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THE USES AND ABUSES OF INCUMBENCY: *PEOPLE v. OHRENSTEIN* AND THE LIMITS OF INHERENT LEGISLATIVE POWER

*JAMES A. GARDNER**

RARELY have elected legislators been held in lower esteem by the voting public than they are now. The crisis in the savings and loan industry and the ethical lapses of the so-called "Keating Five"[1] are only the latest events to reinforce a growing public perception that legislators are single-minded seekers of reelection whose desire for job security far exceeds their desire or ability to fulfill the public duties with which they are entrusted. Recent public dissatisfaction has taken the form of renewed calls for campaign finance reform[2] and for higher legally binding

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1. The Keating Five are five United States Senators who were accused of improperly intervening with federal banking industry regulators dealing with a savings and loan institution run by Charles H. Keating, Jr. The Senators' intervention was allegedly prompted by Keating's large contributions to their reelection campaigns. *See, e.g.*, Magnuson, *You Sold Your Office*, Time, Nov. 26, 1990, at 35 (describing the senators' involvement with Keating). These charges were brought before the Senate Ethics Committee, *see Down the Road: The Keating Five*, 48 Cong. Q. W. Rep., at 1855 (June 16, 1990); *Keating Five Ask Exoneration As Panel's Hearings End*, 49 Cong. Q. W. Rep., at 169 (Jan. 19, 1991), which found that one Senator had violated Senate ethical rules, and that the other four had used poor judgment. *See* Berke, *Ethics Unit Singles Out Cranston, Chides 4 Others in S. & L. Inquiry*, N.Y. Times, Feb. 28, 1991, at A1, col. 1. This episode has taken part against a larger backdrop of massive bank failures in the savings and loan industry that have required huge federal appropriations to cover insured deposits. Congress has taken much of the blame for these events. *See, e.g.*, Greenwald, *Warning: Further — and Maybe Bigger — Federal Bailouts Ahead*, Time, Dec. 18, 1989, at 40 (stating that requirements designed to aid the savings and loan industry have pushed many into extinction); *Partisan Knives Are Drawn as Thrift Crisis Builds*, 48 Cong. Q. W. Rep., at 1937 (June 23, 1990) (describing Democrat's assaults on the federal administration's mishandling of the savings and loan crisis).

2. In 1990, Congress responded to public pressure for campaign finance reform, but failed to enact legislation. The House of Representatives passed the Campaign Cost Reduction and Reform Act of 1990, H.R. 5400, 101st Cong., 2d Sess. (1990), and the Senate passed the Senatorial Election Campaign Act of 1989, S. 137, 101st Cong., 2d Sess. (1990), but neither bill became law. *See generally Campaign Finance Measures*, 48 Cong. Q. W. Rep., at 2617 (Aug. 11, 1990) (summarizing provisions of these bills). Even this ultimately unfruitful effort was accomplished only with the greatest difficulty. *See* Magnuson, *Search and Seizure on Capitol Hill*, Time, Mar. 7, 1988, at 23.

In New York, calls for campaign finance reform have come not only from the public, *see* Editorial, *Campaign Reform: The Next Moves*, N.Y. Times, Apr. 1, 1989, at 26, col. 1, but from a variety of official bodies as well. *See, e.g.*, State-City Comm'n on Integrity in Gov't, 1 Rep. and Recommendations, at 29-39 (Jan. 1987) (commission established jointly by Governor of New York and Mayor of New York City recommends legislation to eliminate opportunities for abuse and corruption under present system of campaign finance); State of New York, Comm'n on Gov't Integrity, Campaign Financing: Preliminary Rep. (Dec. 21, 1987) (recommending creation of an independent campaign financing enforcement agency, detailed disclosure of contributions, public financing of elections,

ethical standards[3]—measures that seem to be readily forthcoming when they involve restraining the executive branch, but which legislatures at all levels of government have bitterly resisted imposing on themselves.[4]

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and limits on direct contributions from private interests); State of New York, Comm'n on Gov't Integrity, *The Albany Money Machine: Campaign Financing for New York State Legislative Races* (Aug. 1, 1988) (calling for immediate implementation of the recommendations of the Commission in December 1987 and recommending further limits on contributions to party committees).

For examples of calls for campaign finance reform in other states, see Mydans, *Civics 101 on Tape in Arizona, or, "We All Have Our Prices,"* N.Y. Times, Feb. 11, 1991, at A1, col. 1 (Arizona); *California Says Yes to Campaign Reform*, N.Y. Times, June 14, 1988, at A26, col. 1 (California); Comment, *State Campaign Finance Law: An Overview and a Call for Reform*, 55 Mo. L. Rev. 937, 949-60 (1990) (Missouri); Verniero, *Campaign Finance Laws Need Changes*, N.Y. Times, Feb. 25, 1990, § 12NJ, at 14, col. 1 (New Jersey).

3. *See, e.g.*, *Cashing In On Ethics*, Time, July 3, 1989, at 16; Paddock, *Legislature Overwhelmingly Approves Major Ethics Bill*, L.A. Times, Apr. 20, 1990, at A3, col. 1 (stating that the public's desire for higher ethical standards is evident by a Los Angeles Times poll indicating that most voters view legislators as corrupt); Lynn, *Panel, Ending Long Inquiry, Urges Legislation on Ethics*, N.Y. Times, Sept. 19, 1990, at B4, col. 1 (stating that the New York State Commission on Government Integrity has stressed the need for ethical reforms); Suro, *Powerful Texas Politician is Indicted*, N.Y. Times, Dec. 29, 1990, at 9, col. 4 (in her successful 1990 campaign for governor of Texas, Ann Richards campaigned on a promise for tougher state ethics legislation). In New York, limited ethics legislation was enacted in 1987 after a bitter fight. *See* Ethics in Government Act, 1987 N.Y. Laws, ch. 813; Governmental Accountability, Audit and Internal Control Act, 1987 N.Y. Laws, ch. 814.

4. For example, the Senate recently exempted itself from legislation imposing government-wide limits on outside income and employment. *See* Ethics Reform Act of 1989, § 601, 103 Stat. 1716, 1761-62 (amending § 505 of Ethics in Government Act of 1978, 5 U.S.C. § 505 (1988)). *See also House, Senate Differ Markedly on Pay-and-Ethics Package*, 47 Cong. Q. W. Rep., at 3129 (Nov. 18, 1989) (describing failure of Senate to approve House-passed plan combining salary increases with ethics rules). In the same legislation, Congress imposed a permanent ban on certain types of lobbying of executive branch agencies by former executive branch officials, but imposed only a one-year ban on similar lobbying of Congress by former congressional employees. *See* Ethics Reform Act of 1989, § 101(a), 103 Stat. 1716, 1716-17, 1719 (amending 18 U.S.C. § 207 (Supp. I 1989)).

Congress has routinely exempted itself from good-government legislation. Beginning with the earliest civil service legislation, Congress professionalized and eliminated patronage in the executive branch, but not in the legislative branch. *See* Civil Service Act, ch. 27, §§ 2, 14, 22 Stat. 403, 404, 407 (1883); Civil Service Reform Act, Pub. L. No. 95-454, § 2302, 92 Stat. 1111, 1114 (1978). Similarly, section 9(a) of the Hatch Act banned executive branch personnel from attempting to influence elections and from taking an active role in political campaigns, but imposed no such limits on congressional personnel. *See* Hatch Act, ch. 410, § 9(a), 53 Stat. 1148 (1939) (codified as amended at 5 U.S.C. § 7324). Congress has even exempted itself from equal employment opportunity legislation applicable to government hiring and firing. *See* 42 U.S.C. § 2000e-16(a) (1988).

As this work was going to press, the Senate passed a measure setting limits on honoraria that senators would be allowed to earn. The measure was accompanied by a pay raise designed in part to supplement lost future income. The measure also eased somewhat the existing restrictions on receiving gifts. *See* 49 Cong. Q. W. Rep., at 2128-29 (Aug. 3, 1991). The President signed the bill on August 14, 1991. *See* 49 Cong. Q. W. Rep., at 2396 (Aug. 31, 1991); Legislative Branch Appropriations Act, 1992, Pub. L. No. 102-90, 105 Stat. 447 (1991). Shortly after passage of the bill, the Senate Minority Leader introduced a resolution that would lift the new law's cap on donations of honoraria that could be made on a Senator's behalf. *See* 49 Cong. Q. W. Rep., at 2222 (Aug 10, 1991).

Last year, public dissatisfaction reached such a pitch that voters in three states approved constitutional amendments limiting the number of terms a legislator can serve.[5] The message was clear: after a certain amount of time in office, legislators can be presumed to harm the public good more than they help it.

In this environment, it is astonishing that the New York Court of Appeals, the state's highest court, has in a recent decision not only blocked a criminal prosecution of legislators who misused their office for political gain, but essentially ruled that such misuse is a legitimate legislative function. In *People v. Ohrenstein*,[6] the Minority Leader of the New York Senate was charged with theft of state property for using public funds to hire aides whose principal duties consisted of working on the reelection campaigns of several Senate Democrats. The court found that these expenditures had been specifically authorized by state law and that they constituted a legitimate exercise of legislative power; consequently, the court dismissed the most important counts of the indictment.

The hiring by legislatures and individual legislators of staff members, and the determination of their duties and responsibilities, although nowhere specifically authorized by constitutional grant, is generally thought nonetheless to be a necessary and legitimate legislative function. The prosecution of the Minority Leader in *Ohrenstein* for using his staff in a particular way thus raises some important and sensitive questions concerning the nature and scope of inherent[7] legislative power—questions with which the Court of Appeals failed meaningfully to grapple. This Article argues that the court's analysis is fundamentally flawed in that it overlooks important structural limitations on the scope of inherent legislative power implicit in a constitutional scheme of representative democracy. These limitations prevent a legislature from defining the scope of its own functions so broadly as to include campaigning for reelection.

A useful place to begin an analysis of the *Ohrenstein* decision is with a reminder of why abuse of incumbency is viewed so negatively in a democracy; Part I briefly discusses the reasons behind the American distaste for such practices. Part II examines the court's opinion in

5. The states were California, Colorado and Oklahoma. *See* Toner, *Quayle Leads Drive to Limit Congress Terms*, N.Y. Times, Dec. 5, 1990, at B12, col. 3.

6. 77 N.Y.2d 38, 565 N.E.2d 493, 563 N.Y.S.2d 744 (1990) [hereinafter *Ohrenstein III*].

7. The word "inherent" is used here interchangeably with "implied" and "incidental" to describe powers conferred upon legislatures by virtue of a constitutional grant of general legislative power. Some legislative powers may be implied from or incidental to express constitutional grants of specific powers; for example, the Supreme Court has found that the Constitution grants to Congress a spending power that is implied from or incidental to the expressly granted power to raise revenue. *See* United States v. Butler, 297 U.S. 1, 63-66 (1936). The powers discussed here, however, are implied from or incidental to the grant of legislative power in the first instance, rather than the grant of a specific enumerated power. Such powers are therefore "inherent" aspects of legislative power, even though they may also properly be viewed as "implied" or "incidental" in their derivation.

Ohrenstein and the reasoning leading to the court's conclusion. Part III reviews the concept of inherent legislative power, argues that it is subject to significant constitutional limitations under our system of government, and concludes that campaigning for office is not a part of the legislative power. Finally, Part IV examines the question of whether any limitations on inherent legislative power are justiciable in light of Speech or Debate Clause immunity and the political question doctrine, and concludes that neither of these doctrines poses an obstacle to judicial review.

I. ABUSE OF INCUMBENCY

A. *Methods of Abuse*

Among the colorful traditions of American politics, there are two main types of activity by which incumbents have abused their powers as elected officials. The first type involves the use of official power for private enrichment, whether for the benefit of the official or the official's friends and relations. This type of abuse generally takes the form of graft—for example, the personal use of public property or the obtaining of personal business opportunities through government contacts or information[8]—or patronage, which involves the use of governmental influence to obtain jobs or business opportunities for associates, friends, and relatives.[9] This type of incumbency abuse has been condemned at least since the time of Aristotle, who defined a tyrant as one who governs according to his personal advantage rather than the common good.[10]

The second principal form of incumbency abuse occurs when officials use the governmental resources at their disposal for the purpose of maintaining themselves in power. In extreme cases this type of abuse might take the form of outlawing political dissent altogether or stealing elec-

8. A classic explanation of graft is that offered by George Washington Plunkitt, a boss during New York City's Tammany Hall era:

> [M]any of our men have grown rich in politics. I have myself. I've made a big fortune out of the game, and I'm gettin' richer every day . . . .
> Just let me explain by examples. My party's in power in the city, and it's goin' to undertake a lot of public improvements. Well, I'm tipped off, say, that they're going to lay out a new park at a certain place.
> I see my opportunity and I take it. I go to that place and I buy up all the land I can in the neighborhood. Then the board of this or that makes its plan public, and there is a rush to get my land, which nobody cared particular for before. Ain't it perfectly honest to charge a good price and make a profit on my investment and foresight? Of course, it is. . . .

G.W. Plunkitt, *Honest Graft and Dishonest Graft*, in The City Boss in America 149, 149 (Alexander B. Callow, ed. 1976).

9. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 350 (1976) (discharge of public employees solely because of partisan nonaffiliation and failure to obtain sponsorship of party leader); Shakman v. Democratic Org. of Cook County, 435 F.2d 267, 268-69 (7th Cir. 1970) (taxpayer suit alleging patronage practices in Chicago and Cook County), *cert. denied*, 402 U.S. 909 (1971). For a recent, detailed study of patronage in Chicago, see C.G. Bowman, *"We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago*, 86 Nw. U.L. Rev. 57 (1991).

10. *See* Aristotle, Politics, Book III, ch. vii (Ernest Barker, trans. 1978).

tions through vote fraud. Other examples might include using government property—cars, planes, employees, etc.—as private campaign resources. Of course this type of abuse is related to the first: one cannot plunder the public till or dispense patronage unless one holds office. Still, in our society this politically oriented type of incumbency abuse is often viewed as worse than the private enrichment type because it deprives individuals of their most basic liberty, the right of self-government.

A fundamental aspect of American societal self-understanding is that the choice of who shall govern, and on what terms, is one for the people, and not for the government; indeed, as Jefferson wrote, whenever a government becomes unsatisfactory, "it is the right of the people to alter or to abolish it."[11] When the government uses its power to dictate or to improperly influence decisions about who gets to hold office, this basic right of political self-determination is undermined. Madison viewed the overcoming of this dilemma as the central problem of constitutional craftsmanship: "you must first enable the government to control the governed; and in the next place oblige it to control itself."[12] For the political heirs of men who pledged their "lives, [their] fortunes, and [their] sacred honour"[13] to the pursuit of political freedom and self-determination, there can be little doubt that the government's abuse of the powers of incumbency for the purpose of perpetuating its own power is one of the worst possible offenses against the polity.

B. *The Model of Equality of Political Opportunity*

Since, as will be shown below, the *Ohrenstein* case involves this latter and more serious form of incumbency abuse, it is worth taking a moment to define more precisely what amounts to political abuse of the powers of incumbency.

Imbedded in our political and constitutional culture is what might be called a model of equality of political opportunity. According to this model, individual citizens are entitled to an equal opportunity to conceive and to implement their own visions of what American society should be. They may do this by thinking about politics and society; by talking to others and attempting to persuade them; by appealing to the government to implement particular measures or to take certain actions; by supporting and voting for like-minded candidates for public office; and by running for public office themselves and attempting to garner electoral support. According to the model, no individual, group, or idea is privileged; all may compete on an equal footing for success in the political arena.

This model is rooted generally in the concept of republican democracy as a system of government in which politically equal individuals join to-

11. The Declaration of Independence para. 2 (U.S. 1776).
12. The Federalist No. 51, at 322 (J. Madison) (Clinton Rossiter, ed. 1961).
13. The Declaration of Independence para. 31 (U.S. 1776).

gether to practice self-government by choosing freely the identity of their rulers and the scope of the powers those rulers may exercise. The model is thus largely implicit in the form of government Americans have constitutionally created. Nevertheless, explicit evidence of the existence of the model can be found throughout the Constitution. For example, the equal protection clause has been held to establish a regime of one person-one vote,[14] and to require the equal distribution of the franchise where it is granted.[15] The first amendment guarantees the right to petition the government for a redress of grievances,[16] and has been held to establish a free marketplace of ideas.[17] The thirteenth amendment abolishes slavery, and with it the absolute political disenfranchisement of any United States citizen. The fifteenth, nineteenth, and twenty-fourth amendments severely restrict the ability of the state or federal governments to deprive citizens of the right to vote. The Guarantee Clause assures that the states will maintain republican forms of government.[18] All of these provisions, taken together, implement a model of equal political opportunity implicit in republican democratic self-government under which all citizens are entitled to participate in the political process in pursuit of their personal goals and aspirations and can expect to compete in the political arena solely on the basis of their ideas and qualifications.

Although the equality contemplated by this model is ambitious, it is nevertheless incomplete: nothing about the model contemplates equality of political outcomes—that all groups or ideas, for example, will be represented—or equality in the resources needed to achieve a particular political agenda. Some citizens may be more creative political thinkers than others, or more persuasive communicators, or more effective lobbyists, fundraisers, or campaigners. Consequently, inequality in the distribution of political ideas, or in the distribution of resources necessary to advance those ideas, does not offend the model so long as these inequalities reflect differing attributes and preferences among the citizenry. In this respect, the model takes the abilities and resources of citizens as given; equality of political opportunity means the ability to use to the same extent as anyone else the abilities and resources one was born with or has acquired.[19] For this reason, the model can be viewed as one part

14. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964).

15. *See id.* at 565; *accord* Harris v. McRae, 448 U.S. 297, 322 n.25 (1980) (right to participate "equally with other qualified voters"); Hadley v. Junior College Dist., 397 U.S. 50, 55 (1970) (right "to participate on an equal footing in the electoral process").

16. *See* U.S. Const. amend I.

17. *See* Texas v. Johnson, 491 U.S. 397, 418 (1989); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

18. *See* U.S. Const. art. IV, § 4.

19. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 316 (1980) (no constitutional violation for federal government to withdraw funding for abortions even though only way for poor women to exercise their right to an abortion is with such assistance); Maher v. Roe, 432 U.S. 464, 474 (1977) (by denying funds for abortion, the state has imposed no restriction on access to abortions that was not already there); Buckley v. Valeo, 424 U.S. 1, 51-54 (1976) (per curiam) (first amendment prohibits restrictions on speech individuals can

of a general constitutional regime that has been aptly described as one of "negative" rights;[20] it implements a system where everyone is equally free from government interference in the pursuit of political goals. Politics, in this view, is for the people, and governing is for the government; the people's elected representatives may not put a thumb on the electoral scale to tip the balance toward a favored party, candidate, or idea.

From this perspective, it is plain that the use for political purposes of the powers available to incumbents offends the model of equal political opportunity. The enactment of laws that erect obstacles to the candidacies of challengers, for example, offends the model by using the coercive powers of government to influence the outcomes of elections. In such cases, incumbents rely on their legislative powers rather than their appeal as candidates, and gain an unfair competitive advantage not available to challengers. The courts have understandably been quite hostile to such uses of government power, striking down laws that make it unduly difficult for challengers to gain a spot on the ballot,[21] or that relegate challengers to less favorable or less visible spots on the ballot.[22]

The model is no less offended when incumbents use the physical or financial resources available to them as government officials for their own election campaigns. To get elected, one must campaign for office; to campaign for office effectively, one must have access to the resources needed to travel, pay campaign workers, print and mail campaign literature, advertise in the various media, and get out the vote on election day.[23] It is one thing for candidates for office to use whatever resources they can marshal as private citizens in conducting their election cam-

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make using their own resources); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 23-24 (1973) (property tax-based school financing does not violate the Constitution even though the poor will necessarily have worse schools). This scheme is open to criticism for taking as "natural," and therefore an appropriate constitutional baseline, what may really be an arbitrary and socially perpetuated status quo. *See* Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271, 2300 (1990); L. Tribe, Constitutional Choices 243-44 (1985).

20. *See* Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864, 864-67 (1986); Kriemer, *Allocational Sanctions: The Problem of Negative Rights in the Positive State*, 132 U. Pa. L. Rev. 1293, 1324-26 (1984); Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental Rights Analysis and to the Welfare-Rights Thesis*, 81 Colum. L. Rev. 721, 734-40 (1981).

21. *See* Williams v. Rhodes, 393 U.S. 23, 30-34 (1968).

22. *See* McLain v. Meier, 637 F.2d 1159, 1167 (8th Cir. 1980); Sangmeister v. Woodard, 565 F.2d 460, 467 (7th Cir. 1977), *cert. denied*, 435 U.S. 939 (1978); Gould v. Grubb, 14 Cal. 3d 661, 676, 122 Cal. Rptr. 377, 387, 536 P.2d 1337, 1347 (1975); Holtzman v. Power, 62 Misc. 2d 1020, 1025, 313 N.Y.S.2d 904, 909, *aff'd*, 27 N.Y.2d 628, 261 N.E.2d 666, 313 N.Y.S.2d 760 (1970). *But see* Clough v. Guzzi, 416 F. Supp. 1057, 1067 (D. Mass. 1976).

23. The analysis advanced in this Article rests on the assumption that money is a significant factor in election campaigns. This phenomenon has been well documented. *See* H. Alexander, Financing Politics 20-23 (3d ed. 1984); D. Adamany & G. Agree, Political Money 2-3 (1975); *see generally* Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 Am. Pol. Sci. Rev. 469 (1978); Palda, *The Effect of Expenditure on Political Success*, 18 J.L. & Econ. 745 (1975).

paigns and to compete using those resources on an equal footing with other candidates. But it is quite another thing for candidates who happen to be incumbents to use the resources of the government—resources which were extracted by force of law from the electorate and which are not available to other candidates—to assist their own reelection campaigns. Use of such resources gives incumbents access to the resources of government in addition to their own, an advantage that can be tantamount to direct government intervention on their behalf.[24]

It is important to stress that the advantage incumbents gain by using government powers at their disposal in pursuit of reelection is not problematic merely because it offends some abstract notion of fair play in the election game. On the contrary, it is problematic because it upsets relationships at the heart of the notion of republican self-rule on which our system of government is based. Popular self-rule means, in large part, that the people choose the individuals who will represent them as government officials. For such self-rule to be free, the people's choices must be freely made. When the government uses its powers to improve or obstruct the fortunes of particular candidates, it deprives the people of the free choice among candidates that belongs to them alone. Such actions by the government introduce an element of nonconsensual rule—of despotism—into the system of self-rule inherent in republican democracy. Thus, abuse of the powers of incumbency by elected officials, at least in its more extreme manifestations, ultimately threatens democracy itself.

C. *Abuse of Incumbency in New York State*

Against this backdrop, many common practices of the New York Legislature look distinctly suspicious. Generally speaking, the legislature has never been a paragon of ethical behavior. Three of the last four Speakers of the Assembly, for example, were indicted while in office: the current Speaker is now under indictment for federal mail fraud, and two of his predecessors were indicted on charges of vote fraud and patronage abuse, respectively.[25] According to one count, since 1987 more incumbent New York legislators have been indicted than have been defeated at the polls.[26]

Many apparently widespread practices of the legislature fall into the first category of incumbency abuse discussed above. In recent years, legislators have been accused of padding the state payroll with no-show workers; hiring friends, relatives and business associates as committee staff; spending public money lavishly on their offices and on other perquisites such as limousines; and becoming involved in the representation of

24. Several states have enacted legislation based on the view that access to state resources gives incumbents an unfair advantage. *See infra* note 159.

25. *See* Kolbert, *Indictments: Just a Part of the Albany Routine*, N.Y. Times, Dec. 23, 1990, § 4, at 12, col. 1.

26. *See id.*

clients who do business with state agencies.[27]

Other practices fall into the second category of incumbency abuse. Several influential legislators have been criticized for accepting large campaign contributions from individuals or entities who are subject to state regulation by committees on which these legislators sit.[28] In 1987, a commission appointed by Governor Cuomo found that the state electoral process was "awash in money," and that significant campaign finance reforms were needed to prevent the discouragement of less affluent candidates and to eliminate the "vast opportunities for abuse, influence peddling and other improprieties" created by the existing system.[29]

Finally, and most pertinent here, the legislature has often engaged in the practice of using legislative staff, employed at public expense, as workers in the reelection campaigns of incumbents.[30] This practice has been often criticized and occasionally investigated,[31] and public pressure recently prompted the legislature to set some modest limits on the practice.[32] Nevertheless, the decision of the Manhattan District Attorney to prosecute the Minority Leader represents the first direct challenge ever mounted to the legality of the practice. The *Ohrenstein* case is thus the first in New York State to confront the question of what happens when

27. *See, e.g.*, Kolbert, *A Legislator Quits as Panel Urges Penalty*, N.Y. Times, Mar. 10, 1987, at B1, col. 6 (state legislator resigns after admitting to hiring no-show employees); Editorial, *Open the Legislature's Books*, N.Y. Post, June 5, 1987, at 22, col. 1 (charging Senate Majority Leader with unnecessarily renting "posh Fifth Avenue offices" while downtown state office space "stands empty," and of using "limos and chauffeurs"); Barbanel, *Legislature's Payroll: Few "No-Shows," But Patronage Persists*, N.Y. Times, Feb. 2, 1987 at B1, col. 2 ("two no-show secretaries on the Assembly payroll, was a throwback to an earlier era"); Cross & Connell, *State Legislature a Hotbed of Patronage, Cronyism*, Albany Times Union, Feb. 8, 1987, at 1 (detailing hiring by legislators of relatives, law partners, political associates and former colleagues); Madden, *The Lawyers in Albany: Lawmaker With 2 Hats*, N.Y. Times, July 15, 1987, at A1, col. 5 (some legislators who are lawyers continue to represent clients appearing before state agencies).

