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James A. Gardner

University at Buffalo School of Law, jgard@buffalo.edu

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Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns

JAMES A. GARDNER†

INTRODUCTION

Election campaigns ought to be serious occasions in the life of a democratic polity. We all know that, for it is the centerpiece—perhaps the one completely uncontested truth—in the shared public ideology of American politics. For citizens of a democracy, an election is a time to take stock—to reexamine our beliefs; to review our understanding of our own interests; to ponder the place of those interests in the larger social order; to contemplate, and if necessary to revise, our beliefs about how our commitments are best translated into governmental policy. In the words of one prominent student of the electoral process, we “have long assumed that the mass electorate should be composed of two hundred fifty million Aristotles.”¹

Our conception of the democratic election campaign is informed by deeply ingrained collective social images. The ideal candidates, like the Lincoln and Douglas of political mythology, present to the electorate well-considered alternative programs based on thoughtful analyses of the nation’s problems.² In illuminating, sophisticated, and well-reasoned debates, the candidates earnestly and respectfully

† Joseph W. Belluck and Laura L. Aswad Professor of Civil Justice, State University of New York, University at Buffalo Law School. Thanks to Guy Charles, Luis Fuentes-Rohwer, Rick Hasen, Sam Issacharoff, Ethan Leib, and Richard Winger for valuable comments on an earlier draft.

1. R. MICHAEL ALVAREZ, *INFORMATION AND ELECTIONS* 2 (2000).

2. The Lincoln-Douglas debates “are widely regarded . . . as the model for what political argument ought to be, the standard from which we somehow have fallen and the ideal that we should seek to restore.” DAVID ZAREFSKY, *LINCOLN, DOUGLAS AND SLAVERY: IN THE CRUCIBLE OF PUBLIC DEBATE*, at ix (1990).

probe one another's positions, appealing to the electorate's most deeply held beliefs. These appeals may be passionate, but they are based ultimately on reasoned arguments about what is right and most conducive to the common good.³ News media and other private organizations supplement the information and arguments made by the candidates, perhaps in suitable circumstances making carefully considered endorsements.⁴

Voters also have a highly specific role to play in the ideal election campaign. Each citizen during a campaign becomes a careful and discerning shopper in the marketplace of ideas, a forum that is never more fully open for business than at election time.⁵ As the campaign gets underway, eligible voters turn, like Cincinnatus, from the ordinary duties and pleasures of private life to take up the burden of citizenship.⁶ They reflect on the state of the na-

3. See Shanto Iyengar, Daniel H. Lowenstein & Seth Masket, *The Stealth Campaign: Experimental Studies of Slate Mail in California*, 17 J. L. & POL. 295, 310 (2001) (citing Lincoln-Douglas debates as "standard classical examples in the American tradition" of the belief that "campaigning and political debate has value to the extent it is informative and rational"); Jamin Raskin, *The Debate Gerrymander*, 77 TEX. L. REV. 1943, 1944 (1999) (citing Lincoln-Douglas debates as the "paradigm example in our history" of genuine candidate debate that "force[s] candidates and voters to address substantive issues in a serious way and to engage in real political dialogue").

4. This practice is of course not only protected absolutely by the First Amendment, *Mills v. Alabama*, 384 U.S. 214 (1966), but is so widespread as to be the subject of significant social science research. See, e.g., MICHAEL BRUCE MACKUEEN & STEVEN LANE COOMBS, *MORE THAN NEWS: MEDIA POWER IN PUBLIC AFFAIRS* 147-226 (1981) (studying the impact on voting behavior of editorial endorsements of candidates); Kim Fridkin Kahn & Patrick J. Kenney, *The Slant of the News: How Editorial Endorsements Influence Campaign Coverage and Citizens' Views of Candidates*, 96 AM. POL. SCI. REV. 381 (2002) (examining the relation between a newspaper's editorial endorsements of candidates and its substantive coverage of campaigns).

5. "[T]he First Amendment . . . has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971).

6. On this view, responsible citizenship imposes a substantial burden indeed. As the authors of a classic study of voting behavior observed: "The democratic citizen is expected to be well informed about political affairs. He is supposed to know what the issues are, what their history is, what the relevant facts are, what alternatives are proposed, what the party stands for, what the likely consequences are." BERNARD R. BERELSON, PAUL F. LAZARSFELD & WILLIAM N. MCPHEE, *VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN* 308 (1954). Indeed, the duties of citizenship are sometimes experienced as dis-

tion. They consider the policies pursued by incumbents. They sift the available information. They deliberate together with friends, family, neighbors, coworkers. They hold themselves open to new ideas and new perspectives, and review even their most deeply held beliefs, if necessary, in light of what they learn. Finally, they exercise the ultimate responsibility of democratic citizenship by making a mature and well-considered voting decision.⁷

At the root of this widely held social understanding of election campaigns lies the concept of persuasion. Indeed, no idea more fully captures the essence of American democracy than the belief that persuasion is ultimately what election campaigns are for.⁸ We hold election campaigns *because* we want candidates, parties, voters, clubs, leagues, and private organizations of every description to have the opportunity to persuade one another on the merits of the great questions facing the electorate. Little of the activity that we conventionally associate with the ideal election campaign—the speeches, the position papers, the debates, the newspaper editorials, the conversations around the water cooler and over the fence—would be necessary, or even particularly beneficial, if persuasion played no significant role in the campaign process.⁹ Without the meaningful pos-

tinctly unpleasant. See ROBERT E. LANE, *The Joyless Polity: Contributions of Democratic Processes to Ill-Being, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS* 329, 353 (Stephen L. Elkin & Karol Edward Soltan eds., 1999).

7. See, for example, Richard Hofstadter's description of the ideal citizen of the Progressive Era: "the emergent New Citizen. . . . [H]is contribution to the public weal grew not out of his pursuit in politics of his own needs but, in the manner of the old Mugwump ideal, out of his disinterested reflection upon the needs of the community. . . . At the core of their conception of politics was . . . [an] old-fashioned character[:] the Man of Good Will. . . . He would act and think as a public-spirited individual, unlike all the groups of vested interests that were ready to prey on him." RICHARD HOFSTADTER, *THE AGE OF REFORM* 259-61 (1955).

8. "Politics, at its core, is about persuasion. It hinges not just on whether citizens at any one moment in time tend to favor one side of an issue over another, but on the numbers of them that can be brought, when push comes to shove, from one side to the other or, indeed, induced to leave the sidelines in order to take a side." Diana C. Mutz, Paul M. Sniderman & Richard A. Brody, *Political Persuasion: The Birth of a Field of Study, in POLITICAL PERSUASION AND ATTITUDE CHANGE* 1 (Diana C. Mutz, Paul M. Sniderman & Richard A. Brody eds., 1996).

9. As one commentator has observed, "The special constitutional protection afforded political speech would hardly make sense if such speech could have no

sibility of persuasion, a campaign would be nothing but empty ritual.

Americans, of course, are haunted by the fear that our election campaigns fall far short of the ideal to which we aspire; as political philosopher Michael Sandel has observed, the fear of loss of meaningful self-government is one of the defining anxieties of our age.¹⁰ The typical modern American election campaign does not seem reflective, reasoned, and deliberative so much as crass, shallow, and unengaging. Candidates compete with slogans and soundbites, not well-crafted ideas and arguments. Voters pay little attention to public affairs, do not reflect or deliberate, and for the most part cannot be bothered to vote. Reasoned persuasion does not seem to enter the picture.

We can see this all around us, but if more systematic evidence is required, political scientists have supplied it in abundance. Ever since the publication in 1960 of *The American Voter*,¹¹ the electorate's inattentiveness, sheer ignorance of the basic facts of public affairs, and inability to reason coherently have been demonstrated over and over again.¹² To be sure, political theorists have attempted to rescue American democracy from the seemingly dire consequences of its apparently impoverished electoral life. Some would lower the bar by counting ignorance and inattentiveness as appropriate and sufficient behavior for democratic citizens;¹³ others would rehabilitate voters by reinterpreting demonstrations of ignorance and inattentiveness as evidence of sophisticated information processing strategies.¹⁴

effect—if majorities were fixed in stone with respect to every conceivable issue.” Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1, 24 (2001) (footnote omitted).

10. See MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 3 (1996).

11. ANGUS CAMPBELL ET AL., THE AMERICAN VOTER (1960).

12. See, e.g., MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996); ERIC R. A. N. SMITH, THE UNCHANGING AMERICAN VOTER (1989).

13. See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (3d ed., Harper & Row 1950) (1942); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

14. See, e.g., BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES (1992); SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS (1991).

But even if these rehabilitative efforts are sound, the existence of a vigorous cottage industry devoted to explaining why the American electoral system is—no, really, is—genuinely democratic indicates a serious social problem, one rooted in the disjunction between political ideals and everyday reality.

In this Article, I approach this disjunction from an institutional perspective by asking whether the gulf between American political ideals and reality might have its roots in any kind of flaw in our legal institutions. Do we have, that is to say, a constitutional infrastructure well suited to summoning forth the kind of electoral politics to which we aspire? I conclude that although the American constitutional regime pays emphatic lip service to the ideal of reasoned persuasion in elections, its actual institutional arrangements in fact presuppose just the opposite—election campaigns that are thin rather than thick, that are aggregative rather than deliberative, that are aimed at counting political preferences, not creating them. To put this in social science lingo, American constitutional law rests on the presupposition that public opinion is exogenous to political campaigns rather than endogenous to them—that political opinion, in other words, is something citizens bring to election campaigns, not something they formulate during campaigns. As a result, the legal structure of American politics is weighted heavily toward the premise that the central purpose of an election campaign is not to provide a forum in which citizens can reflect upon and arrive at sound political opinions, but rather is simply to tabulate as accurately as possible the opinions that citizens already hold at the inception of the campaign. In the terminology I use in this Article, elections are understood in our law to be “tabulative” rather than “deliberative.”

Part I of this Article describes the emergence of the deliberative ideal of election campaigns, and the establishment in recent times of a social and legal consensus that campaigns ought to be significant political events dedicated primarily to the persuasion of citizens. Part II conducts a detailed institutional analysis of several areas of law that contribute critically to the structure of American election campaigns, including the rules governing candidate access to the ballot, the system of public financing of presidential campaigns, the associational rights of political parties, and the constitutional treatment of laws regulating the giving

and spending of money in election campaigns. From this analysis, Part II concludes that the constitutional infrastructure that has been created by the Supreme Court's election law jurisprudence establishes a system in which the main purpose of campaigns is in fact not persuasion, but tabulation of exogenously held voter preferences. Part III examines briefly some of the implications of this disjunction between our democratic ideals and practices for our conceptions of democratic legitimacy, our aspirations for better quality campaigns, our notions of the venues in which democratic politics is actually conducted, and some important scholarly critiques of electoral regulation.

I. THE SOCIAL IDEOLOGY OF THE PERSUASIVE ELECTION CAMPAIGN

The purpose of an *election* is obviously to provide a method for measuring public opinion as it stands on Election Day,¹⁵ but what is the purpose of an election *campaign*? Democratic theory offers essentially two different answers to this question, each tracking one of the two principal strands of democratic thought, which may be characterized, following political theorist Ian Shapiro, as the "deliberative" and the "aggregative" models.¹⁶

According to the deliberative model, the purpose of a campaign is, as the name suggests, to provide voters with an opportunity to engage in political deliberation. So conceived, the purpose of a campaign is to permit voters to reflect on the important issues of the day, to consider the merits of the positions taken by the candidates, to collect and consider information, to discuss and debate political questions among themselves—in short, to arrive at mature, well-considered opinions about how they ought to cast their votes.¹⁷ In this model of deliberative or "thick" democracy,¹⁸

15. According to the Supreme Court, "the function of the election process is 'to winnow out and finally reject all but the chosen candidates,'" *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)).

16. See IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 10-34 (2003).

17. See, e.g., *id.* at 3 ("Deliberative theorists . . . tak[e] a transformative view of human beings . . . in which deliberation can be used to alter preferences so as to facilitate the search for a common good."); Simone Chambers, *Deliberative Democratic Theory*, 6 ANN. REV. POL. SCI. 307, 308 (2003) (deliberative theory

the campaign plays an indispensable role in the process of democratic self-governance because it is the period when voters actually consider and formulate their political opinions, opinions upon which they subsequently act when casting their votes. In the language of social science, public political opinion in a deliberative campaign is "endogenous" to the campaign in the sense that it is actually forged during the campaign period through a process of meaningful discussion, debate, and persuasion.¹⁹

In the aggregative model, the purpose of a campaign is much more limited. In aggregative theories of democracy, collective public opinion is understood not as the product of public reflection and deliberation, but merely as the sum, or aggregation, of individually held private opinions.²⁰ On this view, the purpose of an election is not to provide opportunities to change anyone's mind, or to forge some new, unique collective judgment that did not exist prior to the election, but merely to add up as accurately as possible the views that individual voters already hold prior to the election. It follows that campaigns, on this "thinner" model of democracy, do not play a very significant role in democratic processes. They serve, at most, as an opportunity for each voter to collect just enough information to determine which of the candidates will best promote his or her own self-interest, or indeed whether the candidates differ enough in this respect

"focuses on the communicative processes of opinion and will-formation that precede voting").

