

The Abuse of Incumbency on Trial: Limits on Legalizing Politics

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In politics, incumbency comes with significant advantages. Government officials running for reelection can use the benefits of their incumbent position to speak with their constituents and, at least incidentally, support their reelection. At some point, an incumbent candidate's use of those privileges becomes abuse — and possibly a criminal act. Using a case study, this Note explores the fine line between the legitimate use and illegitimate abuse of official incumbency to advance political goals, arguing that courts should consider the justiciability of abuse of incumbency claims in light of the unique separation of powers concerns such cases often raise. The claim is ultimately a modest one: this is an area of the law with particularly difficult line-drawing questions and few clear doctrinal solutions.

I. INTRODUCTION

Former Massachusetts Treasurer Timothy P. Cahill was having a bad October. An independent candidate for governor in the upcoming statewide election, Cahill was buried under a cascade of bad news in the final weeks of the campaign. All major polls pointed to a sure defeat in the upcoming election.¹ On October 1, 2010, his running mate officially defected, appearing at an opponent's campaign office to endorse the opponent's candidacy.² Sev-

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1. Frank Phillips, *Patrick opens narrow lead, poll suggests*, BOS. GLOBE, Oct. 24, 2010, at B1 (“independent Timothy P. Cahill, the state treasurer and former Democrat, trailed far behind with 8 percent.”).

2. Michael Levenson, *Cahill's running mate defects*, BOS. GLOBE, Oct. 2, 2010, at B1.

eral days later, Cahill's top campaign strategists also jumped ship, leaving a nasty lawsuit in their wake.³

Then, on October 14, Cahill's office received a call from Massachusetts Attorney General Martha Coakley.⁴ Coakley requested that the state lottery, under his control as Treasurer, shut down a multi-million dollar self-congratulatory advertising blitz that neatly coincided with Cahill's campaign for the Commonwealth's top office — despite the fact that the lottery ads didn't mention Cahill by name.⁵ At the time, Coakley said she asked Cahill to stop the ads “to avoid even the appearance of impropriety.”⁶ But her investigation of Cahill's involvement was ongoing and on April 2, 2012, a grand jury indicted Cahill for using his office to secure an “unwarranted privilege” during the campaign.⁷ Did Cahill act corruptly? By allowing or encouraging the state agency he oversaw to promote itself as he ran for higher office, was he committing a crime? Ultimately, that question stumped a jury: Cahill's criminal prosecution ended in a mistrial on December 12, 2012, and it appeared to raise more questions than it resolved.⁸

In politics, as in many competitive fields, incumbency often comes with significant advantages. It's good to already have the job you're running for. And on one end of the spectrum, some uses of official position to secure political goodwill must be legitimate. Consider the daily reminders of a city's current mayor emblazoned on city property from construction signs to fire trucks.⁹

3. Frank Phillips, *Cahill accuses ex-aides of plot to help Baker, Judge blocks 4 defendants from releasing information*, BOS. GLOBE, Oct. 8, 2010, at B1. Cahill sued the strategists first. *Id.* They retaliated by releasing emails purporting to show that the campaign had collided with the state lottery. Michael Levenson, *Cahill's advisers discussed lottery ads*, BOS. GLOBE, Oct. 14, 2010, at A1.

4. Michael Levenson, *Cahill agrees to suspend lottery ads*, BOS. GLOBE, Oct. 15, 2010, at B1.

5. *Id.*

6. *Id.*

7. See Indictment, Commonwealth v. Timothy P. Cahill, No. SUCR201210348, 2012 WL 1141622 (Mass. Super. filed Apr. 2, 2012); Frank Phillips, *Cahill indicted in corruption case*, BOS. GLOBE, Apr. 3, 2012, at B1.

8. Michael Levenson, *Jurors deadlock on corruption charges against Cahill*, BOS. GLOBE, Dec. 13, 2012, at A1.

9. See *Curb appeal: Pittsburgh mayor's name on trash cans*, ASBURY PARK PRESS, Feb. 18, 2009, available at 2009 WLNR 16835771; Sarah Schweitzer, *Cahill faced a fine line on government advertising*, BOS. GLOBE, Apr. 4, 2012, at B1 (noting the presence of “[Boston] Mayor Thomas M. Menino's name on construction project signs, Secretary of

Crossing state lines on the highway, the subtitle to many states' welcome signs is the current Governor's name.¹⁰ But at the extreme, the notion of directly supporting a partisan reelection campaign with taxpayer funds appropriated for official government business is reprehensible.

Between the two poles is a vast gray area that continues to generate significant controversy. In the most recent national election, Republicans accused President Barack Obama's administration of politicizing presidential travel and using federal resources — such as Air Force One — to run for reelection.¹¹ The Chairman of the Republican Party went so far as to file a complaint with the federal government's General Accounting Office.¹²

This Note addresses the fine line between the legitimate use and illegitimate abuse of official incumbency to advance political goals. Drawing that line — and deciding who draws it — presents a doctrinal and policy challenge. Addressing the federal campaign finance regime in *Buckley v. Valeo*, the Supreme Court described the regulations as a “reasonable accommodation between the legitimate and necessary efforts of legislators to communicate with their constituents” and “activities designed to win elections by legislators in their other role as politicians.”¹³ But the line between the two is rarely so clear, and many courts have been reluctant or unable to draw a bright line between actions that constitute partisan electioneering and those that amount to appropriate official decision-making.

State William F. Galvin's name and picture on voter guides, and Governor Deval Patrick's name on Massachusetts highway signs”).

10. See Schweitzer, *supra* note 9; Roger R. Johnson, ROGER JOHNSON'S WELCOME TO AMERICA, <http://www.welcometoamerica.us> (last visited Feb. 21, 2013) (collecting photographs of states' highway welcome signs).

11. Jackie Calmes, *Is That Trip 'Presidential' Or 'Political'?*, N.Y. TIMES, Apr. 21, 2012, at A1.

12. Letter from Reince Priebus, Chairman, Republican Nat'l Comm., to Gene L. Dodaro, Comptroller, Gov't Accountability Office (Apr. 25, 2012), available at <http://www.gop.com/images/1GAORNCLetter.pdf>. Chairman Priebus did not get a response: the Government Accountability Office (GAO) only initiates audits at the request of Congress. George E. Condon Jr., *Obama Undeterred by GOP Complaints About Air Force One*, NAT'L J., (July 12, 2012, 6:00 a.m.), <http://www.nationaljournal.com/white-house/obama-undeterred-by-gop-complaints-about-air-force-one-20120712>.

13. 424 U.S. 1, 84 n.112 (1976).

State and federal courts have disagreed about whether the judiciary is well-equipped to draw these sensitive lines.¹⁴ Some courts have relied on the political question doctrine and other justiciability grounds to avoid reaching the merits of an alleged abuse of incumbency.¹⁵ Others have abstained from hearing such controversies based on a prudential decision about which branch is best suited to resolve the issue.¹⁶ The Supreme Court has yet to confront the issue squarely.¹⁷

This Note argues that courts should consider the justiciability of abuse of incumbency allegations on a case-by-case basis and those decisions should be informed by a respect for the separation of powers and an awareness of the judiciary's limited capacity to meaningfully resolve such controversies. The claim is ultimately a modest one: this is an area of the law with particularly difficult line-drawing questions and few clear doctrinal solutions. Courts should apply a more careful threshold inquiry into justiciability before acting in the absence of clear rules governing elected officials' conduct. This argument is informed by the experiences of lower federal courts and the lessons learned from the Massachusetts case study introduced at the outset. Part II of this Note discusses the specific challenge posed by an elected official's abuse of incumbency and considers when alleged abuses are susceptible to judicial review. Part III surveys the various approaches state and federal courts have taken to judicial review of abuse of incumbency allegations. Part IV considers whether a recent Massachusetts criminal statute banning the use of elected office to gain an "unwarranted privilege" clarifies the puzzle. The first criminal trial in which the statute was deployed, which resulted

14. Compare, e.g., *U.S. ex rel. Joseph v. Cannon*, 642 F.2d 1373 (D.C. Cir. 1981), with *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), supplemented on denial of reh'g, 68 F.3d 489 (D.C. Cir. 1995).

15. Compare, e.g., *Cannon*, 642 F.2d at 1384 ("Moreover, the inability of the Senate a body constitutionally authorized and institutionally equipped to formulate national policies and internal rules of conduct to solve the problem demonstrates 'the impossibility of deciding' the issue appellant poses 'without an initial policy determination of a kind clearly for nonjudicial discretion.'") (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)), with *Common Cause v. Bolger*, 574 F. Supp. 672, 684 (D.D.C. 1982), *aff'd mem.*, 461 U.S. 911 (1983) ("Our deference to Congress is guided also by important prudential considerations.").

16. See *People v. Ohrenstein*, 565 N.E.2d 493, 497 (N.Y. 1990) (noting that "The Legislature is the 'political' branch of government.").

17. The Court did summarily affirm the result in *Common Cause v. Bolger*. 461 U.S. 911 (1983) (mem.).

in a mistrial, demonstrates the limitations of the Massachusetts approach. The Note concludes with a call for caution: a court's willingness to resolve an abuse of incumbency challenge should be informed by prudential considerations — most importantly, the clarity and concreteness of the conduct rules allegedly violated by the elected official.

II. DIMENSIONS OF THE INCUMBENCY ABUSE PROBLEM

Abuse of incumbency cases pose special challenges for courts. This Part addresses the nature of those challenges and the legal questions they raise. It begins by describing the “harm” inflicted by officeholders abusing the advantages of incumbency. Subpart B goes on to discuss the specific separation of powers issues that are implicated by the question this Note considers.

A. CONCEPTUALIZING THE HARM OF INCUMBENCY ABUSE

In *Buckley v. Valeo*, the Supreme Court casually endorsed the division of an elected official's role into two spheres: the political and the official.¹⁸ The Court's dictum reflects a central principle of American democracy: that the government must remain neutral in partisan elections.¹⁹ While the government is allowed to

18. *Buckley*, 424 U.S. at 84 n.112 (drawing a distinction “between the legitimate and necessary efforts of legislators to communicate with their constituents” and “activities designed to win elections by legislators in their other role as politicians”).

19. See, e.g., THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (governments derive “their just Powers from the Consent of the Governed”). The Court has previously upheld legislative schemes that favor incumbent or major-party candidates, see *Buckley*, 424 U.S. at 30–36; *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), *overruled by Citizens United v. Fed Election Comm'n*, 558 U.S. 310 (2010), but seems increasingly concerned about such subsidies. In *McConnell*, Justices Kennedy and Scalia voiced concerns about legislation favoring incumbent candidates. *McConnell*, 540 U.S. at 249–50 (Scalia, J., concurring in judgment in part and dissenting in part); *id.* at 306–07 (Kennedy, J., concurring in judgment in part and dissenting in part). In *Citizens United*, Justice Stevens stated that he would consider striking down legislation expressly geared toward protecting incumbents. *Citizens United*, 558 U.S. at 462 (“Along with our duty to balance competing constitutional concerns, we have a vital role to play in ensuring that elections remain at least minimally open, fair, and competitive.”) (Stevens, J., concurring in part and dissenting in part). Justice Breyer previously recognized “we should not defer [to the legislature] in respect to whether its solution . . . insulates legislators from effective electoral challenge.” *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 404 (2000) (Breyer, J., concurring).

participate as a speaker in the First Amendment marketplace²⁰ and the formal advantages of incumbency are not suspended during elections,²¹ government support of one candidate over the other is problematic.²² The ability of one candidate to deploy public money as speech in a contested election threatens the fundamental fairness of free elections — a serious constitutional injury.²³ Scholars have identified potential First Amendment²⁴ and

20. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (holding that “government speech is not restricted by the Free Speech Clause.”).