28. *See, e.g.*, Gesensway, *Ethics Proposal a Compromise of Earlier, Tougher Bill*, Albany Times Union, Mar. 18, 1987, at A1 (New York State Senator Bruno has ties to the industry his committee regulates); *see generally* Sack, *In Albany, Big Donors Follow Party in Control*, N.Y. Times, Sept. 8, 1990, at 26.

29. State-City Comm'n on Integrity in Gov't, 1 Rep. and Recommendations, at 30-31 (Jan. 1987).

30. *See generally* N.Y. State Comm'n on Gov't Integrity, *Evening the Odds: The Need to Restrict Unfair Incumbent Advantage* (Oct. 1989); Report of the N.Y. State Blue Ribbon Comm'n to Review Legislative Practices in Relation to Political Campaign Activities of Legislative Employees (May 1988); N.Y. State Senate Research Serv.: Task Force on Critical Problems, *Political Campaign Activity—The Use of Legislative Staff and Resources: A Comparative Analysis of Laws, Rules, Regulations and Court Decisions* (Jan. 1988).

31. The Brooklyn District Attorney investigated the practice in 1985, but declined to take legal action; she urged the Legislature to take legislative action instead. *See* People v. Ohrenstein, 153 A.D.2d 342, 363, 549 N.Y.S.2d 962, 974 (1st Dept. 1989) [hereinafter *Ohrenstein II*], *aff'd*, 77 N.Y.2d 38, 565 N.E.2d 493, 563 N.Y.S.2d 744 (1990). *See also supra* note 30.

32. *See* New York Legislature, Concurrent Resolution 812, quoted in *Ohrenstein II*, *supra* note 31, at 364, 549 N.Y.S.2d at 975; *infra* note 186.

the legislature takes direct legislative action authorizing its members to use public resources in their efforts to keep themselves in office.

II. THE *OHRENSTEIN* CASE

A. *Background*

In 1986, when the events that are the subject of the Court of Appeals decision took place, Manfred Ohrenstein was a Democratic State Senator representing a district in lower Manhattan, and was the Minority Leader of the New York Senate. The post of Minority Leader is of course filled by a Senator of the political party constituting the largest minority party in the Senate. The Leader is elected to the office by the Senators who are members of his party. Likewise, the members of the majority party in the Senate, currently the Republican Party, choose a Majority Leader.[33]

Although nothing in the New York Constitution or state law requires Senate business to be conducted in any particular way, the Majority and Minority Leaders have traditionally wielded enormous influence in the legislature. Like their counterparts in the United States Congress, the Majority and Minority leaders play extensive roles in developing legislative programs for their respective parties, setting the legislative agenda, negotiating bills, making committee assignments, and selecting Senate employees.[34] The Majority and Minority Leaders also negotiate among themselves the Senate budget, which is then distributed along party lines. Each Leader subsequently allocates to Senators of his party funds to be used for administrative expenses, including staff salaries and mailing costs.[35] The hours, salaries, and duties of Senate staff are determined by the individual Senators for whom the employees work.[36]

Under Senator Ohrenstein, the office of Minority Leader became something of a nerve center for virtually all activities conducted by Senators of the Democratic Party. While some members of Ohrenstein's staff performed functions typical of aides to any other Senator, such as drafting legislation and providing services to constituents,[37] the majority of Ohrenstein's many employees were assigned to the Senate Minority Conference.[38] The Minority Conference is an association of Democratic Senators formed for two purposes. First, it develops and coordinates the implementation of a Democratic legislative agenda for the Senate.[39] To this end, the Conference staff, under the direction of the Minority

33. *See* Kolbert, *Marino of L.I. Appears to Win Top Senate Post*, N.Y. Times, Sept. 15, 1988, at B2, col. 1.

34. *See Ohrenstein II*, *supra* note 31, at 348-49, 549 N.Y.S.2d at 965.

35. *See id.*

36. *See id.*

37. *See id.* at 350, 549 N.Y.S.2d at 966.

38. *See id.*

39. *See* People v. Ohrenstein, 139 Misc. 2d 909, 913, 531 N.Y.S.2d 942, 945 (1988) [hereinafter *Ohrenstein I*], *aff'd*, 77 N.Y.2d 38, 565 N.E.2d 493, 563 N.Y.S.2d 744 (1990).

Leader, researches and drafts legislation, writes newsletters, and assists new Democratic Senators in learning the legislative process.[40]

The second function of the Minority Conference is to provide support of a more overtly political nature to Democratic Senators and to Democratic candidates challenging incumbent Republicans. In this role, conference staff members, under the direction of a Steering Committee headed by the Minority Leader,[41] assess the political impact of proposed legislation, provide demographic and political intelligence about election districts, and act as liaison between the Minority Conference and each district's political and business leaders.[42]

Finally, during election campaigns, the Steering Committee supervises Democratic campaigns for the Senate. It selects candidates to run against incumbent Republicans, targets particular districts for special campaign efforts, sets campaign budgets, approves the campaign manager, and supervises the formulation of campaign strategy.[43] The trial court in *Ohrenstein* found that the Steering Committee is able to exercise considerable influence over Democratic campaigns for the Senate by virtue of its "control over two sources of material assistance to selected candidates: funds of the Senate Democratic Campaign Committee [a campaign finance organization of the New York Democratic Party], and the assignment of Senate minority staff to work in campaigns."[44] Thus, the Minority Leader sits at the center of a web of activities and resources designed to advance the political and legislative agenda of the Democratic Party and its members and incumbent legislators.

In the 1986 election, the Minority Conference decided to target several districts for substantial campaign assistance. Accordingly, the Conference reassigned existing staff and hired new staff to work on the targeted campaigns; these individuals were paid with public funds allocated from the Senate operational budget. Ten staffers already on the Senate payroll in other capacities were shifted to work on the campaigns. Twenty-six other individuals were hired to work on the campaigns; eighteen of these were removed from the payroll after the election, while eight were retained on the payroll in a legislative capacity during the 1987 legislative session. In addition, three individuals were hired by the Conference but performed no duties of any kind—the so-called "no-show" employees.[45]

In 1987, a Manhattan grand jury indicted Ohrenstein and three other Senators, charging them, in substance, with over six hundred counts of larceny, theft of services, and conspiracy.[46] These charges were based on

40. *See Ohrenstein II, supra* note 31, at 350, 549 N.Y.S.2d at 966; *Ohrenstein I, supra* note 39, at 913, 531 N.Y.S.2d at 945.

41. *See Ohrenstein II, supra* note 31, at 351, 549 N.Y.S.2d at 967.

42. *See Ohrenstein I, supra* note 39, at 913-15, 531 N.Y.S.2d at 945-46.

43. *See id.* at 914, 531 N.Y.S.2d at 946.

44. *Id.*; *see also Ohrenstein II, supra* note 31, at 351-52, 549 N.Y.S.2d at 967 (discussing Steering Committee influence).

45. *See Ohrenstein I, supra* note 39, at 915, 531 N.Y.S.2d at 946.

46. *See Ohrenstein II, supra* note 31, at 353, 549 N.Y.S.2d at 968.

the theory that paying public employees to work on private reelection campaigns was a theft of public property. The defendants moved to dismiss the indictment on a variety of grounds including separation of powers, legislative immunity, political question, and due process. The trial court dismissed approximately a third of the counts, principally for lack of justiciability.[47] On appeal, the Appellate Division[48] dismissed all counts except those relating to no-show employees.[49] The court's ruling rested on justiciability and due process grounds.[50]

B. *The Court of Appeals Decision*

The Court of Appeals affirmed the Appellate Division ruling, but took a very different approach from that of the courts below. It parted company with the lower courts at the outset, declining to address any constitutional questions and holding that the case could be resolved on statutory grounds alone.[51] The court thus held, as a matter of statutory interpretation, that New York's larceny and theft of services statutes simply did not reach Ohrenstein's conduct, except to the extent that he hired no-show employees who did nothing to earn their pay. However, the court's analysis is statutory in only the most superficial way; underlying its conclusion are significant assumptions about the constitutional powers of the legislature.

The court's reasoning proceeded as follows. Under the New York Constitution, the legislature has the power to appropriate funds and to set the wages and hours of state employees.[52] Section 6 of New York's Legislative Law implements this authority by empowering the Minority Leader to "appoint such employees to assist him in the performance of his duties as may be authorized and provided for in the legislative appropriation bill."[53] Section 6 thus places no restriction on the uses to which such employees may be put by the Minority Leader, merely referring such decisions to the relevant legislative appropriation bill.[54]

In 1986, the relevant appropriation bill authorized the Minority Leader to spend certain sums to hire staff, but provided only that these sums were to be used for "personal service of employees and for temporary and expert services of legislative and program operations . . . [and] of standing committees."[55] Thus, the court held, the legislature had by statute expressly authorized the Minority Leader to hire staff to perform

47. *See id.* at 354, 549 N.Y.S.2d at 969.

48. In New York, the trial court is known as the Supreme Court. The intermediate court of appeals is known as the Appellate Division. The state's highest court is the Court of Appeals.

49. *See id.* at 374-75, 549 N.Y.S.2d at 981-82.

50. *See id.* at 368-69, 374-75, 549 N.Y.S.2d at 977-78, 981-82.

51. *See Ohrenstein III*, *supra* note 6, at 46, 565 N.E.2d at 496, 563 N.Y.S.2d at 747.

52. *See id.*

53. *Id.* (citing Legislative Law § 6(2)).

54. *See id.*

55. *Id.* at 47, 565 N.E.2d at 497, 563 N.Y.S.2d at 748.

such duties as he saw fit to assign, including working on election campaigns.

The court rejected the District Attorney's contention that this statutory authorization should be read narrowly to refer only to typically "governmental activities" like drafting bills and performing constituent services.[56] The court instead pointed out that the performance of "political" activities by Senate staff was "considered an inherent part of the job of an elected representative;"[57] that the legislature was "aware of the fact that its members were using staff employees in political campaigns;"[58] and that the legislature "chose to place no restrictions on the practice."[59] In short, the Minority Leader had open-ended statutory authorization "to appoint staff members, to determine the terms and conditions of their employment and to assign duties and the hours of work as [he] deemed necessary to fulfill the broad range of legislative duties."[60] If the Minority Leader determined that working full-time on the reelection campaign of an incumbent Democratic Senator was within the "broad range of legislative duties," the court was unwilling to say otherwise.

From here, it is a short step to the conclusion that Ohrenstein could not be criminally prosecuted on theft charges. The court reasoned that Ohrenstein's conduct was not specifically prohibited by any law,[61] but what it really seemed to mean was that the conduct could not be the subject of a criminal prosecution because it was expressly authorized by law. As the dissent pointed out, penal statutes generally "do not proscribe specific practices or methods . . . [and the] myriad ways in which the improper use of governmental funds may be accomplished precludes such specificity."[62] Elsewhere in the opinion, the majority seemed to recognize this and to rely implicitly on a due process theory: "at the time the defendants acted, their conduct was not prohibited in any manner; nor could they have known that they were subject to criminal prosecution for their acts."[63] Alternatively—and the court's reasoning is quite opaque on this point—the court might have thought that an explicit stat-

56. *See id.*
57. *Id.*
58. *Id.* at 49, 565 N.E.2d at 498, 563 N.Y.S.2d at 749.
59. *Id.*
60. *Id.* at 47, 565 N.E.2d at 497, 563 N.Y.S.2d at 748.
61. *See id.* at 49, 52, 565 N.E.2d at 498, 500, 563 N.Y.S.2d at 749, 751.
62. *Id.* at 58, 565 N.E.2d at 503, 563 N.Y.S.2d at 754 (Simons, J., dissenting).
63. *Id.* at 52, 565 N.E.2d at 500, 563 N.Y.S.2d at 751. Although the court seemed to find the law authorizing Ohrenstein's conduct to be constitutional, it could have ruled the same way even if it had found the law unconstitutional. That is, Ohrenstein's reliance on even an unconstitutional statute might have shielded him from later prosecution under New York Law, *see* N.Y. Penal Law § 15.20(2) (McKinney 1987) (no criminal liability for conduct engaged in "under a mistaken belief that it does not, as a matter of law, constitute an offense, [when] such mistaken belief is founded upon an official statement of the law contained in . . . a statute"), and possibly also under the Due Process Clause. *See* U.S. Const. amend. XIV, § 1; *see, e.g.*, Raley v. Ohio, 360 U.S. 423, 437-40 (1959) (due process forbids conviction based on refusal to answer questions of state investigative commission in reliance upon commission's assurance that privilege applied). On the other

utory authorization to perform a specific act carves out an exception from general prohibitory statutes like the theft laws. In any event, the court concluded by affirming the dismissal of all counts relating to the paying of staff for work performed in election campaigns.[64]

The court's ruling turns decisively on its interpretation of the two statutes which it found to authorize the Minority Leader to hire staff members and to assign them to campaign for incumbent legislators. This interpretation is a curious one. The statutes did not say: "The Minority Leader may hire staff to work on senatorial election campaigns." Rather, the statutes spoke only vaguely of the "duties" of legislators and the "personal service" of their employees. Had the court felt the slightest doubt about the propriety of legislators using public funds to get themselves reelected, it could have adopted the narrowing construction offered by the District Attorney and held that, in the absence of a specific indication to the contrary, staff duties and services would be taken to mean those relating to the legislative process rather than the campaign process.[65]

Instead, the court seemed to go out of its way to hold that legislators are entitled to construe the scope of their official duties to include getting themselves reelected and using their staffs to help them do it. Indeed, the court went further: the legislature, it held, may by law define its legisla-

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hand, a criminal defendant's reliance on a statute must generally be reasonable to provide a defense against prosecution. *See* Model Penal Code § 2.04(3)(b) (1985).