18. The terms "thin" and "thick," when used in reference to democracy, typically refer to the intensity of citizen engagement in democratic politics and the nature of the goals citizens pursue. Democracy is thicker to the extent that citizens are highly engaged and seek to promote a shared common good, and thinner to the extent that citizens are disengaged and seek to promote their own private interests. See, e.g., BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 4 (1984) (democracy is thin when its values are "prudential and thus provisional, optional, and conditional—means to exclusively individualistic and private ends.").

19. On the difference between endogenous and exogenous preferences, see, among many possible works, Elisabeth R. Gerber & John E. Jackson, *Endogenous Preferences and the Study of Institutions*, 87 AM. POL. SCI. REV. 639 (1993).

20. As Shapiro puts it, aggregative theorists "regard preferences as given and concern themselves with how best to tot them up." SHAPIRO, *supra* note 16, at 3.

to justify bothering to vote at all.²¹ In the language of social science, public opinion, on this model, is "exogenous" to the campaign—it is not formulated during the campaign, but rather exists antecedent to the campaign, which serves not to test or alter it, but merely to ensure that it is tabulated as accurately as possible.

Of course, the distinction between the deliberative and aggregative—or as I prefer to call it, the "tabulative"—models should not be overdrawn. No campaign in the real world is likely to be purely deliberative or purely tabulative. Different voters have different priorities, behave in different ways, and respond to different kinds of incentives and stimuli. In any election some people will enter the campaign season with a clear idea of their political priorities and others will enter it in a state of confusion; some will open themselves to persuasion and others will close their minds to unfamiliar alternatives; some will cast their votes out of habit and others will cast their votes after reflection. The distinction between deliberative and tabulative campaigns is thus likely to be more a matter of degree than of kind. Nevertheless, as a measure of our aspirations for good democratic self-governance, the distinction is a useful one, for it is clear that a contemporary social consensus about what successful democracy requires tilts decisively in favor of the deliberative model.

A. Emergence of the Deliberative Ideal

It is an article of contemporary common faith that American election campaigns are of poor quality. A glance at the editorial and opinion pages of the nation's leading newspapers makes this clear. Our campaigns, it is said, are "degraded"; our politicians will "do or say or justify just about anything to win office."²² The candidates "barely touch fundamental issues America must face," and fail to "treat us as if we could face serious problems seriously."²³ Campaigns are run by "[p]olitical consultants" who "dredge

21. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 265-73 (1957).

22. Meg Greenfield, *Winning Respect*, WASH. POST, Nov. 8, 1996, at A31.

23. Richard Darman, Op-Ed., *If We Were Serious*, N.Y. TIMES, Sept. 1, 1996, § 4, at 9.

up or invent some factoid" or "package a few quotes," and "politicians build a campaign around it."²⁴ Should a candidate "start making sense on the issues, an adviser's obsession with pithy soundbites and saleable photo opportunities cuts short any reckless move toward intelligent discourse."²⁵ As the campaign progresses, it "becomes increasingly about itself"²⁶ rather than about issues of any significance.

Perhaps no campaign event has come in for more sustained and unified criticism than the quadrennial presidential debates. "Elections," according to one prominent editorial page, ought to be "town meetings to form a more perfect community,"²⁷ and presidential debates, which "ought to be about the choices of ideas in the marketplace of politics,"²⁸ should therefore play an important role in the public processes of electoral democracy. Instead, critics from all points on the ideological spectrum agree that the presidential debates fall far short of this standard. To liberal columnist Frank Rich, the presidential debates are "Oprahfied, prescribed, content-free" events that "have more in common with 'The Gong Show' than with the three-hour intellectual exchanges of Lincoln and Douglas."²⁹ To conservative columnist George Will, the presidential debates are "tossed salads of brevity" that consist "primarily [of] the regurgitation of market-tested paragraphs."³⁰ The poor quality of the debates has led thoughtful commentators to ask questions that carry more than a whiff of despair. Have we, one asks, "lost the ability in our public discourse to speak to one another in a way that moves ideas forward, that can result in

24. Michael Kinsley, *Electio ad Absurdum*, WASH. POST, Oct. 31, 2004, at B7.

25. Editorial, *Bush and Dukakis Owe Us Answers*, CHI. TRIB., Sept. 18, 1988, at C2.

26. Kinsley, *supra* note 24.

27. Editorial, *Refining the Debates*, CHRISTIAN SCI. MONITOR, Oct. 5, 2000, at 10.

28. Colman McCarthy, *A 'Minor' Problem With the Debates*, WASH. POST, Oct. 1, 1996, at D20.

29. Frank Rich, Op-Ed., *The Next Infomercials*, N.Y. TIMES, Sept. 14, 1996, § 1, at 19.

30. George F. Will, *The Uselessness of Debates*, WASH. POST, Sept. 11, 1988, at C7.

enlightenment?"³¹ "Is Persuasion Dead?" inquires another, who goes on to ask: "Is it possible in America today to convince anyone of anything he doesn't already believe?"³²

These criticisms suggest strongly that their authors judge contemporary election campaigns—and find them wanting—against a standard established by the deliberative campaign model. A campaign devoid of intelligent discourse, meaningful persuasion, or the development of public enlightenment on important political issues poses a problem for democracy only if it is the function of campaigns to provide these public goods, a role that campaigns are held to play under the deliberative model. In contrast, the lack of sustained, high-quality, persuasive campaign discourse is of no real concern under the tabulative model because that model does not conceive of public political opinion as something formed during the campaign. Present public unhappiness with election campaigns, then, seems to result from a judgment that they are not sufficiently deliberative to satisfy our aspirations for meaningful democratic self-governance.

The deliberative model, however, did not always occupy the prominent place it now holds in the public imagination. During the eighteenth and early nineteenth centuries, the dominant American political ideology was a brand of republicanism in which the people were thought to have a very limited capacity to make political judgments.³³ Because of these limitations, the public could not possibly have prof-

31. John Sexton, Op-Ed., *Resolved: That Was No Debate*, L.A. TIMES, Oct. 8, 2004, at B11.

32. Matt Miller, *Is Persuasion Dead?*, N.Y. TIMES, June 4, 2005, at A15.

33. See, e.g., Richard R. Beeman, *Deference, Republicanism, and the Emergence of Popular Politics in Eighteenth-Century America*, 49 WM. & MARY Q. 401, 407 (1992) (the eighteenth-century citizen "was entrusted with the responsibility of identifying and evaluating his superiors"); see also BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. 2 at 9-10 (Franz Neumann ed. & Thomas Nugent trans., Hafner Books 1949) (1748) ("The people are extremely well qualified for choosing those whom they are to intrust with part of their authority. . . . But are they capable of conducting an intricate affair, of seizing and improving the opportunity and critical moment of action? No; this surpasses their abilities."); ADRIENNE KOCH, *THE PHILOSOPHY OF THOMAS JEFFERSON* 153 (1957) (quoting a letter from Thomas Jefferson to Dupont de Nemours (Apr. 24, 1816), which claimed that the people are competent as judges of fact and choose representatives based on their knowledge of human character, i.e., rather than on the basis of an independent evaluation of a candidate's policy positions).

ited from election campaigns designed to persuade them on the merits of political issues, so campaigning would have been pointless. Moreover, for almost a century after the founding, the idea that candidates might campaign actively for votes was thought inconsistent with the dignity that holders of public office were required to possess:

Presidential electioneering during the first eighty-five years of our national existence was rare, and even frowned upon. Candidates were expected to remain quietly in the background. The office must seek the man, not the man the office. To do otherwise was degrading not only to the candidate but to the dignity of the position he sought.³⁴

The Jacksonian era is known for the invention of the modern political party and the emergence of techniques of recognizably modern mass campaigning,³⁵ yet even during this period, persuasion and public deliberation were not thought to play a significant role in election campaigns. Although they were highly organized and actively contested elective offices through organized campaigning, Jacksonian Democrats did not see themselves as dedicated to advancing the interests or beliefs of any particular segment of society against any other segment, and thus did not see themselves as engaged in a process of public persuasion. Instead, under the leadership of Martin Van Buren, perhaps the nation's first political operative, Jacksonian Democrats saw themselves as standing in an older tradition of popular party movements in which the party represented the "true" and organically complete polity in a continuing effort to block illegitimate seizures of power by aristocratic or anti-popular factions.³⁶

34. Robert W. Johannsen, *Stephen A. Douglas' New England Campaign, 1860*, 35 *NEW ENG. Q.* 162, 162 (1962); see also RALPH KETCHAM, *PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY, 1789-1829* at 89-140 (1984) (describing how the first six presidents declined to campaign actively for office).

35. See JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 106-19 (1995); RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840* at 242-46 (1969).

36. See GERALD LEONARD, *THE INVENTION OF PARTY POLITICS* 33 (2002); see also JAMES A. MORONE, *THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT* 83 (1998) (Jacksonians "postulated a shared common good which only the iniquitous . . . would violate.").

Van Buren did not conceive of this party organization that he celebrated as a mere electoral machine or as an agent of a particular set of social or economic measures or even ideologies. Such a party he would have regarded as factious. His party was the constitutional party of the [entire] sovereign people. . . . But in Van Buren's hands the constitutional party [of earlier times] became a mass party, organized down to the last democrat in the land. It anticipated no single millennial victory but permanent triumph through permanent constitutional struggle, every election a ratification election for Van Buren's partyist Constitution of pure majoritarianism and strict construction.³⁷

Even in the mid-nineteenth-century West, where stump campaigning became a well-established tradition,³⁸ the purpose of campaigning was not to engage the electorate in collective deliberation on matters of policy but mainly to entertain.³⁹ "Votes," in this environment, "were given not on principle, or as a manifestation of policy preferences, but as a matter of personal reward or favor."⁴⁰

It was not until the late nineteenth century, with the rise first of the Mugwumps, and then of the Progressives, that election campaigns began to be associated with meaningful public deliberation on political issues. These reformers, according to Michael Schudson, "helped transform voting from a social to a civic act," thereby "rationalizing electoral behavior."⁴¹ The fundamentally optimistic Progressives, in particular, believed that technological advances had changed American life sufficiently to require nothing less than a new and more inclusive form of truly democratic self-governance:

With the telephone, the telegraph, the railroad, the newspaper, and the magazine, with the spread of education and the increase in the intelligence of the average voter, there is every reason why the people should exert more and more influence on government rather than less and less. There is every reason why a majority of

37. LEONARD, *supra* note 36, at 43.

38. See RICHARD ALLEN HECKMAN, *LINCOLN VS. DOUGLAS: THE GREAT DEBATES CAMPAIGN 1-2* (1967).

39. See MICHAEL SCHUDSON, *THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE* 136 (1998).

40. DAVID ZAREFSKY, *LINCOLN, DOUGLAS, AND SLAVERY: IN THE CRUCIBLE OF PUBLIC DEBATE* 26 (1990).

41. SCHUDSON, *supra* note 39, at 147.

the people, expressing their opinions in an open, legal way should control the acts of presidents, judges, and legislators⁴²

"There has been," wrote the Progressive reformer William Allen White, "an immense magnifying of the human being, since Hamilton's time."⁴³ Advances in the organization of human life, he argued, have given the ordinary person the luxury of leisure time, and "[w]ith leisure came reflection, with reflection came opinions, with opinions came revolt against the inequalities of men, and with that revolt modern democracy is coming."⁴⁴

This changed opinion of the capacity of the ordinary citizen-led Progressives to a dramatically new model of citizenship in which the "twentieth-century voter was obliged to act out something new and untested in the political universe—citizenship by virtue of informed competence."⁴⁵ For Progressives, the hallmark of citizenship was intelligence rather than passion, information rather than enthusiasm,⁴⁶ and it followed that the appropriate way to appeal to this new breed of democratic citizens was to engage their intelligence through reasoned persuasion directed to ascertaining the Truth.⁴⁷ Even long after the fall of Progressivism as a political movement, the Progressive conception of elections and election campaigns as fundamentally deliberative, democratic events persists in the public understanding of political life.