21. The franking statute does contain such limitations. Senators may not send franked mail within sixty days of an election. 39 U.S.C. § 3210(6)(C) (2006). Members of the House must abide by a ninety-day window. 39 U.S.C. § 3210(6)(A)(i). The franking statute is discussed in greater detail in text accompanying notes 89–105 and in Part III.C.

22. Many academic commentators have discussed potential sources of a constitutional command to remain neutral in candidate elections. *See, e.g.*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 13 1097 (2d ed. 1988) (“Few prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which the voters, in theory, can register their dissatisfaction by choosing new leadership.”); Erwin Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 OHIO ST. L.J. 773, 776 n.29 (1988) (collecting cases requiring government partisan neutrality); Helen Norton, *Campaign Speech Law with A Twist: When the Government Is the Speaker, Not the Regulator*, 61 EMORY L.J. 209, 221 (2012) (arguing “[i]t would be establishing a dangerous and untenable precedent to permit the government or any agency thereof, to use public funds to disseminate propaganda in favor of or against any issue or candidate. This may be done by totalitarian, dictatorial or autocratic governments but cannot be tolerated, directly or indirectly, in these democratic United States of America.”).

23. *See supra* note 22. *Cf. Coal. to End Permanent Cong. v. Runyon*, 971 F.2d 765 (D.C. Cir. 1992) (unpublished table decision), 1992 WL 181991, at *1, *supplemented and depublished by* 979 F.2d 219 (D.C. Cir. 1992) (per curiam) (“Any such statute, which provides financial support to an incumbent against a major-party challenger must receive some degree of heightened scrutiny under the First and Fifth Amendments to determine whether the burden placed on the rights of candidates and their supporters is justifiable.”) (citations omitted); *Anderson v. City of Boston*, 380 N.E.2d 628, 637 n.14 (Mass. 1978) (“Surely, the Constitution of the United States does not authorize the expenditure of public funds to promote the reelection of the President, Congressmen, and State and local officials Government domination of the expression of ideas is repugnant to our system of constitutional government”).

24. U.S. CONST. amend. I. Relying on the First Amendment’s protection of “the people’s meaningful self-governance — their free choice about whom to elect,” Professor Helen Norton has recently written in favor of a constitutional limitation on the government’s power to participate “expressively in candidate campaigns,” without impeding its ability to influence issue campaigns or “expressive purposes more generally.” Norton, *supra* note 22, at 257–59. Recognizing that “government speakers are often — and unavoidably — motivated both by public-minded and self-interested purposes,” Professor Norton argues that “the best we can do is to root out government speech expressly geared to influencing results in current, contested candidate elections on the premise that official government speech most directly connected to candidate electioneering is generally more dangerous and less valuable than government speech on issue campaigns.” *Id.* at 257–58.

Fifth Amendment²⁵ Equal Protection problems with government support of incumbent candidates. Most clearly, the threat of incumbent abuse can be understood as a corollary to the harm posed by “corruption” generally.²⁶

Erwin Chemerinsky has elaborated on the Equal Protection problem.²⁷ When an incumbent unfairly exploits substantial privileges unavailable to the challenger, Dean Chemerinsky writes, “[t]he government is aiding one candidate and no others. Such actions by incumbents are inconsistent with the very definition of a democratic government.”²⁸ To Chemerinsky, the “Equal Protection Clause of the Fourteenth Amendment is violated if the government acts to aid only the incumbent. Use of government power and money to favor an incumbent in an election contest violates the right to vote for those who support an incumbent’s opponent by lessening the value and effectiveness of their votes and depriving their votes of equal weight by putting government money and power into the balance against them.”²⁹

Similarly, Abner Greene has argued that “viewpoint-based government speech that . . . favors views supportive of the current administration or majority party while disfavoring views of the opposition” is unconstitutional insofar as it “tends toward entrenching the current ruling party, and blocks the paths of political change. It thus violates one of the two key principles of the famous footnote four on *Carolene Products*, and should be deemed invalid.”³⁰

An alternative framework for understanding the harm done by abuses of incumbency is within the broad legal concept of corrup-

25. U.S. CONST. amend. V; Chemerinsky, *supra* note 22, at 776.

26. Going forward, this Note dispenses with the scare quotes going forward, but they serve to distinguish the Supreme Court’s shifting definition of corruption from the variegated interpretations offered by academics. *See infra* notes 33–36.

27. Chemerinsky, *supra* note 22, at 776.

28. *Id.*

29. *Id.* at 778. *See also* *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’”) (citations omitted).

30. Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 38, 39 (2000) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)) (suggesting that a more rigorous judicial standard of review could be applied to legislation targeting a discrete and insular minority).

tion. The nature of public or political corruption resists simple definition.³¹ The term “corruption,” at its core, seems to refer to a basic disloyalty to principles of honest governing, or an intentionally dishonest action by a public official in violation of an ethical or fiduciary obligation to the public at large.³² The Supreme Court’s experience in attempting to define corruption in the campaign finance context demonstrates the concept’s slipperiness.³³ The Court’s shifting definition of the term, from “*quid pro quo*” bribery³⁴ to “the appearance of corruption”³⁵ and, most recently, back to a more limited conception of the term in *Citizens United v. FEC*, with Justice Kennedy’s comment that “[i]ngratiation and access . . . are not corruption” epitomizes the challenge.³⁶

Where the Court has failed to provide a workable or consistent definition, scholars have moved in. Samuel Issacharoff has articulated an “outputs account of corruption . . . concerned with the subversion of the role of government, conceived of in terms of the need to provide public goods.”³⁷ Calling for a more sophisticated understanding of the harm that campaign finance reformers seek to mitigate, Professor Issacharoff proposes considering whether the “outputs” of government are benefitting the interests of the public or private individuals.³⁸ To Issacharoff, “[t]his in turn requires rethinking the incentives toward candidate engagement of the electorate as they compete for office, including in

31. See Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1829 (2011) (“Corruption . . . takes creative forms and occurs in relationships structured to avoid detection . . . Disloyalty in general defies quantification, and the harm of dishonest government is no exception.”).

32. David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1393–94 (2008) (“It seems that the best we can do is say that society has made the understandable, if philosophically shaky, decision to criminalize certain behavior that appears to distort what we assume to be the otherwise undistorted processes of government . . .”). See generally Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

33. See Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887, 889–92 (2011) (discussing the Court’s various definitions of corruption in the campaign finance cases).

34. *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976).

35. *McCannell v. Fed. Election Comm’n*, 540 U.S. 93, 95 (2003), *overruled by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

36. *Citizens United*, 558 U.S. at 360.

37. Issacharoff, *supra* note 32, at 127.

38. *Id.* at 126–27.

the process of fundraising, and a more nuanced understanding of the corrupting influence of incumbent reelection on the outputs of the political process.”³⁹ Under Issacharoff’s rubric, the harm wrought by incumbency abuse is that it subverts the democratic process to provide a private good for one individual, rather than a public good for all.

Zephyr Teachout has gone further, identifying a freestanding anti-corruption principle “embedded in the Constitution’s structure.”⁴⁰ Professor Teachout argues that at the Constitutional Convention, “[t]he greatest concern and the most heated argument developed around the problems of perks of office, which the Framers believed could overwhelm the offices by creating incentives for legislators to abuse their position to reap the benefits of incumbency.”⁴¹ To Teachout, certain deliberate constitutional choices, such as clauses requiring an accounting of the Treasury,⁴² giving Congress the “power of the purse,”⁴³ as well as the Ineligibility and Emoluments,⁴⁴ and Foreign Gifts⁴⁵ Clauses, all speak to this concern. The document itself and the architecture of the new republic, to Teachout, “was intended to provide structural encouragements to keep the logic and language of society as a whole from becoming corrupt, representing a technical and moral response to what they saw as a technical and moral problem.”⁴⁶ Teachout’s articulation of the constitutional anti-corruption principle has the closest fit to the concerns raised by the abuse of incumbency.

Whether conceptualized as an Equal Protection question, a First Amendment injury, or a more generalized affront to the integrity of democratic government, there is broad agreement that

39. *Id.* at 142.

40. Teachout, *supra* note 32, at 342. Most recently, Lawrence Lessig’s forthcoming article on how the Framers’ conception of “dependence corruption” shaped the founding document elaborates on the centrality of anti-corruption concerns within the constitutional scheme. Lawrence Lessig, *What an ‘Originalist’ Would Understand ‘Corruption’ to Mean: The 2013 Jorde Lecture*, CAL. L. REV. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257948. See also Brief for Professor Lawrence Lessig as Amicus Curiae Supporting Appellee, *McCutcheon v. Fed. Election Comm’n*, No. 12-536 (U.S. July 25, 2013).

41. Teachout, *supra* note 32, at 358.

42. *Id.* See U.S. CONST. art. I, § 9, cl. 7.

43. Teachout, *supra* note 32, at 358–59. See U.S. CONST. art. I, § 9, cl. 7.

44. Teachout, *supra* note 32, at 359. See U.S. CONST. art. I, § 6, cl. 2.

45. Teachout, *supra* note 32, at 361. See U.S. CONST. art. I, § 9, cl. 8.

46. Teachout, *supra* note 32, at 352.

the political abuse of official office results in serious harm. In each definition of corruption, the central concern is that one group of individuals is wielding an unfair and disproportionate amount of influence — that abusing the trappings of office distorts and perverts a competitive democratic system.⁴⁷ Thus, on the one hand, the government has the unambiguous, constitutional duty to remain neutral in elections. On the other, the government has virtually unconstrained freedom to speak. And the law's platonic fiction that an officeholder's motivations can be clearly separated into the political and official is largely that: a fiction. Faced with this quandary, it's not difficult to see why many courts have excused themselves from deciding cases that raise such thorny issues.

B. JUDICIAL REVIEW AND SEPARATION OF POWERS

Abuse of incumbency cases frequently implicate separation of powers concerns that may lead a court to abstain from resolving a controversy for prudential reasons. The terrain of these cases is rent with potential conflict between the judiciary and the so-called “political” branches.⁴⁸ Judicial decisions about the appropriate blend of politicking and official decision-making that an elected official can engage in raise the prospect of judicial micro-management of another coordinate branch — or at least allegations of it. Such a concern is hardly new: political scientists and jurists have wrestled with the appropriate role of the judiciary in the constitutional scheme since the beginning of the Republic. The question of courts' power in this area is another episode in a long-running conversation about the extent of judicial review.⁴⁹

47. In many ways, the concern over disproportionate influence and unfairness finds a ready analogy in antitrust law. Candidates who are able to use their office to subsidize an election campaign distort the free market of political choice. Regulating anti-competitive political behavior flowing from the abuse of one's official position is a compelling policy goal but faces substantial doctrinal pushback from the Supreme Court's recent position in *Citizens United*. See *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 351 (2010) (describing the consequences of an “antidistortion rationale” as “dangerous and unacceptable”).

48. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (discussing separation between the “Judiciary and the two political Branches”).

49. See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803); THE FEDERALIST NO. 53 (James Madison).

Abstention or dismissal for lack of jurisdiction based on a separation of powers rationale can be expressed as a function of the political question doctrine. In principle, the doctrine serves to identify conflicts that a court could hear but, based on prudential considerations, should not.⁵⁰ The political question doctrine is “essentially a function of the separation of powers,”⁵¹ and the inheritance of a legal tradition emphasizing the need for caution and prudence in exercising judicial review as a function of a court’s finite institutional capital.⁵² To many observers, the doctrine has fallen on hard times and all but “disappeared” from the Supreme Court’s jurisprudence in recent years, replaced by a distinct bias in favor of judicial review.⁵³ Whether an abuse of incumbency controversy presents a nonjusticiable question better resolved by another branch of government requires a brief discussion of the doctrine’s salient characteristics and their application to the abuse of incumbency problem.

The Supreme Court’s now-familiar list of a political question’s identifying features came in *Baker v. Carr*:

... a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate

50. See generally Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1275 (2006); Louis Henkin, *Is There A “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976).

51. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

52. In Alexander Bickel’s classical “pre-doctrinalization” account, a political question was characterized by “the Court’s sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally (“in a mature democracy”), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.” ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 184 (1962).

53. See Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002).

branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁵⁴

Concerns about the “lack of respect due coordinate branches” and the absence of “judicially discoverable and manageable standards” for resolving controversies are presented by many incumbency abuse allegations, insofar as they ask a court to review or provide conduct rules for elected officials.⁵⁵ But the doctrine that followed from *Baker v. Carr* is not triggered merely by the presence of politically controversial or weighty questions. “The doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases,’” the Court emphasized, unhelpfully.⁵⁶

The lack of discoverable standards and concerns about “due respect”⁵⁷ for other branches both reflect an awareness of the comparative advantages of other branches to resolve certain types of conflicts.⁵⁸ The “political” branches may have a greater competency to make final decisions about “political” questions, though the Supreme Court and lower federal courts have been far from clear in establishing the boundaries of this area, especially in areas like political gerrymandering at the conjunction of electoral politics and law.⁵⁹ Louis Seidman captured this challenge well, writing that “[t]he difficulty posed by political question ju-

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

55. *Id.*; see also, e.g., *U.S. ex rel. Joseph v. Cannon*, 642 F.2d 1373 (D.C. Cir. 1981); *Common Cause v. Bolger*, 574 F. Supp. 672 (D.D.C. 1982), *aff'd mem.*, 461 U.S. 911 (1983).

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

57. *Id.*

58. See Barkow, *supra* note 53 at 336 (“Perhaps even more importantly, the doctrine is part of a larger vision of the constitutional structure in which the institutional strengths and weaknesses of each branch are taken into account in resolving particular issues.”).

59. In 2004, a plurality of the Court held in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), that partisan political gerrymandering posed a nonjusticiable political question, overturning its earlier decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), to enter the “political thicket” of political district-drawing. *Bandemer*, 478 U.S. at 148 (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946)). The Court was unable to settle on a neutral judicial standard for resolving allegations that redistricting efforts violated the Equal Protection Clause, holding that the place for such complaints was with the political branches themselves. *Vieth*, 541 U.S. at 305.

risprudence is not that the court has sometimes politicized law, but that it has never successfully legalized politics.”⁶⁰

Prudential considerations about the separation of powers inform decisions about justiciability in other ways, without directly raising the increasingly baroque, formal doctrine of political questions. Federal standing doctrine has a “core component derived directly from the Constitution” but also embraces “judicially self-imposed limits on the exercise of federal jurisdiction.”⁶¹ Standing, ripeness, and mootness doctrines are outgrowths of Article III’s requirement that federal courts hear only “cases and controversies,”⁶² but are also “founded in concern about the proper — and properly limited — role of the courts in a democratic society.”⁶³ Before reaching the merits, a court’s analysis of the “prudential considerations that are part of judicial self-government” may militate in favor of dismissing the challenge for lack of jurisdiction.⁶⁴ Considering the separation of powers consequences of a given case as an element of the standing analysis may be the most doctrinally solid move for a court — even though it effectively tracks a political question analysis.

III. ABUSE OF INCUMBENCY AND JUDICIAL REVIEW

Allegations of incumbency abuse have reached federal courts in a variety of vehicles:⁶⁵ as civil suits under the False Claims Act,⁶⁶ as complaints alleging deprivations of a Constitutional right,⁶⁷ and as criminal prosecutions for fraud,⁶⁸ to name a few. This Part surveys judicial responses to these allegations. The cases have alleged a wide palette of substantive abuses. Many

60. Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 442 (2004).

61. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

62. U.S. CONST. art. III, § 1.

63. *Allen*, 468 U.S. at 750 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

64. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

65. See generally Ivan Kline, Note, *Use of Congressional Staff in Election Campaigning*, 82 COLUM. L. REV. 998, 1006–15 (1982) (reviewing “potential sources of judicial action” to challenge the use of official staff in political campaigns).

66. See, e.g., *U.S. ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1373 (D.C. Cir. 1981).

67. *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980).

68. See, e.g., *United States v. Diggs*, 613 F.2d 988, 990 (D.C. Cir. 1979); *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), *supplemented on denial of reh’g*, 68 F.3d 489 (D.C. Cir. 1995).

complaints have focused on the hiring of political aides as official staff and paying them with taxpayer funding.⁶⁹ Another common alleged abuse is the misuse of official means of communication, such as the congressional franking privilege or similar taxpayer-subsidized forms of mass communication.⁷⁰ This Note considers judicial approaches to both categories of claims, seeking to provide a representative, if not exhaustive, survey of the relevant case law. This Part begins by discussing whether a challenge to the lawful use of the incumbency's advantages presents a justiciable controversy. It then goes on to consider other potential claims in areas with increasingly well-defined rules that might aid judicial review.

A. CHALLENGING THE PERQUISITES OF INCUMBENCY

Many allegations that an elected official has abused his or her incumbency are clearly justiciable. There are easy cases: the mayor who plasters city hall with her reelection posters or the Congressman with a campaign manager on his official payroll. On the other end of the spectrum, challenges to the legitimate *use* of the privileges of incumbency, as opposed to their *abuse*, are perhaps most likely to be dismissed as raising a nonjusticiable political question. Yet courts have not been silent in this area and have struck down some statutory schemes designed, at least in part, to boost the political prospects of incumbents.⁷¹

Albanese v. Federal Election Commission,⁷² a 1995 decision from New York's Eastern District, stands as one of the few reported decisions to consider a broad constitutional challenge to the general benefits of incumbency, in addition to challenges to the campaign finance and Congressional franking laws.⁷³ In 1992, Sal Albanese, a New York City Councilman from Brooklyn,

69. See, e.g., *Rostenkowski*, 59 F.3d 1291; *Cannon*, 642 F.2d 1373; *People v. Ohrenstein*, 565 N.E.2d 493 (N.Y. 1990).

70. See, e.g., *Common Cause v. Bolger*, 574 F. Supp. 672, 684 (D.D.C. 1982), *aff'd mem.*, 461 U.S. 911 (1983); *Hamilton v. Hennessey*, 783 A.2d 852 (Pa. Commw. Ct. 2001), *aff'd per curiam*, 800 A.2d 927 (Pa. 2002).

71. See also *supra* note 19 (discussing the range of Supreme Court opinions on whether campaign finance regulations are unconstitutional incumbency protection regimes).

72. 884 F. Supp. 685 (E.D.N.Y. 1995), *aff'd*, 78 F.3d 66 (2d Cir. 1996).

73. *Id.* at 687-88.

ran for Congress and lost handily to the incumbent, Susan Molinari, by sixteen points.⁷⁴ In 1994 he considered running again but, dismayed by Molinari's entrenched status and fundraising advantage, ultimately decided not to.⁷⁵ Instead, he and his supporters sued Molinari and the Federal Election Commission, claiming that the electoral advantages of incumbency, as codified by federal election laws, prevented them from meaningfully participating in the electoral process.⁷⁶ The plaintiffs sought a declaratory judgment that the Federal Election Campaign Act (FECA)⁷⁷ and the Franking Statute⁷⁸ violated the Equal Protection Clause⁷⁹ and the First Amendment.⁸⁰ Targeting the "exclusionary campaign finance process in federal elections which heavily favors incumbents," the plaintiffs broadly attacked the "incumbent subsidy" as a creature of federal law.⁸¹

The District Court dismissed the complaint, relying primarily on the parties' lack of standing to challenge FECA.⁸² As to the plaintiffs' more general challenge to the "incumbent subsidy," the court dismissed the complaint for presentation of non-justiciable political questions.⁸³ Quoting *Baker v. Carr*, the Court held that the Constitution evinced a "textually demonstrable constitutional commitment" of the allotment of incumbent benefits to the Congress itself in Article I, section 5, which empowers each House to "determine the Rules of its Proceedings."⁸⁴ The District Court held that "for this Court to ignore this constitutional separation

74. *Id.* at 687.

75. *Id.* Apparently undeterred, Albanese unsuccessfully ran for mayor of New York City in 2013. Will Bredderman, *Sal Albanese Will Not Become Mayor, But . . .*, BROOKLYN DAILY (Sep. 20, 2013), http://www.brooklyndaily.com/stories/2013/38/web_whithersal_2013_09_20_bk.html ("The former councilman from Bay Ridge came in last among Democratic hizzoner hopefuls on Sept. 10, but he said he's still determined to fight the political machine — which he claims keeps grassroots candidates like himself, who refuse donations from developers and corporations, from rising.")

76. *Albanese*, 884 F. Supp. at 687.

77. Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-55 (2012)).

78. 39 U.S.C. § 3210 (2012).

79. U.S. CONST. amend. XIV, § 1.

80. U.S. CONST. amend. I; Complaint, *Albanese*, 884 F. Supp. 685.

81. Complaint, *Albanese*, 884 F. Supp. 685. See also Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993) (fleshing out the broader legal theory of the case in an article written by Albanese's attorneys).

82. *Albanese*, 884 F. Supp. at 694-95.

83. *Id.* at 94.

84. *Id.* at 694 (quoting *Baker v. Carr*, 369 U.S. 186, 217).

of powers and become entangled in the micromanagement of the conduct of Representative Molinari and all other incumbent Members would violate the political-question doctrine and be an affront to the coordinate legislative branch.”⁸⁵ The Second Circuit affirmed and the Supreme Court denied certiorari.⁸⁶

Critically, the *Albanese* plaintiffs were not alleging violations of any federal statutes but rather that the rules that governed federal elections themselves were unconstitutional — the plaintiffs sought judicial review of the legitimate use of an incumbent’s benefits.⁸⁷ The court’s reasoning and outcome are sound: the District Court would have been simply litigating a policy decision settled by the legislative branch presenting no obvious constitutional injury. But the court was careful to limit its reasoning to the set of facts before it.⁸⁸

Other schemes that explicitly favor incumbents have been successfully challenged. In 1992, a constellation of public advocacy organizations challenged the constitutionality of a provision of the Congressional franking law that allowed sitting members of Congress to send free mass mailings to persons in areas added to their districts during redistricting.⁸⁹ Members would have to abide by all the other rules of the franking privilege but Section 3210(d)(1)(B) directly enabled members with new constituents to reach new potential voters at taxpayers’ expense.⁹⁰ The plaintiffs lost at the district court and the D.C. Circuit reversed in a *per curiam* summary order later that year, indicating a written opin-

85. *Id.*

86. *Albanese v. Fed. Election Comm’n*, 78 F.3d 66 (2d Cir. 1996); *cert. denied*, 519 U.S. 819 (1996).