64. The court also affirmed the ruling of the court below that the defendants would have to stand trial on the counts relating to no-show employees. The court reasoned that the indictment did not require it to decide whether a particular staff activity constituted a proper legislative duty: "Here there is no question as to what 'proper duties' include, because no matter how they are defined, they must at least include the performance of some services, of some type, at some time." *Ohrenstein III*, *supra* note 6, at 52, 565 N.E.2d at 500, 563 N.Y.S.2d at 751. This aspect of the court's opinion is in some tension with its decision dismissing the other counts. If legislators have inherent or unreviewable power to define the duties of their aides, it is not clear how the court can feel confident that the no-show aides were doing nothing of any value to the legislators. Moreover, the court's distinction between aides who do absolutely nothing and those who do almost nothing is an unpersuasive one. According to the court's reasoning, a legislator who hires someone to do nothing is stealing, but a legislator who pays someone a year's salary to do five minutes' work is not. The court's opinion also fails to provide any basis for distinguishing a legislator who hires an aide to do campaign work from a legislator who hires an aide to paint his house.

The court also went on to reject the defendants' argument that the Speech or Debate Clause of the New York Constitution prohibited prosecution on the no-show counts; a legislator's immunity under the Clause, the court said, does not protect efforts to defraud the state by knowingly placing on the payroll employees whose only function is to collect state salaries. *See id.* at 54, 565 N.E.2d at 502, 563 N.Y.S.2d at 752.

Upon remand to the trial court, the District Attorney chose to drop all remaining charges against Senator Ohrenstein rather than proceed solely on the no-show counts. *See Judge Drops Final Charges on Ohrenstein*, N.Y. Times, Sept. 5, 1991, at B1, col. 6.

65. New York, like other jurisdictions, follows the rule of construction that statutes should be interpreted, when possible, to avoid constitutional questions. *See* Matter of Sarah K., 66 N.Y.2d 223, 238, 487 N.E.2d 241, 248, 496 N.Y.S.2d 384, 391 (1985), *cert. denied*, 475 U.S. 1108 (1986).

tive functions to include running for reelection, and may expressly authorize its members, as it did here, to use public resources to execute this aspect of their jobs. This is a significant holding because it suggests that the legislature has the inherent power to engage in, and even to institutionalize, practices that are ordinarily regarded as an abuse of incumbency.

Neither the parties nor the court suggested that any specific provision of the New York Constitution authorized the legislature to take these actions. On the contrary, the court stressed that the actions are considered an "inherent part of the job of an elected representative,"[66] or were at least so considered by the legislature itself. Thus, the legislative power to define the scope and nature of its own legislative activities, and to use public funds to carry out those activities, must in the court's view have been an aspect of inherent legislative power, for which no specific constitutional authorization was needed.

III. INHERENT LEGISLATIVE POWER

The concept of inherent power is a familiar one in American constitutional discourse. Courts have held, for example, that the powers to conduct foreign policy and to guide administrative agencies in their implementation of the law, although not expressly mentioned in the Constitution, are nevertheless aspects of inherent executive power that the President has been authorized to wield as chief executive of the United States.[67] Similarly, the Supreme Court has held that the general constitutional grant of judicial power to the federal courts includes the inherent power of a court to control its own docket and schedule and to enforce its orders through contempt sanctions.[68]

Somewhat less well-known is the corresponding concept of inherent legislative power—power that the legislature may wield not by virtue of a specific constitutional grant, but by virtue of having been invested with the legislative power of the polity. The relative obscurity of inherent legislative power on the federal level is understandable: Congress is a creature of enumerated powers, and most of the questions regarding the scope of its powers can be answered by reference either to the lengthy list of enumerated powers contained in article I of the federal Constitution, or to the equally lengthy list of express constitutional restrictions on those powers. State legislatures, on the other hand, typically exercise general rather than enumerated legislative powers, so virtually all questions concerning the scope of state legislative power are to some extent questions of inherent legislative power.

Like its executive and judicial counterparts, the notion of inherent leg-

66. *Ohrenstein III*, *supra* note 6, at 47, 565 N.E.2d at 497, 563 N.Y.S.2d at 748.

67. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-21 (1936); Myers v. United States, 272 U.S. 52, 117 (1926).

68. *See* Shillitani v. United States, 384 U.S. 364, 370 (1966); Landis v. North Am. Co., 299 U.S. 248, 254 (1936).

islative power arises from the constitutional creation of a particular branch of government and the investing of that branch with associated powers—in this case, the creation of a legislature and the granting to it of "legislative power."[69] Thus, to the extent that inherent legislative power exists, it must arise out of notions of what it means in our constitutional system for an entity to be a legislature and to wield legislative power.

A. *The Nature of Legislative Power*

What does it mean to have "legislative power," as that term is used in the American constitutional tradition? A logical starting point to begin examining this question is the familiar notion of separation of powers. The Framers, following Montesquieu, theorized that all powers of government fall into one of three categories—legislative, executive or judicial.[70] According to this account, the differences between these categories of power amount very simply to the difference between making, enforcing and interpreting the law. As Hamilton put it, "[t]he essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society."[71] This definition has been taken up by the Supreme Court, which has squarely held that "legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them."[72] Thus, to have legislative power under our Constitution is to have the power to make laws.

Although this definition is a helpful starting point, it seems to raise as many questions as it answers. First, what counts as a "law"? It is useless to know that a legislature can make laws if we lack a clear conception of what a law is. Second, what kinds of laws is a legislature entitled to make? It is imperative to know whether there are any limits on the types or subject matter of laws that accompany the power of making laws. Third, what counts as "making" law? It is far from self-evident what activities of a legislature are necessary to create something that may be acknowledged as a law.

The first question—what constitutes a law—has been for years the subject of a contentious scholarly debate.[73] Nevertheless, the constitutions that grant the power of making laws generally provide significant gui-

69. *See* U.S. Const. art. I, § 1; N.Y. Const. art. III, § 1.

70. *See* The Federalist No. 47, at 301 (J. Madison) (Clinton Rossiter, ed. 1961). *See also* Montesquieu, The Spirit of the Laws, Bk. XI, ch. 6 (1748) (T. Nugent, trans. 1949) (on the Constitution of England).

71. The Federalist No. 75, at 450 (A. Hamilton) (Clinton Rossiter, ed. 1961).

72. Springer v. Philippine Islands, 277 U.S. 189, 202 (1928). The New York Court of Appeals has interpreted the New York Constitution in the same way. *See* People ex rel. Broderick v. Morton, 156 N.Y. 136, 144-45, 50 N.E. 791, 793-94 (1898).

73. This debate is often cast as one between positivists and legal realists. For a classic confrontation in this context, see Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 614-15 (1958); Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 631 (1958).

dance—what H.L.A. Hart called "rules of recognition"[74]—concerning what should be considered a proper law. For example, the United States Constitution states clearly that a "law," whatever else it might be, is something that has been passed by both houses of Congress and signed by the President, or, if vetoed by the President, repassed by two-thirds of each house.[75]

The Constitution likewise provides significant guidance concerning the second question—what kinds of laws can legislatures make? We are told, for example, that Congress cannot pass ex post facto laws or bills of attainder, and that it can make no law abridging the freedom of speech, but that it may pass laws regulating federal elections, creating a uniform bankruptcy system, and appropriating funds from the treasury.[76] While these provisions are hardly without their ambiguities, they at least provide useful starting points for thinking about the scope of legislative power granted by the Constitution.

On the third question, however—what activities constitute "making" law—the Constitution is largely silent. It does tell us that the law-making process involves "bills" and that these bills may be "passed" by a "vote" consisting of "yeas and nays,"[77] but this is scant information on which to build a model of the legislative process. Where do bills come from? Who writes them, and utilizing what information, how obtained? How do legislators cast votes, and what can they do to help them decide which way to vote on a particular bill? American legislatures have been forced to answer such questions simply in order to conduct business, and have often created elaborate institutional mechanisms to support the process of making laws. These mechanisms often include, for example, the creation of numerous legislative committees and the conducting of broad-scale investigations. It is in justifying these practices, for which express constitutional authority is rarely available, that the notion of inherent legislative power has been most often invoked.

B. *The Concept of Inherent Legislative Power*

The United States Constitution makes Congress the repository of "all legislative powers" of the United States.[78] Because the United States government is one of enumerated rather than general powers, it is natural to suspect that the sum of congressional power must be contained in those provisions of the Constitution that grant Congress various forms of specific authority.[79] However, the Supreme Court has occasionally held

74. H.L.A. Hart, The Concept of Law 92-93 (1961). "The simplest form of remedy for the uncertainty of the regime of primary rules is the introduction of . . . a 'rule of recognition.'" *Id.*

75. *See* U.S. Const. art. I, § 7.

76. *See* U.S. Const. art. I, § 4, cl. 1; § 8, cl. 4; § 9, cls. 3, 7; amend I.

77. U.S. Const. art. I, § 7.

78. U.S. Const. art. I, § 1.

79. Most of these are contained in U.S. Const. art. I, § 8, which lists seventeen specific congressional powers. These powers are augmented by the Necessary and Proper

that Congress possesses unenumerated, and therefore implied or inherent, powers by virtue of the grant to it of legislative authority in the first instance.[80]

For example, although Congress may be charged with the power to make laws, the Court has noted that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."[81] This need gives rise to an implied congressional power "to inform itself."[82] The power of the legislature to inform itself gives rise in turn to a constellation of related powers. Congress need not sit passively waiting for pertinent information to come its way, but may seek out such information by conducting investigations. Consequently, the power to "exact testimony . . . has long been treated as an attribute of the power to legislate,"[83] and Congress may therefore call witnesses and request documents. Of course, witnesses are not always willing to appear or to produce documents voluntarily, so the congressional power of investigation includes by implication the power to issue subpoenas. Again, subpoenas are not always obeyed, and the Supreme Court has therefore held that Congress has the power to punish contempt.[84] The inherent congressional power to punish contempt includes the power to pass a law making contempt of Congress a crime against the United States, punishable by the executive branch in a criminal prosecution.[85] The Court has also held, at least by implication, that Congress has the inherent authority to appoint committees to make its work more manageable, and that those committees may exercise the investigatory powers of the chamber that creates them.[86]

Clause, a significant expansion of their scope. *See id.* at cl. 18; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 353 (1819).

80. This is not necessarily inconsistent with the constitutional doctrine that Congress possesses only enumerated powers. *See* The Federalist No. 84, at 513-14 (A. Hamilton) (Clinton Rossiter, ed. 1961); *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824) (Constitution is "one of enumeration"). The Constitution explicitly grants Congress legislative power in art. I, § 1. The Necessary and Proper Clause authorizes Congress to make laws "necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States." *Id.* at § 8, cl. 18. Thus, inherent legislative powers might be those that are necessary for Congress to carry into execution its legislative power. This view, of course, treats the constitutional language granting legislative power as substantive rather than merely rhetorical or explanatory, an interpretation consistent with the Court's view of the constitutional grants of executive and judicial power. *See supra* notes 67-68 and accompanying text.

81. McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

82. United States v. Rumely, 345 U.S. 41, 46 (1953).

83. *McGrain*, 273 U.S. at 161.

84. *See McGrain*, 273 U.S. at 174-75. Congress also has a more general power to punish contempts that arise not from the disobeying of subpoenas, but from behavior that threatens the integrity of the body. *See also* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 228 (1821) (person who attempted to bribe a Representative imprisoned for contempt of the House). *See generally* Brand & Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 Cath. U.L. Rev. 71, 73-77 (1986).

85. *See In re* Chapman, 166 U.S. 661, 672 (1897); 2 U.S.C. §§ 191-96 (1988).

