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Mastering the “Political Marketplace” Metaphor: The Labor-Centric Alternative

By: Thomas Tso

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 basis of many of these analogies. This article presents an alternative vision of the marketplace analogy. Instead of a consumer-voter, this article presents a vision of democracy relying on an analogy between laborer and voter. Through the use of judicial opinions and discussions in labor law and basic labor economics, this article hopes to show the usefulness of re-thinking the political marketplace analogy and how it could be applied to policy and debates within the literature on democratic design.

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I. INTRODUCTION: THE “POLITICAL MARKETPLACE” ANALOGY

The term “political marketplace” is increasingly used in academic literature and judicial opinions.¹ The most famous and most prevalent use of the “marketplace” analogy is in First Amendment jurisprudence.² The First Amendment is often described as protecting a marketplace

¹ Out of a total of 59 federal cases using the exact term “political marketplace,” two were from the late 1970s, nine from the 1980s, and 48 from 1990 onwards.

² For an extensive examination of this metaphor, see David Cole, First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance, 9 YALE L. & POL'Y REV. 236, 239 (1991).

of ideas.³ Beyond the First Amendment protection of speech context, the term “political marketplace” is also used as a complete metaphor for the institutions within a democracy protected under the First Amendment’s protection of association. One important example is Richard Pildes and Samuel Issacharoff’s influential work, which uses analogies between markets and democracy to examine (both normatively and positively) the general structure of democratic competition between political parties.⁴ Under this metaphor, parties produce candidates and voters choose these candidates based on the attractiveness of the candidate 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 larger number of voters willing to choose their products under much judicial and legislative scrutiny. Parties are thus like a heavily “regulated industry.”⁵ Voters are their consumers. The relationship between voters and parties is one of marketing and consumption.⁶ The relationship between the voters and the party is distant and separated. The party is a private institution and voters cast their ballot in a private transaction just as corporations are private entities and consumption decisions are private decisions.⁷ The metaphor is straightforward and persuasive.⁸ While Pildes and Issacharoff offer a complete political marketplace vision of

³ See generally David Cole, First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance, 9 YALE L. & POL’Y REV. 236, 239 (1991).

⁴ See generally 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); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 Colum. L. Rev. 775 (2000) (describing in the political markets paradigm from a consumer perspective).

⁵ 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.”).

⁶ 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 literature describing the intentional merging of consumption and voting, see Douglas A. Kysar, “Preferences For Processes: The Process/Product Distinction And the Regulation of Consumer Choice,” 118 HARV. L. REV. 525, 632 - 635 (2004) (describing the evidence for the trope, “the heroic consumer.”).

⁷ This analogy is explored fully in Pildes and Issacharoff, “Politics as Markets,” at 674, where they compare the two parties to two merchants selling to customers.

⁸ For example of this use of the consumption metaphor in court, see *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.”). However, while the analogy has been used in briefs and academic literature, exemplified by Samuel Issacharoff and Richard Pildes’ work, the Supreme Court has not accepted the metaphor whole-heartedly. As Justice Breyer noted recently in a dissenting opinion: “Amici JoAnn Erfer et al. 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

democracy, different scholars and judges have emphasized different strands of this analogy by focusing on either the voter-consumer,⁹ the party-corporation,¹⁰ or the candidate-product.¹¹

In this article, the rhetorical persuasiveness of the consumer-centric political marketplace is challenged by an alternative vision of democracy as a political marketplace. I hope to offer an equally compelling interpretation of the “political marketplace” metaphor by re-defining these same institutions and actors while altering their metaphorical inter-relationships. I shall distinguish the Pildes-Issacharoff paradigm and this article’s paradigm respectively as a “consumer-centric” paradigm versus a “labor-centric” paradigm. Basically, the alternative paradigm argues, instead, that the voter is a worker, parties are corporate employers, and candidates are political managers. Political parties enter into a long-term relationship akin to the employer-employee relationships and shares space with their voter-workers just like at the workplace. Just as the workplace becomes “public,” because it is subject to more extensive government oversight, including the power of unionization, the political party-voter relationship will also become “public.” The relationship between voters and parties becomes a supervisory relationship and there is an exchange of labor not consumption. This re-definition has not been systematically proposed, albeit strands of the model’s criticism against the dominant consumption models have been suggested by critics still subscribing generally to the consumption paradigm.¹² This article hopes to provide an initial framework for a new interpretation of the political marketplace metaphor and offer reasons why such a re-definition may be useful by connecting this framework to existing themes within the law of democracy. In subsequent articles, I hope to apply the metaphor to specific voting issues and connect the metaphor to existing democracy literature while examining more in-depth the tensions between the consumer and labor-centric paradigms. I believe it is important to see how the various metaphorical pieces fit together (which is the purpose of this piece) before examining the usefulness of this metaphor for particular issue analysis.

II. MAPPING THE ELEMENTS OF LABOR-CENTRICISM

The current conception of the party often uses V. O. Key’s famous 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

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 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).

⁹ See, e.g., Paul Brest, “The Thirty-First Cleveland-Marshall Fund Lecture: Constitutional Citizenship,” 34 *CLEV. ST. L. REV.* 175 (1985/1986) (quoting Daniel Keim), Sheryl Kroen, “A political history of the consumer,” 47 *HISTORICAL J.* 709 (2004).

¹⁰ See, e.g., Randall S. Kroszner & Thomas Stratman, “Corporate Campaign Contributions, Repeat Giving, and the Rewards to Legislator Reputation,” 48 *J.L. & ECON.* 41 (2005) (extending analysis of firm strategy in the economic marketplace to PAC contributions in the political marketplace)

¹¹ See, e.g., Joseph P. Kalt & Mark A. Zupan, “Capture and Ideology in the Economic Theory of Politics,” 74 *AMER. ECON. REV.* 279, 283 (1984) (calling voters “hirers” of their representatives).

¹² See, e.g., David Schleicher.

affiliation, and (3) the party organization (or "professional political workers")."¹³ Instead, the labor-centric model reconfigures this model to argue that low-level (3) political workers and (1) ordinary party members have similar characteristics in their relationships to the party institution: they are both party "employees." I will discuss this grouping of voters and campaign workers as employees in Part A below. Under my re-configuration, (2) elected and appointed officials and higher-level (3) political workers form the "managerial" class. I will discuss this grouping in Part C. In addition, the "managerial" class and "employees" together create a complete party organization/institution that exists as an entity, just like a corporation, independently from the collection of individuals that work within the organization. I shall discuss this independent organization and its relationship with both groupings of individuals in Part B. Finally, I will argue that the party is more than just V.O. Key's three groups. Parties depend significantly on campaign financing, and these financiers, who I shall call "shareholders," will compose a new group that I will discuss in part D.

A. The Voter as Party Employee

The conception of the voter as a metaphorical "worker" and an "employee" of a political party is reflected, though not perfectly, in Justice Powell's defense of patronage practices in several dissenting opinions, such as his opinion in *Elrod v. Burns*. Throughout the following section, quotes from Powell and those agreeing with Powell's observations about democracy, through the lens of patronage practices, will be used to support my argument for why voters are "party employees." Basically, patronage describes the relationship between parties and its volunteer campaign workers as akin to an employment relationship. The relationship between campaign volunteers and parties is more than just an exchange of ideas and the motivation for political labor is much more than just ideological conviction. Parties need campaign workers to maintain its strength and parties do not depend solely on ideological persuasion to recruit and motivate political workers. Taking patronage one step further, *all* electorate affiliates and voters who "vote" and/or "participate" in the political process may have a similar "employment" relationships with the party. From the voter's perspective, voting and participation *is* also work, and the difference between volunteer campaign work and simply voting in multiple elections for the political party may not be a categorical difference, but rather a difference in degree.¹⁴ Just as parties need campaign workers, they also need affiliated voters to vote and ideological persuasion may be necessary, but not sufficient. Thus, lurking behind Powell's patronage view that an active party needs workers who are incentivized by tangible rewards is, perhaps, that all forms of participation within the party is similarly work and requires some link to a tangible "reward."¹⁵ Patronage may merely be the most tangible and most public reward for the most visible and intensive political "work" by political party employees and political affiliates. While

¹³ See 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)).

¹⁴ The difficulties in trying to draw the line between what is a "political" activity is described by J. Douglas in *S. Civil Service Commission v. National 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 affiliation are covered: indifferent and energetic members alike, in well-disciplined organizations or in any transitory 'group of persons.'") (Marshall, J., dissenting).

¹⁵ See, e.g., Pomper, "The Fate of Political Parties," at 75 – 76.

the rewards may be less tangible and the work less noticed, voters could be also be considered “party affiliates” and low-level party workers who also work (i.e. vote) to get rewarded.

The definition of “employee” is hard to pin down. The Supreme Court has offered this definition: “. . . 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.”¹⁶ There are two major elements in this definition of “employment”: a control relationship between an employer and an employee resulting in a primary benefit to the employer. Added to this definition is some reward or compensation for the work performed.¹⁷ In essence, there is (1) a fixed, usually hierarchical, relationship between employer and employee and (2) an exchange of work primarily benefiting the employer in exchange for compensation. As I will argue in this section, both volunteer campaign workers and voters can be considered party “employees” based on the satisfaction of these definitional prongs: (1) they both have a stable, but not necessarily permanent, subsidiary relationship with the party; and (2) they both do “work” primarily benefiting a party, which then rewards them for effective work.

Two sets of observations about the voter support the view that voters have a stable subsidiary relationship with the party. First, the relationship between voter and party is often described in judicial opinions as “political affiliation.” The Supreme Court has described “political affiliations” as some form of “loyalty” similar to religious belief, race, and nativity.¹⁸ Affiliations have been considered, in some circumstances, as a type of employment under the law.¹⁹ “Political affiliation” is thus similar to other forms of “corporate” membership, such as employment. Jonathan Macey has observed that both political parties and corporations act as “mediating institutions” that affect both voters and employees with similar effects.²⁰ A whole field of organizational behavior studies the effects of corporate affiliations on employee attitudes and behaviors.²¹ According to Macey, both political parties and corporate organizations encourage “loyalty” in the form of accepting the mediating institutions’ role in shaping member (or employees, votes) interests and actions.²² Justice Powell equally viewed affiliation as a strong

¹⁶ *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

¹⁷ *U.S. v. Somsamouth*, 352 F.3d 1271, 1275 -76 (9th Cir., 2003).

¹⁸ *See Rogers v. Lodge*, 458 U.S. 613, 650 (1982). (“Thus, the Court has considered challenges to discrimination 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).

¹⁹ *See Bama Tomato Co. v. U.S. Dept. of Agriculture*, 112 F.3d 1542, 1546 – 47 (11th Cir. 1997) (describing how affiliation can sometimes be considered a form of employment).

²⁰ Jonathan R. Macey, “Packaged Preference and the Institutional Transformation of Interests,” 61 *U. Chi. L. Rev.* 1443, 1444 (1994) (“Mediating institutions actually dene 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.

²¹ *See, e.g., S. Barley, & G. Kunda*, “Design and devotion: Surges of rational and normative ideologies of control in managerial discourse”, 37 *Administrative Science Quarterly* 363-399 (1992)

²² For company loyalty, see, e.g., *HarperCollins San Francisco, a Div. of HarperCollins Publishers, Inc.*, 79 F.3d 1324, 1330 (2nd 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)

identification with the party and not just as a consumer who prefers the party platform in a particular election. One commentator noted: “[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.”²³ Unlike the paradigmatic consumption decision, political affiliation, like employment, is paradigmatically relatively fixed – an act of “self-definition.” Thus, strong affiliation with a party overcomes the other considerations that may determine transitory influences affecting the voters’ choice, such as the interest in democracy or personal policy choices.²⁴ In *Elrod*, Powell also observed that voters stick with their parties despite misgivings over the current slate of candidates.²⁵ Equally employees identify with their employee corporations and stick with the corporation despite misgivings about current management.²⁶ The party, like the corporation, has a significant role to play in fostering loyalty not just through selection of candidates, but a commitment to party politics.²⁷

Second, there is similarly strong political science roots for this description of the voter. Powell’s model of “political affiliation” accords with a school within political science named the “Michigan Model.” The main tenet of the Michigan model is the centrality of commitment to partisanship in the determination of electoral outcomes and predicting voter attitudes and behaviors:

“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 . . .

(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.)

²³ Charles E. Borden, Primary Elections, 38 HARV. J. ON LEGIS. 263, 275 (2001).

²⁴ 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 (1981). Nevertheless, this does not run counter to the observation that voters are employed and influenced by the current dominant ideological persuasion enforced by the political managers and the corporation. Corporations often change hiring patterns, strategic visions, etc., however these changes are not as sudden nor as common as altering their product lines.

²⁵ 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, dissenting) (citations omitted).

²⁶ Even if the corporate landscape has changed to foster high mobility across corporate jobs, which is different from the relatively partisan and loyal political labor market, as I shall describe in the next paragraph, organizational behavior scholars have argued that “commitment” (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 *American 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 no assumption that the employees will all leave upon the entrance of new management. *See generally* Janice A. Klein, *True Change: How Outsiders on the Inside Get Things Done in Organizations* (2004).

²⁷ *Id.* at 802 – 804.

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.”²⁸

During 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.”²⁹ The new independent voter paradigm sees voters as free and relatively open to distinguish between competing parties; partisan labels do not affect the voters’ eventual private voting decisions. Much like the consumption decision, voter independence takes on the characteristics of the consumer where voters make private decisions without much constraints, such as partisanship, but base their decisions on the attractiveness and benefits to the voter.³⁰ However, Larry Bartels and many other contemporary political scientists have suggested that the Michigan Model’s demise was inaccurate and partisan affiliations are fairly important and powerful in predicting voter behavior.³¹ Perhaps the perceived decline in the power of partisan commitment has more to do with declines in the intensity of the commitment to parties rather than the increasing “independence” of voters – they are still affiliated, but less motivated to participate/labor in party politics to an extent that they are not willing to vote and signal their partisanship.³² In other

²⁸ ANGUS CAMPBELL, ET. AL., *THE AMERICAN VOTER* 121 (1960).

²⁹ See Larry M. Bartels, “Partisanship and Voting Behavior, 1952 – 1996” 44 *AMER. J. POL. SCI.* 35, 36 (2000).

³⁰ 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).

³¹ 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). These “references” Bartels is criticizing were cited by Justice Thomas, joined by Justices Scalia, Kennedy, and Rehnquist. Equally more “liberal” minded justices have equally agreed that party loyalty has declined, see *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (Souter, J., dissenting). See *Federal Election Com’n v. Colorado Republican Federal Campaign*, 533 U.S. 431, 473 n. 4 (2001) (Thomas, J., dissenting). For further evidence, and an interesting discussion of the definition of “partisanship,” see, e.g., Warren E. Miller, “Party Identification, Realignment, And Party Voting: Back to Basics,” 85 *AMER. POL. SCI. REV.* 557, 557 – 559, 565 0- 566 (1991).