87. *Albanese*, 884 F. Supp. at 695 (“Moreover, it must again be noted that plaintiffs have not claimed that the rules governing the use of the frank have been violated. What they claim is that the rules themselves are unconstitutional.”).

88. *Id.* (“The integrity of the process by which one exercises that precious right is inseparable from the right itself. To the extent that the plaintiffs believe that a modification of the process would enhance its integrity, they must make the case for the validity of that belief with the political branches of our government. For just as fundamental to the political order of this democracy is the doctrine of separation of powers and the limited jurisdiction conferred upon the federal judiciary within that political order. That jurisdiction is limited by principles of standing and by the wise exercise of restraint and self-discipline in resisting invitations to resolve political questions.”) (citations omitted).

89. *Coal. to End Permanent Cong. v. Runyon*, 796 F. Supp. 549, 551–55 (D.D.C. 1992), *rev’d per curiam*, 971 F.2d 765 (D.C. Cir. 1992) (unpublished table decision), 1992 WL 181991, *supplemented and depublished by* 979 F.2d 219 (D.C. Cir. 1992) (*per curiam*).

90. 39 U.S.C. § 3210(d)(1)(B) (1988).

ion would shortly follow.⁹¹ Supplementing the order, Judge Silberman wrote that he believed the statute failed the heightened scrutiny afforded any statute “which provides financial support to an incumbent against a major-party challenger.”⁹² Judge Randolph wrote that heightened scrutiny should apply but the statute couldn’t pass basic rationality review.⁹³ Judge Wald disagreed with both, briefly noting that no heightened scrutiny should apply and the statute passed rationality review.⁹⁴ Before the panel could issue its full opinion, Congress repealed the relevant statute.⁹⁵ Judges Wald and Randolph found that this mooted the dispute and the Circuit disposed of the matter *per curiam*.⁹⁶

Judge Silberman dissented from the *per curiam* disposition and attached his own opinion to elaborate why he felt that heightened scrutiny should apply to the statute in question.⁹⁷ To Judge Silberman, “recent Supreme Court cases have developed a rather general, if imprecise, notion that voters and candidates have a ‘fundamental right’ under the First and Fourteenth (or Fifth) Amendments — independent of the Equal Protection guarantee — which can be abridged by laws affecting elections that favor some candidates over others.”⁹⁸ Addressing a line of Court precedent dealing with “state schemes that arguably infringed on a political party or non-party group’s freedom to participate in an election,”⁹⁹ in addition to *Buckley v. Valeo*¹⁰⁰ and the summary affirmance of *Common Cause v. Bolger*,¹⁰¹ the Judge identified a fundamental constitutional commitment to allowing voters to choose freely between “at least two viable parties or candidates.”¹⁰²

91. *Runyon*, 971 F.2d 765 (D.C. Cir. 1992) (unpublished table decision), 1992 WL 181991, supplemented and depublished by 979 F.2d 219 (D.C. Cir. 1992) (per curiam).

92. *Id.* at *1 (Silberman, J., attached summary opinion concurring).

93. *Id.* at *2 (Randolph, J., attached summary opinion concurring).

94. *Id.* at *3 (Wald, J., attached summary opinion dissenting).

95. Pub. L. No. 102-392, § 309, 106 Stat. 1703 (1992) was passed on October 6, 1992.

96. *Runyon*, 979 F.2d 219, 220 (D.C. Cir. 1992) (per curiam).

97. *Id.* at 221 (Silberman, J., dissenting).

98. *Id.* at 223 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 786–89 (1983)).

99. *Id.* at 224.

100. 424 U.S. 1 (1976); see *supra* Part II.A.

101. 461 U.S. 911 (1983); see *infra* Part III.C.

102. *Runyon*, 979 F.2d at 225 (Silberman, J., dissenting).

In light of these concerns, Judge Silberman reasoned that legislation that directly heightens the advantages given to one candidate at the expense of the other should be review with “heightened, if not strict, scrutiny.”¹⁰³ The opinion then considered “how to draw the line between legislation . . . with a core non-electoral purpose and a statute which explicitly provides funds to an incumbent for campaign purposes.”¹⁰⁴ Conceding the difficulty of drawing clear lines, Judge Silberman proposed that a “statute that provides a subsidy to incumbents directly in contemplation of an election, regardless of its stated purpose, must receive heightened scrutiny.”¹⁰⁵ Under the results-oriented or “proximity-to-election” approach advanced by Judge Silberman, judicial review of statutes that help one group of candidates while hurting another would turn on whether the benefits could be justified by non-electoral motivations.

B. ABUSE OF OFFICIAL PAYROLL

One common strain of incumbency abuse allegations focuses on the ability of elected officials to offer official jobs (or at least salaries) to their political aides who do not conduct official business. Courts have split regarding whether such a complaint presents a justiciable question.¹⁰⁶

The D.C. Circuit Court has had several opportunities to wrestle with the issue.¹⁰⁷ In *Winpisinger v. Watson*, the D.C. Circuit declined to review whether various actions taken by President Jimmy Carter’s administration, such as the use of Air Force One to travel to battleground states or the consideration of the political inclinations of new hires, were “too political” based on separation of powers principles.¹⁰⁸ The plaintiffs (supporters of Senator Ted Kennedy) advanced a novel theory. They described their claim as “an action for declaratory judgment and injunction

103. *Id.*

104. *Id.*

105. *Id.*

106. Compare *U.S. ex rel. Joseph v. Cannon*, 642 F.2d 1373 (D.C. Cir. 1981), with *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), supplemented on denial of reh’g, 68 F.3d 489 (D.C. Cir. 1995).

107. *Rostenkowski*, 59 F.3d 1291; *Cannon*, 642 F.2d 1373; *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir. 1980).

108. *Winpisinger*, 628 F.2d at 136–42.

against defendants' misuse of federal power and federal funds to purchase the Presidential renomination of Jimmy Carter, impairing the operation of the Nation's elective process embodied in the Constitution."¹⁰⁹ The District Court dismissed for lack of standing without reaching the question of whether "prudential limitations" barred the suit.¹¹⁰ The D.C. Circuit went further, describing the prudential concerns that governed the dismissal for lack of standing and the need for courts to avoid acting as the "management overseer of the Executive Branch."¹¹¹ *Per curiam*, the court held that:

Providing the requested relief would unquestionably bring the court and the Executive Branch into conflict because the court would be placed in the position of evaluating every discretionary consideration, including those which result in a decision not to take a particular action, for traces of political expediency. This would necessarily require the court to determine how the particular matter would be resolved if detached from the political consequences to President Carter's renomination efforts The courts are not suited to undertake a neutral consideration of every Executive action, ranging from White House invitations and space reservations on the Presidential aircraft to the decision to award funds to a particular state or other political subdivision for general or specific projects.¹¹²

In *U.S. ex rel. Joseph v. Cannon*, the D.C. Circuit considered a False Claims Act claim against a United States Senator for providing a salary to an administrative assistant who was "extensively and exclusively" working for the Senator's reelection campaign.¹¹³ The plaintiff argued that subsidizing campaign workers'

109. *Id.* at 135.

110. *Winpisinger v. Watson*, 86 F.R.D. 77, 79 (D.D.C.), *aff'd*, 628 F.2d 133 (D.C. Cir. 1980).

111. *Winpisinger*, 628 F.2d at 140.

112. *Id.*

113. *Joseph v. Cannon*, 642 F.2d 1373, 1375 (D.C. Cir. 1981). The United States declined to join the plaintiffs' case. *Id.* at 1376.

salaries with official funds amounted to defrauding the government.¹¹⁴

Again, the District Court dismissed for lack of jurisdiction, relying on a technicality in the False Claims Act.¹¹⁵ On appeal, the D.C. Circuit affirmed the dismissal on separate grounds, holding that a court was “fundamentally underequipped” to confront the issues posed by the suit.¹¹⁶ In challenging the political staffer’s salary, the court noted that the plaintiff could cite “no judicial decision or administrative ruling” or “any statute affording that kind of assistance” other than the Purpose Statute, 31 U.S.C. § 1301,¹¹⁷ requiring that sums appropriated for one statutorily-defined purpose be confined to that purpose.¹¹⁸ In the absence of “judicially discoverable and manageable standards for resolving” the question whether Senators may use paid staff members in their campaign activities,” the D.C. Circuit declined to reach the merits of the complaint.¹¹⁹

In the absence of any discernible legal standard or even of a congressional policy determination that would aid consideration and decision of the question raised by appellant’s first count, we are loathe to give the False Claims Act an in-

114. *Id.* at 1375–77. *See also* Stuart Taylor, *Court upholds Cannon aide’s pay in 1976 campaign*, N.Y. TIMES, Feb. 4, 1981, at B5.

115. *Cannon*, 642 F.2d at 1376 (“Appellant theorizes that Senator Cannon’s authorization of salary payments to Sobsey while the aide was not performing ‘official legislative and representational duties’ made out an actionable false claim. The District Court held that the Government already possessed the information set forth in appellant’s complaint, and that the action was barred by Section 232(C) of the Act for that reason. Although an examination of the language and purposes of that provision convinces us that the court’s interpretation was incorrect, we are persuaded that dismissal of appellant’s first count was nonetheless proper.”).

116. *Id.* at 1379 (“So it is that so-called political questions are denied judicial scrutiny, not only because they invite courts to intrude into the province of coordinate branches of government, but also because courts are fundamentally underequipped to formulate national policies or develop standards of conduct for matters not legal in nature. A challenge to the interworkings of a Senator and his staff member raises at the outset the specter that such a question lurks, and it is to an investigation of that possibility that we first turn.”).

117. 31 U.S.C. § 1301 (2006).

118. *Cannon*, 642 F.2d at 1380.

119. *Id.* at 1379, 1385 (“Accordingly, we affirm the District Court’s dismissal of appellant’s first claim. In doing so, we do not, of course, say that Members of Congress or their aides may defraud the Government without subjecting themselves to statutory liabilities. We simply hold that under the facts alleged in count one of appellant’s complaint, no cause of action has been made out under the Act.”).

terpretation that would require the judiciary to develop rules of behavior for the Legislative Branch.¹²⁰

Fourteen years later, the D.C. Circuit returned to a similar set of issues in *United States v. Rostenkowski*.¹²¹ In 1994, a grand jury indicted then-Congressman Daniel Rostenkowski for devising a “scheme to defraud” the United States of its property and his constituents of his “honest services.”¹²² The government accused Rostenkowski of embezzling government funds by misusing a host of official perks exclusively for personal purposes — not political ones, as in *Cannon*.¹²³ The various alleged schemes included the abuse of his access to the House Stationery Store, the House Post Office, the House vehicle allowance, and his official payroll.¹²⁴ Rostenkowski moved to dismiss the indictment based on the Speech and Debate Clause¹²⁵ and a separation of powers argument stemming from Article I, Section 5 of the Constitution, providing that “Each House may determine the Rules of its Proceedings.”¹²⁶ The District Court denied his motions and he appealed.¹²⁷

The D.C. Circuit agreed with Rostenkowski’s argument that the interpretation of “a sufficiently ambiguous House Rule is non-justiciable.”¹²⁸ Faced with ambiguous House Rules and the prospect of micromanaging federal legislators, the case facially resembled *Cannon*.¹²⁹ To get out from under *Cannon*, the government argued that the presence of the House Rules enabled the court to make the kind of fine-grained distinctions that had eluded the *Cannon* court.¹³⁰ The court held that *Cannon* didn’t con-

120. *Id.*

121. *United States v. Rostenkowski*, 59 F.3d 1291 (1995), *supplemented on denial of reh’g*, 68 F.3d 489 (D.C. Cir. 1995).