86. *See* Barenblatt v. United States, 360 U.S. 109, 122 (1959); Jurney v. McCracken,

Such committees may receive and prepare reports in the course of conducting committee business.[87]

There are also a variety of inherent legislative powers that the Court has recognized by implication in cases where the exercise of the power was not directly challenged as it was in many of the cases involving the power of Congress to investigate. For example, the Court has said, in fairly direct language, that Congress has the power to hire aides and to authorize committees and individual legislators to hire staff because "it is literally impossible, in view of the complexities of the modern legislative process . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants."[88] Such aides, the Court has said, may be treated for constitutional purposes as legislators' "alter egos" when they perform functions that are an "integral part" of the legislative process.[89]

Finally, the Court has expressly approved, without ruling directly on the constitutionality of, a variety of other congressional activities:

> It is well known, of course, that Members of the Congress engage in many activities other than . . . purely legislative [ones]. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "newsletters" to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. . . . [T]hese are entirely legitimate activities. . . .[90]

The lower federal courts have added to this list. For example, several courts have noted the utility of the federal franking statute,[91] which allows members of Congress to use the mails free of charge to communicate with their constituents. As one panel put it, the franking privilege is "a valuable tool in facilitating the performance by individual Members of Congress of their constitutional duty to communicate with and inform

294 U.S. 125, 151 (1935); McGrain v. Daugherty, 273 U.S. 135, 180 (1927); *In re* Chapman, 166 U.S. at 667-72. *See also* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 507 (1975) (holding that legislative activities of congressional committees and their members are entitled to immunity under Speech or Debate Clause); Doe v. McMillan, 412 U.S. 306, 320 (1973) (same); Gravel v. United States, 408 U.S. 606, 628-29 (1972) (same). The power of Congress to create committees seems to have been assumed from the beginning. The very first action of the first Senate, after counting the electoral votes for President, was the creation of a rules committee. *See* 1 Annals of Cong. 18 (Apr. 7, 1789). Indeed, the Constitutional Convention itself utilized committees in the drafting of the Constitution. *See* J. Madison, Notes of Debates in the Federal Convention of 1787, at 24 (committee on rules), 26 (rules for appointing committees) (A. Koch, ed. 1966).

87. *See* Morrison v. Olson, 487 U.S. 654, 694 (1988) ("receiving reports or other information . . . [is a function] that we have recognized generally as being incidental to the legislative functions of Congress").

88. Gravel v. United States, 408 U.S. 606, 616 (1972).

89. *Id.* at 617, 625.

90. United States v. Brewster, 408 U.S. 501, 512 (1972).

91. *See* 39 U.S.C. § 3210 (1988).

their constituents on public matters."[92]

The New York courts have reached similar conclusions regarding the details of inherent legislative power. Indeed, because state legislatures exercise general rather than enumerated powers, virtually all powers of state legislatures are inherent rather than enumerated. The New York Constitution provides only that "[t]he legislative power of this state shall be vested in the senate and assembly,"[93] and this grant of power serves as the sole constitutional basis for most legislative action. Thus, the New York Court of Appeals, like the Supreme Court, has held that the legislature possesses inherent authority to investigate, take testimony, issue subpoenas, punish contempt, and the like.[94] Indeed, the United States Supreme Court relied in part on New York constitutional decisions in reaching its own conclusions about the necessary scope of the inherent legislative power of Congress.[95]

C. *Constitutional Limits on Inherent Legislative Power*

1. The Constitutional Landscape

The cases that define the boundaries of legislative power reveal an inherent legislative power that is broad and flexible, and which the legislature may readily adapt to permit it to perform its constitutionally appointed functions as it understands them. Nevertheless, flexible though this power may be, it is subject to significant constitutional limits. Courts have explicitly identified at least three types of limitations.

First, inherent legislative power, like any other constitutional power, is subject to the various express constitutional limitations designed to protect individual rights. The Supreme Court has thus held that congressional investigations must be conducted consistent with the Bill of Rights. Accordingly, the Court has overturned a conviction for contempt of Congress on the ground that the investigating committee's authority was so vague as to violate due process.[96] It has also held that the first amendment "of course reach[es] and limit[s] congressional investigations,"[97] and has applied first amendment balancing to assess the constitutionality of certain congressional investigations and questions to witnesses.[98] The Court has also invalidated a state law conviction for

92. Common Cause v. Bolger, 574 F. Supp. 672, 677 (D.D.C. 1982) (three-judge court), *aff'd*, 461 U.S. 911 (1983). *Accord* Schiaffo v. Helstoski, 492 F.2d 413, 429-30 (3d Cir. 1974); Bowie v. Williams, 351 F. Supp. 628, 631-32 (E.D. Pa. 1972). *See also* S. Rep. No. 461, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2904, 2906 (explaining virtues of franking privilege).

93. N.Y. Const. art. III, § 1.

94. *See* Keeler v. McDonald, 99 N.Y. 463, 486-87, 2 N.E. 615, 627-28 (1885).

95. *See* McGrain v. Daugherty, 273 U.S. 135, 165-66 (1927).

96. *See* Watkins v. United States, 354 U.S. 178, 215 (1957).

97. Barenblatt v. United States, 360 U.S. 109, 126 (1959).

98. *See id.* at 126-34. The Court's balancing in this case favored upholding the conviction of a witness who refused to answer certain questions about his political and religious beliefs put to him by the House Committee on Un-American Activities.

contempt of a state legislature on first amendment grounds.[99]

Second, many of the circumstances that give rise to implied legislative powers also give rise to implied limits on those powers. The power to investigate, for example, derives from the power to legislate, a power which Congress is entitled to attempt to exercise in an informed and intelligent manner. But, by the same token, the scope of the congressional power to legislate sets the outer bounds of the accompanying congressional power to investigate: "No inquiry," the Court has held, "is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress."[100] For the most part, this means that Congress may inquire only into those areas in which it may potentially legislate.[101] The same limit applies in New York.[102]

Third, inherent legislative power is subject to implicit or structural constitutional limitations that stake out the farthest reaches of legislative power of any kind. The primary way in which legislatures have felt this limitation is through application of the principle of separation of powers. Thus, although Congress has the power to oversee the affairs of the executive branch, and although this oversight function provides a legitimate basis for exercising the inherent congressional power of investigation,[103] Congress cannot define its oversight function so broadly as to intrude on activities constitutionally committed to the executive branch. For this reason, Congress cannot confer on its chambers, committees, or legislators the power to "veto" exercises of the executive power undertaken pursuant to law.[104] Similarly, the Court has noted that the congressional powers to investigate and to punish contempt may not be utilized to achieve goals constitutionally reserved for the judicial branch. Thus, except in cases of impeachment, Congress cannot conduct trials by committee,[105] nor can it inflict punishment for the sake of punishing.[106] Instead, its contempt powers may be wielded only insofar as they serve legitimate legislative ends.[107] Again, the same limit based on separation of powers has been held to apply to inherent legislative power in New York.[108]

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99. *See* DeGregory v. Attorney Gen., 383 U.S. 825, 829-30 (1966).

100. Watkins v. United States, 354 U.S. 178, 187 (1957).

101. *See* Barenblatt v. United States, 360 U.S. 109, 111 (1959); Kilbourn v. Thompson, 103 U.S. 168, 190-92 (1880).

102. *See* Keeler v. McDonald, 99 N.Y. 463, 485, 2 N.E. 615, 626 (1885).

103. *See Watkins*, 354 U.S. at 187.

104. *See* INS v. Chadha, 462 U.S. 919, 956-59 (1983).

105. *See* Watkins v. United States, 354 U.S. 178, 217 (1957); Marshall v. Gordon, 243 U.S. 521, 547-48 (1917); Kilbourn v. Thompson, 103 U.S. 168, 191 (1880).

106. *See Marshall*, 243 U.S. at 542.

107. *See id.* at 548; *In re* Chapman, 166 U.S. 661, 670 (1897); *Kilbourn*, 103 U.S. at 196.

108. *See* Keeler v. McDonald, 99 N.Y. 463, 487, 2 N.E. 615, 628 (1885).

2. Inherent Legislative Power in *Ohrenstein*

With this brief review of the nature of inherent legislative power in mind, let us return to the *Ohrenstein* case itself. There, the New York Legislature enacted laws authorizing the Senate to spend public funds to hire staff who worked on the election campaigns of incumbent legislators and other candidates chosen by the Minority Leader. The Court of Appeals held this to be a proper exercise of legislative authority, essentially on the ground that campaigning for reelection, or for the election of members of a legislator's political party, is an "inherent part of the job of an elected representative."[109]

In one respect, the court's ruling seems unremarkable. If one responsibility of an elected official is to campaign for reelection—or if the legislature may properly choose to define its functions to include campaigning—it seems to follow that the legislature should have the inherent or implied powers necessary to accomplish that result. Given the complexity of the modern legislative and electoral processes, the assignment of aides to assist in the legislators' campaigning duties seems only a necessary and entirely legitimate exercise of the underlying legislative authority.

In another respect, however, the court's ruling is surprising and disturbing. The ruling places the constitutional stamp of approval on a particularly virulent form of incumbency abuse; it treats the scope of inherent legislative power as broad enough to encompass the power to devote substantial public resources to the production of a particular political outcome selected by a small group of incumbent legislators. A result like this ought not to be reached unless it is compelled, and to get there, the Court of Appeals took a broad view indeed of the inherent power of the legislature to identify and accomplish its legislative duties. In light of the constitutional limitations identified in the previous section, it seems logical to ask: has the court overstated the bounds of legitimate inherent legislative authority? Unfortunately, the three types of constitutional limitations mentioned earlier are rather unpromising bases for restricting the ability of the legislature to hire staff to work on political campaigns.

First, because there is no direct, express constitutional limit on the use to which the New York Legislature can put its staff, only general constitutional restrictions could, if applicable, prevent the use of staff for campaigning. The most promising of these restrictions seems to be the equal protection clause,[110] which has been invoked to invalidate laws and governmental practices that systematically favor incumbents over challengers in election contests.[111] On further examination, however, the

109. *Ohrenstein III*, *supra* note 6, at 47, 565 N.E.2d at 497, 563 N.Y.S.2d at 748.

110. U.S. Const. amend. XIV, § 1.

111. *See* Bullock v. Carter, 405 U.S. 134, 145 (1972); Williams v. Rhodes, 393 U.S. 23, 29 (1968). The New York Constitution also contains an equal protection clause, N.Y. Const. art. I, § 11, but it has been interpreted by New York courts to be generally

equal protection analysis turns out to beg the real question. In order to avoid offending the equal protection clause, a law must advance, to a constitutionally determined degree, a legitimate government interest of some constitutionally prescribed strength.[112] In the case of the laws invoked in *Ohrenstein*, that interest would presumably be the legislative interest in campaigning effectively for reelection. But it is impossible to evaluate the strength of such a government interest for equal protection purposes without first determining whether the interest in seeking reelection is a legitimate and important one for a legislature to pursue—the very question at issue here. Thus, although it is of potential interest,[113] the equal protection clause is unable itself to provide the answer to the question of whether the use of public funds to seek reelection is a legitimate exercise of inherent legislative power.[114]

The second type of limitation on inherent legislative power—implied limits that arise from the circumstances giving rise to the underlying power itself—seems equally unpromising. As an initial matter, it is far from clear exactly what aspect of the power to legislate might give rise to an implied power to use the legislative office to seek reelection. Such an inference can hardly be justified, for example, on the ground that inherent in the power to legislate is the power to continue to legislate; the legislature itself continues to exist and to exercise legislative power regardless of the identity of the individual legislators themselves. In any event, if there is some reasonable basis for thinking that the power to seek reelection is an inherent legislative power, it seems highly unlikely that hiring aides to assist in that process will exceed some accompanying implicit limitation. The Supreme Court has held that legislators and their aides may be treated as identical for many important legislative purposes,[115] and the New York courts have largely followed the Supreme

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equivalent to the federal clause. *See* Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 530-31, 87 N.E.2d 541, 548 (1949), *cert. denied*, 339 U.S. 981 (1950).

112. *Compare* Frontiero v. Richardson, 411 U.S. 677, 683 (1973) ("Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it . . . bears no rational relationship to a legitimate governmental interest.") *with* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (under strict scrutiny standard, laws must be "necessary to promote a compelling governmental interest").

113. For a slightly different analysis of the constitutionality under the equal protection clause of legislative use of staff for campaigning, see Note, *Use of Congressional Staff in Election Campaigning*, 82 Colum. L. Rev. 998, 1010-14 (1982). *See also* Hoellen v. Annunzio, 468 F.2d 522, 525-26 (7th Cir. 1972) (then-Circuit Judge John Paul Stevens wrote: "A legislator's desire to retain his public office or to obtain another is laudable and should be encouraged, not demeaned. Implicit in a representative democracy is the assumption that such motivation will provide a wholesome influence on legislative action as well as incentive for the numerous related functions which legislators properly and legitimately perform in an effort to serve their constituents well." (footnote omitted)), *cert. denied*, 412 U.S. 953 (1973).

114. *See generally* Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982) (discussing the practical limitations of the equality principle).

115. *See* Gravel v. United States, 408 U.S. 606, 618 (1972).

Court's lead in this area.[116] Moreover, with the possible exception of the actual casting of votes on the chamber floor, it is hard to imagine a legislative power that may be exercised inherently by legislators but not delegated to their closest aides.

The third limitation on inherent legislative power, the doctrine of separation of powers, is simply inapplicable here: there can be no basis for arguing that acting in pursuit of reelection to the legislature is more a judicial or executive function than it is a legislative one. If campaigning for a seat in the legislature is characteristic of the functions of any governmental branch, that branch can only be the legislature.

Is there, then, no constitutional limit to the power of the legislature to use public resources to seek its own reelection? Had the Court of Appeals fully analyzed the pertinent questions of inherent legislative power, would it nonetheless have been forced to conclude that it lacked any basis for reining in the abuse of incumbency practiced by the Minority Leader and his codefendants? Fortunately, the answer is no. There is a fourth type of constitutional limitation that restricts the scope of inherent legislative power—the system of equality of political opportunity built into the constitutional scheme itself.