³² See Robert Putnam, *Bowling Alone* 37 – 38 & n. 19(2000) (noting the decline in commitment and the correlation between “independence” with less political participation). In wake of the 2004 elections and the “red” versus “blue” states, along with Bartels’ conclusions, it is hard to accept that pure “independent” voters without *any* political affiliation actually exist in significant numbers. It is easy to believe that there are more affiliated voters today who are less committed to partisan politics and thus vote less often or not at all or unwilling to even put energy into signaling their political commitments. The increase in “unemployed” voters (discussed in a latter section), less committed voter-employees, and lazy voter-employees may account for the perceived increase in “independence.” In other words, voting independence is an independence away from the “party” rather than “partisanship” – voters still have established beliefs with the conservative or liberal identifications of “Democrat” or “Republican,” but do not commit their labor to the party under its current form. The perceived rise of independent voters with a collorary rise in independent parties may be indication that workers are still particularly committed with long term attachment to larger firms, such as the two large political parties, with perceived potential for increased opportunities by committed affiliation. See EHRENBERG & SMITH, *MODERN LABOR ECONOMICS* 410 (7th ed., 2000) (“One potential explanation for these wage patterns is that large firms offer more opportunities for specific training than smaller firms, and they thus have greater incentives to train their workers and promote the long-term attachment of their workforce.”). While in the short-term, they may decide not to vote or work hard for the current managers of that political party.

words, there are still Republicans and Democrats, but less committed Republican and Democrat voters. Fitting into the work of Robert Putnam, political parties may still have strong membership and identification, but its members invest less social capital into these organizations. The Supreme Court majority's stance as founded on voter independence or consumerist paradigm may not be based on an inaccurate model of voter behavior, but has also mischaracterized the opposing Powell position by painting Powell's characterization of political affiliation as some sort of "immutable characteristic." The Court has recently stated 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."³³ Yet, the labor model, and Powell, takes a more middle of the road stance: political affiliations are strong just like corporate affiliations, but they also may change, though not as capriciously like usual consumption decisions. Decision to work for an employer is fixed and the decision to shift is not an easy nor quick decision to make.

Positive claims about a perceived rise in "independent voters" correlates with the "voter as consumer" trope. I posit that "voters as laborers" is a useful alternative trope based on the alternative Michigan model about the dominance of "partisan voters," and Powell's observations about the "affiliated voter." Like employment, membership in a corporate body, such as a corporation, is a relatively longer-term relationship as compared to the consumer relationship. Political affiliations are relationships that are relatively fixed for periods of time and have an effect on behavior such as accepting the partisan views on particular issues or the relevance of certain issues. There is also evidence that voting behavior is a repetitive and sustaining relationship. A recent study suggests that voting is a "habit" - once one starts voting, one continues to vote.³⁴ Add this finding to the continued effects of partisanship, voting becomes much like being employed to work a similar job for sustained periods of time.

Having a stable relationship between voters and parties may not be necessarily be normatively undesirable. In the Elrod patronage case, one of the majority'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. There is a difference between "partisan government" and the "government" itself.³⁵ Federal employees are thus prohibited from working on campaigns, because they would be serving two masters.³⁶ In other words, the Court believed 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).³⁷ Thus, implicitly, the majority and dissent both acknowledge the power of party

³³ *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004).

³⁴ Alan S. Gerber, Donald P. Green, Ron Schachar, "Voting May Be Habit-Forming: Evidence From a Randomized Field Experiment," 47 AM. J. POL. SCI. 540, 549 (2003).

³⁵ *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (Powell, J., dissenting).

³⁶This rationale has been extended to lower circuits. 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 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." *Robertson v. Fiore*, 62 F.3d 596, 600 (3rd Cir. 1995) (citations omitted).

³⁷ *See U.S. Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564 – 565 (1973).

affiliations to command individual behavior for long periods of time – even after the campaign, the campaign worker employed by the government is affected by his previous employment as a member of the party. The dilemma is one of a conflict of interests from conflicting employment – like a lawyer who has to serve two clients with conflicting objectives.³⁸ The majority suggests that these affiliations have no benefit to the administrative state nor democratic processes; the dissent disagrees by suggesting that patronage formalizes what is already an informal permanent relationship among parties, party workers, voters, and the government.³⁹ Powell writes: “[p]atronage 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.”⁴⁰ In other words, for Powell, parties need government positions to reward labor that is needed for its operations (all forms of participation) which increases participation and develops stronger and long-lasting relationships between governments and the voters. Completing Powell’s loop, participation and voters’ strong and long-lasting relationships with parties are rewarded by parties with government positions. In other words, party employment is rewarded with government employment, and the carrot of government employment encourages more party employment. They are translatable.

The first half of this section dealt with the fairly similar member-institution relationship found in both employee-employer and “Michigan Model” voter-political party relationships. The essential element that moves this relationship beyond mere “membership” in an organization is the “work” and reward involved in membership. Courts, like the Ninth Circuit, have defined “work” in fairly broad terms,⁴¹ so it would not be unthinkable to frame voting as a form of work. Courts have also acknowledged the important direct trade-off between working at a corporate job and voting.⁴² In addition the ability to work has been linked to qualifications for and the ability to vote.⁴³ Commentators have equally described voting as “work.” For example, Donald Keim and

³⁸ See American Bar Association, Model Rules of Professional Conduct, Rule 1.9(b) and 1.7 (noting that one of the effects of representing clients adverse to your previous clients is this “appearance of impropriety” that harms the integrity of the legal profession.) See also *Steel v. General Motors Corporation*, 912 F. Supp. 724 (D. N.J. 1995). This is the similar concern that political affiliations like client affiliations are strong bonds that may affect the “appearance of impropriety” in the government and threatening its integrity as a “partisan” government.

³⁹ Just as the majority in these patronage cases feared that past work and membership in political organizations may imprint a bias on their work as federal employees, the next step to labor centrism is not that far off: mere voting in an election for a political party can also bias one’s perspective on work as a federal employee.

⁴⁰ *Elrod*, at 384.

⁴¹ *U.S. v. Somsamouth*, 352 F.3d 1271, 1275 -76 (9th Cir., 2003).

⁴² See *Day-Brite Lighting, Inc. v. State Of Missouri*, 342 U.S. 421, 424 - 5 (1952) (“It 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.”).

⁴³ For early views on how wage earners argued for their right to vote based on their ability to work, See Robert J. Steinfeld, “Property and Suffrage in the Early Republic, 41 *Stan. L. Rev.* 335, 367 (1989). For similar arguments used today for including immigrants as voters, see Gerald M. Rosberg, “Aliens and Equal Protection: Why Not the Right to Vote?,” 75 *MICH. L. REV.* 1092, 1092 (1977) (noting the suspect classification offered to alien employment but not voting); Jamin Raskin, “Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage,” 141 *U. PA. L. REV.* 1391, 1460 - 1 (1993) (noting the extent of alien participation in the workforce). For arguments against allowing felons to vote, because of their lack of an ability to work, see Elena

Benjamin Barber base their visions of a “strong democracy” on citizen action “in the form of common work.”⁴⁴ There is also empirical evidence that voters themselves generally see voting and politics as “work.” Labor-related issues are the most important barriers to voting. Labor-related barriers mean that while people may have wanted to vote, environmental obstacles prevented them from carrying out their voting work similar to excuses offered for shirking. In 2002, according to a U.S. Census survey, a lack of time due to being “too busy” or “with conflicting schedule” was offered as the top reason why people did not vote at 27%.⁴⁵ Out of the reasons offered for not voting, 58.5% were labor-centric.⁴⁶ The consumer-centric reasons focused on the personal preferences against voting and the candidates were relatively 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%)). The interest in the elections could be also be re-framed, as I will discuss later, under the labor-centric paradigm as the failure of the corporation/parties to motivate their employees/voters causing a lack of general interest in the election *or* as a failure of particular managers/political candidates to motivate their employees, thus causing a dislike for the candidates.⁴⁷ 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%)).⁴⁸ What is the real motivation for this work and 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 be useful. The similar question answered in the patronage context may apply in answering the previous question: what is the real motivation for helping out on political campaigns?

The history of patronage practices, as Justice Powell suggests, indicate that the lure of some tangible reward may be the real incentive behind motivating party workers to overcome the labor costs. 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

Saxonhouse, Note, “Unequal Protection: Comparing Former Felon’s Challenges to Disenfranchisement and Employment Discrimination,” 56 STAN. L. REV. 1597, 1639 (2004).

⁴⁴ 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/>.

⁴⁵ U.S. Census Bureau, “Voting and Registration in the Election of November 2002,” at <http://www.census.gov/prod/2004pubs/p20-552.pdf>. (July 2004), Figure 10, at 14. For older and consistent results, see also “Too Busy to Vote,” Census Brief, 1996, available at <http://www.census.gov/prod/3/98pubs/cenbr984.pdf>.

⁴⁶ The other reasons offered were: “illness or disability” (13.1%); “out of town” (10.4%), “registration problems” (4.1%), “transportation problems” (1.7%), “inconvenient” (1.4%), “bad weather” (0.4%). *Id.*

⁴⁷ *Elrod v. Burns*, 427 U.S. 347, 384 – 5 (1976) (Powell, dissenting) (“The candidates for these offices derive their support at the precinct level, and their modest funding for publicity, from cadres of friends and political associates who hope to benefit if their “man” is elected. The activities of the latter are often the principal source of political information for the voting public. The “robust” political discourse that the plurality opinion properly emphasizes is furthered not restricted by the time-honored system”). I posit that voters are equally members of a party and thus candidates’ “political associates” in a broad sense of the word.

⁴⁸ “Voting and Registration,” at 14.

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.”⁴⁹

Justice Scalia, after citing this quote approvingly, adds in a later 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.”⁵⁰ I posit that the “chore” of actually voting for political parties cannot be equally sustained without some tangible reward. Ideological conviction may be insufficient to sustain voting work done for parties particularly for elections of less important posts and over the long run.⁵¹ Powell believes local patronage practices are permissible means to reward interest 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.”⁵² Rather than viewing the lure of employment as part of the attractiveness of a candidate, voters see permanent employment as the culmination and reward for the contractual work done during campaigns either in the form of work on campaigns, monetary donations or for publicly affiliating and publicizing his/her vote for the candidate. The work 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.”⁵³ The same rationale could be extended to voting. Political work is continuous throughout both election and non-election cycles and exists at all different levels. The labor-centric model actually could encompass less visible forms of “work” and “chores” that help perpetuate political institutions, such as affiliation, advocacy, participation, polling, and voting. The Tashjian 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 sense the most important.”⁵⁴ 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 (particularly those voters/workers that are most effective, such as interest groups, but more will be discussed about this in a later section).

There is some evidence of an incentive less tangible, but akin, to patronage practices with regards to 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,

⁴⁹ Elrod v. Burns, 427 U.S. 347, 385 (1976) (Powell, dissenting).

⁵⁰ Rutan v. Republican Party of Illinois, 497 U.S. 62, 104 (1990) (Scalia, J., dissenting).

⁵¹ 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 conative attitudes towards the work itself – i.e. “the act of voting itself”).

⁵² Elrod, at 384.

⁵³ Branti v. Finkel, 445 U.S. 507, 527 - 528 (1980) (Powell, J., dissenting).

⁵⁴ See Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1996).

state, and local financial support to that jurisdiction.⁵⁵ “Pork barreling” is an effective and highly used electoral strategy.⁵⁶ 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 the general labor of voting within a jurisdiction, while the former is a specific job to a campaign volunteer. The per capita value of each reward is probably quite apt for the amount of labor (whether votes or campaign management). While patronage practices have declined (as the result of legal restraints), voting might still be linked to certain rewards within public employment, such as Republican public servants believing a new Republican administration will be beneficial for career prospects. Evidence shows that for, at least the past decade, public employees, as a bloc, vote at significantly higher rates than private employees.⁵⁷ The difference between hobby and work has also been defined by where the “benefit” of the labor or time “primarily and necessarily” really lies.⁵⁸ Under this conception of work, the labor or time does not benefit workers upon completion of the labor or use of time – the benefit is not primarily or necessarily for the voters, since no one can predict how a candidate will reward voters. Ultimately, the politicians’ rewarding of voting and its associated labor with pork is evidence for the other half of the employment exchange – the reason politicians focus so much energy on pork is because the voters’ labor is for the politician’s primary benefit not the voters’ primary benefit. The primary benefit to the politician is, obviously, more incumbency, power, and visibility for politicians personally, and also their party. The primary and necessary benefit is for the candidate and party both of whom depend necessarily and primarily on their voters working on the election day.

Just as Powell views patronage practices as a “corruptive” employment relationship that is a necessary benefit to democratic processes,⁵⁹ pork is often considered a necessary and traditional part of politics. Patronage practices and party rewards galvanizes lower level work like grass-roots organizing and democratic action. For example, rewards can be offered to “historically excluded” groups that can obtain rewards 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 . . .”⁶⁰

⁵⁵ See Paul S. Martin, “Voting’s Rewards: Voter Turnout, Attentive Publics, and Congressional Allocation of Money,” 47 AM. J. POL. SCI. 110, 111, 122 – 123 (2003).

⁵⁶ See Paul S. Martin, “Voting’s Rewards,” at 111.

⁵⁷ 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.

⁵⁸ *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

⁵⁹ “Long experience teaches that at this local level traditional patronage practices contribute significantly to the democratic process.” *Elrod v. Burns*, 427 U.S. 347, 384 – 5 (1976) (Powell, dissenting)

⁶⁰ *Carver v. Foerster*, 102 F.3d 96, 106 (3rd Cir., 1996) (Becker, J., concurring).

While the First Amendment protects political parties promising rewards for voting, the court and the public have misgivings about such a conception of democracy and finds the “employment” of voters as corruptive of democratic processes.⁶¹ The perception of corruption derives not necessarily from the fact that voters are working to benefit political parties for a reward; nor is the unease sourced purely in the possible corruptive influence of monetary exchange within democratic institutions. The public may be concerned with direct vote-buying in a pure sense, even though there is disagreement with this position particularly if it allays the labor costs of voting.⁶² Regardless, the public *does* tolerate vote-buying of more powerful voters in different contexts (although it is not certain why) – i.e. voters in administrative boards, Congress, corporate control, etc., though in less crass manifestations: lobbying, campaign donations, pork barreling, and corporate shareholder proxy votes.

Setting the monetary question aside, the greater public and court concern is with the establishment of a fixed and direct relationship between a select few – an “employment” of certain effective voters (i.e. political machines⁶³) thus denying our idealistic view of voters as politically autonomous, politically distant, and sovereign consumers. These similar fears concern our “conflict of interest” restrictions, such as the Hatch Act,⁶⁴ which tries to protect our idealistic view of expert administrative officials as politically autonomous, even when they are also “employed” by political parties throughout the revolving doors of the federal government. Regardless, both demands for protection are normative decisions: what should be the *ethical* role of the voter when there are conflicts with its role elsewhere. Just as our view of the ethical role of the Congressman voter should be one that avoids influence from any friendships with business, so does our ethical role of voter as autonomous consumer conflict with membership in a political party or ideological bloc when working the ballot booth. Imposing these normative views on any analysis of democracy poses the same difficulties that public choice theorists have argued regarding the analysis of Congressional voting.⁶⁵ Two issues must not be confused: (1) the realist view of voters and (2) the normative view of what actually furthers the ultimate goals of voting so as to sustain democratic ideals. Labor-centricism offers perspectives on both. For the

⁶¹ “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).

⁶² Pamela S. Karlan, “Not By Money But By Virtue Won? Vote Trafficking and The Voting Rights System,” 80 VA. L. REV. 1455, 1472 – 1473 (1994). For actual vote-buying in the market for corporate control, see Thomas J. Andre, Jr., *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: *Compare* Cal. Elec. Code § 18522(a) (West 1996) with *United States v. Garcia*, 719 F.2d 99, 102 (5th Cir. 1983) (banning incentives for voting only for federal candidates).

