, the activity is channeled, for all practicalities, to the two dominant parties. In labor-centric language, the parties, through captured state legislatures, protect their labor force by barrng increased competition outside the major party system. Such protection against “unrestrained factionalism” effectively restricts new alternative parties from offering employment opportunities to voters.

“Party raiding” deals with the employment relationship between the party and the voter-employee: how the party can restrict employee liberties. The most recent case on “party-raiding” is Justice Thomas’ plurality opinion in *Clingman v. Beaver*. In *Clingman*, the Court, distinguishing *Tashjian v. Republican Party of Conn.*, upheld Oklahoma’s election laws regarding semiclosed primaries. Semiclosed primaries did not allow voters to disaffiliate

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themselves and openly vote for another party in the primaries. The Court noted that while *Tashjian v. Republican Party of Conn.*\(^{124}\) had “struck down, as inconsistent with the First Amendment, a closed primary system that prevented a political party from inviting Independent voters to vote in the party’s primary. . . . [t]his case presents a question that *Tashjian* left open: whether a State may prevent a political party from inviting registered voters of other parties to vote in its primary.”\(^{125}\) Consistent with Justice Thomas’ adoption of Justice Powell’s dissenting views in the patronage cases,\(^{126}\) the *Clingman* opinion views the political party not as a creation of individuals freely associating with one another, but instead considered the political party a corporation with its own employees. Thus, the Court preserved the party-corporation’s clear boundaries around its voter-workforce and protected the political party against another party from raiding its workforce, such as a sore-loser in the primaries shifting their voters to new or alternative parties. The Court noted that “. . . Oklahoma's semiclosed primary advances a number of regulatory interests that this Court recognizes as important: it ‘preserv[es] [political] parties as viable and identifiable interest groups,’ enhances parties' electioneering and party-building efforts, and guards against party raiding and ‘sore loser’ candidacies by spurned primary contenders.”\(^{127}\) In a sense, the observation that parties have the power to protect “their” voters from shifting to splinter or third party groups indicates a corporate employment power over voter behavior: enforcing its voter-employment contract by preserving the integrity of political party against raiding by other parties and sore losers.\(^{128}\) This type of contractual enforcement is in

\(^{124}\) 479 U.S. 208, 225 (1986).
\(^{126}\)  See supra note 16.
\(^{128}\) *Clingman*, 125 S.Ct. at 2040 (2005) (“. . . Oklahoma has an interest in preventing party raiding, or ‘the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election.’”) (internal quotation omitted).
tension with the idealism of consumption-based voting and parties as an association of independent-minded voters.

(b) Human Capital and Workplace Control

The second employer power is the power to regulate the “workplace” or the conditions that affect the way voters can process and obtain political information in carrying out their political activity. There are two significant powers: a power to discipline members and a power to limit public scrutiny. First, parties can exact discipline on its members just as employees can be disciplined. Parties are “instrument(s) through which discipline and responsibility may be achieved within the Leviathan.”\(^\text{129}\) It is true that parties no longer ascribe to a form of the “political machine” that strictly controls voters and candidates.\(^\text{130}\) Nevertheless, parties are free to have an organizational structure with an internal dynamic including a level of party discipline, such as the expulsion of members. In *California Democratic Party v. Jones*, 530 U.S. 567, 585 (2000), the Supreme Court struck down California’s blanket primary rule on First Amendment grounds. In his dissent, Justice Stevens, joined by Justice Ginsburg, notes: “[i]n my view, the First Amendment does not mandate that a putatively private association be granted the power to dictate the organizational structure of state-run, state-financed primary elections. It is not this Court’s constitutional function to choose between the competing visions of what makes democracy work -- party autonomy and discipline versus progressive inclusion of the entire electorate in the process of selecting their public officials -- that are held by the litigants in this case. . . . That choice belongs to the people.”\(^\text{131}\) By virtue of the majority’s decision in *Jones*, the

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130 See *Geary v. Renne*, 880 F.2d 1062, 1073–1075 (9th Cir. 1989) (describing the resilience of a California political machine).

party, and its officials, and not the people through a blanket primary, has the power to create itself in its own “vision.”

In Burdick, the Supreme Court upheld Hawaii’s prohibition against write-in voting, concluding that “the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system. . . . We think that Hawaii’s prohibition on write-in voting, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, does not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of the State's voters.” Justice Kennedy’s dissent in Burdick, joined by Justices Blackmun and Stevens, argued that the majority’s opinion in Burdick gave the party-employer the power to penalize voters, with the backing of the legislature. Kennedy argues that parties, by enacting stricter voter registration requirements or restricting voting methods, can tighten party grip and penalize certain groups who may be less likely to participate/vote or more willing to seek employment with other parties. Another disciplinary power is the influence over gerrymandering decisions, which party leadership may use to completely control the placement of employees and their work-products (i.e. their value as a voter to the district, which is called “vote dilution”).

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132 Id., 530 U.S. at 581 (“That party nominees will be equally observant of internal party procedures and equally respectful of party discipline when their nomination depends on the general electorate rather than on the party faithful seems to us improbable. Respondents themselves suggest as much when they assert that the blanket primary system will lead to the election of more representative ‘problem solvers’ who are less beholden to party officials.”) (internal quotations and emphasis omitted); see also Id., 530 U.S. at 587 (“The true purpose of this law, however, is to force a political party to accept a candidate it may not want and, by so doing, to change the party’s doctrinal position on major issues.”) (Kennedy, J., concurring).


134 Burdick v. Takushi, 504 U.S. 428, 444 (1992) (“The majority's approval of Hawaii’s ban is ironic at a time when the new democracies in foreign countries strive to emerge from an era of sham elections in which the name of the ruling party candidate was the only one on the ballot. Hawaii does not impose as severe a restriction on the right to vote, but it imposes a restriction that has a haunting similarity in its tendency to exact severe penalties for one who does anything but vote the dominant party ballot.”) (Kennedy, J., dissenting); see generally Francis Fox Piven and Richard Cloward, Why Americans Don’t Vote in ISSACHAROFF, KARLAN, AND PILDES, LAW OF DEMOCRACY, at 132.

135 As Justice Kennedy notes: “[n]or should it be thought to serve [the Court’s] interest in demonstrating to the world how democracy works. Whether spoken with concern or pride, it is unfortunate that our legislators have reached the
environment of voters by channeling voter “work” to party-determined outlets (e.g., which district they vote in and who (candidates, etc.) they associate with for campaign purposes); gerrymandering also permits parties to let go of less useful voters through vote dilution thereby fomenting certain groups’ disillusion and nonparticipation.\(^{136}\) Gerrymandering is like a “covenant not to compete” provision written into party employment: members of a jurisdiction with such a covenant must work for a particular party.\(^{137}\) “[T]he potential for voter disillusion and nonparticipation is great,” as voters are forced to focus their political activities in artificial electoral units. Intelligent voters, regardless of party affiliation, resent this sort of political manipulation of the electorate for no public purpose.\(^{138}\)

The labor-centric view of the political marketplace is also reflected in gerrymandering’s focus: how political parties can use gerrymandering as a managerial device to allocate employee responsibility according to the value of their work and whether their work is needed. (In other words, how party leadership can “dilute” a voter-employee’s work responsibilities to accord with...
their work value). From this perspective, the employees are beholden to the managerial whims of the party architects for an allocation of work responsibility and reward much akin to how corrupt boroughs are dependent on a patron’s managerial whims. Justice Stevens makes this comparison:

The rotten boroughs clearly would violate our familiar one-person, one-vote rule, but they were also troubling because the representative of such a borough owed his primary loyalty to his patron and the government rather than to his constituents (if he had any). Similarly, in gerrymandered districts, instead of local groups defined by neutral criteria selecting their representatives, it is the architects of the districts who select the constituencies and, in effect, the representatives.139

Unlike the voter-as-consumption framework wherein political parties want to sell to as many voter-consumers as possible, a successful political party does not need to employ as many employees as possible. Instead, they want to keep as many effective employees as needed, since its reward resources are limited. Hence there are campaign strategies that focus on particularly symbolic states (and voters), such as New Hampshire and Iowa.

Another form of employee control is information gate-keeping, i.e., the party’s control over the release of information to its voters.140 The Court, in Clingman, concludes that the political party “remained free to govern themselves internally and to communicate with the public as they wished.”141 Patronage practices and gerrymandering both have a “public” and “private” side. Patronage in its “public” face increases the premium on visible political work, i.e., visible political action can secure public rewards. Gerrymandering in its “public” face encourages overt essentialization by political architects and public debates as votes are allocated according to one’s “public” characteristics, such as income, race, and geography (the “blue” vs. “red” state). Yet, for both gerrymandering and patronage practices, there are hidden “private” political compromises and party calculations not in the public domain that are products of closed

139 Vieth, 541 U.S. at 331 (Stevens, J., dissenting).
140 Borden, Primary Elections, at 275.
internal party deliberations. Parties retain power to control how these decisions that influence voting outcomes are to be released to the public, e.g., what types of jobs are subject to patronage rewards and what characteristics are important proxies for gerrymandering decisions. First Amendment scholars have noticed the extent of “corporate” censorship in the political marketplace or, as I call it, the voting workplace. Political corporations can act as quasi-governments who censor information available to their employees. Major parties now have corporate control over both dissenting and also mainstream political information. Political parties can control the issues raised in elections and may choose issues that will attract employment and motivate voters to discuss, vote, and to persuade others to vote. The public acquiescence in this quasi-governmental control is analogous to our acceptance of employers’ quasi-governmental control of information in the workplace.