122. *Id.* at 1294.

123. *Id.* at 1294–96; *Cannon*, 642 F.2d 1373.

124. *Rostenkowski*, 59 F.3d at 1294–96.

125. U.S. CONST. art. I, § VI, cl. 1.

126. U.S. CONST. art. I, § 5; *Rostenkowski*, 59 F.3d at 1296.

127. *Id.* at 1296.

128. *Id.* at 1306.

129. *Cannon*, 642 F.2d 1373.

130. *Rostenkowski*, 59 F.3d at 1308; Brief for Appellee at 35, *Rostenkowski*, 59 F.3d 1291 (Nos. 94-3158, 94-3160) (“The facts before the Court in this case contrast sharply with those involved in *Cannon*. Here, the House of Representatives has promulgated a body of explicit written rules covering the expenditure of U.S. Treasury funds allocated for Members’ office and payroll expenses. These rules set forth in detail what uses of public

trol the result and went on to consider whether the court was capable of discerning “a line between ‘official work’ and ‘personal services.’”¹³¹

While the ethical rules governing lawmakers behavior had flourished since the time of *Cannon*, the three-judge panel combed through the indictment count-by-count, parsing the alleged violations of each House rule and determining whether the given House Rule provided “a ‘judicially discoverable and manageable’ standard clearly indicating that the activity was a ‘personal service.’”¹³² The court was willing to enforce the rules, but only the clearest ones.¹³³ “[T]he Executive may not expect the Judiciary to resolve against a Member of Congress an ambiguity in the Rules by which the Legislature governs itself, if reason allows otherwise,” the court held.¹³⁴

Another public corruption case from New York further demonstrates courts’ unwillingness to review elected officials’ hiring practices for whether they are “too political” in the absence of clear rules.¹³⁵ In 1986, State Senate Minority Leader Manfred Ohrenstein was charged with boosting his colleagues’ struggling

funds are authorized, and what uses are prohibited. They are organized and compiled in a one-volume publication called the *Congressional Handbook*, which is issued and updated periodically by the Committee on House Administration. A copy of each edition of the *Handbook* is given to each Member of Congress.”)

131. *Rostenkowski*, 59 F.3d at 1308–09 (“Similarly, *Cannon* is not controlling because the court did not need to determine whether the particular activities alleged were ‘official’ or ‘campaign-related’ but only whether any congressional rule distinguished between ‘official work’ and concededly ‘campaign-related’ work. In *Rostenkowski*’s case, we know from the Rule cited by the Government that the Congress has distinguished ‘personal’ from ‘official’ expenses; the harder question before us is whether those terms are sufficiently clear, either inherently or as interpreted by the House itself, that we may proceed to apply them to the facts alleged in the indictment. *Winpisinger* is unhelpful because there the court had no standard at all by which to decide whether the defendants’ conduct was ‘official.’ Here, as the Government has shown, both the Appropriations Acts and the *Handbook* provide us with at least some guidance.”) (citing *Winpisinger v. Watson*, 628 F.2d 133, (D.C. Cir. 1980)).

132. *Id.* at 1309–10 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

133. *Id.* at 1310–12.

134. *Id.* at 1312.

135. *People v. Ohrenstein*, 77 N.Y.2d 38, 48 (1990). *Ohrenstein* — along with several others cases discussed in this Note — was decided by a state court. There are any number of structural and doctrinal differences between state and federal approaches to separation of powers issues that might influence a legal outcome. Controlling for those factors is beyond the scope of the Note, but the issue remains relevant. See generally Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543 (1997); Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357 (2000).

senate campaigns by using official aides as campaign workers and putting campaign staffers that were not expected to do any official work on the official state payroll.¹³⁶

To the New York Court of Appeals, the crux of the prosecution's case was that an official aide's campaign activity was not a "proper duty" of a staff member.¹³⁷ The Court refused to draw such a line, holding that the "Legislature is the 'political' branch of government" and describing the roots of the legislature's "inherent" right to self-regulation under the state constitution.¹³⁸ The Court reasoned that "[a]lthough these activities may be fairly characterized as political, as opposed to governmental, they are considered an inherent part of the job of an elected representative and thus perfectly legitimate acts for a legislator or legislative assistant to perform."¹³⁹ Thus, only the legislature could decide what its staff member's "proper" duties were.¹⁴⁰ This "inherent" right to determine the scope of its political role effectively precluded judicial review.¹⁴¹ To the *Ohrenstein* Court, the fact that no internal legislative rules forbidding the majority leader's practice had been codified at the time of the offense was highly relevant.¹⁴²

To critic James Gardner, the opinion served as a judicial invitation for legislators to abuse their incumbency.¹⁴³ According to Gardner, the court held that the legislature "may by law define its legislative functions to include running for reelection, and may expressly authorize its members, as it did here, to use public re-

136. *Ohrenstein*, 77 N.Y.2d at 42–44.

137. *Id.* at 45.

138. *Id.* at 47.

139. *Id.*

140. *Id.* at 53.

141. *Id.* at 47.

142. *Id.* at 49 ("Thus prior to 1987, when the activities at issue here occurred, the Legislature was aware of the fact that its members were using staff employees in political campaigns perhaps excessively, and nevertheless chose to place no restrictions on the practice. Although it is arguable that the defendants' conduct might have exceeded the custom in some respects, the controlling factor for the purposes of a criminal prosecution is that there was no law which, either expressly or as interpreted by the courts, declared the acts to be criminal. Moreover, it cannot fairly be said that the Legislature otherwise forbade the conduct so that it could serve as a predicate for a conviction under general Penal Law provisions.")

143. James A. Gardner, *The Uses and Abuses of Incumbency: People v. Ohrenstein and the Limits of Inherent Legislative Power*, 60 FORDHAM L. REV. 217 (1991).

sources to execute this aspect of their jobs.¹⁴⁴ Declining to enforce soft norms about the legally-tolerable amount of politicking that incumbent officials can pursue does move the ball back into the political actors' court, raising legitimate concerns about such bodies' ability to police themselves.¹⁴⁵ The apparent reluctance of courts to review allegations of elected officials abusing incumbency in this area is closely tied to the granularity of the allegations and the likelihood that judicial review will lead to substantial inter-branch conflict.¹⁴⁶

C. ABUSE OF OFFICIAL COMMUNICATION

When members of the government speak, individuals listen.¹⁴⁷ Holding official government office grants a speaker a powerful megaphone.¹⁴⁸ Many abuse of incumbency allegations stem from officials' use of a subsidized pulpit to broadcast a political message. There is a cautious consensus across state and federal courts that abuses of mailing or advertising privileges are justiciable.¹⁴⁹ But some courts have called for discretion in taking sensitive cases that implicate the autonomy of another coequal branch of government and could lead to micro-managing the First Amendment-protected expression of incumbent candidates.¹⁵⁰

144. *Id.* at 230–31.

145. The dilemma is well-captured by the Roman poet Juvenal's classic formulation of the question, "*Quis custodiet ipsos custodes?*" JUVENAL, SATIRE VI lines 347–48 (translated as "Who watches the watchmen?").

146. Another 2013 state criminal case that raises similar issues culminated in the conviction of a Pennsylvania Supreme Court Justice and her two sisters for misusing official resources in political campaigns. See Grand jury presentment, Commonwealth v. Melvin, No. CP-02-AD-112-2010 (Pa. Commw. Ct. May 17, 2012), available at <http://pmconline.org/files/presentment.pdf>; Paula Reed Ward, *Justice Orié Melvin, sister found guilty*, PITTSBURGH POST-GAZETTE, Feb. 22, 2013, at A1.

147. See Albert D. Cover & Bruce S. Brumberg, *Baby Books and Ballots: The Impact of Congressional Mail on Constituent Opinion*, 76 AM. POL. SCI. REV. 347 (1982) (analyzing empirical evidence of the electoral impact of Congressional communication with constituents).

148. *Id.*

149. Compare *Common Cause v. Bolger*, 574 F. Supp. 672 (D.D.C. 1982), *aff'd mem.*, 461 U.S. 911 (1983), with *Schiaffo v. Helstoski*, 492 F.2d 413 (3d Cir. 1974), and *Hoellen v. Annunzio*, 468 F.2d 522 (7th Cir. 1972), and *Virginians Against a Corrupt Cong. v. Moran*, 805 F. Supp. 75 (D.D.C. 1992). See also *Hamilton v. Hennessey*, 783 A.2d 852 (Pa. Commw. Ct. 2001), *aff'd per curiam*, 800 A.2d 927 (2002) (reviewing alleged violations of an analogous state franking scheme).

150. *Common Cause*, 574 F. Supp. at 685.

The congressional franking privilege is a frequent source of tension. Members of the United States Congress retain “the privilege of sending mail as franked mail . . . in order to assist and expedite the conduct of the official business, activities, and duties of the Congress of the United States.”¹⁵¹ The history of the privilege can be traced back to English common law and has existed in the United States since the founding.¹⁵² Presently codified at 39 U.S.C. § 3210,¹⁵³ the franking statute contains a lengthy list of limitations on members’ ability to send subsidized mail to their constituents.¹⁵⁴ Among other limitations, the statute prevents mailings sent for “purely personal or political basis,”¹⁵⁵ those sent within sixty days “immediately before the date of any primary election or general election,”¹⁵⁶ or “any mass mailing outside the congressional district from which the Member was elected.”¹⁵⁷

Common Cause, a government watchdog group, brought suit challenging a host of alleged abuses of the congressional franking privilege and the statute itself under the First and Fifth Amendments.¹⁵⁸ *Common Cause v. Bolger* had been churning through the courts since 1974 by the time a three-judge panel on the D.C. District Court reached a reasoned decision in 1982.¹⁵⁹ Common Cause challenged the constitutionality of Section 3210 on Fifth and First Amendment grounds, claiming that the unconstitutional “subsidy” for incumbent Congressional candidates abridged others’ rights to associate freely and deprived challengers of equal protection under the laws.¹⁶⁰ The plaintiff also argued that

151. 39 U.S.C. § 3210(a)(1) (2006).

152. *See Common Cause*, 574 F. Supp. 674–77 (reviewing history of the Franking Privilege).

153. 39 U.S.C. § 3210.

154. *Id.* (d)(4)–(8).

155. *Id.* (a)(5)(A).

156. *Id.* 3210(6)(C). *See also supra* note 21.