⁶³ Even in modern “democracies” like Japan’s democracies, there are *explicit* political machines, and described as such. One example is Japan’s Liberal Democratic Party. See, e.g., Doug Struck, “Revolt Opens Up Race to Lead Japan: Younger Lawmakers Balk at Closed-Door Efforts to Elect Former Prime Minister,” *Washington Post*, at A26 (April 12, 2001).

⁶⁴ For discussion and links to the Hatch Act, see http://www.osc.gov/ha_fed.htm.

⁶⁵ Jane S. Shaw, “Public Choice Theory,” *Concise Encyclopedia of Economics*, at <http://www.econlib.org/library/Enc/PublicChoiceTheory.html#biography>.

first issue, the Michigan model of voting, political science, Census data, and analogies to public choice theory may offer evidence that voters may not be the ideal “independent voter” and are influenced by patronage practices, pork, and partisan affiliation. 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.⁶⁶ Labor-centricism merely notes that this view may be applicable to rewards for voting if voting is seen as work. However, these two views do not necessarily have to follow one another just as the acceptance of public choice theory does not mean one normatively accepts the fact that interest groups exist for the good of democracy. In fact, throughout the rest of the paper and in the final section, I posit that by accepting (1), labor-centric perspectives may offer fresh views on how to improve democracy by overcoming some of the deleterious implications for voters-laborers who face similar problems as economic laborers, such as unemployment (which I will address in a later section). Thus, just as accepting public choice theory encourages us to combat the normative implications of powerful interest groups, accepting a labor-centric perspective can encourage us to combat or encourage what we may believe to be the deleterious or positive impact of voter employment.

Different conceptions of the role of the voter can fit alternative normative frameworks that reach opposite policy recommendations. The consumption vision sees patronage as a threat to the political marketplace, because it serves as a bribe for votes, a motivation to vote unrelated to the candidate’s policy stances; it also obligates them into a permanent partisan relationship denying them independence. Under the consumption model, the interaction between voter and candidate should be an arms-length transaction, not a permanent and corporatist one: the party sells the candidate’s image, policy platform, and ideas to the nameless and anonymous voters who purchase/consume the candidate in a detached one-time transaction. Yet, the labor-centric model posits that voters are “employed” by large political parties.⁶⁷ The issue is not to see patronage or other reward mechanisms as threats to voter independence, but rather to see how the patronage and other rewards are utilized in a proper fashion to counteract voter alienation by compensating for the labor costs of voting and other political activities⁶⁸ while incentivizing increased effective work (i.e. participation) within political parties.⁶⁹ The judicial role is not so much to ban rewards for voting labor and thus ignore the employment relationship; instead, there is a role to monitor the relationship just as we have in any other private workplace setting. There are many statutes (OSHA, FLSA, ERISA, etc.) and a complete administrative apparatus that monitor the relationship between private corporations and their employees. While I do not suggest that these statutes apply to voters, I do believe that similar concerns for voters and their political activities in relationship to their political corporations should be of some judicial, legislative, or Federal Election Commission concern. That is why I discuss in the last section, and will explore more fully in a later article, how one of the fruitful purposes of labor law is to use labor law’s experience and jurisprudence in analyzing the conflicts between union voters and

⁶⁶ See *supra* note 40, though he never explicitly confronts the idea that rewards for voters may also strengthen democratic processes.

⁶⁷ See *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267, 270 (7th Cir., 1970).

⁶⁸ There are thus 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.

⁶⁹ Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323 (2000).

voters as corporate employees under different circumstances may be useful for the conflicts between democracy voters and voters as party employees.

B. The Party As Corporate Employer

Viewing the political party as a corporation is not ground-breaking. First of all, the political party is formally a corporate body under law as a nonprofit corporation and both academics and courts have treated the party as akin to a corporation.⁷⁰ “[T]raditional party behavior” includes “ensuring orderly internal party governance.”⁷¹ Under the consumption model, the parties are also corporations, but the focus is on how they sell ideas in the political marketplace to voter-consumers.⁷² As a result of this focus, the internal mechanisms that produces these products are not relevant for voters.⁷³ Nevertheless, there is a tension that political parties are participants in the public arena as political associations *and* also as private corporations. To some extent, there is literature to note that scholars and courts treated *all* corporations as dual natured at one point in the legal history of the corporation.⁷⁴ Roughly speaking, contemporary law (even though there are still exceptions) treat *public* corporations such as cities and churches more as voluntary associations of communities and *private* corporations more as self-regulating enterprises.⁷⁵ However, none quite carries on the characteristics of both public and private entities today quite like the political party particularly with its important role in public democracy and election law.⁷⁶

The consumption model forces this dichotomization between a public voluntary association and a private corporate organization onto political parties. Both voters and party “members” at large are *outside* of the major decisions of the political parties, since they are only consumers of the political party’s ideas, candidates, advertising, etc. The voters’ role is seen as *after* the political parties have already decided the slate of candidates, their agendas, campaign focus, and winning probabilities. They will have no role within party mechanisms unless the party decides to allocate responsibility – these are “private” decisions for a private corporation. For example, parties have a private role in the budgeting decisions. As the Supreme Court has noted, “whether they like it or not, [political parties] act as agents for spending on behalf of those

⁷⁰ See, e.g., *Republican National Committee v. Federal Election Commission*, 487 F.Supp. 280, 292 (D. S.D.N.Y., 1980) (“The plaintiffs in this action are the national committee of the Republican Party, a New York corporation . . .”).

⁷¹ See *California Democratic Party v. Jones*, 530 U.S. 567, 581 (2000).

⁷² See generally Issacharoff & Pildes, “Partisan Lockups.”

⁷³ See Nathaniel Persily & Bruce Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 Colum. L. Rev. 775 (2000) (describing the “political markets paradigm” as overlooking the role of “voice.”).

⁷⁴ See, e.g., Kingman Brewster, Jr., “The Corporation and Economic Federalism,” in *THE CORPORATION IN MODERN SOCIETY* 72 (Edward S. Mason, ed. 1959); Earl Latham, “The Body Politic of the Corporation,” in *THE CORPORATION IN MODERN SOCIETY* 218 (Edward S. Mason, ed. 1959). See generally, Edward S. Mason, ed., *THE CORPORATION IN MODERN SOCIETY* (1959).

⁷⁵ For a general critique and summary of the historical divergence between “public” and “private” corporations, see Gerald E. Frug, *The City as A Legal Concept*, 93 HARV. L. REV. 1059, 1066 (1980)..

⁷⁶ See, e.g., *Republican Party of Texas v. Dietz*, 940 S.W.2d 86 (Tex. Sup. Ct. 1997) (“ . . . federal courts have held that some party activities, such as holding elections, are public state action, while other activities are private . . .”). See generally Daniel H. Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 Tex. L. Rev. 1741, 1747 – 1754 (1993).

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.”⁷⁷ Most importantly, there does not seem to be analogous normative justifications for voter-consumer input into the political party as justifications against such input is borrowed from the private realm - consumers are likewise not represented within corporations for business decisions, but remedied for harms after the fact under tort law.⁷⁸ Similarly, primaries and business decisions of the political party do not allow for *ex ante* input, but rely on *ex post* judicial remedies if any – the two remedies in the private realm are to exit the market (i.e. chose not to purchase/vote) or to sue for damages after the fact.⁷⁹ While one may use minority views in corporate law that consumers should be given input into business decisions, such views are not generally practical given the diverse, transitory, and amorphous interests of consumers.⁸⁰ In any event, as the mainstream theory goes, if consumers and employees want input, they can convert to shareholders by purchasing stocks even though they may have little concentrated power and the option is not plausible for private companies. Political parties are akin to private companies without a transparent system of “public shareholding.” Thus, consumer interests for *ex ante* input seem to run into a dead-end under analogies to corporate law theory.⁸¹

However, these conclusions may change if the voter is instead analogized to labor, which has other plausible routes for representation. So instead of exit or litigation, voice may be a valid option for voters as laborers. The labor-centric model begins with the “voter as employee.” Now voters *are* part of the enterprise and they in the party for significant periods of time. Under a labor-centric view, voters become party “insiders” to the corporate entity akin to campaign workers, who are clearly “employees,” by working to support the enterprise’s pursuit of a clearly marked goal (more power and market share of legislatures akin to profit and market share for corporate enterprises). If campaign workers can have voice in party politics, the voter should equally have a claim to some voice— their only difference is the level of work performed for the political party (perhaps the former can be considered a “skilled” laborer). There are additional fiduciary duties to employees for prevention of harm and protecting active employee “voice” within the institution (such as those under the NLRB, EEOC, OSHA, ERISA, sexual harassment, discrimination in promotion and hiring). Their “dignity” for their work, albeit rewarded, must be

⁷⁷ *FEC v. Colorado Republican Federal Campaign Committee*, 531 U.S. 431, 452 (2001).

⁷⁸ Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 *GEO. L.J.* 439, 439 (2001) (“the most efficacious legal mechanisms for protecting the interests of nonshareholder constituencies ... lie outside of corporate law” in, for example, labor and employment law, consumer protection law, environmental law and tort law.”). *But see* Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 *Tex. L. Rev.* 579, 630-43 (1992).

⁷⁹ Even though consumer protection statutes exist, these are rarely *ex ante* mechanisms adaptable to changing consumer interests and harms such as a the institutions of the EEOC, OSHA and unions that provide forums and broader mandates for possibly voicing and monitoring possible harms and concerns before they become serious.

⁸⁰ For example, while consumer interest is protected on many administrative boards, consumer interest is represented by “public individuals” without any guidance and equated to a general “public interest.” *See, e.g., Finucane v. Pennsylvania Milk Marketing Bd.*, 581 A.2d 1023, 1026 – 1027 (Pa. 1990) (noting the analogy between consumer members within industry boards and public at-large members in occupational boards).

⁸¹ In fact, the political market analogies have been criticized particularly for overlooking voice mechanism. *See* Nathaniel Persily & Bruce Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 *Colum. L. Rev.* 775 (2000) (describing the “political markets paradigm” as overlooking the role of “voice.”).

preserved within managerial decisions.⁸² Thus, under a labor-centric view, voters as employees probably have greater claims to management voice when compared to voters framed as consumers. Perhaps, by analyzing voters as internal to parties, there exists a state 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" can be taken seriously and not dismissed as it was in Eu v. San Francisco County Democratic Central Committee.⁸³ The Supreme Court in Eu reasoned that the "State has no interest in protecting the integrity of the Party against the Party itself."⁸⁴ Once we consider voters as lower-level employees, the internal dynamics of the political party does not look like "Party against Party" but, instead, looking at the power distribution between a "managerial" class within parties and its "employees" just as we have done within the labor law framework.

Political parties, as employers, have significant powers to restrict the employment environment of voters. The first power is based on their 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 as internal to their "corporate bodies" much akin to the corporation's power to determine who votes in shareholder meetings also derive from the state.⁸⁵ The political parties' second power is the power to value and improve the human capital and working environment of the voters-employees.

The courts have been troubled by the party's first employer power. If parties are permanent "corporations" with its own "employees," then it would have the discretion when it wants to hire and keep new voters-employees in attempting to pursue its goals. In Nader v. Schaffer, the plaintiffs filed a complaint against what I consider as the major parties' restrictive retention practices of political parties.⁸⁶ The plaintiff argued that:

" . . . the alternative avenues of political activity open under Connecticut law [unless they participate in primaries] are ineffectual and unrealistic, since in most general elections, only

⁸² Compare Bush v. Gore, 531 U.S. 98 (2000) (" . . . equal weight accorded to each vote and the equal dignity owed to each voter.") with Fox v. Morton, 505 F.2d 254, 256 (9th Cir., 1974) (" . . . possessed the additional interest in the dignity of work. . .") (arguing that voters and workers both similarly have a "dignity" interest not to be trammled by larger institutions that are both public and private employers whether they be state legislatures combined with political parties or government agency in its dual role as both provider of social services and market employer).

⁸³ 489 U.S. 214, 232 (1989)

⁸⁴ *Id.* (citations omitted).

⁸⁵ 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).

⁸⁶ Nader v. Schaffer, 417 F. Supp. 837 (D. Conn) (1976).

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*.”⁸⁷

Under a labor-centric model, the attraction for following the Democratic and Republican parties lies in its rewards and the party’s voter-workforce pool is essentially a restricted labor-force maintained and contained through primaries and party registration (much akin to a renewable labor contract). Some have also argued that voter registration policies, crafted by local and state political parties, have deliberately restricted the turnout and types of people who vote often considering party strategies and policies.⁸⁸ Essentially, party leaders are deciding *who* can vote by using the powers of the state. State policies are sourced in legislatures, which are dominated by the two incumbent dominant political parties - in essence, the legislature is “party”-captured.⁸⁹ The Court in Burdick v. Takushi noted that there is a state interest in restricting primaries, because it protects the party structure. The two state interests preserved are: the state interest against “party raiding” and protecting against “unrestrained factionalism.”⁹⁰ The effect of political party primaries is to “*channel*[] expressive activity at the polls.”⁹¹ As the Nader plaintiffs noted, the activity is channeled to the two dominant parties. Thus, states are backing Democratic and Republican party policies and interests in restricting the voting-labor market. In labor-centric language, the parties, through captured state legislatures, protect their labor force by barring increased competition outside the major party system. The increased competition is framed as a threat of “unrestrained factionalism.” The effect of such protection against “unrestrained factionalism” is to restrict new alternative political parties to offer employment opportunities to voters.

While “unrestrained factionalism” deals with political party issues analogous to anti-trust (preventing the rise of third parties and factions within dominant parties), “party raiding” deals with the employment relationship between the party and the voter-employer – how the party itself can restrict the movements of its employees. The most recent case on “party-raiding” is the Justice Thomas’ plurality opinion in Clingman v. Beaver.⁹² In Clingman, the Court, distinguishing Tashjian v. Republican Party of Conn.,⁹³ upheld Oklahoma’s election laws regarding semiclosed primaries, which did not allow voters to disaffiliate themselves and openly vote for another party in the primaries. The Court noted that while Tashjian v. Republican Party of Conn.⁹⁴ 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

⁸⁷ Nader v. Schaffer, 417 F. Supp. 837 (D. Conn) (1976).

⁸⁸ See generally Francis Fox Piven and Richard Cloward, *Why Americans Don’t Vote* in Issacharoff, Karlan, and Pildes, *Law of Democracy*, at 132.

⁸⁹ See Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. LEGIS. 167, 171 (1991).

⁹⁰ Burdick v. Takushi, 504 U.S. 428, 439 (1992).

⁹¹ Burdick v. Takushi, 504 U.S. 428, 438 (1992) (emphasis added).

⁹² 125 S.Ct. 2029 (2005).

⁹³ 479 U.S. 208, 225 (1986).

⁹⁴ 479 U.S. 208, 225 (1986).

party from inviting registered voters of other parties to vote in its primary.”⁹⁵ The Court 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 – the court preserved the party-corporation’s clear boundaries of its voter-workforce and protected the political party against another party from raiding this workforce, such as a sore-loser 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.”⁹⁶ In a sense, the observation that parties have the power to shift “their” voters indicates a corporate employment power over voter behavior. This state interest confers on the political party a corporate employment power: enforcing its voter-employment contract by preserving the integrity of political party against raiding by other parties and sore losers.⁹⁷ This type of contractual enforcement contradicts the idealism of consumption-based voting and parties as an association of independent-minded voters.