(3) Unions and the Corporate Employer

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142 Courts subscribe to the general proposition that “[t]he courts, generally and consistently, have been reluctant to interfere with the internal operations of a political party.” Irish v. Democratic-Farmer-Labor Party Of Minnesota, 399 F. 2d 119, 120 (8th Cir. 1968). For calculations behind gerrymandering, see Sam Hirsch, Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey, 1 ELECTION L.J. 7 (2002). Any attempt to litigate and thus “publicize” less overt patronage funding and relationships have been restricted by the standing doctrine. See, e.g., Plotkin v. Ryan, 1999 WL 965718, *4 (N.D. Ill. 1999) (“It is impossible to say whether and how the increased funds and campaign work that flowed to the [ ] campaign as a result of the defendants’ actions impacted the election, given the any number of ways the campaign might have spent (or not spent) that money and the myriad of external factors, many of which have nothing to do with the campaign itself, that influence independent voting decisions made by third-party voters.”).

143 See e.g., Jerome A. Barron, Access to the Press – a New First Amendment Right, 80 HARV. L. REV. 1641 (1967).


148 See, e.g. First Healthcare Corp. v. N.L.R.B., 344 F.3d 523, 529 (6th Cir. 2003) (“It has been black-letter law for nearly fifty years that the Board cannot order employers to grant non-employee union organizers access to company property absent a showing that onsite employees are otherwise inaccessible through reasonable efforts.”).
As noted earlier, both political parties and economic corporations have a public and private face. The tension between the dual historic public/private faces of the economic corporation as both a collective democratic association of voluntary individuals and a private hierarchical enterprise\(^\text{149}\) was somewhat alleviated by the growth of unionism; unions strived to become the voluntary, democratic, and public associations within corporations while corporations bolstered its hierarchical, commercial, and private characteristics.\(^\text{150}\) A similar approach may apply to the political party, which is still an awkward hybrid of both voluntary association and corporate enterprise.\(^\text{151}\) For example, one can compare Justice Scalia’s opinion in *California Democratic Party v. Jones*, wherein he says “[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views”\(^\text{152}\) with his observation about political practice in *New York State Bd. of Elections v. Lopez Torres*: “[p]arty conventions, with their attendant ‘smoke-filled rooms’ and domination by party leaders, have long been an accepted manner of selecting party candidates.”\(^\text{153}\) Moreover, he notes in his *Rutan* dissent that:

As described above, it is the nature of the pragmatic, patronage-based, two-party system to build alliances and to suppress rather than foster ideological tests for participation in the division of political ‘spoils.’ What the patronage system ordinarily demands of the party worker is loyalty to, and activity on behalf of, the organization itself rather than a set of political beliefs. He is generally free to urge within the organization the adoption of

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\(^{150}\) Workplace democracy literature describes these efforts. See generally Edward S. Greenberg, *Workplace Democracy: The Political Effects of Participation* (1988) (describing the efforts of the Oregon lumber corporations along these lines); see, e.g., Burke v. Bevona, 866 F.2d 532, 536 (2d Cir. 1989) (“A labor union is by law a democratic organization.”); see generally Clyde Summers, *Union Trusteeships and Union Democracy*, 24 U. Mich. J.L. Rev. 689, 689-90 (1991) (noting that one of purposes of labor laws is “to bring a measure of democracy to the workplace by giving workers an effective voice in decisions governing their working lives.”).

\(^{151}\) See, e.g., *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 92 (Tex. 1997) (“We agree that a political party is a state actor in some instances, such as when it is conducting elections, but a private organization in other instances, such as when it is conducting certain of its internal affairs.”).

\(^{152}\) 530 U.S. 567, 574 (2000).

any political position; but if that position is rejected he must vote and work for the party nonetheless.\textsuperscript{154}

In essence, Scalia views the party as \textit{idealistically} a voluntary band of members but \textit{practically} as a hierarchical corporate enterprise.\textsuperscript{155} As noted earlier, in light of these practices, unionization (and the normative goals of labor law) is an important tool for the implementation of democratic norms \textit{in practice}.\textsuperscript{156}

Accordingly, perhaps there is also need for unions as institutions that democratically represent voters \textit{within} political parties - institutions that are not motivated by the corporate goals, \textit{i.e.}, winning elections, campaign finance, and installing members in positions of power. The movement to unionism may be the \textit{ex ante} institutionalized solution to prevent \textit{ex post} litigation. Voters, as an independent coalition, do have some standing to protect themselves against managerial party interests that may be adverse to their voting conditions. In \textit{Federal Election Commission v. Akins},\textsuperscript{157} the Supreme Court found standing for voters who sued the Federal Election Commission (“FEC”) to challenge its decision not to treat the American Israel Public Affairs Committee (“AIPAC”) as a “political committee”; the FEC thereby did not require AIPIC to make public its contributions to political candidates.\textsuperscript{158} The Court concluded that the group of voters had standing, because they had a “concrete,” albeit “generalized” grievance,” \textit{i.e.},


\textsuperscript{155} He argues in \textit{Rutan} that not acknowledging different political practices in different contexts is “naïve.” \textit{Id.} at 103—04.

\textsuperscript{156} \textit{See supra} note 150. For example in \textit{Duke v. Massey}, 87 F.3d 1226, 1234 (11\textsuperscript{th} Cir. 1996), the Eleventh Circuit found no right for a potential candidate (who sued along with a group of voters) to challenge the Republican Party committee’s decision to exclude him from the presidential primary ballot even though the decision was not ratified by the entire membership. The court considered the Committee’s decision as the will of the political party to define its own membership, because the Committee itself is allegedly democratically elected and is authorized to make decisions on behalf of the entire party. \textit{Id.} One effort of unionization is arguably to ensure that these Committees are serving the will of the party and that these democratic elections \textit{within} parties are themselves fair.


\textsuperscript{158} \textit{Id.} at 21.
an “informational injury” “directly related to voting.” 159 In essence, voters can monitor the political process by mandating an administrative agency to force donors to disclose their relationships with candidates, so that the voters may “evaluate” the candidates and “the role that AIPAC's financial assistance might play in a specific election.” 160

A voter coalition instigating litigation on behalf of all voters to assert a concrete injury to voting is analogous to the unions’ institutional role: to seek remedies and protections on behalf of all employees for harms to their workplace and their work whether or not the employee is a union member. There are several labor law cases that provide a good analog to the Atkins case; for example, an Eastern District of Pennsylvania case, Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc, 161 and a Fourth Circuit case, West Penn Power Co. v. N.L.R.B. 162 These two cases are merely representative of the numerous other examples of union challenges to OSHA and other administrative agency determinations that may affect the workplace. 163 In Delaware Valley, the district court found standing for two trade unions suing on behalf of workers that live, work, and travel near the defendant’s manufacturing plant. The defendant allegedly failed to provide accurate information to the EPA with regards to its toxic pollution harming their workplaces. In West Penn, the NLRB, with the unions as interveners, successfully sued a defendant corporation to release data on its contracting practices so as to determine whether the corporation shifted

159 “We conclude that, similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.” Atkins, 524 U.S. at 24-5.
160 Atkins, 524 U.S. at 21.
162 394 F.3d 233 (4th Cir. 2005).
163 See, e.g., Union of Needletrades, Indus. and Textile Employees, AFL-CIO v. U.S. INS., 336 F.3d 200 (2d Cir. 2003) (union suing the INS for information on raids so as to ascertain whether there is racial animus and employer retaliation against possible illegal aliens seeking to organize); Magnesium Corp. of America v. U.S., 166 F.3d 1364 (Fed. Cir. 1999) (union seeking information on the rates provided for the Department of Commerce determination that Russia was not importing magnesium at less than fair market value and thus harming the U.S. market); Am. Petroleum Institute v. Occupational Safety and Health Admin., 581 F.2d 493 (5th Cir. 1978) (union intervening to support OSHA determination of threshold for benzene at the workplace in response to challenge by benzene producers).
labor from union members to contracted non-union workers. Both cases, like *Akins*, provide coalitions of employees standing to sue for information that shed light on third-parties who may be “corrupting” the relationship between employers and employees. In all similar union cases, the presupposition is that there is an existing, almost fiduciary, relationship that is “corrupted” or “injured” by a concrete violation. Just as candidates and parties must disclose conflicts of interests, such as the “role that AIPAC’s financial assistance might play,” employers must reveal conflicts of interest that might unearth employers’ real motives that are potentially adverse to their employees, their working environment, and generally, employee power within the corporate entity. The *Akins* injury is not so much an interference with the voters’ informed choice when voting for candidates, but rather the lack of knowledge about how much AIPAC is influencing party decisions through funding, how that funding may affect the party’s relationship with political workers, and the party’s unwillingness to reveal public information with regards to those managerial decisions. In analogy to the labor context, action by a “voter union” can protect the voters’ place in the party and as a check against managerial abuses of discretion.

**C. The Candidates As Political Managers**

The view that candidates are political managers is not a new idea, but has been with us since the Founding of the Republic. 164 Political managers, like their private corporate counterparts, are not “Burkean elites,” nor are they completely subservient to their constituents (voters/employees). 165 In fact both corporate and political managers follow a sensible middle ground approach: business management scholars contend that corporate managers are not simply “elites” who command their employees nor are they true “team” players who listen to the wants


of their employee-constituents. In fact, it is often a mix of both.\textsuperscript{166} In essence, both political and corporate managers have a “command” and “representative” side to their jobs. The business management framework is apt to describe legislative representation especially in light of high incumbency rates; the relationships between politicians-managers and voters-employees within the party-corporation are highly stable. Like corporate managers, political party managers are not completely beholden to their constituents, and, in fact, can “manage” their voters (see gerrymandering phenomena) nor are voters beholden to their powerful candidate-managers (see \textit{Akins}-type litigation).