157. *Id.* (a)(7). This subsection was added to the statute after the decision in *Coal. to End Permanent Cong. v. Runyon*, 796 F. Supp. 549, (D.D.C. 1992), *rev’d per curiam*, 971 F.2d 765 (D.C. Cir. 1992) (unpublished table decision), 1992 WL 181991, *supplemented and depublished by* 979 F.2d 219 (D.C. Cir. 1992) (*per curiam*). *See supra* Part III.A.

158. *Common Cause v. Bolger*, 574 F. Supp. 672, 673 (D.D.C. 1982), *aff’d mem.*, 461 U.S. 911 (1983).

159. *Id.* at 673. In 1980, the District Court ruled against the defendant’s motion to dismiss. *Common Cause v. Bolger*, 512 F. Supp. 26, 27 (D.D.C. 1980).

160. *Common Cause*, 574 F. Supp. at 673.

the mailing privilege violated the Constitution's General Welfare Clause.¹⁶¹

Accepting the premise that "Congress has recognized the basic principle that government funds should not be spent to help incumbents gain reelection,"¹⁶² the D.C. District Court listed the many built-in benefits of official office before noting that "the distinction between 'official' and 'unofficial' cannot be sharply defined or delineated and for the court to assume this burden would be an impossible task."¹⁶³ Though recognizing that extreme cases of facially political abuses of the privilege may infringe on other constitutional rights, the court broadly declined to carve up the "middle area" of official communications that may have a mixed official and unofficial purpose.¹⁶⁴

The district court first based its decision on substantive grounds. On the merits of the plaintiff's challenge, the court held that a system that generated potential opportunities for constitutional violations was not *per se* unconstitutional, requiring only that the scheme have a "rational relation to the twin goals at hand: one, to facilitate (even encourage) official communication and two, to discourage or eliminate unofficial communication."¹⁶⁵ The court described the statutory test for measuring a mailing's validity as being focused on the "type and content" of a mailing, rather than underlying motives, and ruled that Common Cause had not shown that the abuses singled out in the record had a "substantial detrimental impact" on the political process.¹⁶⁶ Under this test, the statute passed constitutional muster.

The Court also rested its decision on prudential grounds, noting that the legislature established its own "machinery to monitor, review, and receive complaints concerning uses of the frank."¹⁶⁷ It expressed reluctance to enter the business of generating "rules of behavior for the Legislative Branch," citing *Canon* for the proposition that judicial inquiry into whether activity

161. *Id.*; U.S. CONST. art. I, § 8, cl. 1.

162. *Common Cause*, 574 F. Supp. at 683.

163. *Id.* at 685.

164. *Id.* at 683.

165. *Id.*

166. *Id.* at 682–83.

167. *Id.* at 684–85.

is “too political” can be inappropriate.¹⁶⁸ The Supreme Court summarily affirmed the decision.¹⁶⁹

The *Common Cause* court reached the merits of the controversy and did not rely on the political question doctrine, but the prudential considerations it outlined track the separation of powers concerns at the heart of the doctrine.¹⁷⁰ Other courts have been less modest. In the early 1970s, two federal courts reached the merits of alleged abuses of the franking privilege.¹⁷¹ In *Schiaffo v. Helstoski*, the Third Circuit upheld a District Court opinion drawing complex, nuanced lines among a Congressman’s mailings, sorting them into legitimate and illegitimate groups.¹⁷² Similarly, a District Court Judge sitting in Illinois issued an injunction preventing a Congressman from sending franked mail to voters in a newly-drawn Congressional district outside his own.¹⁷³ At least one court has dismissed a franking challenge on the basis of a plaintiff’s failure to exhaust the administrative remedy available through the House Commission on Congressional Mailing Standards.¹⁷⁴

Franking may be the bluntest manifestation of the inherent communicative advantage incumbent candidates hold over challengers. Another kind of abuse of official communication poses a subtler danger. As government officials, incumbent candidates have the power of the pulpit, often controlling significant resources dedicated to communicating with the public, from press releases to billboards to emergency warning systems.¹⁷⁵ A com-

168. *Id.* at 685 (citing U.S. *ex rel.* Joseph v. Cannon, 642 F.2d 1373, 1373 (D.C. Cir. 1981)).

169. *Common Cause v. Bolger*, 461 U.S. 911 (1983) (mem.).

170. *Common Cause*, 574 F. Supp. at 685. The court’s “impossible task” of resolving the distinction between official and official and its concern about dictating rules for “a coordinate branch of government” closely mirror the defining characteristics of a political question, as established in *Baker v. Carr*. 369 U.S. 186, at 217 (1962) (“Prominent on the surface of any case held to involve a political question is . . . a lack of judicially discoverable and manageable standards for resolving it . . . or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government.”).

171. *Schiaffo v. Helstoski*, 492 F.2d 413 (3d Cir. 1974); *Hoellen v. Annunzio*, 468 F.2d 522 (7th Cir. 1972).

172. *Schiaffo*, 492 F.2d at 428.

173. *Hoellen*, 468 F.2d at 528.

174. *Virginians Against a Corrupt Cong. v. Moran*, 805 F. Supp. 75, 77 (D.D.C. 1992).

175. See Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1384–87 (2001) (surveying the “many capacities in which government speaks”).

mon thread running through the decisions discussed in Part III is court's willingness to take cases that involve alleged violations of specific rules and statutes, rather than more general, wholesale attacks.¹⁷⁶ But resolving an allegation that a government official has effectively subverted one of these channels for political aims would involve answering difficult questions about mixed motives and line drawing. In *Commonwealth v. Cahill*, a recent criminal trial in Massachusetts, a state court set out to do just that.¹⁷⁷

IV. ABUSE OF INCUMBENCY ON TRIAL: *COMMONWEALTH V. CAHILL*

Timothy Cahill served as treasurer of the Commonwealth of Massachusetts from 2003 until 2011.¹⁷⁸ He was responsible for managing the Commonwealth's pensions, funding the construction of new public schools, and overseeing Massachusetts's lottery, among other statutorily defined duties.¹⁷⁹ In 2012, he was charged with abusing his position as Treasurer to advance his political prospects after he authorized television advertisements trumpeting the state lottery he oversaw to air while running for Governor in 2010.¹⁸⁰

Cahill's criminal trial resulted in a mistrial in state court.¹⁸¹ While the trial was covered in depth in Massachusetts and reverberated in the political community, the absence of a verdict robs it of any formal precedential authority. But the significance of the trial is more than just the sum of its parts. Cahill's prosecution vividly demonstrates the challenges discussed in Parts II and III, and is the first application of a novel Massachusetts statute that attaches criminal penalties to the abuse of official incumbency. The statute was passed as part of a larger effort to hold

176. Compare *Albanese v. Fed. Election Comm'n*, 884 F. Supp. 685 (E.D.N.Y. 1995), *aff'd*, 78 F.3d 66 (2d Cir. 1996), with *Schiaffo*, 492 F.2d 413.

177. Indictment, *Commonwealth v. Timothy P. Cahill*, No. SUCR201210348, 2012 WL 1141622 (Mass. Super. filed Apr. 2, 2012).

178. Phillips, *supra* note 7.

179. See, e.g., M.A. CONST. amend. LXIII, § 1 ("Collection of Revenue"); MASS. GEN. LAWS ch. 10, § 2 (West 2006) ("Treasurer's bond; contents").

180. Commonwealth's Statement of the Case, *Commonwealth v. Timothy P. Cahill*, No. SUCR2012-10348, 2012 WL 1141619 (Mass. Super. filed April 4, 2012). Other than the Commonwealth's statement of the case and the indictment, the parties' filings remain under seal.

181. See Levenson, *supra* note 8.

elected officials to a controversially high standard. This section discusses the background of the trial, the trial itself, and its significance in the context of this Note's broader aims. It concludes by proposing a set of loose guiding principles for considering the judicial review of abuse of incumbency cases.

A. SECURING AN "UNWARRANTED PRIVILEGE"

The story of Timothy Cahill begins with another Massachusetts politician: former State Representative Salvatore DiMasi. DiMasi served as Speaker of the Massachusetts House of Representatives from September 2004 until his resignation in January 2009.¹⁸² In June 2009, he was indicted by the United States Attorney for Massachusetts on multiple mail fraud counts.¹⁸³ The heart of the alleged fraud was a fairly simple kickback scheme involving a software company and DiMasi's control over state contracts.¹⁸⁴ On June 15, 2011, DiMasi became the third consecutive speaker of the Massachusetts House of Representatives to be convicted of a federal felony.¹⁸⁵

In the lead-up to the DiMasi case, with newspaper accounts of corruption and rumors of impending indictments swirling, the state's new governor, Deval Patrick, responded to mounting public calls for action by taking up ethics reform in 2008.¹⁸⁶ Governor Patrick commissioned an independent body, the Taskforce on Public Integrity, to study the state's recent ethical challenges and propose a response.¹⁸⁷

One of the commission's recommendations was to add criminal penalties to Section 23 of Chapter 268A, the state's conflict of in-

182. Frank Phillips, *DiMasi will resign*, BOS. GLOBE, Jan. 26, 2009, at A1. See also Jared B. Cohen, *The Commonwealth's Right to "Honest Services": Prosecuting Public Corruption in Massachusetts*, 93 B.U. L. REV. 201 (2013).

183. Indictment, *United States v. DiMasi*, No. 09-10166, 2009 WL 1604774 (D. Mass. June 2, 2009).

184. Andrea Estes & Matt Viser, *Former House Speaker DiMasi indicted on corruption charges*, BOS. GLOBE, June 3, 2009, at B10.

185. Milton J. Valencia, *DiMasi found guilty on 7 of 9 counts in kickback scheme*, BOS. GLOBE, June 16, 2011, at B1.

186. Matt Viser, *Controversies bring push for more ethics laws*, BOS. GLOBE, Nov. 28, 2008, at A1.

187. Exec. Order No. 506, MASS. SEC'Y ST. PUB. REC. DIV (Nov. 7, 2008), available at <http://www.mass.gov/governor/docs/executive-orders/executive-order-506.pdf>; Andrew Ryan, *Governor installs 12-member public integrity task force*, BOS. GLOBE, Nov. 8, 2009, at B3.

terest law.¹⁸⁸ As written, the statute prohibited any state official or employee from using their position to “secure for such officer, employee or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals” among a variety of other broadly-written exploitive behavior.¹⁸⁹ The Taskforce also recommended that the legislature add criminal penalties to two of the statute’s subsections and modify the statute to require that the Commonwealth prove that the individual acted with “fraudulent intent” for the criminal sanction to apply.¹⁹⁰ The recommendation made it into the final bill¹⁹¹ and the Governor signed the ethics reform package on July 1, 2009.¹⁹² Some commentators noted the draconian nature of some of the new ethics provisions, such as those banning all gifts to public officials or criminalizing certain conflict of interest violations, but the bill emerged intact.¹⁹³

B. COMMONWEALTH V. CAHILL

The Commonwealth’s case against former Treasurer Cahill was the first use of the new ethics statute. On April 2, 2012, the Massachusetts Attorney General — Cahill’s former colleague — issued an indictment accusing the former official of fraudulently obtaining an “unwarranted privilege” by coordinating a \$1.5 million taxpayer-funded advertising campaign promoting the lottery

188. GOVERNOR’S TASK FORCE ON PUBLIC INTEGRITY, REPORT AND RECOMMENDATIONS 29–30 (2009), available at <http://archives.lib.state.ma.us/> (search “Governor’s Task Force on Public Integrity”) [hereinafter TASK FORCE REPORT] (citing MASS GEN. LAWS ch. 268A, §§ 23(b)(2)(ii) (West 2010)).