The second employee power is to regulate the “workplace” or the conditions concerning how voters process and engage political information during work. There are two parts to this control: discipline and permitting 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.”⁹⁸ Parties no longer ascribe to a form of the “political machine” that strictly controls voters and candidates.⁹⁹ While parties have relaxed such overt control, it has not relaxed into a purely voluntary political organization. The party is free to have an organizational structure with an internal dynamic including a level of party discipline. Justice Stevens notes: “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.”¹⁰⁰ The dissent in *Burdick* notes that in addition to rewarding voters, the party-employer has the power to penalize voters, with the backing of legislative power, by enacting stricter voter registration requirements to tighten party grip and penalize, with registration requirements, certain groups who may be less likely to participate/vote or more willing to seek employment with other parties.¹⁰¹ Another form of discipline is the power to influence gerrymandering decisions, which party members use to

⁹⁵ *Clingman v. Beaver*, 125 S.Ct. 2029, 2035 (2005).

⁹⁶ *Clingman v. Beaver*, 125 S.Ct. 2029, 2032 (2005) (citations omitted) (emphasis added).

⁹⁷ *Clingman v. Beaver*, 125 S.Ct. 2029, 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.””).

⁹⁸ *Elrod v. Burns*, 427 U.S. 347, 379 (1976) (Powell, J., dissenting).

⁹⁹ *See Geary v. Renne*, 880 F.2d 1062, 1073 – 1075 (9th Cir. 1989) (describing the resilience of a California political machine).

¹⁰⁰ *California Democratic Party v. Jones*, 530 U.S. 567, 598 – 599 (2000) (Stevens, J., dissenting).

¹⁰¹ *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.

completely control the placement of employees and their work-products (i.e. their value as a voter to the district – i.e. vote dilution).¹⁰² Gerry-mandering manipulates the working environment of voters by channeling their “work” to party-determined outlets (e.g., which district they are voting at, who can associate with for campaign purposes) and “letting” go of less useful voters through vote dilution and/or fomenting disillusion and nonparticipation. Gerry-mandering is like a “covenant not to compete” provision written into party employment – voters from this jurisdiction *must* work for this party.¹⁰³ “[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.”¹⁰⁴

Labor-centricism 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 they are needed (how they can “dilute” an voter-employee’s work responsibilities according to their work value). The employees are beholden to the managerial whims of the party architects for an allocation of work responsibility and, reward just like 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.”¹⁰⁵

Unlike the consumption paradigm where 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 – rather they want to keep as many effective employees as needed, since its reward

¹⁰²As 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 point of declaring that, when it comes to apportionment, ‘We are in the business of rigging elections.’” Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, *Winston-Salem Journal*, Jan. 27, 1998, p. B1 (quoting a North Carolina state senator). *Vieth v. Jubelirer*, 541 U.S. 267, 316 – 7 (2004) (Kennedy, J., concurring in judgment).

¹⁰³ I agree with Pildes who finds that gerrymandering are (like?) “agreements [that] reflect a covenant not to compete between the incumbents of the two parties.” Pildes, “Foreword,” at 60. However, the covenant is not imposed between incumbents, but rather on their steady pool of voter-laborers.

¹⁰⁴ *Vieth v. Jubelirer*, 541 U.S. 267, 322 n.6 (2004) (Stevens, J., dissenting). Gerrymandering can solidify partisan classifications. “If a State passed an enactment that declared “All future apportionment shall be drawn so as most to burden Party X’s rights to fair and effective representation, though still in accord with one-person, one-vote principles,” we would surely conclude the Constitution had been violated. If that is so, we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive. This possibility suggests that in another case a standard might emerge that suitably demonstrates how an apportionment’s de facto incorporation of partisan classifications burdens rights of fair and effective representation (and so establishes the classification is unrelated to the aims of apportionment and thus is used in an impermissible fashion).” *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in judgment).

¹⁰⁵ *Vieth v. Jubelirer*, 541 U.S. 267, 331 (2004) (Stevens, J., dissenting).

resources are limited. Hence there are campaign strategies that focus on particular states, such as New Hampshire.

Another form of employee control is as an information gate-keeper by controlling the release of information into and out of the voting workplace processes.¹⁰⁶ Justice Thomas comments, in Clingman, that the political party “remained free to govern themselves internally and to communicate with the public as they wished.”¹⁰⁷ Patronage practices and gerrymandering both have a “public” side. One increases visibility of political work so as to secure public rewards thus encouraging overt political action; the other encourages overt essentialization by managers and public debates so as to predict the value of votes based on one’s “public” characteristics, such as income and race (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 internal party deliberations.¹⁰⁸ Parties retain power to control how decisions that influence voting outcomes are to be released to the public. First Amendment scholars have noticed the extent of “corporate” censorship in the political marketplace or, as I call it, the voting workplace.¹⁰⁹ Corporations act as *quasi-governments*¹¹⁰ acting as censors¹¹¹ that filter information to their employees, thus programming the availability of types of “information” for working/voting. This includes information about how decisions are reached with regards to patronage and gerrymandering. Parties have corporate control over both dissenting and also mainstream democratic information exacerbates these concerns.¹¹² Political parties can control the issues raised in elections and may choose issues that will attract employment and motivate voters to discuss, vote, and motivate others to vote.¹¹³ The public acceptance of this quasi-government control is analogous to our acceptance of employers’ quasi-governmental control of information in the workplace.¹¹⁴ We

¹⁰⁶ Charles E. Borden, Primary Elections, 38 HARV. J. ON LEGIS. 263, 275 (2001).

¹⁰⁷ Clingman v. Beaver, 125 S.Ct. 2029, 2037 (2005).

¹⁰⁸ 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 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 Ryan 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.”).

¹⁰⁹ *See e.g., Jerome A. Barron*, “Access to the Press – a New First Amendment Right,” 80 HARV. L. REV. 1641 (1967).

¹¹⁰ *C.f. Kathleen Sullivan*, “The New Religion and The Constitution,” 116 HARV. L. REV. 1397, 1403 – 1405 (2003).

¹¹¹ BENJAMIN R. BARBER, A PASSION FOR DEMOCRACY: AMERICAN ESSAYS 142 – 158 (1998) (entitling the chapter as “The Market as Censor in a World of Consumer Totalism”).

¹¹² STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 98 – 100 (1990). *See also C. Edwin Baker*, “Scope of the First Amendment Freedom of Speech,” 25 UCLA L. REV. 964 (1978); Herbert Marcuse, “Repressive Tolerance,” in Robert Wolff, et al., A CRITIQUE OF PURE TOLERANCE 95 (1965).

¹¹³ Owen G. Abbe, Jay Goodliffe, Paul S. Herrnson & Kelly D. Patterson, “Agenda-Setting in Congressional Elections: The Impact of Issues and Campaigns on Voting Behavior,” 56 POL. RESEARCH QUARTERLY 419, 428 (2003).

¹¹⁴ *See, e.g. Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

believe the workplace environment is ultimately controlled by the party-employers rather than the voter-employees.¹¹⁵

The same usefulness of labor-centrism can transform the perspective we adopt for political parties. The tension within the dual image of the corporation as both a collective democratic association and a private hierarchical enterprise was somewhat obviated by the growth of unionism; unions attempted to become the voluntary democratic associations within corporations while corporations retained their status as a hierarchical commercial enterprises. A similar solution may apply to the political party, as they still exist as a hybrid of both a voluntary association and corporate enterprise. Perhaps there is a need for unions as institutions that democratically represent voters *within* political parties. The movement to unionism may be the *ex ante* institutionalized solution to prevent *ex post* litigation. Voters do have standing to protect themselves against managerial party interests that may be adverse to their voting conditions. In Federal Election Commission v. Akins,¹¹⁶ the Supreme Court found standing for voters to sue the FEC to treat the American Israel Public Affairs Committee (AIPAC) as a “political committee” and thus make public the contributions to potential political candidates.¹¹⁷ The voters had standing, because they had a “concrete,” albeit “generalized” grievance. In essence, Akins stands for the proposition that voters *can* monitor the political process by mandating an administrative agency to force donors to disclose their relationships with their candidates and party manager as these relations with donors may affect their candidates and the value of their work in a specific election.¹¹⁸ This “public” model of rights adjudication would allow employees and voters, particularly unionized voters, to challenge the parties when they violate fiduciary-like statutory duties towards them (e.g., vote dilution)

A voter coalition instigating litigation on behalf of all voters to assert a concrete injury can be analogized to an established role for unions to assert protections on behalf of *all* employees for their workplace and work regardless of the employee’s union membership.¹¹⁹ Analogies can also be sought between the NLRB and the FEC – these will be explored in another paper. The public rights model for organized voter standing has some basis for the public rights basis for union standing in labor law. There are several labor law cases that provide a nice analog to the Akins proposition: a Eastern District of Pennsylvania case, Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.,¹²⁰ a Fourth Circuit opinion in West Penn Power Co. v. N.L.R.B.,¹²¹ along with numerous union challenges to OSHA and other administrative agency determinations that may affect the workplace.¹²² In Delaware Valley, the court found standing

¹¹⁵ See supra notes 110 – 112.

¹¹⁶ 524 U.S. 11 (1998).

¹¹⁷ Id. at 21.

¹¹⁸ “There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC’s financial assistance might play in a specific election.” 524 U.S. 11 (1998).

¹¹⁹ Another public rights example with standing difficulties is the assertion by environmental groups on behalf of the public to protect the environment.

¹²⁰ 813 F.Supp. 1132 (E.D.Pa., 1993).

¹²¹ 394 F.3d 233 (4th Cir. 2005).

¹²² See, e.g., Union of Needletrades, Indus. and Textile Employees, AFL-CIO v. U.S. INS., 336 F.3d 200 (2nd 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

for two trade unions suing on behalf of workers that live, work, and travel near the defendant's manufacturing plant and who allegedly failed to provide accurate information under EPA obligations 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 labor from union members to contracted non-union workers. Both cases, like Atkins, show how coalitions of employees can sue for information on how third-parties may be "corrupting" the relationship between employers and employees whether it is the environmental effects on the workplace or concealed relationships between management and third-parties (such as non-union contractors). Similarly unions have instigated numerous suits that challenge administrative determinations and enforcement that potentially harm the safety and jobs of employees. In all these cases, the presupposition is that there is a existing relationship that is "corrupted" or "injured" by a concrete violation of a statutory duty almost akin to a fiduciary duty. Just as candidates must disclose conflicts of interests, such as the "role that AIPAC's financial assistance might play," employers must reveal conflicts of interest that might reveal employers' motives potentially adverse to their employees, their working environment, and generally, their power within the corporate entity. The Atkins injury is not so much an interference with the voters' informed choice when voting for candidates, but rather knowing how much AIPAC is influencing party decisions through funding and how that may affect its relationship with workers and the party's unwillingness to reveal public information with regards to those managerial decisions. In analogy, voter litigation is protecting their sphere of influence on their party's decisions and their managers' motivations. They are concerned about influences that may be adverse to the voting environment and how capital contributions may influence candidate's preferences on issues more so than the voters. The labor versus capital conflict will be discussed later.

C. The Candidates As Political Managers

The view that candidates are political managers is a not new idea, but has been with us since the Founding of the Republic.¹²³ Neither candidates nor corporate managers fit the mold of Burkean elites nor are they completely beholden to voters,¹²⁴ but in fact, again, both toe a sensible middle line – business management scholars have noted that managers are not simply "elites" that command their employees nor is there a true "team" model where managers listen to

(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); American 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.

¹²³ See, e.g., Gordon S. Wood, *The Radicalism of the American Revolution* 366 (1992) (describing the views of George Washington and others arguing that candidates control and "command" votes).

¹²⁴ Atkins seems to want to toe this middle line believing that voters can both force disclosure of political action committees, which are traditionally under control of candidates not voters *and* preventing standing doctrine to reach a form of direct democracy. Compare "In addition to being a silly distinction, given the weighty governmental purpose underlying the "generalized grievance" prohibition-viz., to avoid something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." 33 (Scalia, dissenting) with "[A]n entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" 26.

their constituents. In fact, it is often a mix of both.¹²⁵ The business management framework is apt to describe legislative representation especially in light of the high incumbency rates (not surprising if voters have relatively fixed employment in parties);¹²⁶ relationship between politicians-managers and voters-employees within the party-corporation is highly stable. The labor-centric model plies its trade somewhere between the two extremities in the conception of the voter-candidate relationship. Party managers are not completely beholden to the voter as voters are never completely sovereign consumers (see gerrymandering phenomena) nor are voters completely enslaved by their powerful candidate-managers (see *Atkins* type litigation). Both of these polar visions of democracy are abundantly sourced in the literature and history of democracy.¹²⁷ Within this framework, the definition of democratic “representation” becomes a euphemism for corporate-like management. The role of the candidates is *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.”¹²⁸ Instead, representation is only one side of candidate management – clearly candidates have to represent to fellow managers within the political party, the views of their “group of employees” (i.e. what their jurisdictions desire). The flip-side of management is to motivate, reward, and control their voters-employees to accept the political compromises that the party wants to enforce upon constituents. As Macey suggests, politicians use the party’s corporate structure to serve their own interests, because they will be better able to manage a particular sub-division of the party conglomerate – a subset of interest groups.¹²⁹ As David Schleicher points out, the party’s choice between emphasis on command and representation is also reflected in the balance the courts try to seek in regulating the competition between political parties and within political parties.¹³⁰ Hence, the corporate structure of parties, which allows candidates to focus on a geographical area and a set of interest groups, does not just enable easier representation, but also their management. The candidates can create and enforce a consensus among his set of interest groups (i.e. what I call “shareholders”) and geographical workers by relying on a variety of tools inherent to their positions within the party or through the powers of their political office, such as gerrymandering, pork-barreling, and other political influence to “discipline” their party members.¹³¹ The discipline is more powerful if managers, just as in corporations, can use their positions as representatives of the will of the corporate body (i.e. the party). Justice Powell observed that a perception of unity within the party management can increase voter productivity by creating partisan voting patterns.¹³² For example, Richard Pildes

¹²⁵ Barry T. Hirsch & Edward J. Schumacher, Private Sector Union Density and Wage Premium: Past, Present, and Future, 22 J. Lab. Res. 487, 497 (2001). It has been endorsed by many industry leaders, unions and academics. See Allan D. Gilmour, Union Management Cooperation, 43 Labor L. J. 513, 516 (1992).

¹²⁶ http://journalofpolitics.org/files/68_1/Incumbency.pdf#search='incumbency%20rates'.

¹²⁷ Samuel Issacharoff & Richard H. Pildes, “Election Law as its Own Field of Study,” 32 Loy. L.A. L. Rev. 1173, 1177 – 1179 & nn. 18 (1999).

¹²⁸ *Lucas v. The Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964) (Stewart, J., dissenting).

¹²⁹ Macey, “Packaged Preferences,” at 1463.

¹³⁰ David Schleicher, “Politics as Markets” Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections,” Supreme Court Economic Review, Vol. 15, available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=469670.

¹³¹ SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 281 (emphasis added).