42. BENJAMIN PARKE DE WITT, *THE PROGRESSIVE MOVEMENT* 143 (Univ. of Wash. Press ed. 1968) (1915).

43. WILLIAM ALLEN WHITE, *THE OLD ORDER CHANGETH: A VIEW OF AMERICAN DEMOCRACY* 3 (1910).

44. *Id.* at 5.

45. SCHUDSON, *supra* note 39, at 173.

46. *See id.* at 182.

47. *See* ROBERT M. CRUNDEN, *MINISTERS OF REFORM: THE PROGRESSIVES' ACHIEVEMENT IN AMERICAN CIVILIZATION 1889-1920* at 58 (1982) (quoting John Dewey to the effect that the goal of twentieth-century politics should be "to realize the state as one Commonwealth of truth"); ROBERT C. WOOD, *SUBURBIA: ITS PEOPLE AND THEIR POLITICS* 157 (1958) (stating that Progressives had "an expectation that in the formal process of election and decision-making a consensus will emerge through the process of right reason and by the higher call to the common good"). For a more complete discussion of the epistemological assumptions underlying American electoral institutions, see James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 114-48 (2000).

B. *The Law's Public Embrace of the Deliberative Campaign*

Even the briefest examination of the legal discourse of elections reveals that legal actors adhere overwhelmingly to the deliberative model of election campaigns. Indeed, a rhetorical commitment to the importance of persuasion in electoral campaigns suffuses our legal institutions. It is present, for example, in the ideology of the marketplace of ideas, which presupposes a meaningful competition among political ideas in which citizens choose among those ideas on the basis of their persuasiveness.⁴⁸ It is equally present in the theory of the First Amendment, long associated with the philosopher Alexander Meiklejohn, that the primary reason for constitutionally protecting free speech is to enable citizens of a democracy to govern themselves intelligently.⁴⁹ The Supreme Court has explicitly elevated the process of persuasion in election campaigns to the status of constitutional doctrine: "The primary goal of all candidates," the Court has held, "is to carry on a successful campaign by communicating to the voters persuasive reasons for electing them."⁵⁰ "Competition in ideas and governmental policies," the Court has said, "is at the core of our electoral process and of the First Amendment freedoms."⁵¹ For that reason, "the First Amendment . . . has its fullest and most urgent application precisely to the conduct of campaigns for political office."⁵² As D.C. Circuit Judge J. Skelly Wright explained:

[T]he First Amendment is founded on a certain model of how self-governing people . . . make their decisions. . . . Self-governing people . . . see the [campaign] process as a way of calling forth the various positions. They listen to all [and then] do their best to . . . penetrate to the merits of the arguments. They retire and consider

48. See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

49. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

50. *Buckley v. Valeo*, 424 U.S. 1, 101 (1976) (per curiam).

51. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

52. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

the positions. And then they choose the course which seems wisest.⁵³

The deliberative model of election campaigns is also the clear consensus choice of legal scholars who study government regulation of politics. Richard Briffault, for example, gives this account of the purpose of an election campaign:

During the election campaign, candidates, parties, interest groups and interested individuals undertake efforts to persuade the voters how to cast their ballots. The campaign period enables voters to inform themselves about the candidates and decide how they will vote. The election campaign is, thus, a central part of the process of structured choice and democratic deliberation that constitutes an election.⁵⁴

For Daniel Ortiz, one of “democracy’s central normative assumptions” is that “voters are civically competent,” meaning that they are “engaged, informed voters who carefully reason through political arguments.”⁵⁵ According to Ronald Dworkin, democracy requires that citizens have equal opportunities to participate in democratic politics, from which it follows that “each citizen is entitled to compete for [the attention of other citizens], and to have a chance at persuasion, on fair terms.”⁵⁶ Bruce Ackerman has recently argued for creating a new national holiday called “Deliberation Day,” held two weeks before Election Day, to provide voters with an appropriate opportunity during the campaign to deliberate collectively on the issues and to engage in “productive interchange—hearing out spokespersons for different sides, and changing their minds on the basis of new arguments and evidence.”⁵⁷

This commitment among legal scholars to the deliberative model of election campaigns is more than rhetorical;

53. J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1018-19 (1976).

54. Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1769 (1999).

55. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 895 (1998).

56. Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 23.

57. BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 5 (2004).

many scholars have used the deliberative model as a point of reference from which to launch critiques of various aspects of legal oversight of the electoral process. Richard Hasen, for example, has argued against restrictive ballot access laws on the ground that minor parties should be welcome in electoral campaigns for their capacity to "broaden the debate."⁵⁸ Jamin Raskin has similarly criticized the exclusion of minor party candidates from government-sponsored campaign debates on the ground that such candidates can "contribute to the campaign discourse" and "inject new ideas and messages into public discussion in order to influence the public agenda."⁵⁹ Bradley Smith has argued against limitations on the giving and spending of money in election campaigns on the ground that such limits have "inhibited the robust discussion of public issues" by interfering with the ability of candidates to persuade voters to their points of view.⁶⁰ Samuel Issacharoff has criticized partisan gerrymandering on the ground that uncompetitive election campaigns deprive voters of the opportunity that competitive campaigns offer to come to "know their true preferences,"⁶¹ presumably through a process of campaign-

58. See Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 840 (2001).

59. Jamin B. Raskin, *The Debate Gerrymander*, 77 TEX. L. REV. 1943, 1969 (1999).

60. BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 73 (2001).

61. Samuel Issacharoff, *Surreply: Why Elections?*, 116 HARV. L. REV. 684, 693 (2002). In the same article, Issacharoff explicitly rejects "a view of political preferences as fixed and static," *id.* at 686, and he elsewhere appears to endorse the view that electoral campaigns take place in "a competitive market for ideas and governance" Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 300 (2001). I take these and other, similar statements to amount to an endorsement of the proposition that public political opinion is significantly campaign-endogenous. There is some ambiguity, however, to Issacharoff's position. Much of his recent work promotes the idea that the main goal of government regulation of democratic processes should be to ensure meaningful competition among parties and candidates. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) [hereinafter Issacharoff & Pildes, *Politics as Markets*]; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) [hereinafter Issacharoff, *Gerrymandering*]. This is an idea that sounds heavily in Downsian political economy, a theory typically associated with a foundational belief in the campaign-exogeneity of public opinion. See *infra* section II.A. I am disinclined, however, to read Issacharoff's

endogenous opinion formation. In short, with very few exceptions,⁶² legal scholars are just as committed as are the federal courts to the proposition that the main purpose of an election campaign is, and should be, to provide candidates and voters with a meaningful opportunity for persuasion and deliberation on pressing political issues of the day.

II. ELECTION LAW AND THE CAMPAIGN-EXOGENEITY OF PUBLIC OPINION

The social, jurisprudential, and scholarly consensus documented in the previous part concerning the deliberative basis of election campaigns is amply reflected in the Supreme Court's understanding of how the Constitution bears on governmental attempts to regulate the campaign process. The central function of an election campaign, the Court has indicated, is to serve as a "platform for the expression of views,"⁶³ characterized by "[d]iscussion of public issues and debate on the qualifications of candidates."⁶⁴

commitment to a jurisprudence of electoral competition as an endorsement of the most arid assumptions of an economic theory of democracy. According to Issacharoff's frequent co-author, Richard Pildes, the theory of electoral competition is more a pragmatic effort to offer courts and regulators a manageable, disciplining concept to guide their interventions in political processes. See Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999) [hereinafter Pildes, *Political Competition*]. Interestingly, Pildes himself seems to me to have been more circumspect about his conception of the underlying nature of electoral competition. Much of what he has written seems equally consistent with a view of public opinion as campaign-endogenous and campaign-exogenous. See, e.g., Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) [hereinafter Pildes, *Foreword*] (developing and extensively discussing applications of the principle that regulation of elections should be informed by an anti-entrenchment principle, but without committing to any particular conception of how electoral competition advances democratic goals).

62. Among the possible exceptions is Nathaniel Persily, whose work appears to accept the median voter model of political science, in which public opinion is usually treated as a largely fixed, campaign-exogenous variable and the positions of the candidates are treated as the campaign-endogenous, dependent variable. See, e.g., Nathaniel Persily, *Reply: In Defense of Foxes Guarding Hen-houses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002) (arguing, among other things, that partisan gerrymandering is unobjectionable to the extent that it results in accurate representation in the legislature of public opinion).

63. See *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

64. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam).

During a campaign, according to the Court, candidates aim to "communicat[e] to the voters persuasive reasons for electing them,"⁶⁵ and voters aim to "evaluate the candidates' personal qualities and their positions on vital public issues."⁶⁶ In sum, for the Court, "[c]ompetition in ideas . . . is at the core of our electoral process."⁶⁷

On the face of it, this kind of emphatic commitment to free and open political expression suggests a constitutional regime of electoral politics that accords a central role in election campaigns to the process of persuasion. Election campaigns, however, do not take place in the abstract world described by broad, cross-cutting constitutional principles; they take place in the real world of concrete legal and political institutions. If we examine the constitutional regimes shaping our actual electoral institutions, we shall see that they operate on a set of very different principles. In particular, much of the constitutional architecture structuring the electoral process is based not on a robust commitment to electoral persuasion, but on its opposite: on the premise that very little of what we might think of as persuasion is to be expected in the electoral process. Thus, despite our gaudy commitment to persuasion as a principle of constitutional design, down in the constitutional boiler room our regulatory institutions do not expect persuasion, do little to encourage it, and may even operate in a way that suppresses it.

I shall illustrate this proposition by reference to four constitutional regimes that contribute significantly to the structure of contemporary American electoral politics: the rules by which candidates may earn a place on the ballot; the federal system of public financing of presidential elections; the associational rights of political parties; and the constitutional treatment of laws regulating the giving and spending of money in election campaigns.

A. Ballot Access Rules

In perhaps no area of constitutional jurisprudence is the disjunction between the Court's professed commitment

65. *Id.* at 101.

66. *Id.* at 53.

67. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

to campaigns as forums for persuasion more at odds with its actual decisions than in the field of ballot access—the body of law that determines how and when candidates may obtain a place on the official election ballot. An election ballot is in a sense just a piece of paper, yet laws regulating the production of the ballot are among the most significant in an electoral democracy. Although such laws do not on their face purport to regulate much more than the terms upon which candidates may have their names printed on the ballot, in practice they exert an extremely powerful influence on the course of election campaigns. First and foremost, of course, laws regulating access to the official ballot play a crucial gatekeeping role by establishing the conditions under which potential candidates for public office may become actual candidates.⁶⁸ Second, the necessity of complying with ballot access laws⁶⁹ means that ballot access rules often drive party and candidate decisions about the allocation of time, effort, and resources, especially early in the process of mounting a candidacy.

Although the Court has sometimes mentioned the gatekeeping function of ballot access laws as a reason for examining them closely,⁷⁰ in an extensive body of decisions adjudicating the constitutionality of state ballot access laws⁷¹ it

68. As Madison observed, “[a] Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect.” Notes of James Madison (Aug. 10, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 250 (Max Farrand ed., 1911).

69. Write-in voting is permitted in many states and can be used by voters and candidates as a way of circumventing ballot access laws, but no candidate would deem the possibility of waging a write-in campaign a meaningful substitute for a line on the official ballot form, as the Court has explicitly acknowledged. *Anderson v. Celebrezze*, 460 U.S. 780, 799 n.26 (1983) (“[T]his opportunity [to cast a write-in vote] is not an adequate substitute for having the candidate’s name appear on the printed ballot.”). Nothing, moreover, requires states to permit any write-in voting at all. *Burdick v. Takushi*, 504 U.S. 428 (1992). Moreover, in many states candidates wishing to run write-in campaigns must themselves register as official candidates. See, e.g., MICH. COMP. LAWS ANN. § 168.737a(1) (West 1997); OHIO REV. CODE ANN. § 3513.041 (West 2006).

70. E.g., *Lubin v. Panish*, 415 U.S. 709, 716 (1974) (“[T]he voters can assert their preferences only through candidates or parties or both.”); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (“[T]he [ballot access laws] . . . limit the field of candidates from which voters might choose.”).

