B. Regulation of Campaign Promises and Access to the Ballot

> **"It remains to determine the standards by which we might distinguish between those 'private arrangements' that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system."**

Brown v. Hartlage

456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982).

Sec. 121.055 of the Revised Statutes of Kentucky reads:

> No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person.

In Sparks v. Boggs (1960) the Kentucky Court of Appeals interpreted § 121.055 to outlaw a pledge made by a candidate to serve in office at a reduced salary. In 1979, Carl Brown, a candidate for county commissioner, attacked the "outrageous salaries" paid to commissioners and promised that if elected he would reduce the commissioners' compensation. Upon learning of *Sparks*, Brown withdrew his pledge to reduce salaries. He won the election anyway, but his opponent, Earl Hartlage, filed suit in a state court, asking the judge to void the election because Brown had engaged in a corrupt practice in violation of § 121.055.

Hartlage lost in the trial court; but the court of appeals reversed on the basis of *Sparks*, and Kentucky's supreme court refused to hear the case. Brown then sought and obtained certiorari from the U.S. Supreme Court.

Justice **BRENNAN** delivered the opinion of the Court. ...

II

... Just as a State may take steps to ensure that its governing political institutions and officials properly discharge public responsibilities and maintain public trust and confidence, a State has a legitimate interest in upholding the integrity of the electoral process itself. But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated.

At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed. As we noted in Mills v. Alabama (1966):

> Whatever differences may exist about interpretations of the First Amendment,

> there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign. "[I]f it be conceded that the First Amendment was 'fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor Patriot Co. v. Roy (1971). The political candidate does not lose the protection of the First Amendment when he declares himself for public office. Quite to the contrary. ...

When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported not only by a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.

III

On its face, § 121.055 prohibits a candidate from offering material benefits to voters in consideration for their votes, and, conversely, prohibits candidates from accepting payments in consideration for the manner in which they serve their public function. Sparks v. Boggs (1960) placed a not entirely obvious gloss on that provision with respect to candidate utterances concerning the salaries of the office for which they were running, by barring the candidate from promising to reduce his salary when that salary was already "fixed by law." We thus consider the constitutionality of § 121.055 with respect to the proscription evident on the face of the statute, and in light of the more particularized concerns suggested by the *Sparks* gloss. We discern three bases upon which the application of the statute to Brown's promise might conceivably be justified: first, as a prohibition on buying votes; second, as facilitating the candidacy of persons lacking independent wealth; and third, as an application of the State's interests and prerogatives with respect to factual misstatements.

A

The first sentence of § 121.055 prohibits a political candidate from giving, or promising to give, anything of value to a voter in exchange for his vote or support. In many of its possible applications, this provision would appear to present little constitutional difficulty. ... No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter. ... The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech. ... See Hoffman Estates v. Flipside (1982); Central Hudson Gas & Elec. v. Pub. Service Comm'n (1980); Pittsburgh Press Co. v. Human Relations Comm'n (1973).

... [I]t is equally plain that there are constitutional limits on the State's power to prohibit candidates from making promises in the course of an election campaign. Some promises are universally acknowledged as legitimate, indeed "indispensable to decision-making in a democracy," First National Bank of Boston v. Bellotti (1978); and the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means ... is a fundamental principle of our constitutional system." Stromberg v. California (1931). Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect of their vote. The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare. So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one's ballot.

It remains to determine the standards by which we might distinguish between those "private arrangements" that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system. ...

It is clear that the statements of petitioner Brown in the course of the August 15 press conference were very different in character from the corrupting agreements and solicitations historically recognized as unprotected by the First Amendment. Notably, Brown's commitment to serve at a reduced salary was made openly, subject to the comment and criticism of his political opponent and to the scrutiny of the voters. We think the fact that the statement was made in full view of the electorate offers a strong indication that the statement contained nothing fundamentally at odds with our shared political ethic.

... [T]here is no *constitutional* basis upon which Brown's pledge to reduce his salary might be equated with a candidate's promise to pay voters for their support from his own pocketbook. ... Brown did not offer the voters a payment from his personal funds. ... At least to outward appearances, the commitment was fully in accord with our basic understanding of legitimate activity by a government body. Before any implicit monetary benefit to the individual taxpayer might have been realized, public officials—among them, of course, Brown himself—would have had to approve that benefit in accordance with the good faith exercise of their public duties. ...

In addition ... it is impossible to discern in Brown's generalized commitment any invitation to enter into an agreement that might place the statement outside the realm of unequivocal protection that the Constitution affords to political speech. Not only was the source of the promised benefit the public fisc, but that benefit was to extend beyond those voters who cast their ballots for Brown, to all taxpayers and citizens. ...

In sum, Brown did not offer some private payment or donation in exchange for voter

support. ... Like a promise to lower taxes, to increase efficiency in government, or indeed to increase taxes in order to provide some group with a desired public benefit or public service, Brown's promise to reduce his salary cannot be deemed beyond the reach of the First Amendment, or considered as inviting the kind of corrupt arrangement the appearance of which a State may have a compelling interest in avoiding. See Buckley v. Valeo [1976]. ... [A] candidate's promise to confer some ultimate benefit on the voter, qua taxpayer, citizen, or member of the general public, does not lie beyond the pale of First Amendment protection.

B

Sparks relied in part on the interest a State may have in ensuring that the willingness of some persons to serve in public office without remuneration does not make gratuitous service the sine qua non of plausible candidacy. The State might legitimately fear that such emphasis on free public service might result in persons of independent wealth but less ability being chosen over those who, though better qualified, could not afford to serve at a reduced salary. But if § 121.055 was designed to further this interest, it chooses a means unacceptable under the First Amendment. In barring certain public statements with respect to this issue, the State ban runs directly contrary to the fundamental premises underlying the First Amendment as the guardian of our democracy. That Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is simply not the function of government to "select which issues are worth discussing or debating," Police Department of Chicago v. Mosley (1972), in the course of a political campaign. ...

[*Reversed.*]

The Chief Justice [**BURGER**] concurs in the judgment.

Justice **REHNQUIST**, concurring in the result. ...

Editors' Notes

(1) **Query:** Brennan began to discuss "the standards by which we might distinguish between those 'private arrangements' that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system." What are those standards? Cf. Madison in *Federalist* No. 10, reprinted below, p. 1087.

(2) **Query:** Why would inconsistency with principles of democratic government raise a constitutional question? Brennan observed that "the States have a legitimate interest in preserving the integrity of their electoral processes." Do courts have a special constitutional obligation to assure the integrity of the political processes?

(3) **Query:** If voting is a constitutional right of the individual citizen, why can he or she not sell his or her vote or exchange it for something else of value? In what *constitutionally* significant way does selling one's vote differ from voting for a candidate whom a voter knows

will reward him or her with public office or some other benefit, such as a tax reduction for people in a particular income bracket or welfare payments for others?

(4) Notice that the U.S. Supreme Court takes § 121.055 as it has been interpreted by the courts of Kentucky. The Supreme Court could not, as it did for a federal statute in *Yates* (1957; reprinted above, p. 666), interpret a state statute so as to avoid constitutional questions.