D. *Equality of Political Opportunity as a Structural Constraint on Inherent Legislative Power*

1. Legal Force of the Model

Implicit in the Constitution is a model of equality of political opportunity that derives from the concept of republican self-government and that condemns political abuse of the powers of incumbency.[117] If this model has any kind of constitutional force—if it is anything more than an interesting observation about the constitutional scheme—then it could potentially serve as a concrete limitation on inherent legislative power sufficient to prevent the type of incumbency abuse at issue in *Ohrenstein*. Does this principle of republican government have constitutional force? There is more than ample reason to believe that it does.

It is true that there is no provision of the United States or New York constitutions that expressly bars the legislature from violating the principle of equal political opportunity when defining and then pursuing what it takes to be its proper legislative duties. Express constitutional limitations, however, are only one of three distinct and powerful kinds of limits on inherent legislative power identified and applied by courts. The other two types of limits are implicit in the constitutional scheme, arising from

116. *Ohrenstein III* was apparently the first decision of the Court of Appeals to construe the state's Speech or Debate Clause. *See Ohrenstein III*, *supra* note 6, at 54, 565 N.E.2d at 501, 563 N.Y.S.2d at 752. The court relied exclusively on decisions of the United States Supreme Court in analyzing the Clause. *See id.* at 53, 565 N.E.2d at 501, 563 N.Y.S.2d at 752.

117. *See supra* notes 14-24 and accompanying text.

the nature of legislative power and from structural limits implicit in the constitutional system of separation of powers.

Indeed, the notion of equal political opportunity can be said to arise from a constitutional separation of powers just as real and just as significant as the traditional tripartite division of governmental powers; here, though, the relevant separation is not the separation of powers among the different branches of government, but the separation of powers between the government and the people themselves. The deliberate decision of the people to create a republican form of government rather than some other form reflects a popular desire to exercise control over government officials by retaining the power to select those officials in elections. For the people simultaneously to grant the legislature the power to take significant steps to perpetuate itself in office would undermine the very decisions reflected in the choice of a republican form of government.[118] Thus, the principle of equality of political opportunity is in at least this one sense a structural constitutional limit no different from the kinds of structural limits routinely enforced by both federal and New York courts.

Moreover, courts have on several occasions expressed principles much like the one invoked here, albeit in slightly different contexts. The Supreme Court has a long history of recognizing the important structural role played by popular sovereignty—the power of the people to control the government through the electoral process—in the constitutional scheme. As early as *McCulloch v. Maryland*,[119] the Court drew upon general principles of republican government implicit in the constitutional structure to identify significant limits on the taxing power of the states.[120] In the much more recent case of *Garcia v. San Antonio Metropolitan Transit Authority*,[121] the Court also relied on general principles of republican government to deduce that any constitutional limits on the federal commerce power were enforceable primarily through the political process. Significantly, the Court hinted that "failings in the national political process" might prompt it to take a more active role in policing the

118. The purpose of the separation of powers doctrine is generally said to be the protection of liberty. *See* The Federalist No. 47, at 301 (J. Madison) (Clinton Rossiter, ed. 1961); Mistretta v. United States, 488 U.S. 361, 380 (1989). The separation of powers is thought to protect liberty by disabling any single branch or person from acquiring sufficient power to pursue tyrannical ends. *See* The Federalist No. 47, *supra*, at 301-03. But if the separation of powers among branches of government is important to liberty, the separation of powers between government and the people must be even more so. Indeed, the goal of protecting the people against encroachments by the government is coherent only if accompanied by an antecedent distinction between the two in which the rights of the governed are superior to those of the government. *See also* The Declaration of Independence para. 2 (U.S. 1776) (regarding the government's derivation of power from the consent of the governed).

119. 17 U.S. (4 Wheat.) 316 (1819).

120. *See id.* at 425-37.

121. 469 U.S. 528 (1985).

boundaries of the Commerce Clause.[122] Although the types of political failings the Court referred to in *Garcia* were those involving the representation of state interests in Congress, the incumbency abuse at issue in *Ohrenstein* poses a different but no less real threat to the state political process. Under the reasoning of *Garcia*, judicial intervention to prevent this form of incumbency abuse might well be required, even if the ordinary constitutional methods for enforcing limits on inherent legislative power were political.

In another, more directly pertinent context, the Supreme Court has invoked a conception of constitutional limits on legislative power that is similar to the limits embodied in the principle of equal political opportunity. The notion that "legislatures are to make laws, not legislators,"[123] implicit in the nature of legislative power in a republican government, is the basis for the constitutional doctrine that Congress may not delegate its legislative functions to other branches of government.[124] The idea that the designation of legislators is beyond the power of the legislature itself is rooted in the same republican scheme of representative democracy as the model of equality of political opportunity; both derive from the notion that the task of choosing legislators is one reserved for the people alone, and in which the legislature may play no role.

A decision more directly on point is *Shakman v. Democratic Organization of Cook County*.[125] There, the Seventh Circuit sustained a wide-ranging challenge to the elaborate patronage and political practices of the Chicago Democratic machine. One of the claims made by the plaintiffs, party outsiders who sought to reform the abuses of the machine, was that the patronage system provided the machine with an unfair advantage in election contests. As the court put it, the allegations amounted to a charge that the challenged practices "create a substantial, perhaps massive, political effort in favor of the ins and against the outs," and that this violated the plaintiffs' constitutional right to "an equal chance" in local elections.[126] In allowing the case to go forward, the court held that the right to "an equal chance" was constitutionally protected, and that the plaintiffs had therefore stated a claim.[127] This is as clear an endorsement of the notion of a constitutionally enforceable doctrine of equal political opportunity as one is likely to find, although whether *Shakman* would be decided the same way today is open to question.[128]

122. *See id.* at 554.

123. Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 672-73, 686 (1980) (Rehnquist, J., concurring).

124. *See* Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 218-23 (1989); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935).

125. 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971), *rev'd in part on jurisdictional grounds sub nom.* Shakman v. Dunne, 829 F.2d 1387 (7th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988).

126. *Shakman*, 435 F.2d at 270.

127. *Id.*

128. In a much later appeal, portions of the original *Shakman* decision were overturned for lack of standing. *See* Shakman v. Dunne, 829 F.2d 1387, 1392-99 (7th Cir.

2. The Duties of Legislators

Even assuming that the doctrine of equality of political opportunity has some constitutional force and may limit the scope of inherent legislative power, a potentially significant objection to its application in *Ohrenstein* must be considered. The objection might go something like this. The notion of equal political opportunity has no application here because, as the Court of Appeals correctly held, seeking and campaigning for reelection is an integral part of the job of being a legislator; it is an inherent function of legislators and legislative bodies which is itself implicit in republican government. Because legislators by definition have access to the resources of government, legislating, by its very nature, encompasses some degree of inequality of political opportunity. However, the existence of this inequality is simply a necessary and unavoidable effect of the constitutional creation of a legislative body. As a result, any constitutional doctrine of equal political opportunity can have no application to the practices at issue in *Ohrenstein*.

This objection can also be couched in a somewhat weaker form that does not go so far as to claim that legislating inherently encompasses the duty to campaign for reelection. Suppose we grant that the model of equal political opportunity provides a theoretical basis for distinguishing abstractly between legislating and campaigning for reelection. Nevertheless, in practice, the two functions are so inseparably intertwined that there is no way to regulate the latter without impinging unacceptably on the former. Any serious attempt to deprive legislators of the opportunity to use the advantages available to them as incumbents would have the highly undesirable effect of crippling their ability to perform effectively the various functions that fall within the proper domain of the legislative process.

These are objections that legislatures themselves have taken seriously, and have invoked from time to time as reasons for resisting reform of the

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1987), *cert. denied*, 484 U.S. 1065 (1988). This suggests, of course, that the entire case as originally brought might today be dismissed in light of post-1970 developments in the law of standing. More fundamentally, though, the 1970 *Shakman* decision probably represents the high-water mark of judicial policing of the electoral process, a trend that the Court seems to have reversed. *Compare* Hadley v. Junior College Dist., 397 U.S. 50, 52 (1970) (expanding reach of one-person, one-vote requirement) *and* Avery v. Midland County, 390 U.S. 474, 481-83 (1968) (same) *and* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (same) *with* City of Mobile v. Bolden, 446 U.S. 55, 75-80 (1980) (declining to expand reach of the requirement). *See also* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294-300 (1981) (striking down laws designed to reduce electoral advantage of candidates and ballot initiatives derived from imbalanced financial support); First Nat'l Bank v. Bellotti, 435 U.S. 765, 775-95 (1978) (same); Buckley v. Valeo, 424 U.S. 1, 39-59 (1976) (per curiam) (same). However, a very recent case suggests that the court may be on the verge of reassuming more responsibility for policing the electoral system. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, — (1990) (acknowledging for first time "the corrosive and distorting effects of immense aggregations of wealth" on the political process).

legislative process.[129] Ultimately, though, the objections are unpersuasive. In its strong form, the objection confuses actual legislative practices with legitimate ones. The weak form of the objection, though potentially powerful in some circumstances, carries little weight in this case because using public resources for private campaigning is an activity that is easily distinguished from legitimate legislative activity, and is therefore, at least in its more extreme manifestations, susceptible to practical regulation.

Political and legislative activities are often intertwined in our system of government, and as a result it can sometimes be difficult to distinguish legislating from campaigning. When incumbent legislators run for reelection, their legislative records are legitimate campaign issues. The way legislators vote, their attendance records, their influence with colleagues, and their committee assignments, to name just a few, are all factors which voters may for good reason wish to consider when it comes time to decide whether to reelect particular individuals for another term. Consequently, almost everything legislators do in the normal course of business affects their reelection fortunes in some way. Moreover, the converse is also true: promises candidates make during campaigns and the platforms or programs they endorse exercise a strong influence on the way they conduct legislative business when elected. All this is an integral and expected part of the political process in a republic.

Legislators also perform other tasks besides participating in the law making process proper, and these tasks, which are generally considered appropriate activities for legislators, can also affect their prospects for reelection. For instance, legislators routinely try to keep their constituents informed of their activities. This "informing function"[130] is often considered to play an important role in the legislative process in a democracy, where the people are supposed to exercise ultimate control over the activities of the government.[131] Similarly, legislators often solicit the views of their constituents on business before the legislature, again on the

129. *See, e.g.*, United States ex rel. Joseph v. Cannon, 642 F.2d 1373, 1380-83 (D.C. Cir. 1981) (reviewing United States Senate's deliberations concerning restricting campaign activities of Senate staff, and concluding that Senate has been reluctant to impose such restrictions in part because of the difficulty of distinguishing campaigning from other official duties of staff); *Ohrenstein II*, *supra* note 31, at 364, 549 N.Y.S.2d at 975 (New York Legislature affirms that "[t]he official duties of a legislative employee, the adequacy of performance thereof and the compensation therefore are the exclusive prerogatives of the Legislature.").

130. The phrase "informing function" was apparently coined by Woodrow Wilson in an influential 1885 work examining the workings of Congress. *See* Hutchinson v. Proxmire, 443 U.S. 111, 132 (1979).

131. The Supreme Court has held that the congressional practice of keeping constituents informed of activities in Congress is not part of the "core" legislative activity entitled to immunity under the Speech or Debate Clause. *See infra* notes 164-68 and accompanying text. Although the Court has deemed such activities to be "legitimate," *see* United States v. Brewster, 408 U.S. 501, 512 (1972), and "helpful," *see Hutchinson*, 443 U.S. at 133 n.15, the strongest approval for this aspect of the informing function has come from the lower courts. *See, e.g.*, Common Cause v. Bolger, 574 F. Supp. 672, 677 (D.D.C. 1982) (three-judge court); Bowie v. Williams, 351 F. Supp. 628, 631 (E.D. Pa. 1972);

theory that legislators, as representatives of the people, owe their principals a duty of consultation on important matters. But every communication with constituents places legislators in the public eye and creates the impression that they are working diligently as representatives, both of which inevitably enhance their prospects for reelection. The same is true of public appearances such as speeches delivered outside the legislature, and of the wide variety of services legislators often perform for their constituents—helping constituents solve problems encountered when dealing with government agencies, for example.

These close connections between legislative and campaign activities have only been strengthened by the commonplace practice of elevating political parties and their officers to quasi-governmental status. For example, despite the fact that the United States Constitution makes no mention of political parties, Congress has chosen to organize itself for many official purposes along party lines. Thus, Congress has written the positions of Majority and Minority Leader of the Senate and House of Representatives into law, and provided that these officers may be paid a higher salary than other members of Congress.[132] It has also specifically authorized the Majority and Minority Leaders of the Senate to hire employees and consultants,[133] and to undertake various responsibilities concerning foreign legislative bodies and officials of foreign governments.[134] Congress has also by law granted special privileges to the Majority and Minority Whips.[135] Further, the Senate has by rule authorized the Majority and Minority Leaders to exercise continuing review over various Senate rules.[136] The New York Legislature has structured itself along similar lines through a mixtures of laws and rules.[137]

The institutionalization of party organization within the legislature itself, backed by force of law, inevitably draws into the legislative process political concerns transcending that process. Modern American political parties are huge associations of citizens and government officials organized to achieve a great variety of political and social goals. Political parties often have agendas that call for the achievement of change over a long period of time—certainly far longer than a single legislative session—and in areas not always directly subject to legislative control. Part of a political party's agenda may therefore include developing and imple-

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Hoellen v. Annunzio, 348 F. Supp. 305, 315 (N.D. Ill. 1972), *aff'd*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973).