Following the scholarship on corporate managers, the labor-centric model views the political managers similarly. Both polar visions of political managers are abundantly sourced in the literature and history of democracy.\textsuperscript{167} The role of the candidates is therefore \textit{not} simply to “channel the numerous opinions, interests, and abilities of the people of a State into the making of the State’s public policy”\textsuperscript{168} nor is it just to act as a “spokesman.”\textsuperscript{169} On the one hand, candidates must represent to fellow managers within their political party the views of their “employees-constituents” (\textit{i.e.}, what their jurisdictions desire). On the other hand, representation is only one side of political management. The manager is also responsible for motivating, rewarding, controlling, and disciplining his/her voters-employees so that they accept the political compromises that the party wants to enforce upon his/her constituents. As Macey suggests, politicians use the party’s corporate structure to serve their own interests: the party’s corporate

\textsuperscript{169}Jones, 530 U.S. at 586 (2000).
structure helps candidates by allowing them to defer to the party on most policy positions and business decisions, which, in turn, frees their energies to focus on engaging and mobilizing their specific constituents (i.e., groups of voters and financial backers).\textsuperscript{170} This facilitates easier representation and management. The candidates can thereby more easily create and enforce a consensus among his allotted set of interest groups (i.e. what I call his “shareholders”) and geographical workers to the general party platform to which he defers.\textsuperscript{171} Their disciplinary power over these members is powerful, since political managers, just as corporate managers, can call on their positions as representatives of the corporate body’s will to ostensibly enforce the corporate body’s will on their constituents. Richard Pildes and Elizabeth Anderson makes two related observations that describe this “command” side of representation. First, they write, “political institutions and decision procedures must create the conditions out of which, for the first time, a political community can forge for itself a collective will.”\textsuperscript{172} Second, Pildes and Issacharoff then acknowledge that the party allocates decision-making power over procedural rules to the managerial class who can decide how to use these procedural devices to forge a collective will:

Like the managerial class well-known to the laws of corporate governance, these political managers readily identify their stewardship with the interests of the corporate body they lead. Like their corporate counterparts, they act in the name of the entity to protect themselves against outside challenges to their personal authority. Again, like their corporate counterparts, political managers use procedural devices, created in their incumbent capacity, to lock up their control.\textsuperscript{173}

Democratic and Republican managers, thus, use procedural devices to lock-up control over their constituents. This is best exemplified by gerrymandering. Managers can determine where to

\textsuperscript{170} Macey, Packaged Preferences, at 1463.
\textsuperscript{171} Schumpeter, Capitalism, Socialism and Democracy 281 (1954) (emphasis added).
\textsuperscript{173} Pildes & Issacharoff, at 647.
place their voter-workers according to “Taylorist” management techniques so as to maximize the production of their own power. In essence, using the corporate body’s power, they can impose their will on their constituents. Justice Stevens has noticed that the success of parties has been attributed to architect-managers of gerrymandering rather than the voter-employees.

Therefore, politicians have two constituencies, akin to corporate managers: their voters (employees) and their political backers, i.e., party leaders (senior management) and financiers (shareholders). In his dissent in Vieth, Justice Stevens writes: “[e]lected officials in some sense serve two masters: the constituents who elected them and the political sponsors who support them. Their primary obligations are, of course, to the public in general, but it is neither realistic nor fair to expect them wholly to ignore the political consequences of their decisions.” The political manager is a party employee; political managers, like voters, must adhere to the party leadership’s judgment or face discipline. For example, political leadership can expunge from its rolls candidates or voters if they are not “in sympathy with the principles of the party.” One other possible mechanism to control managers is the allocation of resources and national

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175 Vieth v. Jubelirer, 541 U.S. 267, 329 - 330 (2004) (Stevens, J., dissenting) (“Gerrymanders subvert that representative norm because the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles.”) (citations omitted).
177 “[The New York] Supreme Court, in determining whether a voter was in sympathy with the purpose of a potential party, and whether the determination of a party leader was just, noted: ‘In so holding I do not mean that a voter may not change his party as he sees fit; that he may not enter a party for the sole purpose of seeking nomination and election; that he may not disagree with the party in its choice of candidates; that he may not criticize the party leadership and try to change it; or that he may not even oppose candidates of the party in an election. He may do any or all of these things and still remain a member of the party provided he is in reality in sympathy with its principles. But where, as I think it has been conclusively shown here, a man is not in reality in sympathy with the principles of a party he is not entitled to enroll in order to further his ulterior motives.’” Rivera v. Espada, 98 N.Y.2d 422, 429 (N.Y. 2002) (quoting Matter of Mendelsohn v. Walpin, 197 Misc. 993, 1000 (N.Y. Sup. Ct. 1950)); see also Nathaniel Persily, Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws, 88 GEO. L. J. 2181, 2220-221 (2001).
In a separate opinion in *Colorado Republican Federal Campaign Committee*, Justice Thomas notes that “coercion” through party allocation of campaign financing defines party politics. He writes:

As applied in the specific context of campaign funding by political parties, the anti-corruption rationale loses its force. What could it mean for a party to “corrupt” its candidate or to exercise “coercive” influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute “a subversion of the political process.” For instance, if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party's platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system. To borrow a phrase from *Federal Election Comm'n v. NCPAC*: “The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by [political groups] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.”

Politicians need and want to tap into the parties’ distribution of interest group money to candidates and their party’s official endorsement. As Macey notes, “[w]hile this point is somewhat counterintuitive, because most people are taught that political parties are organized to serve the interests of voters, I would posit that, upon reflection, many would agree that political parties are designed to serve politicians’ interests at least as much as they are designed to serve voters’ interests. After all, politicians have far more at stake in choosing a party affiliation than do individual voters.”

Political scientist John Aldrich has gone so far to envision the party as a medium through which political managers assert their will and gain power. Particularly important for local candidates (i.e. lower-level political managers) is the party’s internal

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180 Macey, *Packaged Preferences*, at 1463.
promotion mechanism; party leaders can choose who to cultivate for national attention. The party’s effective control over candidates or budding political managers starts when party leaders decide who can be promoted from mere party member to political manager. Politicians do not have any recourse against party leadership decisions; there is still little overt legal compulsion for internal accountability by party leadership to managerial groups within political parties. These decisions are subject to the leadership’s managerial discretion. This discretion can be quite expansive even including power over internal advertising by one group to other voter-employees and interest groups within the party.

Party management with regards to the “command” side of the job has changed over the years. The changing nature of corporate management parallels the changing nature of political party management. Corporate boards have shifted managerial strategies dominated by hierarchical structures to more emphasis on team-orientated cooperative relationships between employees and management. In similar respects, the era of “smoke-filled room[s]” that determined party nominations when major decision-making processes excluded employees from participation have been replaced by quite open primaries and more, but still weakly, transparent mechanisms for party decisions. Similarly, the most radical team-orientated corporate strategy allows the employees a “voice” within the corporation through stakeholder voting permitting

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182 See, e.g., Federal Election Com’n v. GOPAC, Inc., 917 F. Supp. 851, 856 (D. D.C. 1996) (“In 1990, GOPAC initiated ‘Project 170,’ which focused on ‘recruiting, training and funding strong local and state candidates in specific congressional districts, with the expectation that successful candidates at the state and local level would run for higher office in the future.’”).
184 See supra note 166.
185 See, e.g., Republican Party of Texas v. Dietz, 940 S.W.2d 86, 92-93 (Tex. 1997).
186 A separate inquiry is how to organize the relationship between political managers and party leaders. While academics acknowledge the “managerial role” of party leaders and control over managers, there is a separate debate over the level and type of control party leaders should exert over relatively decentralized candidates. See, e.g., Rosenblum, Political Parties as Membership Groups, at 827-31.
187 See supra note 166.
188 See, e.g., Nader v. Schaffer, 417 F. Supp. 837, 843-45 (D. Conn) (“In the past, many political nominations were made by a process . . . described as the ‘smoke-filled room.’”).
some employee input in considering who should run and win positions in management.\textsuperscript{188} Primary elections analogously changed the way nominations for party leadership and representation in government is determined. A now disfavored alternative method is to create managerial fiefdoms; party leaders that delegate and decentralize their management by giving lower-level managers political control and discretion over budgets, patronage, and promotions. These were the so-called “political machines,” which some, as noted earlier, claim to have helped racial and ethnic minorities gain a piece of political power as the party delegated racial minority leaders management authority over members of their own race within the parties.\textsuperscript{189}

The primary managerial duty is to command through the motivation and rewarding of employees-voters within their member rolls. Fund-raising, stumping, making reward promises, personal contact, and other political campaign activities do not just enhance a candidate’s image, but also motivate voters to vote and work despite labor-centric obstacles. Political scientists identify an important voting phenomenon called “voter fatigue,” also called “voter roll-off.” Voter fatigue describes the fact that too many elections and too many candidates cause voters to ignore elections simply because voters are overworked. Some scholars compare voting to taking

\textsuperscript{188} See, e.g., Roberta S. Karmel, \textit{Implication of the Stakeholder Model}, at 1171-72.

\textsuperscript{189} \textit{Rutan v. Republican Party of Illinois}, 497 U.S. 62, 108 (1990) (Scalia, J., dissenting) (“By supporting and ultimately dominating a particular party ‘machine,’ racial and ethnic minorities have--on the basis of their politics rather than their race or ethnicity--acquired the patronage awards the machine had power to confer.”). The Supreme Court majority in \textit{Georgia v. Ashcroft} emphasized the importance of allocating minority managers power. \textit{Georgia v. Ashcroft}, 539 U.S. 461, 483 (2003) (citations omitted) (“In addition to influence districts, one other method of assessing the minority group’s opportunity to participate in the political process is to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts. A legislator, no less than a voter, is ‘not immune from the obligation to pull, haul, and trade to find common political ground.’ Indeed, in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. A lawmaker with more legislative influence has more potential to set the agenda, to participate in closed-door meetings, to negotiate from a stronger position, and to shake hands on a deal. Maintaining or increasing legislative positions of power for minority voters’ representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under § 5.”).
an SAT. Plaintiffs and courts have also acknowledged the “voter fatigue” phenomena and one district court framed voting as not necessarily a matter of interest, but rather one of “eagerness.” As Justice Stevens notes, “[s]peech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field.” Party contact is known to increase voter turnout. There is strong evidence that candidates tailor their messages so as to motivate voter-employees. For example, managers within former President George Bush, Sr. and the Republican Party had promised “influence in the appointment process” as a reward to the conservative-leaning Christian Coalition who would be “outsourced” responsibility to mobilize and motivate voters within that interest group.