189. MASS GEN. LAWS ch. 268A, § 23(b)(2)(ii).

190. TASK FORCE REPORT, *supra* note 188, at 30.

191. 2009 MASS. LEGIS. SERV. ch. 28, § 81; Matt Viser, *Leaders approve ethics revamp*, BOS. GLOBE, June 25, 2009, at B1.

192. Matt Viser, *Patrick signs ethics overhaul bill into law*, BOSTON.COM, July 1, 2009, http://www.boston.com/news/local/breaking_news/2009/07/patrick_signs_e.html.

193. Just how strict the new ethics laws could be was captured by an episode that occurred shortly before they took effect. Grateful for the decision of the state’s legislative leadership to support a key bill, the Massachusetts Governor sent the Senate leader a bouquet of flowers and the Speaker of the House a box of cigars. Matt Viser, *Patrick’s gifts probably violated ethics rules*, BOS. GLOBE, June 12, 2009, at B1. The bonhomie was punctured when a *Boston Globe* reporter asked whether the gift to a public official would violate the Governor’s proposed total ban on accepting gifts of “substantial value.” *Id.* Pressed for an explanation, the Governor’s office argued that technically the gifts were to the leadership’s offices, not to them personally. *Id.* The *Globe*’s headline claimed that the gifts “probably” violated the ethics rules. *Id.*

he supervised to benefit his election campaign.¹⁹⁴ The state lottery ads were launched in the final weeks of the 2010 gubernatorial race, with Cahill running a distant third behind the Republican challenger and Democratic incumbent governor.¹⁹⁵

In October 2010, as the ads were running, Cahill's running mate defected to the Republican candidate and his top political aides abandoned him.¹⁹⁶ Cahill responded by suing his former aides who, in turn, publicized internal campaign emails that suggested the lottery ad blitz had been improperly initiated by Cahill's campaign staff.¹⁹⁷ The emails exposed that the scripts for the lottery ads — though they didn't mention Cahill by name — had been re-written by Cahill's political aides and that the former Treasurer had authorized the ad blitz over the strenuous objections of the lottery's oversight board.¹⁹⁸ The ads that ran between September and November of that year consumed more than eighty percent of the lottery's annual advertising budget.¹⁹⁹ At this point Attorney General Martha Coakley launched an investigation into the ads, prevailing upon then-Treasurer Cahill to immediately pull them off the air.²⁰⁰ He complied, but the Attorney General's investigation continued.²⁰¹

Indictments were handed down in April 2012, against Cahill and his campaign manager, an alleged co-conspirator.²⁰² In September, Cahill's attorneys moved to dismiss the indictment, arguing that the new law was so vague as to be constitutionally in-

194. Commonwealth's Statement of the Case, *supra* note 180.

195. *Id.*

196. See Levenson, *supra* note 2; Phillips, *supra* note 3.

197. See Levenson, *supra* note 3.

198. See Levenson, *supra* note 3; Frank Phillips, *Files link Cahill to lottery '10 ad blitz*, BOS. GLOBE, June 22, 2011, at A1. According to the Commonwealth, the full script of the ad, with the alleged changes from Cahill's political team in italics, was:

Massachusetts is home to the most successful state lottery in America. Since 2003, the Lottery has given back over 6.4 billion dollars to communities throughout the Commonwealth.[.] That's over 6.4 billion dollars for everything from improving roads and schools to hiring police officer and firefighters. That's the result of a consistently well-managed Lottery. And luck has nothing to do with it.

Commonwealth's Statement of the Case, *supra* note 180.

199. Phillips, *supra* note 3.

200. See Levenson, *supra* note 4.

201. Phillips, *supra* note 198.

202. Indictment, *supra* note 177.

firm.²⁰³ “The term [unwarranted privilege],” they argued, “is too imprecise and subjective to provide adequate notice to defendants or adequate guidance to those who enforce and interpret the law. . . . Without appropriate definitional guideposts, criminal liability cannot be premised on this term.”²⁰⁴

Failing that, Cahill’s attorneys suggested throughout the trial that the controversy would be better resolved at the State Ethics Commission, where the complaint likely would have been filed before the 2009 reforms.²⁰⁵ The State Ethics Commission had accumulated over 30 years of case law defining the contours of “unwarranted privilege.” How relevant those decisions were to the instant criminal proceedings was unclear, given the higher burden required in a criminal trial and the unique facts of the charges brought against Cahill.²⁰⁶ The presiding judge, Judge Christine Roach, a former commissioner of the State Ethics Commission herself,²⁰⁷ denied the motion to dismiss.²⁰⁸

The trial began on November 5, 2012.²⁰⁹ Over the course of the trial, jurors heard from lottery officials, considered over a hundred exhibits and heard testimony from the defendant himself.²¹⁰ On the stand, Cahill explained to the jury that he “always wore two hats. One as treasurer and one as a candidate,” comparing himself to any other incumbent candidate.²¹¹ His defense

203. Defendant’s motion to dismiss at 10–14, *Commonwealth v. Timothy P. Cahill*, No. SUCR2012-10348 (Mass. Super. Aug. 8, 2012).

204. David Frank, *Massachusetts’ ex-Treasurer Timothy P. Cahill moves for dismissal of indictment*, MASS. LAW. WKLY., Sept. 6, 2012, available at 2012 WLNR 19451566. The statute had survived the vagueness challenge before in its earlier, civil incarnation. See *Op. of the Justices to the Senate*, 396 Mass. 1211, 1213 (1985) (upholding the statute).

205. David Frank, *Commentary: Fallout from Cahill mistrial*, MASS. LAW. WKLY., Dec. 12, 2012, available at 2012 WLNR 27309406 (quoting Cahill’s defense attorney as saying that “these cases really are more properly vetted and resolved before the State Ethic Commission in a civil setting than they are in a criminal context in Superior Court.”). In the defense’s motion to dismiss, Cahill argues that he would succeed on the merits in the administrative venue as well. Defendant’s motion to dismiss, *supra* note 202 at 5–10.

206. See *Op. of the Justices to the Senate*, 396 Mass. 1211; Defendant’s motion to dismiss, *supra* note 203; Frank, *supra* note 204.

207. David Frank, *Commentary: Government rests in public corruption trial of ex-Treasurer Timothy P. Cahill*, MASS. LAW. WKLY., Nov. 28, 2012, available at 2012 WLNR 25799235.

208. David Frank, *Commentary: Cahill mistrial points to flaws in corruption statute*, MASS. LAW. WKLY., Dec. 20, 2012, available at 2012 WLNR 27941592.

209. Peter Schworm, *Cahill’s trial gets underway*, BOS. GLOBE, Nov. 6, 2012, at B1.

210. See Frank, *supra* note 204.

211. David Frank, *Commentary: Cahill case soon to be in the hands of the jury*, MASS. LAW. WKLY., Nov. 30, 2012, available at 2012 WLNR 26013503.

lawyers circled back to the analogy at closing argument, comparing Cahill's behavior to President Barack Obama's decision to visit storm-ravaged and politically-sensitive New Jersey before Election Day and wait until after the election to visit politically-safe New York.²¹² On December 4, Judge Roach instructed the jury on how to interpret the novel, critical phrase "unwarranted privilege":

The term 'unwarranted privilege' means a benefit lacking in justification, authorization or official support. An unwarranted privilege may include some personal or family benefit or interest to which a government official is not personally entitled by virtue of his official role or job. A personal or family benefit in turn may include political activity or benefits. However, elected officials may use public resources to respond to public criticism when such use is reasonable and proportionate in scope. An incidental enhancement to an official's political future as a result of official action is not unlawful. In distinguishing between personal benefit and activity, and official benefit and activity, you may consider whether the activity was reasonably related to or in support of the official's statutory duties. To be unlawful the official's intent to secure a personal benefit for himself need not have been the sole reason for the official's actions. It is enough if without that intent to obtain a personal benefit for himself, the official would not have acted as he did.²¹³

Deliberations began on December 4, 2012.²¹⁴ The jurors deliberated for over forty hours.²¹⁵ On December 11, the jury acquitted Cahill's co-conspirator (his campaign manager) and reported that they remained deadlocked on the Cahill charges.²¹⁶ The jury was

212. Interview with David Frank, Managing Editor, MASS. LAW. WKLY., in Bos., Mass. (Dec. 19, 2012).

213. Jury instructions at 24, Commonwealth v. Timothy P. Cahill, No. SUCR2012-10348 (Mass. Super. Dec. 4, 2012) (on file with author). The jury instructions were provided to the author by Judge Roach's clerk.

214. Levenson, *supra* note 8.

215. *Id.*

216. Michael Levenson, *Jurors stuck over Cahill; former aide acquitted*, BOS. GLOBE, Dec. 12, 2012, at A1.

unable to overcome their deadlock and Judge Roach declared a mistrial on December 12.²¹⁷ While some observers thought that the emails constituted a “smoking gun” that made Cahill’s actions criminal,²¹⁸ others argued that his prosecution was unfair in Massachusetts, where the Mayor of Boston’s name adorns construction signs, the Secretary of State has his picture on voting guides, and the Governor’s name is found on highway signs.²¹⁹

On March 1, 2013, Attorney General Coakley chose to not retry Cahill.²²⁰ The parties came to an agreement: Cahill would pay a \$100,000 fine, agree not to run for elective office during a probation period that would last at least eighteen months, and admit that he “knew or should have known, that he was attempting to use his official position to secure for himself an unwarranted privilege.”²²¹

C. CAHILL IN CONTEXT

The Cahill case dramatizes the tensions that this Note has explored, highlighting the difficulty of drawing clear liability lines in certain public corruption cases and challenging assumptions about which branch of government is most capable of identifying and punishing this type of fraud. Criminalizing the pursuit of an “unwarranted privilege” exposes a wide range of potentially unseemly though common political activity to serious legal penalties.²²² In doing so, the legislature acts well within its prerogative. But prosecutors, in enforcing the statute, and judges, in re-

217. Levenson, *supra* note 8. During the trial, the jury submitted several private questions to the judge asking about the details of the conspiracy charge and afterwards, at least one juror blamed the conspiracy charge as the jury’s sticking point. *Id.*

218. Schweitzer, *supra* note 9 (“Pam Wilmot — executive director of Common Cause Massachusetts, a nonpartisan watchdog group — said, “In this case, there is a smoking gun — the e-mails that tie the advertisement’s purpose to a political goal, rather than a public policy goal.”). Incidentally, Wilmot served on the government taskforce that proposed the new ethics rules. TASK FORCE REPORT, *supra* note 188, at ii.

219. Schweitzer, *supra* note 9; Noah Bierman, *Effect of outcome on Coakley’s future a matter of debate*, BOS. GLOBE, Dec. 13, 2012, at A12.

220. Peter Schworm & Frank Phillips, *Cahill, Coakley settle his case*, BOS. GLOBE, Mar. 2, 2013, at A1.

221. Joint Disposition Agreement Pursuant to G.L. c. 276, § 87 at 3–4, Commonwealth v. Timothy P. Cahill, No. SUCR2012-10348 (Mass. Super. Mar. 1, 2013), available at <https://www.bostonglobe.com/rw/Boston/2011-2020/2013/03/01/BostonGlobe.com/Metro/Graphics/CahillSettlement.pdf>.