¹³² “Powell also found the difference between an open primary and a classic closed primary with same-day registration to be negligible. In each case, a previously unaffiliated voter could associate with the party and qualify to vote on the day of the primary. Powell thus asserted that closed primaries differ from open primaries only in that

makes two related observations that describe this “command” side of representation. First, “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.”¹³³ The party allocates decision-making power and the decision procedures to the managerial class who decide how to use these procedural devices to create a collective will. Second, “[l]ike 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.”¹³⁴ There are many examples of managerial behavior of procedural devices for lock-up most exemplified by gerrymandering where Democratic and Republican managers have determined where to place their workers in different districts according to Taylorist management techniques in order to maximize the production of power.¹³⁵

Politicians have, thus, two constituencies, akin to corporate managers: managing their employee-voters while also serving party leaders and sponsors (i.e. shareholders) as an employee of the corporate body, albeit in the managerial class.¹³⁶ 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.”¹³⁷ With regards to the political manager as a corporate employee, even political managers must, like voters, adhere to the party leadership and adhere to the leadership’s judgment about whether candidates or voters as employees are “in sympathy with the principles of the party.”¹³⁸ One potent mechanism to control managers is the allocation of resources and

the former compel public affiliation through registration with the party while the latter allow private association through the act of voting for a party candidate.” Bartels, “Partisanship and Voting Behavior, 1952 – 1996,” at 44.

¹³³ Richard H. Pildes & Elizabeth Anderson, “Slingshot Arrows at Democracy, Social Choice Theory, Value Pluralism, and Democratic Politics, 90 Colum. L. Rev. 2121, 2197 – 98 (1990).

¹³⁴ Pildes & Ischakoff, at 647.

¹³⁵ See, e.g., Sam Hirsch, “Unpacking *Page v. Bartels*: A Fresh Redistricting Paradigm Emerges in New Jersey,” 1 ELECTION L. J. 7 (2002).

¹³⁶ There is a certain contradiction between viewing politicians as beholden to voters rather than party leadership. For example, in *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996), the state “has a compelling interest in protecting political parties’ right to define membership.” Within this “right to define membership,” [a Committee of Republican party leaders] has this right, as “these persons are aware of the principles and platform of the Republican Party and can decide what presidential candidates are aligned with the party’s views. Therefore, as leaders the membership of the party elected, they have been entrusted with the authority to make decisions for the party, and [the statute] recognizes that these party leaders are in the best position to decide who should appear on Georgia’s Republican Party presidential ballot.” *Id.* These leaders are only hypothetically accountable for their decisions to the general “voters”/“members.” *Id.*

¹³⁷ *Vieth v. Jubelirer*, 541 U.S. 267, 332 (2004) (Stevens, J., dissenting).

¹³⁸ For example, “[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”

national attention. Justice Thomas notes that “coercion” through party allocation of campaign financing is what party politics is all about. 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.”¹³⁹

Politicians want and need tap into the parties’ allocation of interest groups along with the endorsement of party affiliation. 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.”¹⁴⁰ Particularly important for local candidates (i.e. lower-level political managers) is the party’s internal promotion mechanism; party leaders can choose who to cultivate for national attention.¹⁴¹ 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.¹⁴² 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 managerial discretion of party leaders, including even the exhibition of positions and advertising to other employees and interest groups within the party.¹⁴³

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. 1950).

¹³⁹ *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 646 (1996) (Thomas, J., concurring in part & dissenting in part).

¹⁴⁰ Macey, “Packaged Preferences,” at 1463.

¹⁴¹ 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.””).

¹⁴² See Nathaniel Persil, *Candidates v. Parties : The Constitutional Constraints on Primary Ballot Access Laws*, 88 *Geo. L. J.* (2001).

¹⁴³ See, e.g., *Republican Party of Texas v. Dietz*, 940 S.W.2d 86 (Tex. Sup. Ct. 1997).

Party management style with regards to the command side has changed over the years. The changing nature of corporate management has distinct parallels with the changing nature of political party management. Corporate boards have shifted managerial strategies from hierarchical structures to relatively team-orientated cooperative relationships between employees and management.¹⁴⁴ The “smoke-filled room[s]” involved in party nominations and major decisions shutting out employees from participation have been replaced by quite open primaries and more transparent mechanisms for party decisions.¹⁴⁵ One corporate strategy is to allow the employees a “voice” within the corporation through stakeholder voting when considering who should run and win positions in the management. Primary elections are similar in the sense that they changed the way nominations for party leadership and representation in government is determined. Once politicians get selected as a manager within the system, they take on the responsibility of coordinating their “domain” of interest groups and employees/voters allocated to them via various methods. One method is gerrymandering, which is a method to allocate responsibility within the party perhaps, in part, to reflect diverse employees.¹⁴⁶ A disfavored alternative method is to create managerial fiefdoms; party leaders delegate and decentralize their management by giving lower-level managers political control over budgets, patronage, and promotions. These were the so-called “political machines,” which some claim to have helped racial and ethnic minorities gain a piece of political power as the party delegated racial minorities management authority over members of their own race within the parties.¹⁴⁷ Justice Stevens has noticed that the success of parties has been attributed to architect-managers of gerrymandering rather than the voter-employees.¹⁴⁸ Equally any change to their “domain,” creates a shift in managerial strategies. The Supreme Court in *Viet* observed that “[i]f the districts change, the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change-everything changes.”¹⁴⁹

¹⁴⁴ Barry T. Hirsch & Edward J. Schumacher, *Private Sector Union Density and Wage Premium: Past, Present, and Future*, 22 *J. Lab. Res.* 487, 497 (2001). It has been endorsed by many industry leaders, unions and academics. See Allan D. Gilmour, *Union Management Cooperation*, 43 *Labor L. J.* 513, 516 (1992).

¹⁴⁵ See *Nader v. Schaffer*, 417 F. Supp. 837 (D.Conn) (“In the pass, many political nominations were made by a process. . . described as the “smoke-filled room.”).

¹⁴⁶ Heather Gerken, “Dissenting by Deciding,” 57 *STAN. L. REV.* 1745 (2005)

¹⁴⁷ *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 *Georgia v. Ashcroft* emphasized the importance of allocating minority managers power. *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.”).

¹⁴⁸ *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).

¹⁴⁹ *Vieth v. Jubelirer*, 541 U.S. 267, 289 (2004) (quoting Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 *UCLA L.Rev.* 1, 59-60 (1985)).

One of the main roles of corporate managers in their relationship with employees is to motivate, reward, and command voters within their member rolls. There is no doubt that voters need motivation in the classic labor-centric perspective. According to a Pew Center survey, 51% of Americans say that “voting doesn’t really change things.”¹⁵⁰ Fund-raising, stumping, making reward promises, and other political campaign activities are not purely for making the candidate seem like a better candidate, but also to motivate voters who have, as discussed earlier, labor-centric obstacles. 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.”¹⁵¹ The need for managerial coaching exists equally for voters. Political scientists have already identified an important voting phenomena called “voter fatigue,” also called “voter roll-off.” In voter fatigue, too many elections and candidates at the different levels causes voters to ignore elections because they are overworked. Some scholars compared voting in America to taking an SAT.¹⁵² 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.”¹⁵³ There is strong evidence that candidates tailor their messages to motivate voter-employees.¹⁵⁴ For example, managers within the George Bush, Sr. and Republican political party promised a reward of “influence in the appointment process” so that conservative-leaning Christian Coalition could be “outsourced” responsibility to mobilize and motivate voters already within the interest group.¹⁵⁵

D. The Campaign Contributors As Shareholders

The idea that campaign contributors can act as shareholders has been a natural metaphor and the comparison has been debated throughout the literature.¹⁵⁶ However, the metaphor has taken hold as an impetus for “campaign finance reform.” The Court no longer sees donations on a larger scale as simply a form of organizational activity and a form of voter participation as it did in Tashjian, but rather as a form of corruption.¹⁵⁷ Indeed, the Court in Buckley wanted to

¹⁵⁰ <http://people-press.org/reports/display.php3?PageID=405>.

¹⁵¹ *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (Stevens, J., concurring).

¹⁵² Martin P. Wattenberg, Ian Mcallister & Anthony Salvanto, “How Voting is Like Taking an Sat Test: An Analysis of American Voter Rolloff,” 28 AM. POL. Q. 234 (2000).

¹⁵³ *See Vera v. Bush*, 933 F.Supp. 1341, 1348 – 1349 (S.D.Tex. 1996).

¹⁵⁴ *Federal 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.”).

¹⁵⁵ *See Federal Election Com'n v. Christian Coalition*, 52 F.Supp.2d 45, 69 (D.D.C.,1999).

¹⁵⁶ Spencer Overton, “The Donor Class: Campaign Finance, Democracy, and Participation,” 153 U. PA. L. REV. 73 (2004). For a more critical view from a deliberativist and participatory viewpoint, *see* J. Skelly Wright, “Money and The Pollution of Politics: Is the First Amendment An Obstacle to Political Equality?,” 82 COLUM. L. REV. 609 (1982). *See also* Randall S. Kroszner & Thomas Stratman, “Corporate Campaign Contributions, Repeat Giving, and the Rewards to Legislator Reputation,” 48 J.L. & ECON. 41 (2005) (extending analysis of firm strategy in the economic marketplace to PAC contributions in the political marketplace). There are real-life examples. The Democratic Party calls contributions “bonds” thus making contributors “bond-holders.” *See* Democratic Party, “Take Control with “Democracy” Bonds,” *available at* http://www.democrats.org/a/2005/06/democracy_bonds.php.

¹⁵⁷ *Compare McConnell*, 540 U.S. at 95 (“ . . . the 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 (1996).

separate the labor and the capital sides to campaign contribution. The Court writes to separate the Tashjian labor aspect of contribution or “the symbolic *act* of contributing” from the corrupting influence of the party’s capital dependence - “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.”¹⁵⁸ Buckley observed that candidates are dependent on large infusions of cash to support their campaigns:

“[t]he 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.”¹⁵⁹

The “quid pro quo” relationship harks back to the discussion regarding patronage.¹⁶⁰ The labor-centric vision complements this shareholder vision of democracy; patronage and financial contributions are the two most salient, troublesome, but related, quid pro quo exchanges. 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. The rewarding of these investments in its most overt and egregious forms are patronage and donation corruption. In fact, the Buckley Court cites to CSC v. Letter Carriers,¹⁶¹ which discussed the limitations on political activities by federal employees. In Elrod, the Court noted that the restrictions on federal employees was related to the threat that federal employees become party to patronage relationships. In a sense the same problems that plagued Buckley, CSC, and Elrod were not necessarily the quid pro quo relationships underlying donations and patronage, but the intensity and permanence of the quid pro quo relationship. In essence, neither patronage nor donations are categorically corruptive, but the problem is when do either create a relationship that causes undue influence over candidates when balancing party managerial responsibilities and public duties. Campaign contributors establish a permanent link to candidates as creditors and shareholders in the party, and specifically, to candidates.¹⁶² What the Court feared with the large amounts of contributions from a single source was the creation of a permanent relationship akin to a larger shareholders to corporate managers.¹⁶³

¹⁵⁸ See Buckley v. Valeo, 424 U.S. 1, 19 – 21, 26 – 28 (1976) (per curiam).

¹⁵⁹ *Id.*

¹⁶⁰ 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.”).

¹⁶¹ 412 U.S. 548 (1973).

¹⁶² 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).

¹⁶³ Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) (“... voters tend to identify a big donation with a corrupt purpose.”).

The relationship created between campaign financiers-shareholders and voters does not fit neatly into the consumption paradigm. Under a consumption paradigm, shareholders would finance corporate bodies and campaigns so that they succeed in gaining more market share and profit by attracting more consumers. Shareholders desire companies to match and satisfy consumer interests or else lose to the competitors.¹⁶⁴ Increased number of shareholders can actually improve corporate selling to more consumers.¹⁶⁵ Increased campaign financing should increase the welfare of all voters/consumers as products become better. Yet, the campaign financing and voter relationship here is different. Shareholders are buying influence with corporate managers so that managers listen to them not their party voters. There is no alignment of interests between shareholders and voters in general – shareholders are not worried about attracting a larger popular vote with better candidates, but worried more about what happens with party decisions after candidates win their offices, hence corporate sponsors often fund both sides of the aisles. The relationship is more akin to shareholders and employees. Shareholders want corporate employees and voters to adhere to party discipline and the shareholders' will on the corporate body. In essence, like the fight between unions (labor) and shareholder (capital) interests, campaign contributors-shareholders and voter-employees are in a struggle for influence within the corporate body. Thus, campaign financing does not focus on the number of campaign donors, but the *amount* of donations. Increasing the number of shareholders will have no effect on the power of employees; the controlling shareholders (ones with the largest donations) still has control and power over the enterprise's direction. However, the amount of donation might cut into the need for labor power as is discussed in the next few paragraphs. Corporate law seeks other sources of power within the corporation to counteract the influence of controlling shareholders, including minority shareholders, and possibly employees.¹⁶⁶ Perhaps, campaign financing reform will also seek to empower employees to counteract the power of large donors within the party.

Patronage and campaign contribution restrictions have not blunted the corporate form of parties – they still need capital and require rewards for labor. The viability of candidates is often determined by their “war chests” (just like corporate start-ups) rather than their efforts to gain support from voter-employees.¹⁶⁷ One of the major advantages of larger parties is its ability to

¹⁶⁴ See, e.g., Frank E. Easterbrook, 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.”).

¹⁶⁵ See Samuel Issacharoff, “Throwing in the Towel: The Constitutional Morass of Campaign Finance,” 3 ELECTION L.J. 259 (2004).

¹⁶⁶ See, e.g., Anupam Chander, “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 shareholders and management, corporate law seeks to establish other resources of power in minority shareholders.”). See also *Id.* at 128.

¹⁶⁷ Compare, e.g., Steve Gorman, “Sen. Hillary Clinton hits Hollywood money trail,” Reuters, Oct. 14, 2005 http://news.yahoo.com/s/nm/20051014/people_nm/hillary_dc_1; “Colorado Representatives Bolster War Chest For Races Ahead,” Associated Press, Oct. 15, 2005, available at <http://www.thedenverchannel.com/politics/5102505/detail.html?rss=den&psp=news> (“Loevy and Scott Adler, a University of Colorado political scientist, said the race could also be competitive if the opponent is conservative and if Democrats pour in lots of money.”) with, e.g., Toledo Blade, “Toledo investment group puts \$1 million in 5 start-

capture more employees and more capital, similar problems that exist in the private sector where larger corporations keep on getting larger.¹⁶⁸ Instead of eliminating the essential need for capital and labor, political parties have to seek them in less transparent ways and drive capital and labor sourcing “underground.” Justice Thomas recently observed that:

“ . . . 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 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.”¹⁶⁹

There is much evidence that the search for capital has shifted to safe harbors under issue advocacy.¹⁷⁰ To take an analogy from the corporate sector, capital and labor sourcing has been “outsourced.” PACs garner capital and interest groups, like the Christian Coalition described earlier, employ and manage voters. Scalia notes a transference from party employment to interest groups caused by patronage restrictions in Elrod and Branti. He writes: “there is little doubt that our decisions in Elrod and Branti, by contributing to the decline of party strength, have also contributed to the growth of interest-group politics in the last decade.”¹⁷¹ Indeed, patronage rewards for labor on campaigns has not been eliminated, but has been driven underground. Regardless, important patronage rewards for political posts still abound, such as judicial offices, which have been quite public and open.¹⁷² The retraction of Harriet Miers after criticism by interest groups that helped Bush win office may be another example of the power of interest groups whether via their power over capital or labor in influencing managerial decisions.

Additionally, much like corporate management, American campaigning has become less “labor-intensive” thus causing a decline in patronage practices with relation to a dependence on capital (and courts have recognized this.¹⁷³) This may, in part, be the result of the relative

ups,” Oct. 14, 2005, *available at*

<http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20051014/BUSINESS06/510140359>.