71. Ballot access, even for federal offices, is regulated almost exclusively by state law. States have the authority to regulate state and local level political processes as a matter of state sovereignty and self-governance. States have also

has focused its attention on a different aspect of ballot access rules: their implications for election campaigns. For more than twenty years, the Court has taken the position that the main constitutional interest in ballot access lies in its implications under the First Amendment for the ideological content of campaign discourse. In this area, the Court has held, "the rights of voters and the rights of candidates do not lend themselves to neat separation,"⁷² and the principal reason for this interdependence is that "an election campaign is an effective platform for the expression of views on the issues of the day."⁷³ In consequence, the Court has long analyzed legal restrictions on the ability of candidates to secure a place on the ballot in terms of the First Amendment right of expressive association of candidates, their parties, and their supporters in the electorate.⁷⁴

Much of the Court's language in the realm of ballot access expressly contemplates an ideologically-focused campaign in which public opinion is formed endogenously, through a meaningful process of speech and persuasion. "Competition in ideas," the Court said in one of its earliest cases involving a constitutional challenge to ballot access restrictions, "is at the core of our electoral process."⁷⁵ For the Court, "an election campaign is a means of disseminating ideas"⁷⁶ and a "platform for the expression of views."⁷⁷ Formal candidates for office, the Court has often argued, play a critical role in the competition among ideas during a campaign because only such candidates are granted "the opportunity . . . to wage a ballot-connected campaign."⁷⁸ Nothing of course prevents candidates who are not listed on the ballot from waging a kind of rump campaign aimed at drawing attention to themselves or the issues they advo-

been granted the authority to regulate federal congressional elections under Article I, Section 4 of the U.S. Constitution, and presidential elections under Article II, Section 1.

72. *Bullock*, 405 U.S. at 143.

73. *Anderson*, 460 U.S. at 788.

74. *See id.* at 787-88.

75. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

76. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979).

77. *Anderson*, 460 U.S. at 788.

78. *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986).

cate, but a campaign that is connected to the ballot is more effective than one waged by unofficial candidates because, as the Court has observed, an official candidate listed on the ballot “serves as a rallying point for like-minded citizens.”⁷⁹ To deny a party’s candidates a place on the ballot makes their candidacies more hypothetical than real, thereby “eliminat[ing] the basic incentive that all political parties have”⁸⁰ to advance their ideological goals and impoverishing the campaign itself.

For these reasons, the Court has proclaimed its skepticism of state ballot access restrictions. Such restrictions, the Court has held, not only “jeopardize [a] form of political expression,”⁸¹ but also impair the central function of campaigns to serve as forums for ideological persuasion on topics of public importance. The Court has therefore taken the position that if campaign discourse is to be “uninhibited, robust, and wide-open,”⁸² election campaigns must not be “monopolized by the existing political parties.”⁸³ Parties and candidates must accordingly be “free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish,”⁸⁴ and to do so from the platform of a line on the official ballot. After all, the Court has noted, even losing candidacies have “contributed to [the public’s] understanding of the issues;”⁸⁵ “Abolitionists, Pro-

79. *Anderson*, 460 U.S. at 788; see also *Buckley v. Valeo*, 424 U.S. 1, 101 (1976) (“[Q]ualifying for the ballot [is] a step . . . that, with rare exceptions, is essential to successful effort.”).

80. *Anderson*, 460 U.S. at 788 n.8 (quoting *Williams v. Rhodes*, 393 U.S. 23, 41 (1968) (Harlan, J., concurring)).

81. *Illinois State Bd. of Elections*, 440 U.S. at 186. Political scientists have begun to provide empirical support for this contention. For example, Lacy and Burden found that Ross Perot’s 1992 independent run for the presidency “increased turnout by nearly three percentage points, and one out of every five Perot supporters would not have voted had Perot not entered the race.” Dean Lacy & Barry C. Burden, *The Vote-Stealing and Turnout Effects of Ross Perot in the 1992 U.S. Presidential Election*, 43 AM. J. POL. SCI. 233, 252 (1999).

82. *Anderson*, 460 U.S. at 794 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

83. *Id.*

84. *Jenness v. Fortson*, 403 U.S. 431, 438 (1971).

85. *Anderson*, 460 U.S. at 798.

gressives, and Populists have undeniably had influence, if not always electoral success.”⁸⁶

Despite the Court’s expressed commitment to ballot access as a vehicle for securing the campaign-endogenous formation of public political opinion, state ballot access laws have, with the Court’s approval, generally taken precisely the opposite approach. The main concern of today’s ballot access laws typically is not to create a campaign in which many candidates and many points of view compete for public approval, but rather to *narrow* the scope of campaign discourse by restricting ballot access to candidates who support positions that *already* command substantial support among the electorate before the campaign has even begun. That is to say, most ballot access laws contemplate election campaigns weighted heavily toward the simple tabulation of public opinion that has been formed exogenously to the campaign.

Until the late nineteenth century, American election ballots were printed privately, by political parties.⁸⁷ The state provided a ballot box and tabulated the results, but any party could promote its candidates and supply its supporters with a ballot listing the party’s candidates. As a result, ballot access in the contemporary sense was completely open. By the end of the nineteenth century, however, this system had proven itself so susceptible to corruption that, in a wave of reform that quickly swept the nation, most states adopted the so-called “Australian ballot” system.⁸⁸ Under this system, private ballots were disallowed, an official ballot was prepared by the state at public expense, and voters cast their ballots in secrecy.⁸⁹ By taking over the production of the ballot, however, the state was forced to decide whom to list as official candidates for office. In South Australia and in Britain, both of which had previously adopted the system, virtually free ballot access was

86. *Illinois State Bd. of Elections*, 440 U.S. at 185-86.

87. See L.E. FREDMAN, *THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM*, at ix, 21, 28 (1968); see also RICHARD FRANKLIN BENSEL, *THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY* 14-17 (2004); Peter H. Argersinger, “A Place on the Ballot”: *Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 290 (1980).

88. See FREDMAN, *supra* note 87, at 46-63.

89. See Argersinger, *supra* note 87, at 291.

preserved by permitting candidates a place on the official ballot upon presentation of a nominating petition containing two or ten signatures, respectively.⁹⁰ In the United States, on the other hand, access to the official ballot has been from the beginning considerably more restrictive; a widely-copied Massachusetts law of 1888, for example, required candidates for statewide office to submit nominating petitions containing one thousand signatures.⁹¹

Today, most states regulate ballot access according to a simple principle: parties and candidates that, *prior to* campaigning for office, can demonstrate substantial existing support among the electorate are permitted a place on the ballot; parties and candidates who cannot demonstrate such support are excluded. Consider, for example, Connecticut's not atypical scheme of ballot access. Like many states, Connecticut distinguishes between a "major party" and a "minor party." A "major party" is any party whose candidate for governor at the last gubernatorial election polled at least twenty percent of the total votes cast, or whose members comprise at least twenty percent of the total number of voters who have registered as members of a political party.⁹² A "minor party" is any party whose candidate "for the office in question" received at least one percent of the total votes cast.⁹³ Under the statute, candidates nominated by parties that have qualified as major or minor are listed automatically on the ballot.⁹⁴ In contrast, candidates of parties that were not sufficiently popular at the most recent election to qualify as "minor," and candidates wishing to run as independents, must make a showing of current support by filing nominating petitions containing signatures equal to one percent of the number of votes cast at the preceding election for the office for which they are running, or 7,500, whichever is less.⁹⁵ Connecticut's scheme thus makes ballot access contingent upon a showing of electoral support

90. See FREDMAN, *supra* note 87, at 47.

91. See *id.*

92. CONN. GEN. STAT. ANN. § 9-372(5) (West 2006).

93. *Id.* § 9-372(6).

94. See *id.* § 9-379.

95. *Id.* § 9-453d. Candidates nominated by major and minor parties are precluded from qualifying for the ballot by nominating petition. See *id.* § 9-453t.

well before the commencement of the official campaign.⁹⁶ In the case of major and minor party candidates, support is simply presumed on the basis of recent electoral performance. All other candidates must show substantial support by producing signed nominating petitions before being admitted to the ballot.

Connecticut's ballot access scheme is in some ways on the generous side. In some states, independent candidates and candidates representing parties that do not qualify for automatic ballot access must collect signatures of as many as five percent of the votes cast at the last election to obtain a ballot position.⁹⁷ Some states, moreover, impose additional geographical distribution requirements on signature-gathering; in New York, for example, candidates for statewide office must not only collect a total number of signatures equal to five percent of the party's total registered membership, but must in addition collect a certain proportion of those signatures from each of one-half of the state's congressional districts.⁹⁸ Also, unlike Connecticut, which treats major and minor party candidates equally, some states subject minor parties to more onerous ballot qualification requirements.⁹⁹ In every state, however, the major parties enjoy a continuing presumption of access to the ballot on account of their prior record of electoral success.

The burden of these ballot access requirements on third party and independent candidates should not be underestimated. To obtain signatures of even one percent of the electorate for statewide office can require, in large states, a heroic effort. In Florida, for example, until 1998 third party

96. Nominating petitions must be filed no later than ninety days before election day. *See id.* § 9-453i; *see also id.* § 9-423(a) (establishing second Tuesday in August as the date for party primary elections).

97. *See, e.g.,* ME. REV. STAT. ANN. tit. 21-A, ch. 5, § 303(3) (2005) (for a new party seeking to obtain a ballot position through petitions, the petitions "must contain the signatures and legal addresses of voters equal in number to at least 5% of the total vote cast in the State for Governor at the last preceding gubernatorial election"). Maine does, however, offer an alternative avenue of ballot access for candidates running as independents. *See id.* § 354.

98. N.Y. ELEC. LAW § 6-136(1) (McKinney 1998). The five percent requirement is, however, capped at 15,000 signatures. *Id.*

99. *See, e.g.,* Am. Party of Texas v. White, 415 U.S. 767 (1964) (upholding state ballot access scheme that made ballot access substantially more difficult for minor parties and independents).

and independent candidates for governor had to obtain nearly two hundred thousand signatures, a burden no candidate ever successfully carried.¹⁰⁰ Nominating signatures, moreover, are costly to obtain. Commercial signature-collection firms routinely charge more than one dollar per signature,¹⁰¹ meaning that small-party or independent candidates might conceivably exhaust a good portion of their campaign resources merely qualifying for the right to run, if indeed they have the resources to qualify at all.

The effect of these kinds of ballot access schemes is of course to make it extremely unlikely that any views will be presented to the electorate during the campaign that do not, prior to the campaign, already enjoy widespread public support. The typical ballot access regime thus serves not as an initial move in a campaign-endogenous process of open debate by diverse candidates and their supporters, but as a first-pass method of narrowing the scope of discussion to those ideas that are already widely held. This may well be a practical principle on which to run a smooth election campaign, yet it is an approach that undercuts at least to some degree the possibility of campaign-endogenous public opinion formation by limiting the slate of official candidates to those who already enjoy some popularity as the champions of positions that large numbers of voters exogenously hold.

Given the Court's strong rhetorical commitment to open ballot access as a means of encouraging campaign-endogenous opinion formation, one might expect the Court

100. See Richard Winger, *Ballot Access: A Formidable Barrier to Fair Participation*, May 17, 2005, <http://www.ballot-access.org/winger/fbfp.html>. Florida substantially eased this requirement in 1998 after an initiative amendment to the Florida Constitution required equality of candidate ballot access. See Richard Winger, *How Many Parties Ought to Be on the Ballot?: An Analysis of Nader v. Keith*, 5 ELEC. L.J. 170, 177 n.55 (2006).

101. In California initiative drives, the present going rate appears to be between one and two dollars per signature, see John Marelus & Ed Mendel, *Governor's Backers, Foes Scramble to Make Ballot*, SAN DIEGO UNION-TRIBUNE, March 28, 2005, at A-1 (reporting going rate of \$1 to \$1.50 per signature), but considerably higher figures have often been reported. See Robert Salladay, *Game of the Name Is Profit*, LOS ANGELES TIMES, Apr. 20, 2005, at B-1 (reporting expenditures of \$1 to \$2 per signature); see also John M. Hubbell & Lynda Gledhill, *Petition Circulators Cleaning Up*, SAN FRANCISCO CHRONICLE, March 24, 2004, at B3 (reporting \$3 to \$3.50 per signature); George Skelton, *Gov.'s Performance in Role of 'Reformer' Seems a Little Strained*, LOS ANGELES TIMES, March 14, 2005, at B-3 (reporting up to \$10 per signature).

to take a dim view of these kinds of restrictions. It has not. The Court has, to be sure, invalidated certain state ballot access laws as unduly exclusionary on the grounds that they require the payment of excessive filing fees,¹⁰² require candidates to announce their candidacy too early in the political season,¹⁰³ or interact so as to establish an infeasible ballot access monopoly in favor of the two major parties.¹⁰⁴ But the Court has never invalidated a ballot access restriction solely on the ground that it required an excessive showing of pre-campaign support, or that it treated the major, established parties more leniently in its access requirements than minor parties or independent candidates.¹⁰⁵

In fact, the Court has quite enthusiastically endorsed state ballot access laws that restrict ballot positions to candidates who are able to show a significant level of exogenous public support. The Court has been quite clear on this point: "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot."¹⁰⁶ But what is the nature of

102. *See* *Bullock v. Carter*, 405 U.S. 134 (1972); *see also* *Lubin v. Panish*, 415 U.S. 709 (1974).