D. The Campaign Contributors As Shareholders

(1) The Analogy Explained

Analogizing campaign contributors to shareholders seems to be a natural fit and this comparison has been debated extensively in the academic literature. This metaphor has, in part, spurred “campaign finance reform.” The Court generally does not view donations on a large scale as simply another of form of organizational activity and voter participation as it did in

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194 Fed. Election Com’n v. GOPAC, Inc., 917 F. Supp. 851, 856 (D.D.C. 1996) (“In particular, GOPAC convened ‘shirtsleeve sessions,’ which provided ‘themes and message development for state and local Republican candidates,’ and ‘focus groups,’ which identified and defined political issues that would motivate voters in various regions of the country.”).


Tashjian, but rather as a form of corruption.\textsuperscript{197} Indeed, the Court in Buckley wanted to distinguish the labor and the capital faces of campaign contribution. The Court separated the labor face of contribution or “the symbolic act of contributing” from the corrupting influence of the party’s dependence on capital -- “the extent that large contributions are given to secure political quid pro quo’s from current and potential office holders, the integrity of our system of representative democracy is undermined.”\textsuperscript{198} The Buckley Court observed that candidates are dependent on large infusions of cash to support their campaigns:

The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy.\textsuperscript{199}

This potential for a “quid pro quo” relationship harks back to the prior discussion regarding patronage.\textsuperscript{200} Patronage and large financial contributions are the two most salient, problematic, but related, quid pro quo exchanges, \textit{i.e.}, rewarding political activity that helps the party with the use of government power.\textsuperscript{201} As Richard Hasen has studied, there is a competing and translatable relationship between political managers’ use of patronage practices versus relying on campaign

\textsuperscript{197} Compare McConnell, 540 U.S. at 95 (“. . . [T]he idea that large contributions to a national party can corrupt or create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible.”) with Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 215 (1996) (“Some of the Party's members devote substantial portions of their lives to furthering its political and organizational goals, others provide substantial financial support, while still others limit their participation to casting their votes for some or all of the Party's candidates.”).

\textsuperscript{198} See Buckley v. Valeo, 424 U.S. 1, 19–21, 26–28 (1976) (per curiam).

\textsuperscript{199} Id.

\textsuperscript{200} Compare McConnell v. Federal Election Com’n, 540 U.S. 93, 153 (2003) (“Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation. The evidence set forth above, which is but a sampling of the reams of disquieting evidence contained in the record, convincingly demonstrates that soft-money contributions to political parties carry with them just such temptation.”) with, \textit{e.g.}, Rutan, 497 U.S. at 73 (“[G]overnment employees] will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder.”) (describing \textit{quid pro quo} in patronage context, \textit{i.e.}, promoting, firing, hiring as a reward for performing in accordance with party wishes).

contributions.\textsuperscript{202} In the end, the judicial question is which and at what level can capital or labor investment into a candidate or party be legally rewarded and normatively justified as furthering democracy and as an acceptable form of political participation?\textsuperscript{203} In both patronage and campaign contribution cases, the underlying problem is at what level do patronage or campaign contributions create a relationship that unduly influences office-holders when they balance party managerial responsibilities and public duties? In other words, at what level do patronage or campaign contributions create a long-term “conflict of interest”?\textsuperscript{204} What the Court feared with the large amounts of contributions from a single source was the creation of a permanent relationship akin to the relationship between larger shareholders and corporate managers.

The relationship between campaign financiers-shareholders and voters does not fit neatly into the consumer-centric framework. Under a consumer-centric framework, shareholders would finance corporate bodies and campaigns so that they succeed in gaining more market share and profit by attracting more consumers. Shareholders want companies to match and satisfy

\textsuperscript{202} Richard L. Hasen, An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence, 14 CARDOZO L. REV. 1311, 1329 (1993) (“The substitutability of patronage and campaign contributions varies by region, the size of the political race, and the importance of the contested position.”).

\textsuperscript{203} Id. at 1330 (“Choosing the optimal amount of patronage or campaign contributions in the presence of externalities requires balancing the benefits to the political system (the positive externalities) against the costs to the political system (the negative externalities). A political practice may have benefits such as protecting the First Amendment rights of political speech and strengthening the two-party system. It may have costs such as corruption and the squelching of First Amendment rights.”).

\textsuperscript{204} Daniel Hays Lowenstein, On Campaign Finance Reform: The Root of All Evil is Deeply Rooted, 18 HOFSTRA L. REV. 301, 334 (1989) (“These criticisms are themselves unfounded once it is understood that the allegation need not be that the legislators are for sale, but that they routinely act within a position of conflict of interest. Perhaps it is likely that legislators would have acted in the same manner if the conflict of interest had not been present. That likelihood does not change the fact that, when they did act, the conflict existed. The studies of the public interest groups show the breadth of the conflict of interest problem; the investigative journalists’ anecdotal evidence shows its quality.”); see, e.g., Board of County Com’rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 688 (1996) (Scalia, J., dissenting) (describing the patronage practices in the contracting realm). In fact, the relationships are accounted for within the party, see, e.g., FEC v. Colorado Republican Federal Campaign Committee, 531 U.S. 431, 459 (2001) (describing the “tallying” system); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 391 (2000) (“… [V]oters tend to identify a big donation with a corrupt purpose.”).
consumer interests or else their companies would lose to their competitors.\textsuperscript{205} Under the consumer-centric framework campaign financing should increase the welfare of all voters/consumers as the corporation is better funded to serve the consumer-voter.\textsuperscript{206}

Yet, the judicial opinions above describe campaign financing and its relationship to voters differently. Shareholders are buying permanent influence with corporate managers so that managers listen to them not the voters, \textit{i.e.}, the “conflict of interest” problem described earlier. There is no general alignment of interests between shareholders and voters. Shareholders are not worried about attracting a larger popular vote with better candidates. Instead, they are worried more about what happens with party decisions \textit{after} candidates win their offices.\textsuperscript{207} The relationship between voters and campaign financiers is more akin to the relationship between shareholders and employees. Shareholders want corporate employees and voters to adhere to party discipline and, concomitantly, the shareholders’ power over the corporate body. In essence, like the fight between unions (labor) and shareholder (capital) interests, campaign contributors-shareholders and voter-employees are also in a struggle for influence within the corporate body. Progressive corporate law scholars seek other sources of power within the corporation to counteract the influence of controlling shareholders; other potential sources of power include minority shareholders, and possibly employees.\textsuperscript{208} Thus, campaign financing does not focus on

\textsuperscript{205} \textit{See, e.g.}, Frank E. Easterbrook, \textit{Foreword: The Court and the Economic System}, 98 HARV. L. REV. 4, 8 (1984) (“Those who offer what consumers want--by design or by accident--and produce it at low cost will prosper. Rewards and punishments arise automatically in any market system. The investor who continually misunderstands the markets soon finds that he has no money left to invest; those who understand more soon control the bulk of liquid funds. The manager who lets costs get out of control or makes things no one wants finds that sales shrink. The influence of those who misunderstand or mismanage wanes.”).

\textsuperscript{206} \textit{See, e.g.}, CHARLES R. BEITZ, \textit{Political Equality} 195-96, 202 (1989) (“The main public purpose of campaign activities is communicative. We do not take an interest in them only because, like voting, they are elements in a causal chain linking the preference of citizens with the formal mechanism for identifying winners and losers.”).


\textsuperscript{208} \textit{See, e.g.}, Anupam Chander, \textit{Minorities, Shareholder and Otherwise}, 113 YALE L. J. 119, 155 (2003) (“Corporate law recognizes the inevitability of power imbalances. In response to the possible self-dealing of controlling
the number of campaign donors, but the amount of donations. The controlling shareholders (ones with the largest donations) have the power to distort the enterprise’s direction.\textsuperscript{209} The power can be equally balanced by multiple donors of small amounts (as exemplified by the image of the Obama 2008 fundraising campaign) or voter-laborers. Moreover, as discussed below, the total amount of donations might cut into the need for alternative forms of corporate input/participation, such as labor-intensive political activity or work.

Patronage and campaign contribution restrictions have not blunted the corporate form of parties – parties still need capital and labor. The viability of candidates is often determined by their “war chests” (just like corporate start-ups) more so than their credentials and support from voter-employees.\textsuperscript{210} Larger parties’ competitive advantage is their ability to capture more capital and increase rewards to its employees. In face of campaign finance reform and limitations on patronage, instead of eliminating the essential need for capital and labor, political parties now seek them in less transparent ways thereby driving capital and labor sourcing “underground.”