132. 2 U.S.C. § 31(1)(B) (1988).

133. 2 U.S.C. §§ 61h-4 to -6 (1988).

134. 2 U.S.C. § 31a-2(a) (1988).

135. 2 U.S.C. §§ 31a-1, 61j-2 (1988).

136. *See* Senate Comm. on Rules and Admin., Senate Manual, S. Doc. No. 1, 100th Cong., 1st Sess. § 79.20 (1987).

137. *See* N.Y. Legis. Law §§ 5-a, 6(2) (McKinney Supp. 1991); New York State Senate, Rules of the Senate, 1989-90, Rule II, §§ 1-4; New York State Assembly, Rules of the Assembly, 1989-90, Rule I, § 1, Rule IV, §§ 1(b), 2(b).

menting strategies for long-term political and electoral dominance.[138] When key legislative officers are also key officials in political parties, the business of the legislature becomes organized along party lines, and the achievement of legislative goals may become intimately tied up with the achievement of partisan goals—legislative accomplishments become partisan accomplishments, and vice versa. All this makes it that much more difficult to distinguish activities of legislators designed to achieve legislative goals from those designed to achieve partisan political advantages.

However, just because legislating and campaigning may sometimes overlap does not mean that they are inseparable for any purpose. Quite the opposite seems to be the case; courts and legislatures rather routinely make fine distinctions between legislative and other activities, and not infrequently require that campaigning be conducted under different conditions than legislating.

In a series of cases decided under the Speech or Debate Clause,[139] the Supreme Court has developed a highly refined conception of what constitutes the type of "core" legislative activity protected by the Clause. The Court has held repeatedly that the Constitution contemplates a very basic legislative process consisting exclusively of those activities that may eventually result in the passage of a law.[140] This constitutional model of the legislative process provides the basis for distinguishing core legislative activities entitled to immunity under the Clause from other activities which, no matter how desirable in their own right, are nevertheless dispensable from a constitutional point of view. Thus, the Court has held that making a speech on the floor of Congress is part of the core legislative process,[141] but making a speech to the general public is not.[142] A subcommittee investigation is also part of the core legislative process,[143] but communicating with an executive agency is not.[144] These cases,

138. *See* Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. Pa. L. Rev. 1567, 1607-09 (1988).

139. *See* U.S. Const. art. I., § 6, cl. 1.

140. *See* Hutchinson v. Proxmire, 443 U.S. 111, 126-33 (1979); Gravel v. United States, 408 U.S. 606, 625 (1972); United States v. Brewster, 408 U.S. 501, 512-13 (1972).

141. *See Hutchinson*, 443 U.S. at 130.

142. *See Gravel*, 408 U.S. at 625; *Hutchinson*, 443 U.S. at 133.

143. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504-05 (1975); Tenney v. Brandhove, 341 U.S. 367, 377-78 (1951).

144. *See* Chastain v. Sundquist, 833 F.2d 311, 314 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1240 (1988). The lower courts have further elaborated these distinctions. For example, lower courts have held that the allocation of limited press seating in the congressional gallery is within the sphere of core legislative activity protected by the Speech or Debate Clause, Consumers Union v. Periodical Correspondents' Ass'n, 515 F.2d 1341, 1348-50 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976), as is the hiring of legislative press officers. *See* Agromayor v. Colberg, 738 F.2d 55, 58-59 (1st Cir.), *cert. denied*, 469 U.S. 1037 (1984). The firing of a committee stenographer is also an activity within the legislative core, Browning v. Clerk, 789 F.2d 923, 929-30 (D.C. Cir.), *cert. denied*, 479 U.S. 996 (1986), but the firing of the manager of the House of Representatives restaurant is not. *See* Walker v. Jones, 733 F.2d 923, 931 (D.C. Cir. 1984). *See also* Davis v. Passman, 442 U.S. 228, 236 n.11 (1979) (declining to decide whether congressman's firing of aide was immune under Clause).

which the New York courts follow, suggest that courts have had no difficulty in the past distinguishing legislative from non-legislative activities. Indeed, although the issue has never been squarely decided, it seems clear that the Supreme Court would have no trouble concluding that campaigning is not a part of the core legislative process entitled to constitutional immunity.[145]

Another area in which courts frequently and explicitly distinguish legislative from campaign activity is the franking privilege. Congress has by statute authorized its members to use the United States mail without charge for "the conduct of the official business, activities, and duties of the Congress of the United States."[146] In the franking statute, Congress has defined its official duties more broadly than the Supreme Court has defined them in the Speech or Debate Clause cases;[147] for example, the frank is available for "conveying of information to the public, and the requesting of the views of the public, or the views and information of other authority of government"[148]—activities the Court has held to be outside the constitutionally protected legislative core.[149] However, Congress has also provided that the frank is *not* available for "mail matter which specifically solicits political support for the sender or any other person or any political party, or a vote or financial assistance for any candidate for any public office."[150] Thus, the public will by law pick up the tab for material mailed for legitimate legislative purposes, as Congress defines them, but not for material mailed for the purpose of campaigning. Mailing costs for campaign material must be borne by the legislator individually.

The statutory distinction between legislating and campaigning created by the franking law has put the federal courts into the business of deciding when a congressional mailing serves legitimate official purposes and when it constitutes prohibited campaigning for office. Although courts deciding cases under the franking statute have recognized that "it simply is impossible to draw and enforce a perfect line between the official and political business of Members of Congress[,]"[151] they have nevertheless

145. This issue is considered more fully later. *See infra* notes 161-71 and accompanying text.

146. 39 U.S.C. § 3210(a)(1) (1988).

147. For criticism of the Court's narrow view of Speech or Debate Clause immunity, see Cella, *The Doctrine of Legislative Privilege of Speech or Debate: the New Interpretation as a Threat to Legislative Coequality*, 8 Suffolk U.L. Rev. 1019, 1024-25, 1040-46 (1974); Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 Va. L. Rev. 175, 184-91 (1973); Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1171-77 (1973).

148. 39 U.S.C. § 3210(a)(2) (1988).

149. The Court has expressly noted that the "[p]rovision for the use of the frank . . . cannot expand the scope of the Speech or Debate Clause to render immune all that emanates via such helpful facilities." Hutchinson v. Proxmire, 443 U.S. 111, 133 n.15 (1979).

150. 39 U.S.C. § 3210(a)(5)(C) (1988).

151. Common Cause v. Bolger, 574 F. Supp. 672, 683 (D.D.C. 1982) (three-judge court), *aff'd*, 461 U.S. 911 (1983).

from time to time held the use of the frank improper.[152] In adjudicating cases under the franking statute, courts have not shrunk from making subtle distinctions. In one case, the court held that the same mailing was proper under the franking statute when sent to one group of citizens, and improper when sent to another group. In *Hoellen v. Annunzio*,[153] a congressman whose election district had been redrawn sent questionnaires to residents of the redrawn district. The court held that the mailing was proper insofar as it reached residents of wards within the redrawn district that were also within the old district—that is, citizens whom the incumbent congressmen then represented. However, the court held that the mailing was improper insofar as it reached residents of wards that the congressman did not then represent, but hoped to represent if returned to office from the new district. These mailings, the court held, constituted pure campaigning.

In perhaps the most blunt judicial decision to address the point, the California Court of Appeal held: "The use of state employees by a legislator's campaign committee to solicit contributions, plan campaign strategy, coordinate volunteers, and prepare the campaign budget, all at state expense, is in no way a proper part of a legislator's official functions; that is not to be questioned."[154] The court accordingly ruled that the performance of campaign duties by a legislative employee at public expense constituted a "contribution" by the legislature to the reelection campaign of the legislator who received the employee's services, and therefore fell within the reporting requirements of California's Political Reform Act.[155]

Courts are not the only bodies that occasionally distinguish the legislative activities of legislators from their campaign activities. Many legislatures, including Congress and the New York Legislature, have adopted internal rules that recognize the distinction between campaigning and legislating and that take steps to keep the two separate.[156] Indeed, some of these regulations concern the use of legislative staff, the very issue in

152. *See* Hoellen v. Annunzio, 348 F. Supp. 305, 313-16 (N.D. Ill.), *aff'd*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973); Rising v. Brown, 313 F. Supp. 824, 826-27 (C.D. Cal. 1970). In other cases, the use of the frank has been sustained against claims that the privilege was abused. *See* Schiaffo v. Helstoski, 492 F.2d 413, 428-31 (3d Cir. 1974); Bowie v. Williams, 351 F. Supp. 628, 632-34 (E.D. Pa. 1972); Van Hecke v. Reuss, 350 F. Supp. 21, 25 (E.D. Wis. 1972); Straus v. Gilbert, 293 F. Supp. 214, 216 (S.D.N.Y. 1968).

153. 348 F. Supp. 305, 313-16 (N.D. Ill.), *aff'd*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973).

154. Fair Political Practices Comm'n v. Suitt, 90 Cal. App. 3d 125, 130, 153 Cal. Rptr. 311, 314 (3d Dist. 1979).

155. *Id.* at 130-31, 153 Cal Rptr. at 314-15; *see* Cal. Gov't Code §§ 81000-16 (West 1987).

156. *See, e.g.*, Senate Standing Rule 41.1, in Senate Manual, *supra* note 136, at 77 ("No officer or employee of the Senate may receive, solicit, be a custodian of, or distribute any funds in connection with any campaign for the nomination for election, or the election, of any individual to be a Member of the Senate or to any other Federal office."). *See infra* notes 157-60.

Ohrenstein. For example, the United States Senate has issued guidelines to Senators stating that staff "are compensated from public funds for their official congressional duties rather than for campaign services."[157] The House of Representatives ethics manual similarly provides that staff "may not be compensated from public funds to perform nonofficial, personal, or campaign activities on behalf of the Member."[158] And the New York Legislature, partly in response to the events of *Ohrenstein*, adopted a concurrent resolution in 1987 which stated: "It is hereby established as the rule of the Legislature that no person shall be hired by the Legislature to engage solely in political campaign activity."[159]

Even if these limitations are enforceable only internally by the legislature, or are not intended to be enforced at all, they nevertheless reveal two beliefs of these legislative bodies. First, the legislatures that adopted these restrictions clearly believed that campaigning and legislating are distinct activities, regardless of the extent to which they may overlap.[160] Second, the legislatures believed that the distinction between legislative and campaign activities is sufficiently clear to form the basis for practical decisions by individual legislators concerning the use and payment of staff members.

All this points to two conclusions. First, there is no good constitu-

157. Senate Comm. on Rules and Admin., Senate Election Law Guidebook, S. Doc. No. 25, 100th Cong., 2d Sess. 257 (1988) [hereinafter *Senate Election Law Guidebook*].

158. House Comm. on Standards of Official Conduct, Ethics Manual for Members and Employees of the U.S. House of Representatives, 100th Cong., 1st Sess. 84 (1987) [hereinafter *House Ethics Manual*].

159. New York Legislature, Concurrent Resolution 812, quoted in *Ohrenstein II*, *supra* note 31, at 364, 549 N.Y.S.2d at 975. Several other states have passed laws prohibiting the expenditure of public funds or the use of public property for the purpose of assisting candidates for political office. *See, e.g.*, Ala. Code Ann. § 17-1-7(c) (1988) ("No person in the employment of the state . . . shall use any state funds, property or time, for any political activities."); Colo. Rev. Stat. § 1-45-116(1)(a), (3) (1990) (no agency contributions to political campaigns; candidates must reimburse state for public money spent on campaigns); Fla. Stat. Ann. § 106.15(2) (West Supp. 1991) (no use by candidates of state aircraft or vehicles for campaigning; must prorate expenses if used for dual purposes); Ga. Code Ann. § 50-19-8 (1990) (no use of vehicles); Iowa Code Ann. § 721.4 (West 1979) (no use of state-owned vehicles); Or. Rev. Stat. § 260.432(2) (1986) (no political activity by state employees "while on the job during working hours"); Tenn. Code Ann. § 2-19-206 (1985) (no use of public facilities for display of campaign literature); Wash. Rev. Code Ann. § 42.17.130 (1991) (no use of public facilities). In Louisiana, the prohibition is constitutional. *See* La. Const., art. XI, § 4 (1977) ("No public funds shall be used to urge any elector to vote for or against any candidate or proposition.").