103. *See* *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

104. *See* *Williams v. Rhodes*, 393 U.S. 23 (1968).

105. *See* *Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding Georgia ballot access requirement that independents collect signatures equal to five percent of the total number of voters eligible to vote at the last election); *see also* *Storer v. Brown*, 415 U.S. 724 (1974) (upholding California ballot access requirement that independent candidates collect signatures equaling five percent of total votes cast in the preceding election, during a twenty-four day period, exclusively from registered voters who vote in a party primary); *Am. Party of Tex. v. White*, 415 U.S. 767 (1974) (upholding Texas ballot access scheme imposing successively more onerous requirements on major parties, minor parties, non-minor parties, and independents); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (upholding ballot access requirement that minor party candidates receive at least one percent of the total votes cast in the primary to qualify for a ballot position).

106. *Jenness*, 403 U.S. at 442; *see also* *Lubin*, 415 U.S. at 718 ("States may... impose on minor political parties the precondition of demonstrating the existence of some reasonable quantum of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election."); *Storer*, 415 U.S. at 733 (states may require independent candidates to "qualify for the ballot by demonstrating substantial public support"). The same interest, the Court has held, justifies a state ban on fusion

the state's interest? On this question, the Court has been blunt: to admit to the ballot candidates who do not *begin* the campaign enjoying "a significant modicum" of public support would be to tolerate a kind of "ballot . . . clutter[]"¹⁰⁷ or "clogging of [the] election machinery" that would court "voter confusion" at best,¹⁰⁸ and would at worst open the door to "unrestrained factionalism"¹⁰⁹ and even "chaos."¹¹⁰ Indeed, the Court has gone further: routine ballot access restrictions are constitutional because "a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies."¹¹¹ A candidate, then, who enters a campaign hoping actually to persuade voters to a position that they do not in large numbers already hold before the campaign begins therefore does not display the "seriousness" necessary to justify a place on the ballot;¹¹² he or she is a "spurious candidate[]" that the state is justified in "weeding out."¹¹³

This is surely a remarkable judicial record. In the same group of cases in which the Court enthusiastically touts endogenous public opinion formation as the essence of electoral democracy, and acknowledges the connection between official candidacy and the ability to persuade, it simultaneously condemns an institutional arrangement—relatively unrestricted ballot access—that might well assist in producing just the kinds of campaigns the Court endorses. It is one

candidacies, in which major party candidates run simultaneously on the ballot lines of minor parties. Failing to ban such candidacies would "undercut [the state's] ballot-access regime by allowing minor parties to capitalize on the popularity of another party's candidate, rather than on their own appeal to the voters, in order to secure access to the ballot." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1997).

107. *Munro*, 479 U.S. at 196.

108. *Bullock v. Carter*, 405 U.S. 134, 145.

109. *Storer*, 415 U.S. at 736.

110. *Id.* at 730.

111. *Bullock*, 405 U.S. at 145.

112. *Lubin v. Panish*, 415 U.S. 709, 715; *see also id.* at 718 (producing signed petitions is a way for a candidate to "demonstrate the 'seriousness' of his candidacy").

113. *Bullock*, 405 U.S. at 146. The Court used virtually identical reasoning in upholding the decision of a public television station to exclude from a televised campaign debate among candidates for Congress all but the major party candidates. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

thing to fear electoral chaos and disorder,¹¹⁴ but quite another to equate it with the give and take of genuine persuasion during the campaign. On the other hand, a candidate's attempt to use his candidacy as a platform to persuade the electorate to a position it does not already hold looks disorderly only if one conceives of the true function of election campaigns as simply to record accurately the electorate's exogenously held preferences. With its ballot access jurisprudence, the Court has crafted legal institutions best suited to doing just that: tabulating campaign-exogenous public opinion.

B. Public Financing of Election Campaigns

In a series of statutes stretching back to 1966, Congress has provided for public financing of presidential election campaigns.¹¹⁵ The present statutory scheme of public financing and the Supreme Court's reasoning in upholding it both bear striking similarities to the ballot access laws and cases described in the preceding section. Under the law, candidates for President may receive public financing in amounts that differ depending upon the pre-campaign popularity of the political party of which the candidate is the nominee. For purposes of funding, a "major party" is one whose presidential candidate received at least twenty-five percent of the vote in the preceding presidential election;¹¹⁶ a "minor party" is a party whose presidential candidate received between five and twenty-five percent of the vote in the last presidential election;¹¹⁷ and a "new party" is any other political party.¹¹⁸

Under the statute, candidates nominated by a major party are eligible to receive for the general election the full

114. See Richard H. Pildes, *Democracy and Disorder*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* (Cass R. Sunstein & Richard A. Epstein eds., 2001) (arguing that much of the Supreme Court's election jurisprudence displays an underlying fear of democracy as excessively disorderly and chaotic).

115. This history is briefly recounted in *Buckley v. Valeo*, 424 U.S. 1, 85-86 & n.114 (1976).

116. 26 U.S.C. § 9002(6) (2000).

117. *Id.* § 9002(7).

118. *Id.* § 9002(8).

amount of public funds to which the law entitles them.¹¹⁹ In 2004, this amount was nearly \$75 million.¹²⁰ Minor party candidates, however, are not entitled to the full amount of public funds made available to candidates of the major parties; they are entitled instead only to a proportion of that amount corresponding to the ratio by which their party's candidate in the previous presidential election fell short of the average number of votes earned in that election by the candidates of the major parties.¹²¹ Candidates of new political parties get no public financing up front, but are entitled to a post-election disbursement of public funds in proportion to the number of votes they actually receive, provided they receive at least five percent of the total popular presidential vote.¹²² Candidates who run as independents, without the backing of any political party, even a new one, may not receive public financing.¹²³

Under this scheme, then, public campaign funds are allocated on the basis of a candidate's estimated pre-campaign support, creating a significant bias in favor of candidates who support positions that are widely held before the campaign commences. Although the federal public financing scheme is thus similar to the typical ballot access law, in which ballot access becomes easier as a candidate's estimated pre-campaign support increases, candidates for President who support less popular views actually suffer under this scheme from multiple disadvantages. First, because their views are not already widely held before the campaign begins, they must advance their positions through actual campaign-endogenous persuasion, requiring them to work harder during the campaign to earn votes. Second, again because their views are not exogenously popular, they have greater difficulty securing public funding for their election campaigns. Third, because they will

119. *Id.* § 9004(a)(1).

120. See Federal Election Commission, 2004 Presidential Campaign Financial Activity Summarized (Feb. 3, 2005), <http://www.fec.gov/press/press2005/20050203pressum/20050203pressum.html>.

121. See 26 U.S.C. § 9004(a)(2)(A).

122. *Id.* § 9004(a)(3).

123. Given the possibility of some reimbursement for new party candidates under § 9004(a)(3), functionally independent candidates have a strong financial incentive to organize a new party as a vehicle for their independent run.

have fewer resources at the outset of the campaign than candidates who enter it supporting exogenously popular views, they will be unable to keep pace with their competitors' spending, a disadvantage that, for reasons to be further elaborated below,¹²⁴ will likely cause them to fall even further behind in appealing successfully for votes. In short, the bias under this financing system in favor of exogenously popular political opinion is severe.

The Supreme Court has had no difficulty sustaining this method of public financing. As in the ballot access area, the Court has identified the campaign-endogenous formation of public opinion through persuasive speech as the central value of concern: "Subtitle H [the public financing provision] is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."¹²⁵ Nevertheless, the Court dismissed challenges to the financing scheme's differential treatment of major and minor party candidates in terms similar to those it has employed in the ballot access arena: "Congress' interest in not funding hopeless candidacies with large sums of public money . . . necessarily justifies the withholding of public assistance from candidates without significant public support."¹²⁶ Clearly, if a candidacy that does not, from the very outset of the campaign, enjoy substantial public support is "hopeless," it can only be because persuasion of large numbers of voters during the campaign is simply impossible, and therefore not to be expected—even with a full measure of public funding. This in turn suggests, of course, that the favored major party candidates, if they are sensible, are unlikely to spend their public campaign funds on attempts to persuade voters who do not already agree with them, but are more likely to invest that money in mobilization efforts designed to ensure that existing supporters turn out on election day to vote.

It is possible to design a system of public campaign financing on different premises. Under Maine's Clean Election Act, for example, *all* candidates who qualify for public

124. See *infra* Part II.D.

125. *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (per curiam).

126. *Id.* at 96.

funding receive equal amounts of public funds.¹²⁷ Candidates may qualify, moreover, irrespective of their party affiliation; indeed, they need profess no party affiliation whatsoever. All candidates need do to qualify is to raise a modest number of \$5 contributions.¹²⁸ Upon qualifying, all candidates then have equal amounts of public funds, and may not spend any additional private money. If persuasion of voters during a campaign through political speech is possible, then under the Maine system all candidates have in theory the same chance to persuade the electorate. Of course, candidates for Maine offices who begin the campaign espousing views that are already widely held among voters will have an advantage over candidates who advance less popular views. But the Maine system seems to take seriously the notion of campaign-endogenous opinion formation in a way that the federal system does not. I mention this not to praise the Maine approach over the federal approach, but merely to emphasize the chief point: federal constitutional law bows frequently and reverentially to the concept of election campaigns as forums for political persuasion, yet in its actual operation institutionalizes a system in which significant, meaningful persuasion is not realistically to be expected, and in fact may at times be powerfully suppressed.¹²⁹

127. ME. REV. STAT. ANN. tit. 21-A, § 1125(8) (1995).

128. *Id.* § 1125(3).

129. In fact, the Court has gone further. In *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 682-83 (1998), the Court upheld the decision of a government-financed public television station to exclude from campaign debates a candidate who did not command significant public support before the debate. As a result, candidates who do not express exogenously popular views, but hope instead to persuade the electorate during the campaign, not only can be kept off the ballot and denied public financing, but can actually be denied perhaps the only meaningful opportunity to persuade the electorate that the campaign season might offer. Former Minnesota governor Jesse Ventura, who won election as a minor party candidate of the Reform Party, claimed that being permitted to debate major party candidates early in the campaign season played an important role in his eventual electoral success. Ventura's account is retold in SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 444-45 (rev. 2d ed. 2002).

C. *Political Party Associational Rights and the Responsible Party Model*

The U.S. Constitution makes no mention of political parties, and the Framers harbored a well-known antipathy toward them,¹³⁰ yet political parties have nevertheless emerged as integral and indeed indispensable components of the American electoral process.¹³¹ While not without their critics,¹³² parties often are credited with performing numerous democratically valuable functions such as organizing electoral competition,¹³³ providing important information to the voting public,¹³⁴ mobilizing the electorate,¹³⁵

130. According to one prominent commentator, the "root idea" of Anglo-American political thought concerning parties was that "parties are evil." RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840*, at 9 (1969). A similar story appears in GERALD LEONARD, *THE INVENTION OF PARTY POLITICS*, chs. 1-2 (2002).

131. "It should be stated flatly at the outset that . . . the political parties created democracy and that modern democracy is unthinkable save in terms of the parties. . . . The parties are not therefore merely appendages of modern government; they are in the center of it and play a determinative and creative role in it." E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 1 (1942).

132. See, e.g., Comm. on Political Parties, Am. Political Sci. Ass'n, *Toward a More Responsible Two-Party System*, 44 AM. POL. SCI. REV. SUPP. 15-24 (1950) [hereinafter APSA Report] (criticizing parties as not fulfilling their responsibilities to two-party democracy).

133. See, e.g., Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 276 (2001) ("[T]he vitality of political parties is essential to maintaining a system of partisan competition that, in turn, serves as the locus of accountability of the governors to the governed.").

134. See, e.g., FRANK J. SORAUF, *PARTY POLITICS IN AMERICA* 20 (2d ed. 1972) ("For millions of Americans the party label is the cue for their decision about candidates or issues. It is the point of reference that allows them to organize and simplify the buzzing confusion and strident rhetoric of American politics. It helps them compare and choose between candidates and issues."); CAMPBELL ET AL., *supra* note 11, chs. 6-8 (setting out findings on the importance and stability of party identification as an organizing principle for political action).