Justice Thomas recently observed in a dissent that:

\ldots I could consider sources suggesting that parties in fact have lost power in recent years. I also could explore how political parties have coped with the restrictions on coordinated expenditures. As Justice Kennedy has explained, “[t]he Court has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits.” Perhaps political parties

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\item[209] Figueiredo & Garrett, \textit{Paying for Politics}, at 628. To counteract this effect, Figueiredo & Garrett argue, alternatively, that increasing the number of shareholders would diffuse and dilute the power imbalance. \textit{Id.} They propose a tax credit that provides people with money to contribute to political campaigns; this would diffuse “shareholding” to a broader base and incentivize political parties to mobilize and seek out these new shareholders for capital. \textit{Id.} at 648-50. A diffusion of shareholding will increase the labor-intensive nature of capital funding and thereby increase participation. \textit{Id.} In essence, they suggest a way to align shareholder-financier and employee-voter interests by transforming employee-voters into shareholders. \textit{Id.; see also} Brian L. Porto, \textit{Less is More and Small Is Beautiful: How Vermont’s Campaign-Finance Law Can Rejuvenate Democracy}, 30 VT. L. REV. 1, 37-40 (2005).
\end{enumerate}

\end{footnotesize}
have survived, not because the regulation at issue imposes less than a substantial burden on speech, but simply because the parties have found “underground” alternatives for communication.\textsuperscript{211}

For example, there is much evidence that capital infusion into party politics has shifted to safe harbors under issue advocacy.\textsuperscript{212} To take an analogy from the corporate sector, capital and labor sourcing has been “outsourced.” PACs garner capital; interest groups, like the Christian Coalition, employ and manage voters.\textsuperscript{213} Scalia observes how patronage restrictions caused an outsourcing of voter employment to interest groups, rewarding their labor by permitting them to voice their opinion on certain issues. He writes: “there is little doubt that our decisions in \textit{Elrod} and \textit{Branti}, by contributing to the decline of party strength, have also contributed to the growth of interest-group politics in the last decade.”\textsuperscript{214}

In addition, much akin to economic work, American political campaigning has become less “labor-intensive.” Courts have recognized the decline in the demand for labor by noting relative decline in patronage practices and an increasing dependence on capital.\textsuperscript{215} This may, in part, be the result of their relative levels of regulation. There is much more animosity toward patronage practices as patronage has been substantially banned, while campaign financing is just controlled. Defenders of patronage practices will note that while capital contributions have been restricted by dollar amounts, patronage practices have been categorically barred for most positions. For example, Justice Powell prophesized the resulting shift from labor to capital:

\textsuperscript{213} See supra note 195 and accompanying text.
\textsuperscript{214} \textit{Rutan}, at 107 (Scalia, J., dissenting).
\textsuperscript{215} \textit{Landell v. Sorrell}, 382 F.3d 91, 172 (2d Cir. 2004) (“Incumbents in effect have capital--name recognition, an existing organization, tested donor lists, etc.--to draw upon without making expenditures . . . while virtually every significant capital-building activity by newcomers requires the use of resources that count toward the expenditure limits. Equally important is the fact that incumbents have methods of getting their name before the public that are not limited . . . while challengers do not.”).}
Particularly in a time of growing reliance upon expensive television advertisements, a candidate who is neither independently wealthy nor capable of attracting substantial contributions must rely upon party workers to bring his message to the voters. In contests for less visible offices, a candidate may have no efficient method of appealing to the voters unless he enlists the efforts of persons who seek reward through the patronage system. Insofar as the Court's decision today limits the ability of candidates to present their views to the electorate, our democratic process surely is weakened.\textsuperscript{216}

Justice Scalia has also noted that:

Increased reliance on money-intensive campaign techniques tends to entrench those in power much more effectively than patronage--but without the attendant benefit of strengthening the party system. A challenger can more easily obtain the support of party workers (who can expect to be rewarded even if the candidate loses--if not this year, then the next) than the financial support of political action committees (which will generally support incumbents, who are likely to prevail).\textsuperscript{217}

As these Justices observe, the increasing dependence on capital substantially decreases the level of participation and labor required for the average voter. Now engagement and deliberation perceived necessary for “effective voting” requires merely following instructions from capital fueled advertising. Fewer voters are needed for parties to get out the vote in the age of television and mass media; political machines have been replaced with television and capital-intensive advertising.\textsuperscript{218} Daniel Ortiz calls the modern voter-laborer a “civic slacker [who] cedes his vote to the candidate with the better advertising campaign, just as the traditional vote seller cedes his vote to the vote buyer.”\textsuperscript{219} Perhaps, the voter “ceding” his vote is not a voluntary choice, but rather a consequence of increased party capitalization. As capital-intensive campaigning increases and the campaign machineries become less labor-intensive, the value and types of


\textsuperscript{218} \textit{Branti v. Finkel}, 445 U.S. 507, 528 n.9 (1980) (Powell, J., dissenting) (“Television and radio enable well-financed candidates to go directly into the homes of voters far more effectively then even the most well-organized ‘political machine.’”).

opportunities for labor-intensive political participation/employment declines. For example, legislation attempt to remedy the disproportionate effect of large contributions on voluntary labor by limiting capital flows while exempting labor contributions. The consumption model sees the rise of capital and the value of labor as generally aligned – more capital for advertising equals more information and participation for the voter-consumer. While it is true that more capital will increase mobilization and participation efforts, this relationship does not account for the trade-offs between capital-intensive political participation versus labor-intensive political participation. Increased capital may increase broader participation but less meaningful participation. Philosopher Joseph Tussman concluded: “we may drift increasingly in the

220 See, e.g., Citizens Against Rent Control v. City of Berkley, 454 U.S. 290, 307-8 (1981) (White, J., dissenting) (“Recognition that enormous contributions from a few institutional sources can overshadow the efforts of individuals may have discouraged participation in ballot measure campaigns and undermined public confidence in the referendum process.”).

221 See, e.g., Frank v. City of Akron, 290 F.3d 813, 816 (6th Cir. 2002) (“No candidate for Mayor or At Large Council shall accept or solicit, as a noncash monetary (i.e. checks, money orders, credit cards) or in-kind campaign contribution or loan, more than $300 from any person, campaign committee, political party, or political action committee. No candidate for a Council Ward position shall accept or solicit, as a noncash monetary or in-kind contribution or loan, more than $100 from any person, campaign committee, political party, or political action committee. No person, political action committee, political party, or political campaign shall contribute funds or in-kind contributions in excess of said amounts. Contributions from the candidate and labor of volunteers are exempt from these provisions.”) (quoting a City of Akron campaign finance reform amendment to the city charter). The implicit legislative intent is to equalize the contributory amounts’ power over candidates and the exempted voluntary labor. The same is true for federal laws. See 2 U.S.C. § 431(8)(A)(i)-(ii) (2000) (defining “contribution[s]”); id. § 431(8)(B)(i) (excluding “the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee” from the definition of “contribution”).

222 “Indeed, we might view deliberation in political markets as playing the same role that advertising and reputation play in economic markets for goods and services. Without a robust market in advertising, the markets for goods and services will be inefficient; consumers will not have the kind of information they need to make their purchasing decisions. . . . Yet that same insight applied to politics might suggest that deliberative theory--theories about how politicians give information to voters and how voters inform one another--is critical to well-functioning competitive politics.” Pildes, Competitive, Deliberative, at 691–92.


224 See, e.g., ROBERT D. PUTNAM, BOWLING ALONE 32, 39–40 (2000) (“Participation in politics is increasingly based on the checkbook, as money replaces time.”); Debra Burke, Twenty Years After the Federal Election Campaign Act Amendments of 1974: Look Who’s Running Now, 99 DICK. L. REV. 357, 381-82 (1995) (recognizing the trade-off and concluding that trading for more labor-intensive campaigning might in the end result in a more equal playing field); Rosenblum, Political Parties as Membership Groups, at 837 (“For the most part, however, democratic theorists’ interest in campaign finance reform is not about the relative strength and influence of parties vis-à-vis other political groups, but about voter influence--the worth of political rights.”).

225 See, e.g., SIDNEY VERBA, KAY L. SCHLOzman & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 530-31 (1995); Rosenblum, Political Parties as Membership Groups, at 843 (“Reintroducing the hoopla of elections is a matter of manpower not media.”).
direction of ritualistic democracy . . . the vote will decide less and less as we move deeper into the morass of public relations, the projection of images, and the *painless engineering of consent*.”**226** For example, opportunities for labor participation in political fundraising are *outsourced* to corporate companies, who subsequently outsource the business to cheaper call centers in India, in order to, presumably, conserve capital.**227**

(2) The Labor-Capital Conflict and Voter Alienation

A theory relying on a “voter as consumers” trope is not concerned primarily with piercing the veil of corporate organizations, but concerns itself with whether these organizations are healthily competing for the benefit of the consumer and also the “equity shareholders.”**228** While a consumer-centric vision of the party accepts the influence of shareholders on the corporate form, and is concerned with the market for corporate control,**229** an adherent of the labor-centric model actively rebels against the influence of shareholders and the increased focus on capital-intensive methods. Labor tries to either diffuse shareholder control by creating employee-owned corporations or force corporate decision-makers to consider their “first-order” fiduciary duties towards their workers in face of growing dependence on capital.**230** The focus of inquiry returns to the voter or worker. As Raskin succinctly concludes: “[r]ight now the Supreme Court reasons backwards and upside-down from the imagined needs of the ‘two party system’ or ‘political

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228 See Pildes & Issacharoff, Partisan Lockups, at 648-49.
229 Id.
230 Compare Id. at 647 (describing the shift away from legal regulation and scholarship concerned with individual rights or “first-order duties of corporate managers by providing substantive content to fiduciary obligations that would then be legally enforced.”) with Benjamin I. Sachs, Labor Law Renewal, 1 HARV. L. & POL'Y REV. 375, 398 (2007) (discussing how labor law can answer skepticism that collective action and individual rights can coexist).
stability,’ rather than forward and ground-up from the essential political rights of the citizen, the only standpoint from which a truly open and competitive democracy can grow.”