¹⁶⁸ See Computer Business Review Online, “Investment community failing start-ups says report,” *COMPUTER BUSINESS REVIEW*, Oct. 12, 2005, *available at* http://www.cbonline.com/article_news.asp?guid=C3BAFB1B-4F42-4337-8B90-72F0278453E6 (“According to the report, produced by a joint working group set up between the US Department of Commerce and the European Commission, this lack of investment in early-stage start-ups represents a “fundamental market failure.” The findings call for more public sector and policy maker involvement in the VC process. The working group is made up of representatives of venture capital funds, industry advisers, academics, and specialists.”).

¹⁶⁹ *Federal Election Com'n v. Colorado Republican Federal Campaign*, 533 U.S. 431, 473 n. 4 (2001) (Thomas, J., dissenting) (citations omitted).

¹⁷⁰ See, e.g., Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 *Tex. L. Rev.* 1751, 1759 (1999).

¹⁷¹ *Rutan*, at 107 (Scalia, J., dissenting).

¹⁷² 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.”).

¹⁷³ *Landell v. Sorrell*, 382 F.3d 91, 172 (2nd Cir. 2004) (“Incumbents in effect have capital--name recognition, an existing organization, tested donor lists, etc.--to draw upon without making expenditures as defined in Act 64, while virtually every significant capital- building activity by newcomers requires the use of resources that count toward

regulation on both. There is much more animosity toward patronage practices as patronage has been banned, while campaign financing has just been controlled.¹⁷⁴ Defenders of patronage practices will note that while capital contributions have been restricted by dollar amounts, patronage practices have been categorically barred even for low-level political positions. The shift from labor to capital was prophesized by Powell:

“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.”¹⁷⁵

Justice Scalia has also noted that:

“[i]ncreased 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).”¹⁷⁶

The increasing use of capital has substantially decreased 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. As capital flows have increased, the need for participation to re-affirm political commitments has lessened. There is a normative fear that capital considerations have overwhelmed labor considerations. In fact legislation have targeted the disproportionate effect of large contributions vis-à-vis voluntary labor.¹⁷⁷ For example, less 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

the expenditure limits. Equally important is the fact that incumbents have methods of getting their name before the public that are not limited by Act 64, while challengers do not.”)

¹⁷⁴ *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 106 (1990), banned political patronage promotion, transfer, recall, and hiring decisions. *Compare generally Rutan with Buckley.*

¹⁷⁵ *Branti v. Finkel*, 445 U.S. 507, 528 – 529 (1980) (Powell, J., dissenting). Judge Becker of the Third Circuit provides great assessment of this phenomena and the “patronage” jurisprudence, see *Carver v. Foerster* 102 F.3d 96, 105 – 110 (3rd Cir. 1996).

¹⁷⁶ *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 106 (1990) (Scalia, J., dissenting).

¹⁷⁷ *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.”). The implicit legislative intent is to equalize the contributory amounts’ power over candidates and the exempted voluntary labor.

capital-intensive advertising.¹⁷⁸ Even opportunities for labor participation in political fundraising has been replaced by *outsourcing* to corporate companies, who subsequently outsourced the business to cheaper call centers in India.¹⁷⁹ 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.”¹⁸⁰ Perhaps, the “ceding” is not so much a choice, but the party’s increased capitalization. As capital increases and campaign machinery becomes less labor-intensive, the value of political participation/employment to the political party has declined to such an extent that most voter-laborers are becoming assembly-line workers whose only labor requirement is to punch a ballot. Rewards for labor are also minimized as less labor is needed overall, so there is less incentive to participate. The consumption model sees these as complementary – more capital for advertising equals more information for the voter-consumer.¹⁸¹ Instead the labor-centric model sees these as competitors: more capital for advertising means less party need for labor-centric work to get out the vote, and thus less opportunity for participation. The ultimate choice is between promoting labor-centric acts, such as local political action, advocacy, deliberation, voting etc. versus shareholder-centric acts, such as donation of money, fundraising, discounted services, favors, etc.

A theory focused on consumers would not care about how corporate organizations are controlled, but only care about whether these organizations are healthily competing for the benefit of the consumer. While a consumer-centric vision may permit shareholder-centrism, a labor-centric model actively rebels against shareholder-centrism and tries to either diffuse control by creating employee-owned corporations or force corporate decision-makers to consider their fiduciary duties towards their workers in face of growing dependence on capital. Whereas, the consumption paradigm ignores these concerns, these concerns are discussed in detail in workplace democracy literature. The protection of the value of labor may, again, require analogies to labor law and the union experience. The labor analogy pinpoints our certain discomfort with the move to shareholder-centrism¹⁸² and our concern with campaign finance reform. This discomfort is epitomized in local voting elections. For example, in some cities, nonresidents who have property are given the franchise simply because they are entitled by their investments in the jurisdiction, just like a shareholder.¹⁸³ However, the courts and the public disfavor this focus on property-ownership as a sole qualification for corporate decision-making,

¹⁷⁸ *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 than even the most well-organized “political machine.””).

¹⁷⁹ See Siddharth Srivastava, “How India funds Bush's campaign,” Asia Times Online, May 19, 2004, at http://www.atimes.com/atimes/South_Asia/FE19Df04.html (noting the outsourcing was done for “cost and efficiency gains.”) (last visited, Feb. 23, 2006).

¹⁸⁰ David R. Ortiz, “The Democratic Paradox of Campaign Finance Reform,” 50 STAN. L. REV. 893, 913 (1998).

¹⁸¹ “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 – 2.

¹⁸² *McConnell*, 540 U.S. at 95 (“ . . . the 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.”)

¹⁸³ See *May v. Town of Mountain Village*, 132 F.3d 576 (10th Cir. 1997).

because we feel *residents* who participate and work in the community (the *labor*) should be the focus of franchise entitlement.

Participatory and deliberative democrats often use local government-type grassroots organizations and the local union as the practical examples of how voters can be mobilized for power within the corporate structure. The use of unions and grassroots organizations as two exemplars of democracy are not happenstance. The alienated and nonelite laborers in the corporate structure *are like* the alienated and nonelite “grassroots” voters in the political structure.¹⁸⁴ By centering corporate democracy on laborers and their unions is like centering political democracy on *voters* and *their* local assemblies and grass-root voluntary associations. If one understands labor’s need for unionization, then one would understand the voters’ need for local democracy *and vice versa*.¹⁸⁵ One of the important justifications for unionization is to promote “voice” instead of exit – organizations should be concerned about alienation of workers in face of growing dependence on capital and be the advocates of voters against those that are powerfully influencing and colluding with the managers. Parties have become the managers of voters, but there lacks what the deliberativist observe in a counter-organization such as a union. In their seminal work, labor economists Freeman and Medoff conclude that unions lead to more productivity, enhanced efficiency, more participation, and community-building (i.e. older workers are willing to help younger workers) under in an unionized workplace as they are better able to voice their concerns and protect most easily disempowered (the older workers).¹⁸⁶ This need for voice is echoed by other union scholars based on non-economic democratic norms.¹⁸⁷ The great demand for Howard Dean’s grassroots model in the election 2004 may be emblematic of the need for a counterweight in the political marketplace despite corporate party competition.¹⁸⁸ However, the same reasons for the lack of unionization in the private workforce imparts lessons in the public sector. The lessons from decline in unionization is that the voice of employees could not be guaranteed by structural regulation and competition between labor and capital and has been supplanted by direct regulation called “employment law.”¹⁸⁹ Another consistent explanation is that weak regulations, while ostensibly regulating competition between employers and unions, neglected the power distribution between employees and employers thus allowing employers to succeed in opposing unions.¹⁹⁰ In other words, labor law had no teeth to

¹⁸⁴ 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).

¹⁸⁵ *See* Peter Bachrach, “Interest, Participation, and Democratic Theory,” NOMOS XVI 47 – 49 (1975). *See also* BARBER, A PASSION FOR DEMOCRACY 109 – 110 (identifying the link between *working* and *participation* in democracy through “common work” projects whether laboring to renovate houses or to participate in local assemblies).

¹⁸⁶ *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 107 – 109 (1984). *See also* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 181 – 184 (1990).

¹⁸⁷ *See, e.g.*, ALBERT REES, THE ECONOMICS OF TRADE UNIONS 192 (1989).

¹⁸⁸ *See, e.g.*, CNN, “Dean named Democratic Party chief,” (Feb. 12, 2005), *available at* <http://www.cnn.com/2005/ALLPOLITICS/02/12/dean.dems/>.

¹⁸⁹ *See* Samuel Estreicher, “Models of Workplace Representation for An Era of Global Labor and Product Market Competition,” *in* LABOUR LAW: HUMAN RIGHTS AND SOCIAL JUSTICE 51 (R. Blanpain ed., 2001).

¹⁹⁰ *See* Paul C. Weiler, Governing the Workplace: The Future of Labor and Employment Law 309 - 310 (1990) (“But I am convinced that we need to do more, that we must go beyond the fundamental assumption of the NLRA that American workers must choose unionized collective bargaining as the sole alternative to the nonunion status quo they experience when they go to work in the millions of offices and plants in this country. The labor policy for the next century must include a third option: a guarantee of a minimum level of indigenous worker organization and

protect against the employers' powers. The same obstacles will still exist for protecting voters.

The ultimate effect in the conflict between capital and labor is that unemployment will rise and, analogously, political participation will decline. Robert Putnam has already noticed that there is a general decline in social capital, including political participation and voting.¹⁹¹ The solution to this problem may not be sourced in a consumer-centric vision, which relies on a capital intensive solution: more information and more attractive candidates. Alternatively, the labor-centric solution lies in motivation, engagement, and training. Parties are not currently competing for the maximum share of a pool of consumers who are out there all ready to purchase when the right product comes along with enough information. Instead, parties are looking for labor, and pay just enough labor to win against the other party. However, due to the increasing importance of capital, the labor they need is only the minimal kind – those “civic slackers” are sufficient. Parties are competing against each other and there is no necessary need to compete for labor beyond the necessary minimum to maintain control (there is no difference between employing 20% more voters-employers in a district than employing 5% more voters-employers). There is no need to motivate and reward voting-labor beyond the needed victory. In other words, like in the labor market, there is no motivation for parties to enlarge the labor market and provide labor more sophisticated work beyond the bare minimum needed to produce the product. As capital increases its role, the bare minimum decreases. It is the role of the state to re-tool and re-train workers so that they may obtain more satisfying work in face of the threat of capital to replace their old jobs. Similarly it is the role of the state to counteract unemployment of voters and increase the labor supply when facing threat of capital replacement. The following section uses the labor-centric model to try to better explain and model the decline in voter turnout. It provides an example of how the labor-centric model may be useful for policy-makers.

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

While general labor theory may also provide helpful analogies to the political marketplace, specific problems and analysis in labor economics are also very useful for analyzing the labor-centric political marketplace issues. There is something different about the market for labor when compared to traditional consumer markets. The introduction of *labor* also serves a more pragmatic purpose: to challenge the neo-classicalist hold on law and democracy inherent in consumer-centric rhetoric. While neo-classicists have tried to extend their analysis into the law and economics of labor (i.e. Richard Epstein and Richard Posner have both written on labor law), their work has not generally influenced labor law scholars and economists and our common conceptions of labor – there *is* a qualitative difference between labor inputs and commodities. We are most resistant to extend neo-classicist models to labor. As Robert Solow, the Nobel Prize winning economist, observed, “[t]he labor market might just be different in important ways from the market for fish.”¹⁹² The differences between the labor and consumer markets have direct implications on how economics analysis can be used to analyze the “political market.” The unique features of labor economics can be used to analyze one important problem

representation for employees in every sizable workplace in the country.”). *See also* Paul C. Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769 (1983).

¹⁹¹ Robert D. Putnam, Bowling Alone 32, 39 – 40 (2000) (“Participation in politics is increasingly based on the checkbook, as money replaces time.”).

¹⁹² ROBERT SOLOW, THE LABOUR MARKET AS A SOCIAL INSTITUTION 30 (1990).

in election as analogous: the low turnout of voters.¹⁹³ The analogy is made to different categories of “unemployment” found in labor economics.

Unemployment is a good analogy for use in analyzing why potential voters decide not to vote. The categories used in labor-economics to describe unemployment may be useful to categorize such voters. While the decision to work and vote is the result of a trade-off between work and leisure, there may be no opportunities (or no *perceived* opportunities) to work/vote even if the worker/voter desires to take the trade-off. In labor economics, there is a distinction between “frictional unemployment,” “structural unemployment,” “demand-deficient unemployment,” “seasonal unemployment”¹⁹⁴ to describe the different situations that may cause a decline in such opportunities.

“Frictional unemployment” is straight-forward as the unemployed as he is “between jobs.” Awareness about such unemployment can be useful for 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 voting participation.¹⁹⁵ The solution, like with frictional unemployment, is straightforward – to minimize the costs of registration and spreading information about jurisdictional rules.

The second type of unemployment is “structural.” Structural unemployment” means that there is generally a mismatch between “the skills demanded and supplied in a given area or an imbalance between the supplies and demands for workers across areas.”¹⁹⁶ Some causes may be occupational imbalance and geographical imbalance. Basically, the structure of the market itself

¹⁹³ There may be other analogies and they are pursued throughout this article. For example, labor economics have been puzzled by the “downward wage rigidity” in the labor market compared to the consumer market. “Downward wage rigidity” occurs during recessions when firms are more prone to cut employment rather than nominal wages. *See generally* EHRENBERG & SMITH, at 581 – 585. Looking at the national races, parties and candidates are also more willing to give up competition for certain voters, even if there is a significant segment in certain states, while maintaining the same party line, promises, and positions by trying to keep just enough voters necessary for an electoral victory. In other words, in times of trouble, and when broad consensus building is not possible, parties will generally cease efforts to maintain voters in certain states (cutting advertising, visits, shifting promises to other states), while still trying to be *consistent* in the general promise and efforts for the remaining voters. They do not, instead, choose to spread funding thinly around all jurisdictions in hopes that their inherent position even with less funding and campaign stops might keep them employed. For both, I sense there is both a feeling that *spreading* funding *or spreading* wages is more damaging to the firm’s reputation for success than explicitly *cutting* segments of voters or employees.

¹⁹⁴ *See* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 566 - 589 (7th ed., 2000).

¹⁹⁵ *See, e.g., Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 568 - 9 (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.”).

¹⁹⁶ *See* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 574 (7th ed., 2000).

is preventing a mobility of labors because of endowed geography or skills.¹⁹⁷ Similarly there are geographical and endowment factors in voting that causes racial differences in voting rates just as the structure creates different mobility in employment. The analogy with structural unemployment more accurately describes the situation of the voter who is not fully mobile with regards to voting choices contrary to the consumer-centric model of local voting patterns exemplified and influenced by Charles Tiebout who assumes full mobility of the “consumer-voter.”¹⁹⁸ Under a labor-centric model, in the local voting scenario, certain voters become non-participatory, because, in their jurisdiction, their votes are ineffective/valueless as they are consistently outvoted by an opposing majority, which may cause them to decide to not vote.¹⁹⁹ However, depending on the mobility of the voter, a mobile voter can simply move to another place where their voting and participation could make a difference since they are aligned with the majority – they will then “add” their vote 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, and continue to not participate because their votes never win, will become permanently “discouraged” and, thus, drop out of the system. A similar theory underlies the difference between “additional” job seeker and the “discouraged” job seekers in unemployment theory.²⁰⁰ For the more mobile workers/voters, their unemployment/non-participation is transitory and similar to the frictional unemployment. For the less mobile worker/voter, their unemployment/non-participation could be more permanent requiring government encouragement and outreach so as to sustain their faith in the opportunities to participate in the economy/democracy.