135. See, e.g., Robert Huckfeldt & John Sprague, *Political Parties and Electoral Mobilization: Political Structure, Social Structure, and the Party Canvass*, 86 AM. POL. SCI. REV. 70 (1992); Gregory A. Caldeira, Aage R. Clausen & Samuel C. Patterson, *Partisan Mobilization and Electoral Participation*, 9 ELEC. STUD. 191 (1990).

ensuring the responsiveness of elected officials,¹³⁶ and even organizing public understandings of the political world.¹³⁷ Because parties play such a substantial role in the organization and operation of the electoral system, and because that system is by definition a critical public institution of democratic self-governance, legislators have often viewed parties as fundamentally public organizations whose activities may be freely regulated to promote public goals.¹³⁸ As a result, questions concerning the degree to which the activities of parties may be regulated by law appear regularly on the judicial docket.

In addressing these questions, the U.S. Supreme Court has looked to the Constitution for answers, and has found them primarily in the First Amendment right of expressive association,¹³⁹ a doctrine that the Court has construed to provide parties with extremely robust immunity from unwanted government regulation. The Court first recognized the right of expressive association in a 1958 case, *NAACP v. Alabama*,¹⁴⁰ in which it characterized the NAACP as a group dedicated to public advancement of the shared political beliefs of its members. The freedom of speech, the Court implied, carries with it a correlative right to organize for the purpose of speaking effectively. Because, the Court said, “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,”¹⁴¹ the Constitution protects

136. See, e.g., AUSTIN RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT* 10-14 (1954) (describing how a two-party system ensures governmental responsiveness); APSA Report, *supra* note 132, at 15-19.

137. See, e.g., Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 826 (2000) (“Alone among associations, then, parties offer a comprehensive map of the political world—cues and symbols and framing devices that extend across issues and candidates and over time.”).

138. As Samuel Issacharoff has observed, parties are sometimes treated by law “as the political equivalent of common carriers subject to ordinary regulatory oversight.” Issacharoff, *supra* note 133, at 278.

139. The right to expressive association is distinct from what the Court has called the right of intimate association. The latter is based not on the First Amendment, but on conceptions of personal autonomy in the choice of friends and intimate associates that are rooted in substantive due process. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617-19 (1984).

140. 357 U.S. 449 (1958).

141. *Id.* at 460.

not only speech, but also the associative forms and relationships that permit individuals to enhance their speech through collective action. In later cases, the Court applied this analysis to political parties, which it has tended to view as paradigms of expressive associations:

For more than [three] decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of likeminded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences.¹⁴²

The Court has invoked the right to expressive association on numerous occasions to invalidate government regulations to which parties have objected.¹⁴³

The main benefit that parties derive from the right to expressive association is the ability to control the content of their public communications. As speakers, parties enjoy the same freedom from censorship and content regulation that individuals possess directly under the First Amendment's first-order protection for freedom of speech.¹⁴⁴ The second-order right of expressive association, however, provides parties with the ability to control the content of their speech in another way: by controlling their membership.¹⁴⁵ Thus, par-

142. *Norman v. Reed*, 502 U.S. 279, 288 (1992).

143. *E.g.*, *Cousins v. Wigoda*, 419 U.S. 477, 483 (1974) (invalidating state law requiring delegates to national party conventions to be elected by a method different from the method required by the Democratic National Committee for the seating of convention delegates); *Tashjian v. Republican Party*, 479 U.S. 208, 255 (1986) (invalidating state law prohibiting open primaries); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 216 (1989) (invalidating state law forbidding party central committees to endorse candidates in the party's primary election); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 569, 586 (2000) (invalidating state law mandating blanket primary elections).

144. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989) (holding that a state law prohibiting parties from endorsing candidates during primary elections violated the free speech rights of the parties and their members).

145. *See Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 122 (1981) ("The freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.") (citation omitted).

ties can not only decide who can be a member, but also can decide, even over the objection of the state, who will be eligible to participate and vote in primary elections to select party candidates.¹⁴⁶ On this view, a party must be able to control its membership in order to effectively control its speech because the presence within an organization of individuals who do not share a commitment to its goals and positions can contradict or undermine the organization's message. This might occur when unwanted members deliver a contrarian message under the organizational banner,¹⁴⁷ or when their mere presence within the organization by itself delivers a message that conflicts with the one the organization wishes to send.¹⁴⁸

Considered in isolation, application of the right of expressive association to political parties appears consistent with a constitutional commitment to persuasion as a significant element of electoral competition. After all, the right of expressive association is based on the idea that individuals can speak more effectively, and thereby presumably reach and persuade more listeners, when they act in concert with others of similar views. Considered, however, in its institutional setting of electoral competition in a two-party system, the right of expressive association functions quite differently. In fact, the doctrine contributes significantly to the institutionalization of a system of party competition in which, paradoxically, persuasion of voters plays a minimal role. This is because, in elaborating and applying to political parties a robust right of expressive association, the Supreme Court has essentially constitutionalized under the First Amendment a version of the "responsible party" model

Parties cannot, however, exclude members on the basis of constitutionally prohibited criteria such as race. *See Smith v. Allwright*, 321 U.S. 649 (1944).

146. *See Tashjian v. Republican Party*, 479 U.S. 208 (1986); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (both invalidating state laws overriding internal party decisions about who would be eligible to vote in party primary elections).

147. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

148. *See Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). An especially cogent example of this is the 1992 decision of the Georgia Republican Party to forbid David Duke, a former leader of the Ku Klux Klan, from running in Georgia's Republican presidential primary, an act tantamount to expelling him from the state party. The Court of Appeals for the Eleventh Circuit sustained the party's action. *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992).

of politics elaborated by American political scientists during the 1950s—a model that *rejects* the idea that meaningful voter participation is an important ingredient of electoral politics.

1. *The Responsible Party Model.* The responsible party model has its origins in Joseph Schumpeter's influential minimalist theory of mass democracy.¹⁴⁹ Schumpeter argued that the classic liberal theory of democracy, in which the legitimacy of government depends upon a system of active popular sovereignty implemented through democratic elections, rests on a blatant fallacy: that the people of a democracy select representatives to do their bidding, and thus to implement their will.¹⁵⁰ This view is false, according to Schumpeter, mainly because the citizenry of a modern mass democracy does not in fact actively determine its wishes and then select leaders to implement its instructions, but instead does nothing more than passively authorize leaders to pursue policies chosen by those leaders. As Schumpeter famously summarized his critique: "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."¹⁵¹

Shortly after its appearance, Schumpeter's theory was firmly embraced by mainstream American political science in the form of the "responsible party" model of democratic governance. According to Austin Ranney, its most articulate expositor, the responsible party model contemplates that the people do not actively participate in the formulation of collective policy goals, but rather exercise a form of much more indirect "*control* over the government in this sense: If half-plus-one of the people feel their wants are not being satisfied, they can, in peaceful and orderly elections coming at frequent intervals, replace the set of rulers in power with an alternate set."¹⁵² This form of popular control requires

149. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269-83 (3d ed. 1950). Austin Ranney traces the roots of the doctrine back considerably further, to Woodrow Wilson and A. Lawrence Lowell. AUSTIN RANNEY, THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT: ITS ORIGINS AND PRESENT STATE 25-69 (1954).

150. SCHUMPETER, *supra* note 149, at 250-68.

151. *Id.* at 269.

152. RANNEY, *supra* note 149, at 11.

political parties because only parties “can provide the coherent, unified sets of rulers who will assume collective responsibility to the people for the manner in which government is carried on.”¹⁵³ The possibility of meaningful popular control over government, however, depends upon the people being presented with a clear choice:

There must exist at least two (and preferable only two) unified, disciplined political parties. Each has its conception of what the people want and a program of various measures designed to satisfy those wants. In a pre-election campaign each attempts to convince a majority of the people that its program will best do what the people want done. In the election each voter votes for a particular candidate in his district, primarily because that candidate is a member of the party which the voter wants to take power, and only secondarily because he prefers the individual qualities of one candidate to those of the other. The party which secures a majority of the offices of government in the election then takes over the entire power of the government and the entire responsibility for what the government does. It then proceeds to put its program into effect.¹⁵⁴

The Supreme Court’s jurisprudence of political parties as expressive association tracks closely the basic assumptions of the responsible party model.¹⁵⁵ Under the doctrine

153. *Id.* at 12.

154. *Id.* A similar concept is articulated in the 1950 special report of the American Political Science Association’s Committee on Political Parties. See APSA report, *supra* note 132, at 15-24.

155. Many legal scholars have noticed the similarity, often in the course of criticizing the Court’s adoption of it. See, e.g., Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 820 (2001) (“Current responsible party government scholars and the Supreme Court that has adopted their viewpoint are stuck in something of a time warp back to the 1950s.”); Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 332 (noting the Court’s “uncritical reliance on . . . the ‘responsible party government’ position”); Gregory P. Magarian, *Regulating Political Parties under a “Public Rights” First Amendment*, 44 WM. & MARY L. REV. 1939, 1965 (2003) (describing and criticizing a “[s]ymbiosis” between the jurisprudence of parties as privately autonomous rights bearers and the responsible party model); Rosenblum, *supra* note 137, at 827-38 (criticizing the responsible party model as a basis for regulating political parties); Pildes, *Foreword*, *supra* note 61, at 111-17 (recognizing the responsible party model as a basis for justifying the Court’s jurisprudence of party rights, but arguing that courts should not be making such choices). But see Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical*

of expressive association, a political party is defined as an organization devoted centrally to a set of ideas: it is an association of like-minded individuals dedicated to the advancement, ultimately through electoral success, of a set of policies to which all members subscribe—precisely what a party should be under the responsible party model.¹⁵⁶ Furthermore, under the doctrine of expressive association, a party has the right to exclude from membership and participation individuals who do not share its members' convictions, thereby allowing the party to maintain its ideological purity. This authority in turn ensures that parties will be able to differentiate themselves as sharply as possible, in turn providing the electorate with a set of clear and coherent alternatives—again, precisely the kind of boundary maintenance required by the responsible party model.¹⁵⁷ Indeed, it is doubtless no coincidence that the Court's jurisprudence of expressive association first emerged in the 1950s, contemporaneously with the emergence of the responsible party model in political science, and came to full flower during the 1970s and 1980s, at a time when many political scientists began loudly to bemoan the decline of the party system and to call openly for its renewal.¹⁵⁸

Inquiry, 71 TEX. L. REV. 1741, 1760-63 (1993) (using the responsible party model as a basis for arguing against a strong right of party autonomy based on expressive association).

156. The Court made this extremely clear, if there had been any doubt, last term in *Clingman v. Beaver*, 544 U.S. 581 (2005), when it upheld Oklahoma's "semi-closed" primary system in which parties were prohibited from allowing any non-party members other than independents to vote in their primaries. A voter's desire to vote in a party's primary while remaining affiliated with a different party, the Court reasoned, represents a non-ideological form of association not entitled to constitutional protection: "Their interest is in casting a vote for [another party's] candidate in a particular primary election, rather than in banding together with fellow citizens committed to [that party's] political goals and ideals." *Id.* at 588.

157. The Court has affirmed the authority of the state to police the clarity of party identity. *See id.* at 587 (state may bar a party from permitting members of other parties to vote in its primary); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (state may prohibit a party from designating as its candidate a person who is the candidate of another party).

158. *See, e.g.*, DAVID S. BRODER, *THE PARTY'S OVER: THE FAILURE OF POLITICS IN AMERICA* (1972); WILLIAM CROTTY, *AMERICAN PARTIES IN DECLINE* (1984); JEAN J. KIRKPATRICK, *DISMANTLING THE PARTIES: REFLECTIONS ON PARTY REFORM AND PARTY DECOMPOSITION* (1978); MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952-1996* (1999).

One of the distinguishing features of the responsible party model of election campaigns is the diminished and highly circumscribed role it prescribes in the electoral process for engagement and persuasion of individual voters. In its more extreme versions, the responsible party model attributes to the electorate virtually no capacity or independent agency: "[T]he electoral mass," said Schumpeter, "is incapable of action other than a stampede."¹⁵⁹ Thus for Schumpeter, at least, a modern election campaign is not and cannot be an attempt to persuade the electorate through reasoned argument; it is at most an attempt to induce a stampede.¹⁶⁰ The political scientists who built the responsible party model on Schumpeter's foundation did not share to the same degree Schumpeter's apparent contempt for the capacity of the modern democratic citizenry.¹⁶¹ Yet even so, like Schumpeter, they plainly contemplated a degree of citizen capacity for and engagement in electoral politics that falls considerably short of the role that citizens had previously been thought to play in prevailing democratic theories.