The protection of the value of labor may require analogies to labor law and the union experience. For example, the labor analogy can help explain the judiciary and the public’s heightened concern over the fact that “equity stakeholders” leads, plausibly, to “corruption” in parties. Local elections provide some context for this concern. In some cities, nonresidents who have property are enfranchised simply by virtue of their capital investments within the jurisdiction, just like an equity shareholder. However, some disfavor this focus on property-ownership as a determinant qualification for corporate decision-making because residents who participate and work in the community (the labor) should be the focus of franchise entitlement rather than outsiders who “buy” access to deliberative decisions without on-the-ground political engagement. In response, defenders of the practice do not justify enfranchisement that is based purely on property-ownership; instead, they argue that property-ownership is itself a proxy for participation and membership in the community. Both sides of the debate agree, to some extent, that equity share-holding by itself (and not as a proxy for labor) does not justify political empowerment. In essence, “equity shareholding” by itself “corrupts” the political arena because it equalizes those who actively engage and labor within the political community and those outside of the community who “buy” access into it.

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232 See, e.g., McConnell, 540 U.S. at 95 (“. . . [T]he idea that large contributions to a national party can corrupt or create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible.”); SIDNEY VERBA, KAY L. SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 530-31 (1995).
233 See May v. Town of Mountain Village, 132 F.3d 576, 582 (10th Cir. 1997); see generally Spencer Overton, Racial Disparities and the Political Function of Property, 49 UCLA L. REV. 1553, 1562-66 (2002) (describing how campaign contributions and its link to political activity can viewed as transfers of property).
235 See id.
The conflict over the party between capital and labor is real. There is some evidence that the perception of corruption, such as a party’s heightened focus on capital rather than labor, would increase voter alienation and, thereby, lower voter turnout.\textsuperscript{236} To counteract voter alienation, participatory and deliberative democrats often use grassroots self-governing organizations at the local government level and the local union as practical examples of how voters can be mobilized for power within a corporate structure.\textsuperscript{237} The use of unions and grassroots organizations as two exemplars of democracy in practice is not a coincidence. The alienated laborers in the economic corporate structure are like the alienated “grassroots” voters in the political structure.\textsuperscript{238} The analogy is useful. If one understands labor’s need for unionization, then one would analogously understand the voters’ need for grassroots democracy and \textit{vice versa}.\textsuperscript{239} One study has shown that the strength of the labor movement is correlated with and affects aggregate voter turnout.\textsuperscript{240}

An important justification for unionization is to promote “voice” in the community instead of exit. In their seminal work, labor economists Freeman and Medoff conclude that unions lead to more productivity, enhanced efficiency, more participation, and community-


\textsuperscript{238} The concern for both local government and trade unionism originated with one of the original “participatory democrats,” G.D.H. Cole. See generally G.D.H. COLE, LOCAL AND REGIONAL GOVERNMENT (1947); G.D.H. COLE, GUILD SOCIALISM (1920).

\textsuperscript{239} See Peter Bachrach, \textit{Interest, Participation, and Democratic Theory}, NOMOS XVI 47 – 49 (1975); see also BARBER, A PASSION FOR DEMOCRACY 109–10 (identifying the link between working and participation in democracy through “common work” projects whether laboring to renovate houses or to participate in local assemblies).

building (i.e. older workers are willing to help younger workers). In a unionized workplace, workers are better able to voice their concerns and protect those most easily disempowered (i.e., the older workers). Other labor economists justify the union’s role to encourage voice using non-economic democratic norms. In this respect, democratic union-analogues in the political context may be able to generate “voice” for alienated voters possibly enhancing the corporate party, such as increased community-building and protecting those most easily disempowered. Issacharoff notes that “a challenge to the malfunctioning of the political process requires the existence of alternative sources of power that are not immediately accountable to the political process.” One example Issacharoff presents is the presence of alternative systems, including an independent commission, to draw voting district lines in an effort to prevent the alienation of voters whose work has been diluted or devalued. In similar respects, a broader unionization of voters presents an alternative system not accountable to the political parties that counteract the alienation of voters (caused by processes such as gerrymandering). They can also advocate for the disclosure and impact of campaign contributions, pork-barreling, and legislation on voters. Michael Kang has noted that independent non-partisan groups have a role in signaling approval for political initiatives that are fair to voters.

Unionization focuses on circumventing the alienation of workers within the political structure and thereby also focuses on the dynamic and long-term relationship between the voter and political parties. Mobilizing institutions that represent interests of the less powerful and less

affluent have been shown to increase voter turnout beyond the institutional membership.\textsuperscript{247} For example, studies have shown that the presence and strength of worker unions can increase turnout of voters beyond its own membership.\textsuperscript{248} Not only does this provide some evidence for analogizing or linking worker and voter alienation, a union of voters specifically representing voter interests can, perhaps, even more effectively counteract voter alienation of behalf of all voters beyond its institutional membership and outside of the workplace context.

In addition to a role for unions in counteracting voter alienation, this labor-centric perspective also identifies a role for the state analogous to its role in the labor market. One specific role is to support people who are forced out of the political marketplace unwillingly or are unable to enter the political marketplace. In the political market, like in the labor market, there is no incentive for political parties to enlarge the labor market and provide labor more sophisticated work beyond the bare minimum needed to win.\textsuperscript{249} As Nancy Rosenblum notes:

\begin{quote}
It is not so clear that money per se “squeezes out” participation . . . Parties do. This failure lies with party officials comfortable with the status quo, interested in “winnability” above all, supportive of the least controversial candidates. It lies with party leaders, arrogant toward members and citizens overall, who treat their positions as personal fiefdoms. And with those suspicious of mobilization and resistant to opening up the association to substantive claims and deliberation.\textsuperscript{250}
\end{quote}

Moreover, if the party is, as Macy and Aldrich among others, have proposed, a conduit for political managers to assert power and command voters, legally protected unions, like in the NLRA context, have a role within parties to equalize voters’ bargaining position vis-à-vis political management particularly over important decisions in which they have no “voice” such as gerrymandering, financing, selecting the slate of candidates, primary scheduling, etc. One

\begin{footnotes}
\item[248] \textit{Id.}
\item[249] Rosenblum, \textit{Political Parties as Membership Groups}, at 823 (“The goal of parties is not to ‘maximize the number of people who express an attitudinal preference for it,’ but to contest elections effectively.”).
\item[250] \textit{Id.} at 843.
\end{footnotes}
state protected tool used in the bargaining process is the “strike,” which is only differentiated from a similar phenomenon, shirking, because the union has signaled to management that the decision not to work is a form of dissent.\textsuperscript{251} Minority voters can use their power over the decision to vote similarly as a tool of dissent. In this sense, unionization of voters can signal dissent to party decisions by not voting, an affirmative act of dissent, which would otherwise be misinterpreted as just malaise, alienation from the political system, disinterest in this specific election, or a “civic slacker” mentality. The state has a role to recognize and protect\textsuperscript{252} this legal instrument of protest as it has in the economic strike context.

Treating the political market for voters like a labor market, the state, in cooperation with union-like institutions, can have some responsibility to train unemployed or underemployed workers so that they may obtain satisfying work when threatened with replacement caused by more capital-intensive production methods and shifts in corporate focus to other less costly locales.\textsuperscript{253} In the political marketplace, the federal government is already somewhat involved, with its federal observer program, to counteract discrimination and other tactics that prevent minority groups from entering the political marketplace.\textsuperscript{254} The federal observer program is a prime example of state involvement in removing barriers to entry; but beyond removing barriers, like in the labor context, the state may also have a role in training unemployed voters who can overcome those barriers but otherwise receive no valued opportunities for political work. Such efforts may include training such persons for political action in other jurisdictions where their

\textsuperscript{251} See generally Heather Gerken, \textit{Dissenting by Deciding}, 57 STAN. L. REV. 1745, 1767 (2005) (noting that the teacher’s union’s decision to integrate was a form of dissent).

\textsuperscript{252} For example, parties may gerrymander the jurisdictions with these voters or prevent these voters from participating in party events, such as the party convention.


work is valued or for participation in capital-intensive and new political work, such as internet blogging and campaigning. The following section uses the labor-centric model to try to better explain the decline in voter turnout in analogy to unemployment and its implications for public policy.

III. APPLYING THE LABOR-CENTRIC MODEL: UNEMPLOYMENT AND VOTER TURNOUT

Labor law and theories regarding labor in the economic marketplace may provide helpful analogies and insight into discussions regarding the voter in the political marketplace. There is something different about the market for labor when compared to traditional consumer markets. The choice of analogizing voters to consumers versus voters to laborers and the corresponding examination of the political marketplace as a consumer market versus a labor market has important consequences. As economist Robert Solow observed, “[t]he labor market might just be different in important ways from the market for fish.”255 The differences between the labor and consumer markets have direct implications on how economics analysis can be used to analyze the “political market.” For example, the unique features of labor economics can be used to analyze one important problem in political marketplace: the low turnout of voters. The “low turnout” problem can be analyzed using analogies to different categories of “unemployment” found in labor economics.