160. It is also true, however, that these legislatures have not necessarily thought that it is always easy to tell the difference between campaigning and legislating or to keep the two distinct. Both the Senate and House of Representatives have raised the possibility of "arguably unavoidable, 'overlap' or intrusion of some minimal campaign related activities into the official operation of a Member's office." *Senate Election Law Guidebook*, *supra* note 157, at 262; *House Ethics Manual*, *supra* note 158, at 87. In such cases, the Member is directed to keep such overlap to a *de minimus* level. *See id.* The New York Legislature has also indicated that it is proper for staff to engage in some campaign activities, but not if such activities interfere with the performance of official duties. *See also Ohrenstein II*, *supra* note 31, at 346, 549 N.Y.S.2d at 975 (quoting § 5 of Concurrent Resolution 812).

tional basis for thinking that campaigning for reelection is such an integral part of the duties of incumbent legislators that it cannot be restricted without impairing some important legislative function. To the extent that incumbents actually do campaign for reelection, they are doing something other than the legislative tasks assigned to them by virtue of their holding constitutional office. Second, although the intertwining of legislative and campaign activities is significant and unavoidable in many areas, it is not so completely unavoidable, where the use of legislative staff is concerned, as to preclude all regulation. A legislator may be compelled to hire aides, and may unavoidably derive political benefits from the activities of those aides; but no legislator is compelled for any legitimate legislative reason to hire aides to spend all or most of their time on the legislator's reelection campaign. Consequently, a line distinguishing legislating from campaigning may be drawn somewhere without doing fatal damage to legislators' abilities to perform legislative duties, and it can certainly be drawn at the point where staff are assigned to work full time on campaigns, as was the case in *Ohrenstein*.

IV. JUSTICIABILITY

One final issue remains to be considered. Even assuming that there are constitutional limits on the scope of inherent legislative power, and that the conduct of the *Ohrenstein* defendants transgressed those limits, it does not necessarily follow that courts have the power to enforce those limits. There are two potential barriers to justiciability in *Ohrenstein*: the Speech or Debate Clause of the New York Constitution, and the political question doctrine. Neither one, however, is an obstacle to judicial review given the circumstances of the case.

A. *Speech or Debate Clause Immunity*

Much like its federal counterpart, the New York Speech or Debate Clause provides: "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place."[161] The main purpose of this provision, which is rooted in the seventeenth-century English struggle between Parliament and the Crown,[162] is to create a constitutional immunity allowing legislators to perform their duties free from interference by other branches of government.[163]

The New York Court of Appeals has construed the New York Speech

161. N.Y. Const. art. III, § 11. *Compare* U.S. Const. art. I, § 6, cl. 1.

162. *See* Tenney v. Brandhove, 341 U.S. 367, 372-75 (1951). *See also* Reinstein & Silverglate, *supra* note 147, at 1120-44 (discussion of the historical development of the Constitution's speech or debate privilege).

163. *See Ohrenstein III*, *supra* note 6, at 53, 565 N.E.2d at 500-01, 563 N.Y.S.2d at 751-52; *accord* United States v. Johnson, 383 U.S. 169, 178-79 (1966) (discussing the legislative privilege to be free from interference by the Judiciary and Executive branches).

or Debate Clause to have the same meaning as the federal version,[164] so the rulings of the federal courts are a reliable guide to the meaning of the New York Clause. The Supreme Court has been quite specific about what activities of legislators are entitled to the immunity conferred by the Clause. Only acts "done in Congress in relation to the business before it,"[165] the Court has held, fall within the scope of constitutional immunity. Such acts

> must be an integral part of the deliberative and communicative processes by which Members participate in committee and [congressional] proceedings with respect to the consideration and passage or rejection of proposed legislation. . . .[166]

The scope of this immunity is quite narrow. The Court has emphasized that the Clause does not protect "all things in any way related to the legislative process," because virtually anything a legislator does could fall within that definition.[167] Rather, the Clause protects only those activities "within the legislative core."[168] As noted earlier, the Court has specifically held that certain activities commonly performed by legislators, such as informing and communicating with constituents, are outside the protected legislative core.[169]

In light of these holdings, it is highly unlikely that the Court would consider acts associated with campaigning for reelection to be immune under the Clause. Campaigning for reelection does not relate to the business before the legislature, but to the business before the electorate. It is no part at all, much less an integral part, of the process by which proposed legislation is considered, for the outcome of an election is not legislation, but legislators. Indeed, the legislature could carry on its business without any impairment at all (and perhaps could carry on more effectively) even if legislators were constitutionally barred from succeeding themselves in office, and thus were ineligible to campaign while holding office.[170]

Finally, in the portion of the *Ohrenstein* opinion dealing with the no-show employees, the Court of Appeals itself noted that Speech or Debate immunity "does not extend to acts which a legislator performs to secure support in the community or to insure reelection."[171] Thus, the Speech or Debate Clause does not bar judicial enforcement of constitutional limits on inherent legislative power as they relate to the use of staff for campaign purposes.

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164. *See Ohrenstein III*, *supra* note 6, at 53-54, 565 N.E.2d at 501, 563 N.Y.S.2d at 752.

165. United States v. Brewster, 408 U.S. 501, 512 (1972).

166. Gravel v. United States, 408 U.S. 606, 625 (1972).

167. *Brewster*, 408 U.S. at 516.

168. Browning v. Clerk, 789 F.2d 923, 926 (D.C. Cir. 1986).

169. *See Brewster*, 408 U.S. at 512.

170. This is the case for the Governor of Virginia, who is constitutionally barred from serving two consecutive terms. *See* Va. Const. art. V, § 1.

171. *Ohrenstein III*, *supra* note 6, at 54, 565 N.E.2d at 501, 563 N.Y.S.2d at 752.

B. *The Political Question Doctrine*

The other potential bar to the justiciability of legislative transgressions of constitutional limits on inherent legislative power is the political question doctrine. That doctrine, rooted in the constitutional separation of powers, precludes courts from deciding cases that require the resolution of certain types of questions which the judiciary is poorly equipped to resolve.[172] The Supreme Court has identified six instances in which the political question doctrine bars judicial review of government actions; these include a "textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving" a question.[173]

In the only other case besides *Ohrenstein* to consider the propriety of the use of legislative staff for campaigning, the United States Court of Appeals for the District of Columbia Circuit held that the political question doctrine barred judicial review. In *United States ex rel. Joseph v. Cannon*,[174] a private plaintiff brought a *qui tam* action under the False Claims Act[175] to recover public funds spent by an incumbent Senator to pay an aide who for nine months allegedly worked exclusively on the Senator's reelection campaign. The court held the action barred by the political question doctrine due to a lack of judicially discoverable and manageable standards.[176] The court based its ruling on the absence of statutory, administrative, and case law addressing the propriety of the use of congressional staff for campaign purposes, and on what it deemed the inability of the Senate itself to decide the question in its internal deliberations.[177]

Because the assignment of duties to legislative staff seems so intimately a part of the internal self-governance of a coordinate branch of government, the decision of the court in *Cannon* to stay out of the dispute makes at least superficial sense. Upon further examination, however, there are three good reasons to reject the court's conclusion.[178] First, the court completely ignored the constitutional standards that constrain the scope of inherent legislative power. Legal standards established by the Constitution itself are more than sufficient to make a case judicially manageable within the meaning of the political question doctrine.[179]

172. *See* Goldwater v. Carter, 444 U.S. 996, 998-1000 (1979) (Powell, J., concurring); Baker v. Carr, 369 U.S. 186, 217 (1962).

173. *Baker*, 369 U.S. at 217.

174. 642 F.2d 1373 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999 (1982).

175. *See* 31 U.S.C. § 231 (1988).

176. The New York Appellate Division relied on *Cannon* to reach a similar conclusion with respect to some of the counts in *Ohrenstein*. However, this part of the Appellate Division's opinion was affirmed by the Court of Appeals on different grounds. *See Ohrenstein II*, *supra* note 31, at 356-69, 549 N.Y.S.2d at 970-77.

177. *See Cannon*, 642 F.2d at 1379-84.

178. A fourth reason, not discussed here, is that the court simply erred in concluding that the Senate was ambivalent about the use of staff in reelection campaigns. A persuasive case to this effect is made in Note, *supra* note 113, at 1018-24.

179. *See* Powell v. McCormack, 395 U.S. 486, 549 (1969).

Second, the very thing that makes the political question doctrine ultimately justifiable—the availability of a political check on the legislative and executive branches—is missing under the circumstances of *Ohrenstein*. An important, and perhaps paramount, function of the judicial branch is to enforce constitutional norms against the political branches of government.[180] The political question doctrine relies on the notion that certain types of issues are better resolved by the political branches themselves, but that does not mean that those branches are then unaccountable for any transgressions of constitutional norms. Accountability to the judiciary is not the only type of accountability: the legislative and executive branches are always accountable to the people directly at the polls.[181] However, this assumption breaks down when the actions taken by those branches, actions claimed to be sheltered from review by the political question doctrine, tend to undermine the political check itself. Here, the legislature has used its staff to campaign precisely in order to obtain an advantage in the election, and this advantage weakens the ability of the people to exercise an electoral check on those very legislative actions. Thus, legislative actions designed to perpetuate the power of the legislature stand on a different footing from the types of actions for which the political question doctrine is typically invoked. In these circumstances, courts should be extremely wary of invoking the doctrine because they may be the only bodies capable of curbing the constitutionally offensive practice.[182]

A final reason for rejecting the reasoning of *Cannon* is peculiar to the circumstances of *Ohrenstein*. The political question doctrine flows in part from the idea that separation of powers considerations caution against judicial intrusions into the province of coordinate branches of government.[183] The more intrusive the judicial inquiry, the less likely the court is to undertake it.[184] In *Ohrenstein*, the way in which the issue of legislative staff use was presented made judicial resolution of the issue as unintrusive as it could possibly be: all the court had to do was construe the statutes that the defendants claimed authorized them to hire staff to do campaign work. Unlike the issuance of declarations or injunctions, or the type of inquiry into the motivations of legislators potentially implicated in *Cannon*, statutory construction is among the least intrusive methods of judicial action.[185]

180. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803).

181. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551-55 (1985); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428-34 (1819).

182. *See Garcia*, 469 U.S. at 554. *See generally* J.H. Ely, Democracy and Distrust 73-179 (1980) (addressing the Court's role in political change).

183. *See Baker*, 369 U.S. at 217; *Cannon*, 642 F.2d at 1379.

184. Thus, the Court will decline to adjudicate a case on political question grounds if its resolution would "express[] lack of the respect due coordinate branches of government," or would require "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

185. *See* Goldwater v. Carter, 444 U.S. 996, 1001 (1979) (Powell, J., concurring). Jus-

CONCLUSION

Abuse of the powers of incumbency for political gain is a serious offense against the polity and against republican self-government itself. If true, the allegations against the Minority Leader of the New York Senate reveal a systematic pattern of legislative abuse that ought to be intolerable under our form of government. In its decision in *Ohrenstein*, the New York Court of Appeals not only failed to put a stop to these activities, but in essence put them beyond the reach of any branch of government to prevent other than the legislature—the one entity that can least be trusted to resist the temptation to use public resources to perpetuate its own power.[186]

The court's decision rests on the misguided notion that the legislature has virtually unlimited inherent power to define its own duties and to pay assistants to accomplish them. In fact, inherent legislative power is subject to numerous constitutional limitations, including the structural constraint arising from the concept of equality of political opportunity implicit in our system of republican government. The use of public resources to obtain an electoral advantage offends this structural constraint, and is thus beyond the constitutional power of the legislature to undertake.

The close relation in our political system between those activities of legislators that promote their legislative interests and those that promote their personal political fortunes gives incumbents an electoral advantage over challengers that is to a certain extent unavoidable. That does not mean, however, that all such advantages inevitably accompany incumbency, or that legislating and campaigning can never be differentiated. The hiring of staff at public expense to work on reelection campaigns is so clearly beyond the scope of activities integral to the legislative process that courts should not hesitate to invalidate the practice. Moreover,

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tice Powell argued that interpreting the Constitution does not imply a lack of respect for the coordinate branches; it is the duty of courts to say what the law is. *See id. See also* Powell v. McCormack, 395 U.S. 486, 548-49 (1969) (judicial interpretation of the Constitution "falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of respect due [a] coordinate [branch] of government' " (quoting *Baker*, 369 U.S. at 217)); *accord* Davis v. Passman, 442 U.S. 228, 235 n.11 (1979) (same). If constitutional interpretation is sufficiently unintrusive to avoid creating a political question, interpreting a statute must be even less so.

186. The only action the New York Legislature has taken thus far, even in response to intense pressure from the public and from an extremely popular Governor, is Concurrent Resolution 812, a modest and highly circumscribed reform. *See Ohrenstein II*, *supra* note 31, at 346, 549 N.Y.S.2d at 975. The Resolution says only that legislative staff may not be hired to engage "solely" in campaign work. *Id.* The Resolution provides no means of enforcing even this limited restriction, which, in any event, is easily evaded. Moreover, the Resolution further undercuts the possibility of meaningful reform by expressly affirming that "[t]he official duties of a legislative Employee, the adequacy of performance thereof and the compensation therefor are the exclusive prerogatives of the Legislature." *Id.*

neither the Speech or Debate Clause nor the political question doctrine makes such legislative practices non-justiciable.

For now, the Legislature has decided, at least on paper, voluntarily to curb the most egregious abuses of legislative staff. It remains to be seen whether the court's decision in *Ohrenstein*, coupled perhaps with the eventual election of a governor less interested in government ethics than the incumbent, will undermine this legislative resolve, thereby paving the way for a return to practices that have no legitimate place in a democracy.