The diminished role of voters in the responsible party model results primarily from the diminished nature of the electoral decision that the model attributes to them. According to the model, democracy does not consist in unconstrained reflection and deliberation by the people followed by a popular choice among candidates competing to do the people's bidding. It involves instead something much less: unconstrained reflection and deliberation by political elites, organized in competing parties, followed by approval or disapproval by the electorate of the parties' proposed political programs. Indeed, a critical assumption of the responsible party model is that voters do not in general independently formulate opinions on matters of public policy because they lack the information, time, and expertise necessary to do

159. SCHUMPETER, *supra* note 149, at 283.

160. As Schumpeter openly proclaimed: "The psycho-technics of party management and party advertising, slogans and marching tunes, are not accessories. They are of the essence of politics." *Id.*

161. The authors of the APSA Report, for example, explicitly rejected a view of politics as simply the pure clashing of interest groups. APSA Report, *supra* note 132, at 16, 19. They spoke repeatedly of the need for the public to be able to make an "intelligent" choice, and of party differentiation as necessary for "reasonable and profitable discussion." *Id.* at 22.

so.¹⁶² An election, on this view, is not—or certainly need not be—an occasion for serious public reflection, deliberation, and debate; it is instead nothing more than a very gross kind of referendum on the performance of the party currently in power. This is just the kind of decision that, on the model's assumptions, appropriately matches voters' capacities with their responsibilities as citizens: voters need not hold opinions on the desirability of particular policies, the nature of the common good, or any other aspect of public affairs; all they need to know is whether they generally approve or disapprove of the incumbent administration. So far as issues and positions are concerned, the parties do all the heavy lifting.¹⁶³

Most importantly for present purposes, the responsible party model does not contemplate (though it does not preclude) a kind of election campaign in which voters come to their voting decisions during the campaign after some substantial process of persuasion through campaign speech. On the contrary, the purpose of an election, according to the responsible party model, is not to provide an opportunity for voters and other political actors to persuade the electorate what to believe, but is rather to give parties an opportunity to compete for votes by appealing to what voters *already* believe. The model, that is to say, presupposes that public opinion on electorally salient issues is formed exogenously to election campaigns, not endogenously during them. In fact, under the responsible party model, parties lack any incentive to use the campaign period to try to move voters off of their initial beliefs by persuading them to change their opinions: in the three or so months between a summer nominating convention and a November election, parties will surely have their hands full if they do nothing more than simply try to convince voters that they, better than the opposing party, will satisfactorily fulfill the wishes of the voters as the voters exogenously understand their own wishes. This kind of an appeal, to be sure, involves a kind of

162. See RANNEY, *supra* note 136, at 10 (the model contemplates that "governmental problems are so complex that the great bulk of the people can have neither the leisure nor the special training required to formulate specific and workable measures for their solution").

163. See generally Samuel Issacharoff & Daniel R. Ortiz, *Governing through Intermediaries*, 85 VA. L. REV. 1627 (1999) (analyzing parties as agents of the electorate).

persuasion, but it is persuasion of a distinctly thin variety that demands little of either voters or party speakers.

2. *The Limits of Parties' Internal and External Communications.* Thus far, I have argued that the First Amendment right of expressive association contemplates the campaign-exogenous formulation of public political opinion primarily by showing its congruity with the responsible party model. But we can reach the same conclusion about the doctrine by examining directly the ways in which it institutionalizes communications both among party members and between members of competing parties.

According to the Court, the justification for recognizing a right of expressive association is that groups enjoy an advantage over unaffiliated individuals in getting their opinions accepted in the marketplace of ideas. Although the Court has often been vague about the precise nature of this advantage, it seems to derive mainly from the ability of groups to pool resources:¹⁶⁴ presumably, groups of like-minded individuals can take advantage of economies of scale and effort in crafting a message that is sound and persuasive, and can disseminate their message more efficiently and consistently, and to a wider audience than could the group's members individually. The advantages of association, in other words, are measured in the enhanced capacity of the speech to persuade.¹⁶⁵

164. See, e.g., *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985) (public interest organizations are "mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to 'amplify[y] the voice of their adherents'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (per curiam)); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981) (the "value [of association for expressive purposes] is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost"); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 637 (1996) ("Political associations allow citizens to pool their resources and make their advocacy more effective.") (Thomas, J., dissenting).

165. This is a view that is traceable back at least as far as Tocqueville:

When an opinion is represented by [an association of individuals], it necessarily assumes a more exact and explicit form. It numbers its partisans and engages them in its cause; they, on the other hand, become acquainted with one another, and their zeal is increased by their number. An association unites into one channel the efforts of divergent minds and urges them vigorously towards the one end which it clearly points out.

In an election campaign, however, where the expressive associations are the two major political parties, a different dynamic arises, one not particularly well suited to the persuasion of voters during election campaigns. On the contrary, at every step of the electoral process the right of expressive association seems to work against, and even to undermine the possibility of meaningful campaign persuasion. In the first place, if political parties really have significant advantages over individuals in the expression of political views, then the best, and possibly the only, way for the great majority of individuals successfully to engage in persuasive campaign speech is to affiliate with the political party that best matches their views. This institutional arrangement, however, immediately imposes potentially serious constraints on the number and kinds of opportunities during which persuasion of voters by campaign speech can reasonably be expected. Specifically, it tends to reduce the opportunities for meaningful campaign persuasion mainly to two occasions: (1) during the process by which individuals affiliate with a party—that is, speech between the party and its members; and (2) in the course of inter-party competition during the campaign for the votes of nonmembers—that is, speech between competing parties.

The first of these is not a likely venue for much that we would call persuasion. The process by which voters affiliate with political parties is largely mechanical and impersonal; affiliation usually involves little more than registering to join the party,¹⁶⁶ and perhaps contributing some money. Certainly, voters do not typically join political parties in the hope of changing the party's beliefs and positions; if anything, "affiliation" implies the contrary—a commitment by the voter to adhere to, or at least to support, the positions

ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 199 (Phillips Bradley ed., Vintage Books 1945). For a much more contemporary expression of the same sentiment by a leading political theorist, see Amy Gutmann, *Freedom of Association: An Introductory Essay*, in FREEDOM OF ASSOCIATION 3 (Amy Gutmann ed., 1998) ("Without access to an association that is willing and able to speak up for our views and values, we have a very limited ability to be heard by many other people or to influence the political process, unless we happen to be rich or famous.").

166. New York's provision is typical: "At the time a voter is registered or completes an application for registration he may mark his party enrollment within the circle or box underneath or next to the party of his election on the application form." N.Y. ELEC. LAW § 5-300 (1985).

and candidates of the party, even if the voter's beliefs on some issues do not match the party's. Nor does affiliation involve much in the way of campaign persuasion by the party of its adherents. In most states and for most voters, affiliation of a voter with a party is something that occurs *before* the inception of the campaign, not during it.¹⁶⁷ Affiliation typically occurs, moreover, on the basis of the voter's pre-campaign opinion, and it typically endures long after any act of persuasion that may have initially caused the voter to join the party. As a result, parties do not typically bother trying to *persuade* their own membership during election campaigns; they generally take the agreement of their members for granted.¹⁶⁸ Furthermore, the possibility that a party's members might encounter campaign speech designed to persuade them to deviate from the party's commitments is greatly minimized by the party's ability, through exercise of the right of expressive association, to exclude from membership those who do not share its views. This ability of parties to enforce internal ideological purity thus *reduces* the kinds of intellectual encounters among party members that might prompt them to reflect on their preexisting beliefs, and in so doing to open themselves to persuasion. In short, the process of party affiliation is not likely to involve much in the way of persuasion, and if it does, it is extremely unlikely to involve persuasion by way of the party's own speech during election campaigns.

The more important point, however, does not concern intra-party speech, but speech between parties; the First Amendment right of expressive association is less about the

167. This is true by definition in most instances because, in order to vote in a party's primary, a voter must have joined that party before the primary, which occurs by definition before the general election campaign, the main expected venue for public speech designed by parties intended to persuade voters to its positions. More importantly, voters tend to register for a political party and then remain a member of that party without ever reassessing their affiliation, even when they find themselves voting for candidates of other parties. See, e.g., Steven E. Finkel & Howard A. Scarrow, *Party Identification and Party Enrollment: The Difference and the Consequence*, 47 J. POL. 620 (1985). Thus, persuasive speech between a party and its membership during an election campaign is rarely a factor in a voter's decision to support any candidate.

168. Parties do not by any means take for granted that their members will actually turn out and vote, and much of their activity is devoted to activating their loyal adherents. But this has very little to do with persuasion and much more to do with mobilization.

persuasion of existing party members than it is about the ability during election campaigns of parties to persuade voters who are not already their members. Yet how likely is it for a party, in the exercise of its right of expressive association, actually to persuade nonmembers to its views? Under the circumstances in which a two-party system actually operates, the prospects seem slight.

In a two-party system, the principal potential audience for a party's persuasive speech consists naturally of members of the other major party.¹⁶⁹ However, on the set of assumptions that undergird the First Amendment right to expressive association, members of the opposition party are unlikely candidates for persuasion. As we have seen, parties, according to this doctrine, are groups of like-minded voters who are committed to a set of shared ideas. Party affiliation, on this view, is thus not an organizational or social act, but an ideological one. Because they have already affiliated themselves based on ideological preference, then, members of the opposition party have by definition made a commitment to a set of beliefs and positions that will, in the main, differ from the beliefs and positions of which the speaking party wishes to persuade them. Members of one party are therefore already inoculated to a considerable degree against the views of the other party.¹⁷⁰ Moreover, under the doctrine of expressive association, parties can make their members virtually immune from persuasion by insulating them from expressions of contrary views. By policing its internal ideological purity, a party can ensure, first, that all party members will be reasonably like-minded, and

169. The theory behind the two-party system does not really contemplate the existence of independent voters. As the theory has been elaborated, no voter ought to have an incentive to refrain from party affiliation, or at least to have no such incentive that differs from the incentives most voters have to abstain entirely from politics. See generally ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (Harper & Row 1957). Of course, independents do exist in a formal sense as registered independents or as registered voters who have declined formally to join a political party, but most formal independents are not ideologically independent in that they tend to lean habitually toward one of the major parties. True independents, in the sense of voters who are, at every election, equally likely to vote for any party, are extremely rare. See BRUCE E. KEITH ET AL., *THE MYTH OF THE INDEPENDENT VOTER* (1992).

170. See, e.g., *Clingman v. Beaver*, 544 U.S. 581, 604 (2005) (O'Connor, J., concurring) ("[A] party's inability to persuade a voter to disaffiliate from a rival party would suggest not the presence of anticompetitive regulatory restrictions, but rather the party's failure to win the voter's allegiance.").

therefore will not challenge one another's beliefs; and second, that the party membership will select only candidates who share the members' collective views, and who will consequently project messages during the campaign with which party members already agree, thereby confirming their beliefs.

If the audience for each party's speech consists primarily of those who are already affiliated with another party, are committed to a different set of ideological views, and have the capacity to avoid unwanted encounters with alternative points of view, of what, on this model, is campaign speech likely to consist? Surely such a system is unlikely to produce mass raiding by persuasion of each party's membership by the other. A much more likely result is that such a system of mass organizational speech will quickly degenerate into a shouting match directed at a small minority of voters who are either uncommitted,¹⁷¹ or who are among the least strongly committed to their own parties.¹⁷² This may well describe our present electoral politics, but it hardly seems to satisfy the model contemplated by the First Amendment—and, ironically, by the right of expressive association—of the election campaign as an occasion for democratic self-governance by a broad-based regime of meaningful, reasoned persuasion.

In short, so long as political parties operate under the current robust version of the right of expressive association, about the only thing the party system can realistically hope to be is an accurate and efficient electoral sorting mechanism that matches voters, mainly on the basis of their campaign-exogenous ideological commitments, with appropriate candidates. In other words, in a two-party system operating under a strong right of expressive association, the most re-

171. The number of truly uncommitted voters usually is far smaller than the number of formally unaffiliated voters because most independents habitually lean ideologically toward one or another of the major parties. KEITH ET AL., *supra* note 169. Such voters may thus plausibly be described, on the assumptions of the expressive association doctrine, as sharing an ideological commitment with formally affiliated members of the party toward which they habitually lean.