The initial analytical distinction is to differentiate between choosing not to work versus an inability to find work, or the distinction in labor economics between voluntary versus involuntary unemployment. The former is the trade-off between work/vote and leisure. Voluntary unemployment is an individual decision. This trade-off is influenced by the perceived rewards provided for voting, motivation from the party, and commitment to the party versus

preferences for leisure. Amy Gutmann has written specifically on the intersections between election law and welfare law and the effects on this trade-off. She writes:

Given differential desires for political activity among individuals in a just society, the participatory activities of individuals are unlikely to be radically equalized. But the liberal democratic ideal does not demand absolute equalization of participation among individuals or perhaps even among all groups. We can reasonably expect that participation rates among income categories would be equalized, as there is little evidence to suggest that small differences in income would produce large differences in preferences for political participation. Present extreme differentials in income and in the availability of leisure time among classes help account for the great participatory gaps between classes, especially in those political activities (campaigning, for example) that demand a great deal of time and effort. Not only income but enforced leisure differentials among groups would diminish significantly in a just society. Freely chosen differentials in use of leisure among individuals may then limit equality of participation, but those remaining inequalities would not be class based, but based more acceptably upon individual preference, influenced perhaps by group subcultures.256

For involuntary unemployment, the worker/voter already decides he could take the trade-off in favor of work, but perceives or, in reality, has no opportunity to work/vote. This unemployment is structural in nature – the market structure cannot employ him at that time. This initial distinction between voluntary unemployment and involuntary unemployment is important, because they require different legal (and non-legal) remedies. One is an arguably individual harm and a private decision; the other is a structural harm and a public decision.257 In labor economics, there is further categorization of involuntary unemployment: “frictional


257 See Heather Gerken, Understanding the Right to an Undiluted Vote, 144 HARV. L. REV. 1663, 1725-727 (2001) (“As long as the state adheres to a territorially based system with contiguous districts and voting is racially polarized throughout the state, he will always be outvoted by his white neighbors. That is true even if Latinos in other parts of the state can establish a dilution claim and obtain a remedial district. As long as the remedial Latino-majority district is contiguous, it will not reach our hypothetical voter. . . Another possible response . . . is that the right derives from a structural principle regarding the way democracy should function. On that view, all Latinos--indeed, all voters--have an interest in a well-functioning democracy that makes room for the perspectives of racial minorities. The absence of concreteness stems from the fact that the right is a structural one rather than a classic individual harm.”). It is also arguable that persistent income differentials are results of structural harms such as segregation and discrimination.
unemployment,” “structural unemployment,” “demand-deficient unemployment,” “seasonal unemployment” to describe the different situations that may cause a real or perceived decline in such opportunities.

“Frictional unemployment” is straight-forward. Individuals are unemployed, because they are between jobs. Awareness about such unemployment can be useful in the voting context as some segment of voter non-participation may be the result of changes in residence (i.e. moving abroad for example). There are many different policies with regards to provisional ballots and out-of-state voters and these provisions may affect the level of frictional unemployment in voting participation. The solution, like with frictional unemployment, is straightforward – to minimize the costs of moving, and in the voting context, it is often the cost of registration and navigating jurisdictional rules.

The second type of unemployment is “structural.” Structural unemployment generally describes a mismatch between “the skills demanded and supplied in a given area or an imbalance between the supplies and demands for workers across areas.” Some causes may be occupational imbalance and geographical imbalance – in other words, there is more supply than demand for a specific set of workers within an occupation or locale. Basically, laborers are generally immobile, because of their endowed geographical location or their (limited set of) skills, and therefore the labor market cannot easily adjust to the shifting geographic or

259 See, e.g., Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 568-69 (6th Cir. 2004) (“In any event, there is no contradiction between requiring all voters in a county to be given a provisional ballot in case they are subsequently found to reside in the precinct in which they seek to vote, and then allowing the state to continue its practice of not counting votes cast outside of precinct. Although Congress certainly intended that some provisional ballots would be counted as valid after it was determined that voters should in fact have appeared on the list of qualified voters, there is no suggestion in either the legislative history of the statute or the statutory text that Congress intended all provisional ballots to be deemed valid.”).
occupational demands. Analogously, in the political marketplace, similar factors affect the
mobility of voters. The analogy with structural unemployment accurately describes the situation
of a voter who is not fully mobile with regards to voting choices, and perceives no meaningful
opportunity for political work in his native jurisdiction.\textsuperscript{261} In other words, certain voters do not
vote or participate, because, in their jurisdiction, their political work is effectively valueless as
they are consistently outvoted by an opposing majority.\textsuperscript{262} Mobile voters, like mobile laborers,
can simply move to another place where their voting and participation could make a difference; a
place where they can “add” to stability of the governing majority or tip the balance where parties
are evenly balanced. They will then add their vote and political work to another jurisdiction’s
majority. The same situation affecting less mobile potential voters would have a different
consequence. Those who can not leave their jurisdiction for structural reasons will continue to
not participate because their votes never matter; they will become permanently “discouraged”
and, thus, drop out of the system.\textsuperscript{263} A similar theory underlies the difference between an
“additional” job seeker and the “discouraged” job seeker in unemployment theory.\textsuperscript{264} For the
more mobile workers/voters, their unemployment/non-participation is transitory and, in effect,
can be considered frictional unemployment. However, even this categorization is complicated by
gerrymandering. Gerrymandering may effectively prohibit relatively mobile voters from moving
to another jurisdiction, since jurisdictional lines are in flux; they would not know if district lines
will be permanent. This may create even more immobile voters. For the less mobile worker/voter,

\textsuperscript{261} This assessment contrasts with the classical consumer-centric model of local voting patterns exemplified and
influenced by Charles Tiebout who assumed full mobility of the “consumer-voter.” See Charles Tiebout, A Pure
\textsuperscript{262} There is an argument that these groups who are consistently outvoted amount to a structural harm and should
have standing to sue. See Gerken, Understanding the Right to an Undiluted Vote, 144 Harv. L. Rev. at 1725-727.
\textsuperscript{263} See Daniel D. Polsby & Robert D. Popper, The Third Criterion: Compactness as a Procedural Safeguard Against
Partisan Gerrymandering, 9 Yale L. & Pol’y Rev. 301, 308 (1991) (“An effective gerrymander may discourage
minority-party voters from even going to the polls.”).
\textsuperscript{264} Cf. Ehrenberg & Smith, at 235–37.
their unemployment/non-participation is permanent and may require government encouragement and outreach so as to sustain their search for acceptable opportunities to participate within the marketplace.265

The solutions to structural unemployment of less mobile workers is complex as the unemployment is often directly tied to geographical disparities in income that are exacerbated by gerrymandering. Many solutions try to attack these structural problems and often these solutions have analogues in both unemployment and voting contexts.266 For example, Frug attacks the lack of mobility by combining the districts into multi-district regions so less mobile voters can vote and participate, without moving, in other jurisdictions within the region. Their votes will count in what they perceive to be more meaningful elections.267 This solution is similar to a telecommuting or a mass transit solution in the employment context whereby the city provides infrastructure to allow less mobile job seekers to work in another area of the metro region where there may be more jobs without actually moving there.268 The solutions are mutually reinforcing. Regionalization would diversify the voices taken into account in democratic decisions; the disadvantaged and immobile can (and have more incentive) to voice their opinions on a regional scale allowing them to provide input on public transportation and infrastructure decisions that may enhance their labor and voting mobility. For example, mass transit facilitates political participation in non-local communities.

265 One possible example is to inform and train voters for political activity that affect issues outside of the jurisdiction like fundraising for their political party or outreach to voters in districts that may make a difference. Another possibility is to educate voters on political gerrymandering and how they may mobilize to protest the redrawing of district lines.
266 For example, tailored tax policies can help structural problems by creating incentives to leave for more suitable areas. See, e.g., Edward L. Glaeser & Andrei Shleifer, The Curley Effect: The Economics of Shaping the Electorate, 21 J. L. ECON. & ORG. 1, 6, 16 (2006).
Similar to the mobility concerns, great disparities in endowed skills may also structurally inhibit or discourage voting. Education, not just information, is critical to improving voter skills to understand and work in an increasingly complicated political marketplace. Schools can get involved in the training of voters not only in voting technology but also the benefits and opportunities for general political participation. Justice Thomas has noted that “[a]lthough one of the purposes of public schools was to promote democracy and a more egalitarian culture, failing urban public schools disproportionately affect minority children most in need of educational opportunity.” Current political parties are focused on winning elections instead of fostering skills needed to empower new voters/new consumers. The emphasis on voting as labor lends itself to concerns with human capital in an effort to remedy structural unemployment for political participation whereas a consumption model does not.

A third type of unemployment is demand-deficient, or cyclical, unemployment, which tracks “fluctuations in business activity.” Unemployment rises, because the national economy and firms cannot maintain the level of employment due to declines in demand for their products. Cyclical unemployment can be analogized to a candidate’s or a party’s loss of potential voters who drop out because their “candidate” of faction or party lost in previous primaries or were expected to lose in the general election based on electoral data and opinion. Similar to the

269 See SIDNEY VERBA, KAY L. SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 514 (1995). Studies confirm the relationship between education and voter turnout, see, e.g., Southwell, The Effect of Political Alienation on Voter Turnout, at 136; Duff, et. al., Good Excuses: Understanding Who Votes With an Improved Turnout Question, 71 PUBLIC OPINION QUARTERLY 67, 87 (2007) (“What over-reporting the new turnout question does remove will allow researchers to highlight better and explore what is undoubtedly among the most significant findings regarding who votes and who does not vote in the U.S.—that those Americans who lack resources, and the confidence that they can understand politics and participate meaningfully, vote at astonishingly low rates. As a practical consequence of these findings, advocates of higher participation rates should allocate additional resources toward educating the citizenry about politics and the role of the citizen in a democratic society . . . . Efforts that fail to do so are unlikely to overcome the abysmal turnout rates found among those who have little concern for the outcome or little knowledge of politics.”).
270 Id. at 3 (“The foundations for future political involvements are laid early in life – in the family and in school.”).
272 See supra note 250 and accompanying text.
273 EHRENBERG & SMITH, at 581.
unemployment context, sometimes this is because the candidate or party has not raised enough money or garnered enough confidence to run sustained campaigns in all electoral regions. Put another way, the ability of the firm to gather fundraising and broad-based support will lead the candidate to downsize efforts to “employ” more voters in more jurisdictions, thus leading potential support to drop out, because their party or manager is all but certain to lose that jurisdiction. In effect, cyclical unemployment can be caused by “informational and reputational cascades” in both the economic labor and voting context.\textsuperscript{274} An informational cascade occurs when a person or institution follows previous judgments on the same problem assuming that the judgment was rendered independently \textit{despite} information presented to them that may indicate a contrary conclusion.\textsuperscript{275} “[S]ubsequent participants will place more weight on the prior guesses than on their own [information], and eventually people will simply repeat what was said before.”\textsuperscript{276} A related phenomenon – the reputational cascade - occurs when “people think that they know what is right, or what is likely to be right, but they nonetheless go along with the crowd in order to maintain the good opinion of others.”\textsuperscript{277} Such cascades are accentuated when the judgment is given by a person held in high esteem.\textsuperscript{278} First, cyclical unemployment in the labor market is often brought about because of information and reputational cascades. According to traditional Keynesian economics, a primary problem that underlies cyclical unemployment is the drop in investment demand caused by informational and reputational cascades about