The solutions to structural unemployment (i.e. the situation of the less mobile worker) is more complex as they are often directly tied to geographical disparities in income and mobility and are often exacerbated by gerrymandering when political managers can determine whose vote is important. Gerrymandering in the political context will exacerbate structural unemployment. Gerrymandering may effectively prohibit relatively mobile voters from moving to another jurisdiction, since jurisdictional lines are in constant flux; they don’t know where they should move to. This creates even more immobile voters. Many solutions try to attack these structural problems and often these solutions have analogues in both unemployment and voting contexts. For example, Frug attacks the lack of mobility by combining the districts into multi-district

¹⁹⁷ Similar to mobility of workers, tailored tax policies can help structural issues. *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).

¹⁹⁸ *See* Charles Tiebout, “A Pure Theory of Local Expenditures,” 64 J. POL. ECON. 416, 418-420 (1956).

¹⁹⁹ There is an argument that these groups who are consistently outvoted amount to a structural harm and should have standing to sue. *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--one I am exploring in a forthcoming article--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.”). This article only suggests that these structural concerns may result in expressive harms that discourage participation causing a potential voter to decide not to vote. This decision to not vote is qualitatively different from a non-voter created by frictional issues.

²⁰⁰ *Cf.* EHRENBERG & SMITH, at 235 – 237.

regions so less mobile voters can vote and participate in, without moving to, other jurisdictions in the region where their votes will count in what they perceive to be more meaningful elections.²⁰¹ This solution is similar to a telecommuting or mass transit solution in employment whereby the city provides infrastructure to allow less mobile job seekers to work in another area of the region where there may be more jobs without actually moving.²⁰² In this sense, the solutions are mutually reinforcing. Regionalization would improve the diversity taken into account in democratic decisions, and these democratic decisions would probably help the disadvantaged and immobile voice their opinions on a larger scale with more input into public transportation and infrastructure decisions thus facilitating their mobility. In addition, the concern for infrastructure important in alleviating unemployment is itself integral to creating a communal integrity necessary for regional democracy. If there is no available mass transit, it is difficult for voters to participate in town meetings on the other side of town where they want their input felt.

Similar to the mobility concerns, great disparities in endowed skills may also structurally prevent voting. Education, not just information, is critical to improve voter skills. Schools can get involved in the training of voters not only in voting technology but also the benefits and opportunities for political participation. While there is always a belittling of school elections just as a popularity contest, the focus on popularity is a result of a consumer-centrism, which focuses on the vote and outcome rather than the process as an important “life experience.”²⁰³ Current political parties are still trying to gather workers in between contracts (a “swing voter”) instead of fostering and believing that skills must be trained to empower new voters/new consumers.²⁰⁴ The consumer-centric model will assume that everyone has the necessary requirements to vote just like the necessary skills to shop. However, under a labor-centric model, just as industries have no incentives to improve human capital of workers (a public good), the state has to take on that role. So, political parties merely further a zero-sum game for current workers; the government must foster the “employability” of the current non-participants. There is a similar role in the human capital of voters as a necessary public good. Justice Thomas noted, “[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.”²⁰⁵ Taking this one step further, it is also the role of public schools not only to train students for working in the economic marketplace but also the political marketplace – it is not enough to just “promote” the ideas of democracy to solve voter unemployment.

A third type of unemployment is demand-deficient (cyclical unemployment), which track “fluctuations in business activity.”²⁰⁶ Unemployment rises, because the national economy and

²⁰¹ See GERALD FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 107- 109 (1999).

²⁰² David Luberoff, “Right on the Money,” GOVERNING MAGAZINE (Sept. 2000). A similar solution occurs when unions bargain *regionally* by increasing the clout of geographically immobile workers in a localized community. See Irvin M. Freilich, Comment, “De Facto Coalition Bargaining,” 62 GEO. L. J. 325, 355 (1973).

²⁰³ Eloria Newell James, “Students learn the value of choice,” Delta Democrat Times, Oct. 6, 2005, *available at* <http://www.ddtonline.com/articles/2005/10/05/news/news2.txt>.

²⁰⁴ Marshall Ganz, “Voters in the Cross-Hairs: How Technology and the Market Are Destroying Politics,” THE AMERICAN PROSPECT 16 (Winter 1994), at 100-109.

²⁰⁵ *Zelman v. Simmons-Harris*, 536 U.S. 639, 681 (2002) (Thomas, J., concurring).

²⁰⁶ EHRENBERG & SMITH, at 581.

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 favored "candidate" or party lost in the primary or were expected to lose in the general election. Similar to the 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 to potential support dropping out, because their favorite is all but certain to lose. The cascading effect caused by poll numbers and predictions of failure by commentators may lead to a sudden loss of financial and voter support necessary to sustain campaigns for increasing voter turnout. This is exemplified by the decline of Howard Dean's campaign as his money dried up and, along with it, his potential voters. The voting margins might have been tighter in certain districts had there been money and effort to engage voters and increase their motivation to ensure Dean's success or even to invest in a search for alternative Democratic candidates for "employment." The opposite phenomena probably lead to the Kerry victory as increased demand for voters lead him to increase campaign funds in more states and thus mobilize more voters.²⁰⁷ Similar cascade effects in management would lead to downsizing in the corporate sector, as managers cut more funds and employees quit at a higher rate than necessary, because of a perceived threat of recession or financial trouble induced by economic statistics or competitor's profitability.²⁰⁸ These unemployed voters are the voters who do not participate, but would have participated, save for the additional money or the belief that their party/candidate is going to succeed. The voters do not vote because the firm is essentially signaling to them that this is a lost cause and have no money for them to campaign for them. Like the unemployment context, cyclical unemployment does not require a structural solution, but is an eventual result in any voting context and varies with the ability of candidates to sustain their fundraising campaigns along with their perception of possible success.

A fourth type of unemployment is "seasonal." These unemployed workers are analogous to issue voters. 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 be attracted and turn out for particular issues.²⁰⁹ In contradistinction to cyclical voters, seasonal (single-issue) voters, like seasonal employees, are not initially contracted to a particular firm/party, but come and go depending on the fads of a particular time or season – they are "energized" by the issue only.²¹⁰ These potential voters are usually disengaged from the system, possibly discouraged, or never chose to participate. However, one particular issue (e.g. one referendum issue) or one particular candidate may inspire him/her to vote in a one-time effort. Whether these voters will be continued to be engaged in party politics remains to be seen and whether or not single issue voters are normatively desirable depends on one's view of the impact of single-issues on the promotion of deliberation.

²⁰⁷ Duncan Watts, "The Kerry Cascade," SLATE, Feb. 24, 2004 (2004), at <http://slate.msn.com/?id=2095993&>.

²⁰⁸ See John A. Byrne, "The pain of downsizing," BUSINESSWEEK, (May 9 1994), at 60.

²⁰⁹ See EHRENBERG & SMITH, at 588.

²¹⁰ See Christopher W. Carmichael, "Proposals For Reforming The American Electoral System After The 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, And Negative Balloting, 23 HAMLIN J. PUB. L. & POL'Y 255, 308 n. 250 (2002).

By analogizing potential voters who do not vote to be a problem like unemployment, there is now an equal concern for why potential voters do not vote and a starting point for analysis by creating different categories of non-voters. The unemployment analogy can guide us when examining aspects of the non-voting 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.”²¹¹ It would be important to have longitudinal studies of non-voters and reasons for their failure to participate. From a labor economics perspective, structural unemployment is one of the main justifications for government intervention, because second-order regulation does not guarantee first-order values such as specific adjustment of employees from one sector to another sector or protection of the unemployed who are too old to return to the workforce.²¹² 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 the system as a result of vote dilution, dominance by outsider special interests, and getting 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.

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

In this section, I will briefly outline how a labor-centric model can apply to various issues in the law of democracy and how this model can help further the debate. As this article only serves to map out the issues, these various topics are only suggestions as to how the development of the labor-centric models can proceed in subsequent articles.

1. *How to get voters to the polls:* There are two separate issues for consideration here. One is the trade-off between work and leisure, i.e. the micro-economics of the motivation to work. The second is the structural problems that cause non-participation, i.e. the macro-economics of structural unemployment. For the latter, under labor-centrism, this question then is not *how* to “attract” voters like consumers, but how to minimize structural unemployment (i.e. discouraged voters) as discussed earlier, but more policy proposals would be needed. For the former, one must also generally separate the normative ideals imposed on voting and voters and the actual motivations for voting. Strategies to motivate people to vote can be based on very similar grounds as motivating regular people to trade leisure for work. There is some evidence that an increase in access does not necessarily improve voter turnout simply because, unlike “consumption” processes, voters usually derive little inherent satisfaction from the voting process.²¹³ For the worker, there are several motivation techniques: one can use persuasion based on normative virtues of working – the community building, the feeling of participation in the national economy, one’s productivity. One can also try to discuss the other factors for work – earning money, getting self-respect, taking control of one’s life (financial independence), feeling of control (particularly if you are managing). To address all of these strategies may help policy-makers think up alternate mechanisms to encourage voting instead of just touting the normative vision (your duty to the system to empower your voice). These alternate approaches can include

²¹¹ See EHRENBERG & SMITH, at 565.

²¹² See EHRENBERG & SMITH, at 578 n. 21.

²¹³ See *supra* note ??.

more transparency in the pork barreling system – individual voters not just corporations should understand how a representative is getting jobs and money into your district. It ties the representative not just to the unbounded corporation (who may get a pork barrel project and use the money to develop its overseas operations) but rather tie pork barreling to the geographic community – there is thus a wage-like incentive. Setting up minority political action committees and increasing minority power within a district will attract political attention and thus promoting minority self-respect – they can become respectable political groups. This is akin to a management tool of forming committees to empower potentially alienated groups.

2. *The naturalization of entitlements to vote.* It is true that there is no perfect proxy to determine who will predictably labor most effectively in the political process and thus determine who qualifies to participate in a particular demos. However, active debate over the design of proxies will break the naturalization or fetishization of certain proxies that bestow on “qualified” persons a feeling of an “entitlement” to vote. This “entitlement” might lead to complacency and thus less productivity from voters/political participants.²¹⁴ The most prevalent naturalized proxy is residence. I will argue that that while a perfect proxy is impossible, and historical proxies like literacy, race, and gender were clearly imperfect, the reaction should not be: naturalize the vote and argue that all proxies are morally wrong – hence, the vote is for everyone - everyone has a voice and can voice it. The image is attractive; the utopian corollary for the naturalization of the vote is the consumer paradigm without price discrimination: people have a natural right to a product just like a right to public goods (police protection, passports, etc.). However, even with public goods, one must determine who is the public? Consumer-centrism encourages a focus on access issues without concern for demos boundaries because we have accepted these “naturalized” boundaries for every demos (e.g. residence becomes a default proxy for many communal decisions like school elections). Naturalization neglects a fundamental need to deliberate about how to bound the demos in some way.²¹⁵ The important question is which qualification is the most acceptable. Labor-centrism makes us aware that qualifications and proxies inherently exist as qualifications exist for any job out there. For example, today proxies exclude: illegal immigrants, non-residents, minors, and felons in most elections (and most jobs). The labor-centric model also notes that even if there were no qualifications, the labor of voting requires other implicit qualifications that disenables certain people from voting – language barriers, ballot box complexities, and lack of time to become interested in politics.²¹⁶ What labor-centrism encourages is not more proxies, but rather a transparent discussion of how proxies are designed and why they are applied to a particular demos much like open hiring criteria for firms.

3. *Reframing the Coalition District.* One alternative method to frame the choice between the coalition district and the majority-minority district is not just that there is more or less probability that the preferred choice of the national minority will be elected, but rather whether, in the long run, the minority will become better laborers in the political process after gaining experience *controlling* the district by promoting them into management (in a majority-minority) district or

²¹⁴ Voters become akin to “nobility” forgetting the struggle for work and pay and also the struggle for political participation.

²¹⁵ ROBERT DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* 96 – 98 (1982) (calling it a dilemma of democracy).

²¹⁶ This phenomena is called the “persistent wage differential,” which will be discussed in a later section.

giving them more meaningful work as coalition partners (in a coalition district).²¹⁷

4. *Rethinking choice in elections.* Under a labor-centric model, the choice in election and voting is less about “free-will” but more about “voluntariness.”²¹⁸ Consumption only focuses on “free-will,” which just examines whether there is a choice and once an individual chooses a particular choice, he/she is assumed to have *preferred* that choice. On the other hand, labor-centrism is concerned not just with the existence of choice but *how* voluntary (or the intensity of preference) for that choice. Labor-centrism understands the influences of race, geography, human capital limitations, ability, disability, and wage levels in employment choice and the inherent pressures of being unemployed (like being politically disempowered). Labor-centrism also locks in stable voluntary preferences with particular firms/candidates, rather than consumer-centrism’s focus on ephemeral choices. Stable preferences are hopefully fought through with voluntary deliberation rather than the consumer choice’s momentary preferences.²¹⁹ People who choose jobs are similar to people who choose political parties and must defend their choices from stereotypes and often actively, but informally, “campaign” for their company or party when confronted by any opposition even if they do not necessarily agree with company policies. They are investing their time into the political party. People usually do not actively debate the merits of their choice of laundry detergent, however, they do defend their political and occupational affiliations.²²⁰

5. *Examining intersections between election law and voter circumstance.* Amy Gutmann has written on this issue specifically, but “law on democracy” has not followed up on her analysis considering the intersections between election law and welfare law. 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

²¹⁷ See Richard H. Pildes, “Is Voting-Rights Law Now At War With Itself? Social Science and Voting Rights in the 2000s,” 80 N.C. L. REV. 1517, 1572 (2002) (“Those candidates [from coalition districts] might not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.”)

²¹⁸ ALAN WERTHEIMER, COERCION (1987).

²¹⁹ ALAN WERTHEIMER, COERCION 294 – 306 (1987).

²²⁰ See, e.g., Rolf van Dick, et. al, “The utility of a broader conceptualization of organizational identification: Which aspects really matter?,” 77 J. OF OCCUPATIONAL AND ORGANIZATIONAL PSYCHOLOGY,” 171, 172 – 3 (2004). (describing the complexity and affect of these affiliations).

subcultures.”²²¹

Problems in election law like the odd-shaped gerrymandered districting is less the result of differentials in race preferences, but the growing re-segregation caused by zoning, school inequalities, growing income inequalities, etc. To focus on re-districting as the important political exercise, instead of healing underlying issues, complies with a binary picture created by the consumption paradigm: those who are willing to buy Republican versus those who are willing to buy Democrat or “the red versus blue states.” Under a consumer-centric paradigm, districting becomes a marketing exercise – how to divvy up market share among the corporations without concern for improving the situation of the actual customers: blacks just love product X and whites just love product Y without understanding why. By shifting to a labor-centric model, we can add more variables into a complex picture and differentiate among different types of non-voting like what we have done with unemployment. In addition, motivations and factors for voting within each district needs to be studied – is this a red district, because this is a Christian district, or because this is a rich district, or etc.? Studying “subcultures” and not just race is important to dissect the concept of “interests” and “structural impediments” to voting, since, under the labor-centric model, interest evaluation helps election officials create a more nuanced proxy for the ability and willingness to participate in local geographic elections.