222. MASS GEN. LAWS ch. 268A, §§ 23(b)(2)(ii), 26 (West 2010).

solving cases under it, must attend to prudential considerations in order to safeguard their legitimacy and ensure that justice is done. Although the concern in Cahill's case was not about limiting "politics as usual" (Cahill's behavior was far from "usual") the case implicates many of the issues this Note has sought to address.

The problem of over-broad statutes in the public corruption context is nothing new: courts at the federal and state level have expressed significant willingness to adapt or "pare down" over-broad statutes that would seem to criminalize wide swathes of generally-accepted political activity in service of anti-corruption goals.²²³ It may be that courts are simply more comfortable and capable when a violation of a statute is in question, as opposed to refereeing a purely institutional policy dispute.²²⁴

Empowering the judiciary to carefully proscribe the nuanced ethical obligations of elected officials raises the same separation of powers concerns that led the D.C. Circuit to dismiss *Winpisinger*, *Common Cause*, and *Cannon*, for lack of jurisdiction.²²⁵ Though in the *Cahill* case, perhaps surprisingly, the legislature bound itself to a higher standard for ethical activity by adopting the Task Force Report and creating criminal penalties for incumbency abuse.²²⁶

Cahill's attorneys argued that the court could not resolve the dispute in the absence of statutes, regulations or case law providing interpretive guidance for determining the boundaries of an

223. See, e.g., *Skilling v. United States*, 130 S. Ct. 2896, 2905 (2010) ("To preserve what Congress certainly intended § 1346 to cover, the Court pares the pre-*McNally* body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived.") (citing 18 U.S.C. § 1346 (2012), *McNally v. United States*, 483 U.S. 350 (1987)); *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999) (requiring the government to prove a connection between the gratuity and official act when relying on the federal bribery and gratuity statute); *McCormick v. United States*, 500 U.S. 257, 268–75 (1991) (reading a "quid pro quo" requirement into the federal extortion statute).

224. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Resolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do. The political question doctrine poses no bar to judicial review of this case.")

225. *U.S. ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981); *Winpisinger v. Watson*, 628 F.2d 133, 139–42 (D.C. Cir. 1980); *Common Cause v. Bolger*, 574 F. Supp. 672, 683 (D.D.C. 1982), *aff'd mem.*, 461 U.S. 911 (1983). See also *supra* Parts III.B–C.

226. See *supra* Part IV.A.

“unwarranted privilege.”²²⁷ Finding otherwise, Judge Roach instructed the jury that in distinguishing between action taken between illegitimate “personal benefit and activity” and legitimate official ones, the jurors “may consider whether the activity was reasonably related to . . . the official’s statutory duties.”²²⁸ Judge Roach told the jurors that an “incidental enhancement” to the official’s political career is not unlawful, but also that “[i]t is enough if without that intent to obtain a personal benefit for himself, the official would not have acted as he did.”²²⁹

While a commendably clear distillation of an opaque statute, the judge’s instructions open as many doors to jurors as they close. For example, the distance between an “incidental enhancement” and an “unwarranted privilege” exposes a potentially vast spectrum of behavior to criminal sanction.²³⁰ Jurors could have used the requirement of “fraudulent intent” as a sorting principle or look to the “official’s statutory duties” to help sort the personal benefit from the official benefit.²³¹ But even taken together, neither serves to clearly distinguish Cahill’s behavior from non-criminal politicking. His statutory duties say nothing of running for reelection and it is enough that the “intent to obtain a personal benefit” be a but-for cause of the action.²³² Interpreted broadly, this would seem to criminalize all official decision making motivated by securing democratic reelection. Indeed, one commentator and law professor turned the table on the prosecuting Attorney General, suggesting that the same statute could potentially be used to punish her for seeking political benefit from the press conferences she held announcing her investigation into Cahill’s behavior.²³³

227. Defendant’s motion to dismiss, *supra* note 202, at 5 (quoting MASS GEN. LAWS ch. 268A, §§ 23(b)(2)(ii), 26).

228. Jury instructions, *supra* note 212.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Schweitzer, *supra* note 9 (“One could say, if one wanted to be perverse, that Attorney General Coakley was taking advantage of her office by holding a press conference to announce an anticorruption investigation that would be a benefit to her,’ [Boston College Law School professor and former Chair of the Massachusetts State Ethics Commission, George Brown] said.”) Brown, too, served on the taskforce that recommended upgrading the ethics statute to include criminal penalties. TASK FORCE REPORT, *supra* note 188, at ii.

D. LIMITS ON LEGALIZING POLITICS

“It is much easier to state these difficulties than to find solutions to them.”²³⁴ Nevertheless, several tentative conclusions follow from the *Cahill* case and the other examples drawn from the case law. The different approaches to the availability and desirability of judicial review expose a series of considerations that should guide judges, prosecutors, and policy-makers when considering the justiciability of complaints that allege an abuse of incumbency. Critically, the audience for these considerations extends beyond the judge. The broad enforcement discretion in the public corruption context imbues the government prosecutor with significant, important power.²³⁵ In criminal cases, the prosecutorial decision whether to indict can often be the most pivotal moment of the proceedings. In exercising that discretion, prosecutors themselves make independent decisions about the justiciability of legal matters.

The sensitivity of the separation of powers issues raised by abuse of incumbency cases and the challenging task of arriving at manageable judicial standards for separating the “too political” from the “appropriately official” requires courts to exercise a more careful inquiry into the justiciability of such cases. The decision to grant or deny judicial review should be made with an eye toward the prudential limitations of courts to referee the political behavior of elected officials in the legislative and executive branches.

Courts should be cautious. This is an area characterized by a heightened need for clear rules. The second *Baker v. Carr* factor, asking whether a court would face a “lack of judicially discoverable and manageable standards” in resolving a given case, is a relevant consideration in these cases.²³⁶ The presence of clear administrative or legislative rules serves to mitigate the potential for inter-branch conflict as well as provide elected officials with

234. Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 554 (1954).

235. See, e.g., Charles N. Whitaker, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for A Structured Approach*, 78 VA. L. REV. 1617, 1648 (1992) (reviewing the scope of federal anti-corruption statutes and noting that “society must rely heavily on prosecutorial and sentencing discretion to avoid injustice”).

236. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

fair notice of what behavior is acceptable.²³⁷ A complaint alleging a general violation of constitutional rights or a broad facial attack on the benefits an incumbent enjoys is qualitatively distinct from, for example, the criminal prosecution of an elected official for violating a provision of the franking statute. Courts are far better equipped to deal with the latter case.

The presence of clear statutory rules governing the officeholder's violation weighs in favor of finding justiciability, but, as *Rostenkowski*²³⁸ and *Cahill*²³⁹ demonstrate, courts ought to seriously consider whether the text of a statute actually provides the kind of neutral, workable standards needed to fairly resolve a controversy.²⁴⁰ Resolving a case in the absence of clear standards potentially denigrates separation of powers principles by putting the judge and jury in the position of the legislature, creating the possibility for judicial management of legislative ethical requirements. The vast, acknowledged "middle area" between an officeholder's official and political obligations suggests that courts should be particularly sensitive to reliance on open-ended, vague rules of decision in such cases.²⁴¹ Leaning more heavily on legislatures or other political bodies to set out detailed self-conduct clearly raises other concerns, chiefly the problem of self-policing. This Note does not rely on deference to such actors to generate their own rules but suggests that, when provided, conduct standards regarding appropriate political behavior allow a reviewing court to hang their proverbial hat on an articulated legal constraint and avoid separation of powers anxieties.

237. Whether a statute targeting incumbency abuse is unconstitutionally vague or fails to provide fair notice is largely beyond the scope of this note. On void-for-vagueness doctrine — itself rather vague — see generally 16B AM. JUR. 2D CONSTITUTIONAL LAW § 972 (2013).

238. U.S. v. Rostenkowski, 59 F.3d 1291 (D.D.C.), *supplemented on denial of reh'g*, 68 F.3d 489 (D.C. Cir. 1995).

239. Joint Disposition Agreement Pursuant to G.L. c. 276, § 87, *supra* note 220.

240. There are, of course, trade-offs between narrowly written, focused rules and more open, ambiguous standards. For a full treatment of this tension, see generally Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010) and Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). The claim is also fairly susceptible to charges that it leaves executive and legislative bodies open to setting their own standards of conduct and policing themselves — another acknowledged tradeoff. See generally *supra* note 145.

241. *Common Cause v. Bolger*, 574 F. Supp. 672, 683 (D.D.C. 1982), *aff'd mem.*, 461 U.S. 911 (1983).

Judge Silberman's criteria in *Runyon* for applying a heightened standard of review against statutes that entrench incumbents layers an additional, useful consideration for reviewing courts, looking to whether the action in question was done "in contemplation" of an upcoming election, although nominally in pursuit of official duties.²⁴² Certainly no court would penalize all official action pursued "in contemplation" of an election. But the intent test Silberman describes is a useful metric for weighing the appropriateness of an official's decision to leverage the perquisites of their office. Proximity to an election and objective intent should be relevant.

Pursuing judicial review with the threshold inquiry is a proposed approach that recognizes, as Alexander Bickel put it, "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from."²⁴³ Conserving judicial legitimacy and minimizing friction between the executive, legislative, and judicial branches are important goals well served by judicial restraint in the face of thorny and potentially "political" questions such as these.²⁴⁴

V. CONCLUSION

This Note examines the unique set of questions that arise when a private citizen or government prosecutor asks a court to punish an elected official for abusing the perquisites of her office in order to gain a political advantage. These cases raise special problems because of their precarious position balanced between the several branches of government and fundamental concerns about the ability of courts to draw meaningful lines separating the legitimate and illegitimate combinations of political ambition and official duty.

Courts have run up against real limits in their ability to "legalize" politics.²⁴⁵ While there is broad consensus on the need to keep government out of free, partisan elections there is little judi-

242. *Coal. to End Permanent Cong. v. Runyon*, 979 F.2d 219, 225 (D.C. Cir. 1992) (per curiam) (Silberman, J., dissenting). Judge Silberman wrote in the context of pro-incumbent statutes but his insight has relevance to evaluation of official action as well.

243. BICKEL, *supra* note 52, at 184.

244. *Id.*

245. Seidman, *supra* note 60, at 442.

cial agreement on exactly what that entails or even why it would be such a bad thing. Recognizing this, many courts have discussed or relied on prudential considerations such as the separation of powers or the political question doctrine before reaching the merits of cases that allege an abuse of incumbency. Courts have taken various approaches to sorting these issues out and seem more inclined to hear cases that allege a concrete statutory violation. But the presence of a statute or rule alone doesn't necessarily provide a workable judicial standard for resolving such cases. Because of the heightened concerns about the separation of powers and real potential for incorrectly drawing critical lines that govern the conduct of elected officials, this is an area of the law with a special need for clear conduct rules and a searching threshold inquiry into the separation of powers and structural consequences of a decision to afford judicial resolution.

Courts should hear many incumbency abuse challenges because misusing official funds is corrupt and often fraudulent. There are important constitutional values and democratic principles at stake. But not all abuses are most appropriately resolved by a judge or jury. This Note has attempted to provide a loose framework for deciding whether and when an elected official's alleged abuse of their incumbency ought to be reviewed by a court.