\begin{footnotes}
\item[275] Id.
\item[276] Id. at 162.
\item[277] Id. at 162.
\item[278] \textsc{Cass Sunstein}, \textit{Why Societies Need Dissent} 66 (2003) (describing “fashion leaders’’); see also \textit{Brown v. Superior Court}, 5 Cal.3d 509, 592 (Cal. 1971) (“Practices which were particularly found to have the effect of ‘misleading and deceiving the voter’ where the use of ‘high sounding, patriotic names under which the real identity of the interested parties and actual proponents or opponents is disguised,’ the undercover employment as campaign workers of commercial, labor, social, and other leaders who occupied positions from which they might be able to influence large groups of persons who were unaware of the employment, and the commitment of some campaign workers to lend support both for and against particular propositions.”).
\end{footnotes}
perceptions of the well-being in the economy. In other words, business people seeing that other business people have reacted in a way (i.e., layoffs) consistent with a forecast of economic downturn, proceed to do so also despite independent information that may suggest otherwise. In similar respects, candidates and political leaders, in response to media reports, level of campaign donations, and previous primary results, may downsize mobilization efforts and signal decreased opportunities for political work in less productive jurisdictions - essentially permitting those voters to perceive that they are not needed in the election.

A fourth type of unemployment is “seasonal.” These unemployed workers are analogous to issue voters and those who may increase participation during a particular election. Like seasonal unemployment, such fluctuations in voting levels can be anticipated, and follow a systematic pattern, since a party can count and expect certain individuals of certain political persuasions to turn out for particular issues or rewards. Distinct from cyclical voters, seasonal (single-issue) voters, like seasonal employees, come and go depending on the fads of a particular time or season – they are “energized” by particular issues or elections. These potential voters are usually disengaged from the system, possibly discouraged, or never chose to participate (i.e., refuse to trade-off leisure) unless mobilization efforts are aimed at particular issues and particular rewards. One particular issue (e.g. one referendum issue) or one particular candidate may inspire him/her to vote in a one-time effort.

Sociologist professor Duncan Watts of Columbia University has suggested that such a cascade can explain Kerry’s rise and Dean’s fall in the 2004 election. See Duncan Watts, The Kerry Cascade: How a ’50s psychology experiment can explain the Democratic primaries, SALON (February 24, 2004), available at http://www.slate.com/id/2095993/ (last visited, June 23, 2008).
See EHNBERG & SMITH, at 588
The unemployment analogy can guide us when examining aspects of the low voter turnout problem. For example, just as with unemployment, we should be concerned not only by the “incidence of unemployment/non-voting” but also the “duration of spells of unemployment/non-voting.” It would be important to have longitudinal studies of non-voters and reasons for their failure to participate. Second, public policy and legal efforts addressing non-participation will have to identify the magnitude of each type of voter unemployment the solution needs to address. From a labor economics perspective, structural unemployment is one of the main justifications for government intervention and legal protection for unions, because second-order regulation does not necessarily guarantee first-order values such as a specific adjustment of individual employees from one sector to another sector or protection of the unemployed who are too old for a return to the workforce. Similarly, it could be important for government to encourage participation by actively building communities and avenues for re-engaging political life particularly by those who feel disenfranchised by structural changes in the system, i.e., vote dilution, increased dominance by outsider special interests, and entrenchment of jurisdictional lines so that they are consistently outvoted by a dominant majority. The threat of being “laid off” from their party is very real for the immobile voters as they are subject to redistricting efforts where the individual value of their votes and efforts are diminished by external forces.

Nonetheless, comparisons to intervention in the labor market are not incompatible with also favoring second-order regulation that insures the competitiveness of political markets. A

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284 See EHRENBERG & SMITH, at 565.
285 See, e.g., Shockley, Direct Democracy, at 400 (suggesting that long-term and broader studies of more than one time period may better gauge voter alienation).
286 See EHRENBERG & SMITH, at 578 n.21.
287 For example, Mark N. Franklin, et. al. describe voters as having established stable relationships with political parties, see FRANKLIN, VOTER TURNOUT, AT 12, but suggests, like Pildes, that electoral competitiveness is sufficient
competitive labor market is also highly desirable for voters in general. However, a labor-centric perspective, as described earlier, also justifies first-order legal interventions akin to current legal interventions into the labor-management relationship. Thus, in comparison to a consumer-centric view, the labor-centric view accommodates and identifies phenomena and problems in the political marketplace that may justify second-order and first-order legal intervention when such approaches may not be apparent or are ignored within a consumer-centric framework.

IV. MOVING FORWARD: THE USEFULNESS OF THE LABOR-CENTRIC MODEL

Beyond the low voter turnout problem, the labor market analogy can also shed some other interesting parallels between the labor and political markets. I will not exhaust examples here, but suggest two initial areas.

1. **Bounding the demos.** The gerrymandering problem reflects the “dilemma” of democracy: how to bound the demos.\(^\text{288}\) Under a voter-as-consumer paradigm, the market (political and economic) is theoretically boundless – voters and consumers who can access the political marketplace should be able to participate with price used as a discriminatory mechanism. Freer markets and increased access is ideal; the boundaries of the markets hinge on the limits of access.\(^\text{289}\) However, the political marketplace is not limited by access alone. An analogy to labor markets captures the debate over demos boundaries more accurately; the labor market and labor policy is concerned not only with access to the market but also with shifting “qualifications” for entrance.\(^\text{290}\) The polity has determined that certain persons with access and capability to

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\(288\) ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY 96–98 (1982) (calling it a dilemma of democracy).


\(290\) See supra section regarding structural unemployment as one example where shifting demand in the marketplace leaves unemployed and out of the marketplace workers no longer qualified for the jobs in supply.
participate in the political marketplace are nevertheless generally disqualified: \(^\text{291}\) illegal immigrants, non-residents, minors, and felons. An analogy to labor markets encourages debate and parallels between our conceptions of “qualifications” in the labor and political marketplaces. \(^\text{292}\)

2. Rethinking choice in elections. As this Article discusses, an analogy to labor markets conceptualizes low voter turnout sometimes as “involuntary” and thus not a result of “free-will.” In understanding structural unemployment, labor and political markets can be sensitive to influences of endowment, such as race, geography, and disability on both employment and voting choice; \(^\text{293}\) these concerns also account for the often similar sociological and psychological pressures of being without choice for both the unemployed and disempowered, \(i.e.,\) the “discouraged” worker/voter. \(^\text{294}\) Labor-centrism also accounts for the stability of voluntary preferences, like a “preference” for a party or loyalty to an employer. Stable preferences are the consequence of voluntary deliberation. \(^\text{295}\) Choosing employment is similar to choosing political parties – it is a stable commitment and changes are often consequence of voluntary deliberation. While people usually do not actively debate the merits of their consumption choices, they do defend their stable political and occupational affiliations. \(^\text{296}\)

V. CONCLUSION

\(^{291}\) Historically “voting was not seen as a right, but as a privilege to be provided to those thought best qualified to participate in governing the community.” Richard Briffault, The Contested Right to Vote, 100 MICH. L. REV. 1506, 1508 (2002).

\(^{292}\) See supra note 60.


As David Cole notes, “[t]he weakness of the ‘marketplace’ story is its susceptibility to laissez-faire interpretation, which is in turn subject to a devastating practical critique.”

Nevertheless, the marketplace metaphor is attractive and accepted as one tool in understanding democratic institutions. Karlan writes, “[w]e hold both market and nonmarket understandings of what politics is about simultaneously. We are both drawn toward and resistant to understanding politics as simply another form of market.”

Daryl Levinson has also argued that analogies in general are unhelpful, because they imply a unitary theory of election law, but markets can serve as one tool for designing democratic policy. The political marketplace analogy is attractive in part because it offers a straightforward theoretical “heroic consumer” framework and consequently a susceptibility to laissez-faire interpretation. Instead of adopting a practical critique, this Article offers an alternative “marketplace” story that accounts for the reluctance to fully commodify the political process just as one naturally resists full commodification of labor. In similar respects, labor markets are not easily subjected to laissez-faire interpretation particularly in light of the numerous regulatory regimes in place to protect laborers in the free market. Moreover, an analogy between the private and public by comparing labor and political marketplaces serves a rhetorical and normative purpose – it links similar experiences faced by the average citizen and attacks the dichotomization between the “public” and “private” spheres. As many have noted, a vision of a democratic society includes a vision of workplace democracy. Through this analogy, the two fields can learn from each other. Comparing how

297 Cole, First Amendment Antitrust, at 239.
300 Kysar, Preferences for Processes, at 632-35.
301 Karlan, Politics By Other Means, at 1698-99.
303 Samuel Issacharoff & Richard H. Pildes, Election as its Own Field of Study: Not By “Election” Alone, 32 Loyola L.A. L. Rev. 1173, 1183 (1999) conclude that: “[m]oreover, expanding the focus from elections to
democracy is implemented in workplace laboratories may be useful for understanding democratic governance generally. And as many labor law academics have noted, the conceptions of democratic governance can also revitalize labor law.\textsuperscript{304} 

\begin{quote}
See generally Klare, \textit{Workplace Democracy}, at 68 ("The reform agenda is founded on the central premise that labor law should promote and enhance democracy at every level of working life: within firms, in collective bargaining, in unorganized labor markets, and in the institutional relationships between paid employment and the other aspects of social life.").
\end{quote}