6. *Campaign Contributions and The Lack of Institutional Investors*. McConnell and its predecessors have set the road for more regulation on campaign financing limits and contribution limits under a participatory self-government rationale.²²² However, lessons from corporate law indicate that this participatory self-government rationale does not necessarily comport with campaign financing limits. With these regulations, each “shareholder” in the political party system may be diffused to smaller PAC or individual contributors, but this diffusion dilutes the relative power of shareholders as a group vis-à-vis the political party management because coalition-building becomes more difficult. In corporate law, the original hope for corporate responsibility does not lie in diffuse individual shareholders, but rather the mediating institutions that aggregates the power of individual shareholders (i.e. mutual funds). However post-Enron, there are concerns whether these mediating institutions are capable given the questionable dealings between bankers and their invested targets. ERISA exists to protect the employee’s investment by establishing fiduciary duties. Similar duties could be applied to political parties as mediating institutions responsible for aggregating voters/employee investments (either investments directly via taxes paid to political parties through federal and state funding of campaigns or as tax deductible donations), along with their labor investment in the political process. Under a pure share-holder analogy, the most prominent institutional actors may be the special interests, however, examining this from a labor-centric position, voters are still out of the loop, since these institutional agents are usually not focused on voters but on their constituents, which may include voters, but their shareholders generally include other businesses, unions and other institutions making contributions.

V. THE LABOR-CENTRIC VISION: LABOR LAW AND DEMOCRACY

²²¹ AMY GUTMANN, *LIBERAL EQUALITY* 226 (1980) (emphasis added).

²²² See generally Richard L. Hasen, “Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission,” 153 U. PA. L. REV. 31 (2004).

The importance of labor law for the law of democracy is not in a comparison of statutes, but labor does provide a model for a relationship between institutions and collections of individuals under threat of market pressures, market alienation, and weak bargaining power. Just as unionization was a response to corporate excessiveness, political parties have been considered a “necessary evil” from the founding. “Prominent members of the founding generation would have disagreed with the Court's suggestion that representative democracy is “unimaginable” without political parties, though their antiparty thought ultimately proved to be inconsistent with their partisan actions. At best, some members of that generation viewed parties as an unavoidable product of a free state that were an evil to be endured, though most viewed them as an evil to be abolished or suppressed. Indeed, parties ranked high on the list of evils that the Constitution was designed to check.”²²³

Labor economics and law, while losing prestige within academy, has an important role to play in providing an alternative paradigm. The fundamental difference between labor economics and consumer economics is the primacy of a second-order singular maximand in the consumer-centric vision - profit for shareholders - which depends on an easy to determine material signal, like profit. In contradistinction, first-order concerns focusing on worker circumstances are more acceptable as values when regulating labor. The singular maximand vision of the consumer fails to account for the more complete social vision of the laborer. In labor law, we often discuss first-order values and efforts to monitor mediating institutions in their obligations to their employees. We can discuss the fiduciary duties of corporations (and corporate management) for laborers without a need for a singular maximand, because there is a totality of circumstances approach – this is a consequence of labor-management being a first order not a second-order concern. We are discussing a relationship that is more than just mediated by a single signal like price. We have statutes like OSHA and ERISA. This labor vision is more attuned to both group harms and individualistic harms where both group labor law and individualistic employment law paradigms exist since a laborer, unlike a consumer, is considered both part of the “group” of employees, race, etc. and has an individual contact.²²⁴ Thus, labor-centrism, unlike consumer-centrism is attuned to both, not just one, “tectonic plates” of election law: the individualistic interest-based approach versus the group-based geographic approach.²²⁵ Labor-centrism also permits a sensitivity to Pildes’ “expressive harms” against individuals and groups in the election context, i.e. providing election law the ability to denote the expression of social boundaries rather than protection against certain material harms.²²⁶

²²³ *California Democratic Party v. Jones*, 530 U.S. 567, 591 n. 2 (2000) (Stevens, J., dissenting) (citations omitted).

²²⁴ For an exemplar of this relationship, see the jurisprudence on “concerted activity” in labor law. *See, e.g., NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

²²⁵ Richard Pildes, “Avoiding Balancing: The Role of Exclusionary Reasons In Constitutional Law,” 45 *HASTINGS L. J.* 711, 711 (1994) (“Voting-rights controversies today arise from two alternative conceptions of representative government colliding like tectonic plates. On one side is the long-standing Anglo-American commitment to organizing political representation around geography. As embodied in election districts, physical territory is the basis on which we ascribe linked identities to citizens and on which we forge ties between representatives and constituents. On the other side is the increasing power of the Voting Rights Act of 1965 (VRA), which organizes political representation around the concept of interest. The Act prohibits the dilution of minority voting power and thereby necessarily ascribes linked identities to citizens on the basis of group political interests. Whenever these two plates of territory and interest collide, surface disturbances in voting-rights policy erupt.”).

²²⁶ *See* Richard H. Pildes, “Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism,” 27 *J. LEGAL STUD.* 725, 760 – 1 (1998).

Pildes and Niemi define “expressive harms” as: “harms [that] focus on social perceptions, public understandings, and messages; they involve the government's symbolic endorsement of certain values in ways not obviously tied to any discrete, individualized harm. A significant tension, therefore, exists between recognition of expressive harms and traditional requirements of individualized wrongs.”²²⁷ Pildes and Niemi’s article on expressive harms in voting redistricting observes, in clearly a first-order vision of election law:

“Whether any of these federal court decisions merely appear to be in tension with each other, or directly conflict, cannot be determined without an intensely local appraisal of each geographic context. At the least, however, these decisions, and others like them, reveal considerable uncertainty as to how courts and other bodies interpret and weigh compactness against other relevant redistricting values. This is not surprising: compactness is the conceptual point at which the tension between the traditional American commitment to territorial districting and the [Voting Rights Act (“VRA”)] concern for fair representation of group interests must be resolved. The appropriate trade-off between enhancing minority representation and respecting the interests reflected in a territorial-based districting system is both elusive and an issue of considerable political and philosophical conflict. In the absence of some guidelines for making this trade-off, the likely result will be increasingly inconsistent judicial decisions and manipulative uses of the VRA by districting bodies. One alternative is to develop quantitative approaches for evaluating district appearance.”²²⁸

Their conclusion is consistent with a consumer-centric price mechanism or need for a clear judicial rule, like one person one vote,²²⁹ to regulate the consumer/voting relationship uniformly without a consideration for context. Labor economics have been concerned that despite comparable worth of suppliers, there are still uncertain reasons for “persistent wage differentials” between laborers who provide comparable service.²³⁰ The fact that wages have differentials is not the real harm, because there are always differences between occupations, but the harm is expressive, since the differential is perceived to be systematic and persistent between employees working at jobs of *comparable worth*.²³¹ The comparable worth analysis is not pursued by simple rules like one-person-one vote or simple wage comparisons, but rather by examining the context of how a job’s worth is determined: e.g., whether a particular race/gender dominate a particular job. The concern with voter dilution particularly with regards to disadvantaged groups is a very analogous issue in the voting context.²³² While voters are supposed to be of comparable worth, they are given persistently different values by their parties. Labor-centrism, which includes the combination of both labor and employment law, can express these boundaries between collective

²²⁷ Richard H. Pildes & Richard G. Niemi, “Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno,” 92 MICH. L. REV. 483, 513 - 514 (1993).

²²⁸ Richard H. Pildes & Richard G. Niemi, “Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno,” 92 MICH. L. REV. 483, 535 - 36 (1993).

²²⁹ Under a consumer analogy, one person’s consumption is equivalent to another’s vote leading to the mistaken simplicity of “one person one vote.” See generally Grant M. Hayden, “The False Promise of One Person, One Vote,” 102 MICH. L. REV. 213 (2003).

²³⁰ EHRENBERG & SMITH, at 420, 450. A similar assessment of the categorization for employment discrimination may also be analogized to the discrimination in voting.

²³¹ EHRENBERG & SMITH, at 420, 454 – 459.

²³² Heather Gerken, “Understanding the Right to an Undiluted Vote,” 144 HARV. L. REV. 1663, 1725 - 727 (2001).

labor and corporations along with individual boundaries within that structure.²³³ The relationship between labor and the corporate structure is elusive with infinite variations in different corporate environments. This variation is accepted by labor economics even within a framework of competitive economic markets. Consumer-centrism is based on simple price determination not such a nuanced totality of circumstances approach. If there is a concern with expressive harms and contextual factors in relationships between groups of individuals and the structure, a labor relationship analogy is more apt than a consumer one.

Under basic economics, as a laborer, the voter is a supply mechanism, while, as a customer, the voter is a demand mechanism. Under this simplistic distinction, supply analysis is more attuned and salient to what are endowment differences: geography, inputs (like time, leisure), facility limitations, human capital, capital, and income levels. Similarly, in voting, endowment effects are important: “citizens with more education and income, employed individuals, those who own their homes, those who have a longer length of time at current residence, professionals, women, older individuals, married individuals, and Blacks are more likely to register and vote. . . naturalized citizens are less likely to register and to vote than native-born citizens, net of other effects.”²³⁴ There is still choice under both labor and consumer paradigms, however, voting is less of a consumerist choice but an employment/supply choice. The first can be considered a “dispositionist” choice (whether you are willing or can pay for the choice), while instead the second conveys a “situationist” choice, the choice is viewed through the influence of contextual factors that make up the choice - location, level of incentives, preservation of continuity, tradition, etc..²³⁵

Labor law is still relevant to teach us how to formulate organization of employee participation and problems with localized democracies when they are competing quite openly with consumerist tendencies while demand-side consumerism focuses attention on access issues. The laborer, like the voter, is not totally tied to geography nor completely mobile. The voter and laborer’s interest, unlike the consumer’s interest, is not simply the wage or payment ability. Labor interests, like voter interests, are quite specific *and* tied to very similar individualistic factors like geography, age, race, etc..²³⁶ Attuning to these specific factors also creates sensitivity to harms against the *expression* of these individualized interests. Cynthia Estlund notes:

“Just as the infusion of minority and individual rights into the political process has brought turmoil and ferment to the “law of democracy,” the recognition of heterogeneity and individual rights within the workplace poses challenges for the law of democracy within the

²³³ “The core of American labor law has been essentially sealed off--to a remarkably complete extent and for a remarkably long time-- both from democratic revision and renewal and from local experimentation and innovation. “ Cynthia Estlund, “The Ossification of Labor Law,” 102 COLUM. L. REV. 1527, 1530, 1611 (2002) (finding that labor law must revitalize itself by confronting the law’s boundaries that “seal off” labor and labor law).

²³⁴ Loretta E. Bass & Lynne M. Casper, “Are There Differences in Registration and Voting Behavior Between Naturalized and Native-born Americans?”, U.S. Bureau of the Census, Pop. Div. Working Paper No. 28 (1999), available at <http://www.census.gov/population/www/documentation/twps0028/twps0028.html#abstract>.

²³⁵ See generally, Jon Hanson & David Yosifon, “The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture,” 152 U. PA. L. REV. 129 (2003).

²³⁶ See James B. Rebitzer, “Radical Political Economy and the Economics of Labor Markets,” 31 J. OF ECON. LIT. 1394 (1993).

workplace--that is, for labor law. The scholarship that rises to those challenges and contributes to that enterprise may yet, incidentally, reclaim a place for labor law within the core of the legal academy.”²³⁷

Perhaps this call for an *intra-disciplinary* approach²³⁸ could be a two-way street – the way to revitalize labor law is not just to call in theories on the “law on democracy” but also to re-assess how the lessons (both successes and failures) of unionization and regulation of the labor relationship can be applied to the “law of democracy.”²³⁹ Voters can look to union powers for inspiration.²⁴⁰

VI. CONCLUSION

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.”²⁴¹ The political marketplace analogy’s susceptibility to laissez-faire interpretation is actually attractive, because it offers a theoretical justification for scholars who believe the “political marketplace” can be self-regulating without much judicial intervention. The linking of the political marketplace with a consumer-centric vision only accentuates and bolsters these claims and the attractiveness of a self-regulating political market, because the voter-consumer as sovereign is a strong poetic and ultimately accepted mainstream view of what “practically” exists and *should exist* in our democratic-consumption focused society. However, as this article hopes to point out, an alternative paradigm removes that initial “susceptibility” to laissez-faire interpretations, because the experiments in laissez-faire employee-employer relationships have generally been discredited.²⁴² Lay-offs, sexual harassment, racial discrimination, pension fund fraud, etc. are commonplace in our daily lives and we accept direct government regulation through employment and labor law as necessary for protecting employees. Without this initial step towards laissez-faire interpretation, the practical critiques can rely and be guided by the marketplace metaphor

²³⁷ Cynthia Estlund, “Reflections on the Declining Prestige of American Labor Law Scholarship,” 23 COMP. LAB. L. & POL. J. 739, 800 (2002).

²³⁸ This is in contrast to the movement in legal studies to apply scholarship from outside of legal academe to topics within legal academe. Instead, lessons from the specialized fields of legal academe should learn from each other.

²³⁹ Cynthia Estlund, “The Ossification of Labor Law,” 102 COLUM. L. REV. 1527, 1530, 1611 (2002) (finding that labor law must revitalize itself by confronting the law’s boundaries that “seal off” labor and labor law).

²⁴⁰ For example, recently, the Maoist party in Nepal called a “general strike” including a strike of the elections. The consumer-centric view, including many of the reports, have called this a “boycott,” however, there is significant problems with this view: (1) the boycott on the demand side is usually pursued by political organizations influencing consumption decisions; (2) corporations fear boycotts because lower consumption equates to lower profits even in a monopoly situation. However, labor strikes are different. Corporations do not necessarily need labor to succeed in its goals. The power of the “strike” is more akin rather than a boycott, because there is only a required set of labor needed to win – sufficient to beat the competitors – a loss of some participation is not sufficient as the threat of scab workers is always plausible. Their strike (though combined with violence just like many labor strikes. Compare Y.P. Rajesh, Nepal vote credibility seen hit by boycott, threats, Reuters, Feb. 6, 2006, *available at* http://www.boston.com/news/world/asia/articles/2006/02/06/nepal_vote_credibility_seen_hit_by_boycott_threats/ (calling the low turn-out a product of a boycott) *with* Election plans go ahead in Nepal on eve of general strike, Reuters, Jan. 25, 2006, *available at* http://news.yahoo.com/s/afp/20060125/wl_asia_afp/nepalelections_060125085603 (calling the low turnout at the election part of the general strike).

²⁴¹ Cole, “First Amendment Antitrust,” at 239.

²⁴² See generally, *Lochner v. New York*, 198 U.S. 45 (1905).

while also bolstered by its rhetorical advantages. Analogies between the private and public are a useful exercise, since there is much to learn from both experiences; but by cutting off the political marketplace metaphor from the practical critiques, there is an attempt to reinforce the dichotomization between “public” and “private” experiences even though the voter/employee experiences them in many similar ways. I believe a reframed metaphor is still useful, least of which is to counter the consumer-centric vision of democracy. Finally, one may note that the sources of judicial opinions throughout this article come from strong “conservative” voices – Justices Powell, Scalia, Thomas, and Judge Becker. This is a hopeful sign. By taking some of their basic observations as conservative spokespersons to fashion a view that imports progressive labor ideas into democracy, there is some hope that there may be a bipartisan foundation for a labor-centric view of democracy if not normatively, at least positively.