172. As my colleague Jim Campbell has observed, a campaign "can only realistically hope to change the preferences of the subset of voters who lack a pre-campaign commitment or whose commitment is so tenuous that they might be persuaded to change" JAMES E. CAMPBELL, *THE AMERICAN CAMPAIGN: U.S. PRESIDENTIAL CAMPAIGNS AND THE NATIONAL VOTE* 30-31 (2000).

alistic goal to which election campaigns can aspire is not persuasion, but a rough kind of matching function. Persuasion is not of course ruled out, but it is neither expected, nor is it likely to occur.

D. Campaign Finance and the First Amendment Privilege for Widely Held Ideas

In its cases dealing with campaign finance, as in its ballot access and party association cases, the Supreme Court has punctiliously observed a rhetorical commitment to the idea that persuasion is the sine qua non of electoral democracy. Ever since its historic decision in *Buckley v. Valeo*,¹⁷³ still its most significant campaign finance decision, the Court has begun its analysis from the premise that government regulation of the giving and spending of money in election campaigns "operate[s] in an area of the most fundamental First Amendment activities" because it affects "[d]iscussion of public issues and debate on the qualifications of candidates."¹⁷⁴ The Court in *Buckley* expressed particular hostility toward restrictions on campaign spending because they "reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."¹⁷⁵ A campaign, the Court asserted, is an occasion for voters to "evaluate the candidates' personal qualities and their positions on vital public issues"¹⁷⁶ through competition among candidates to provide the voters with "persuasive reasons for electing them."¹⁷⁷

In later campaign finance cases, the Court has repeatedly emphasized the central role of persuasion in the electoral process. It has observed, for example, that "advertising may influence the outcome of the vote" by "persuad[ing] the electorate."¹⁷⁸ It has protected the ability of campaign

173. 424 U.S. 1 (1976) (per curiam).

174. *Id.* at 14.

175. *Id.* at 19.

176. *Id.* at 53.

177. *Id.* at 101.

178. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978); see also *McConnell v. FEC*, 540 U.S. 93, 261 (2003) (Scalia, J., concurring in part, dissenting in part) ("[A]ds do persuade voters . . .").

speakers to tailor their message to make it more persuasive.¹⁷⁹ It has affirmed that campaign appeals for money often are “intertwined with . . . persuasive speech seeking support for . . . particular views.”¹⁸⁰ And it has indicated a concern for persuasion in the electoral process in its approval of regulatory measures designed to “ensure that competition among actors in the political arena is truly competition among ideas.”¹⁸¹

Despite this commitment, the First Amendment doctrines crafted by the Court to evaluate laws regulating campaign finance do not, in their actual operation, presuppose anything like the electoral persuasion the Court’s language seems to take for granted. This is especially ironic, because the Federal Election Campaign Act of 1974 (FECA),¹⁸² which the Court gutted in *Buckley*, was, as originally conceived by Congress, very much concerned with securing a prominent role for persuasion in electoral campaigns. As a result, in *Buckley*—the fountainhead of constitutional campaign finance jurisprudence—the Court in the name of electoral persuasion destroyed a scheme of campaign regulation that might conceivably have promoted persuasion, and replaced it with one in which electoral persuasion is quite unlikely to play any meaningful role.

As Congress wrote it in 1974, FECA set ceilings on the amount of money that individuals could contribute to candidates for federal office, on the amount that individuals could spend independently on behalf of candidates, and on overall campaign spending by candidates for federal office.¹⁸³ It also expanded public financing of presidential campaigns, required public disclosure of campaign contributions and expenditures, and established the Federal Election Commission to oversee and enforce the legisla-

179. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

180. *McConnell v. FEC*, 540 U.S. 93, 139-40 (2003) (quoting *Vill. of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980)).

181. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986).

182. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), *amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (current version at 2 U.S.C. §§ 431-56 (1982)) (codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.).

183. Pub. L. No. 93-443.

tion.¹⁸⁴ The critical idea unifying the various provisions of FECA was equality of resources. Aimed in large part at eliminating the kind of campaign spending abuses that emerged during the 1972 election cycle,¹⁸⁵ the statute was designed to produce a regime in which each candidate, regardless of his or her resources or enthusiasm, ideally would spend roughly the same amount of money on trying to get elected, and in which interested voters likewise would contribute to and spend on behalf of their chosen candidates equally.

Equalizing campaign resources does not, of course, by itself guarantee that election campaigns will be contested on the basis of persuasion through competition in ideas. Congress clearly was concerned, in its legislative deliberations, not just with inequality of resources, but also with what Senator Edmund Muskie, an unsuccessful candidate for the 1972 Democratic presidential nomination, termed "a wave of superficial advertising more appropriate to soap or cereal than national politics."¹⁸⁶ No provision of FECA, of course, purported to prevent candidates from attempting to court voters with slick, content-free advertising. Nevertheless, Congress was apparently convinced that limiting and equalizing campaign resources would create an environment in which ideological persuasion was more likely to emerge as the governing norm. As Senator Bob Dole argued, "[t]he great growth of campaigning expense . . . generates almost irresistible pressures on campaigns away from lengthy, rational and thoughtful presentation of issues and alternatives. It instead fosters shallow, briefly-presented and emotional exploitation of personalities, images and catch-words."¹⁸⁷ Or, as a report accompanying an early version of the bill that became FECA claimed:

This will make possible parity of exposure on [mass] media as between candidates competing for the same Federal elective office. Thus, such candidates will be competing for the votes of the elec-

184. *Id.*

185. These are comprehensively spelled out in the final report of the Senate Select Committee on Presidential Campaign Activities, S. Rep. No. 93-981, 93d Cong., 2d Sess. (June 1974).

186. 117 CONG. REC. 29,321 (1971).

187. 117 CONG. REC. 30,074 (Aug. 5, 1971) (remarks of Sen. Dole concerning proposed Federal Election Campaign Act of 1971).

torate on their merits rather than on the basis of exposure as in the case of such commodities as toothpaste, soft drinks and beer, aspirin, and razor blades.¹⁸⁸

Evidently, the theory behind FECA was that the equalization of campaign resources would promote persuasion as a tool of electoral democracy in two ways. First, equalizing resources would reduce candidates' incentives to compete for votes on the basis of slick advertising and exposure. Presumably, rational voters can be won over only by substantive appeals on the merits of politically salient issues; it is the votes of irrational voters that may be "bought," so to speak, by nothing more than slick, expensive packaging.¹⁸⁹ Equalizing candidates' resources thus puts them on an equal footing in competing for both rational and irrational votes, and this equality in turn improves the substance and rationality of election campaigns by depriving any candidate of the ability to compete unfairly for irrational votes in virtue of having greater resources to devote to the kind of expensive, showy appeals to which certain voters, in the view of Congress, unfortunately respond.¹⁹⁰ Second, by thus reducing candidates' incentives to compete for irrational votes, Congress may have hoped that superficial sloganeering would cease altogether to become an attractive campaign tactic, thereby clearing the field for the kind of substantive, persuasion-oriented campaign discourse that members of Congress clearly wished to encourage.

Finally, FECA's emphasis on equality of resources among candidates and voters suggests an underlying congressional belief that the proper unit of currency in election campaigns should be ideas, and that each idea is entitled to an equal hearing. If spending money bears some rough relation to the ability to persuade by increasing either the depth in which ideas may be communicated or the breadth

188. H.R. REP. NO. 92-565, at 19 (1971).

189. See, e.g., Ortiz, *supra* note 55, at 913 ("The fear here is that the unengaged voter will respond positively to sheer advertising stimulus, that he will vote for the candidate who has the more lavish advertising campaign, regardless of whether that campaign conveys information about where the candidate stands on the major issues.").

190. See James A. Gardner, *Neutralizing the Incompetent Voter: A Comment on Cook v. Gralike*, 1 ELECTION L.J. 49 (2001).

of their dissemination, then limiting the amount of money that voters and candidates may spend restricts the ability of rich individuals to dominate the marketplace of ideas by reaching deeper and more extensively into the market than other individuals who back competing ideas. In such a system, each idea gets to make its best pitch, so to speak, using the resources allowed it, and must then stand aside and let other ideas be heard.¹⁹¹ In the end, the voters choose among the ideas they have encountered, and since each idea has had an equal opportunity to persuade them, voters are presumably more likely to judge those ideas on their merits.

In *Buckley v. Valeo*, the Court tore a gaping hole in the congressional plan by invalidating its most important components—the ceilings on campaign expenditures by candidates and individuals—while leaving in place the Act's restrictions on campaign contributions to candidates. The Court justified its ruling on the ground that restricting the amount of money that candidates and voters can spend on speech is tantamount to restricting the amount of their speech itself: "A restriction on the amount of money a person or group can spend on political communication during a campaign," the Court said, "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."¹⁹² In a now-famous analogy, the Court said dismissively that "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."¹⁹³ Although even electoral campaign speech may be restricted for a sufficiently compelling reason,¹⁹⁴ the Court found the government's asserted justifications insufficient. The Court reserved its greatest antipathy for the government's argument that FECA's spending limitations were justified by an interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections," a con-

191. Justice Scalia has referred derisively to this idea as the "illiberal free-speech principle of 'one man, one minute.'" *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 684 (1990) (Scalia, J., dissenting).

192. *Buckley v. Valeo*, 424 U.S. 1, 19 (per curiam).

193. *Id.* at n.18.

194. *Id.* at 44-45.

cept the Court deemed "wholly foreign to the First Amendment."¹⁹⁵

The contribution limitations fared better for two reasons. First, said the Court, limitations on financial contributions to candidates do not restrict speech to the same extent as do limitations on the expenditures used to purchase speech: such a limitation "entails only a marginal restriction upon the contributor's ability to engage in free communication [because the contribution] serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." Consequently, "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."¹⁹⁶ Second, the Court found this relatively slight diminution in the quantity of electoral speech justified by the government's interest in "limit[ing] the actuality and appearance of corruption resulting from large individual financial contributions."¹⁹⁷

The Court's reasoning in *Buckley*, then, reflects a strongly held belief that the First Amendment contemplates election campaigns in which speech is aimed at persuasion, and in which the timing, amount, and content of electoral speech is to be determined entirely by the speaker. Government, in this view, simply may not take any action to interfere with the process by which candidates and voters persuade each other during election campaigns. The way the Court applied these principles in *Buckley* thus left in place substantial restrictions on the ability of voters to transfer resources to candidates, yet lifted all restrictions on the ability of candidates to spend as much money as they could accumulate, whether from their own bank accounts or from their supporters. Ironically, this judicial reengineering left Americans with a system of campaign finance regula-

195. *Id.* at 48-49. Last term, the Court reaffirmed this aspect of *Buckley* by an 8-1 vote in an otherwise splintered decision. *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

196. *Buckley*, 424 U.S. at 20-21.

197. *Id.* at 26. Because this justification sufficed, the Court had no occasion to consider the sufficiency of the government's equalization-of-influence rationale. *Id.* Last term in *Randall v. Sorrell*, the Court for the first time acknowledged a lower limit to permissible limits on financial contributions to candidates. See *Randall*, 126 S. Ct. at 2492.

tion that, in its actual operation, works in a way very much at odds with the goals the Court claimed it was trying to achieve. By applying a constitutionalized preference for persuasive campaign speech to a statutory system designed to achieve it, the Court unfortunately created a system in which persuasion cannot realistically be expected to play a significant role in election campaigns. Following *Buckley*, our institutions of campaign finance now in effect treat public opinion as campaign-exogenous.

The Court's First Amendment jurisprudence of campaign finance is built around two fundamental assumptions. The first assumption is that a candidate's *expenditure* of money during an election campaign translates into votes. The assumed relationship is certainly rough, but it is also roughly linear: the more candidates spend, the more votes they are likely to get.¹⁹⁸ In assuming this relationship, it bears mentioning, the Court does not, or at least need not, indulge any particular assumption about how, precisely, dollars translate into votes. Dollars might earn votes by purchasing reasoned persuasion in substantive campaign communications appealing to the common good; or by funding voter manipulation strategies launched in well-packaged, suggestive advertising that appeals to sub-

198. See, most recently, *Randall v. Sorrell*, in which stringent contribution limitations were invalidated partly on the ground that challengers would be unable to raise sufficient funds to mount effective challenges to incumbents. *Randall*, 128 S. Ct. at 2499 (such limits threaten to "inhibit effective advocacy"). The proposition that money attracts votes is a widely accepted, though often implicit, premise among political theorists, see, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 360-61 (1996); DENNIS F. THOMPSON, *JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES* 112-14 (2002); legal scholars, see, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 99 (1993); Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 577 (1999); David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 144; judges, see, e.g., Wright, *supra* note 53, at 1004; *Harper v. Canada* (Attorney General), [2004] S.C.C. 33 (upholding limits on independent political spending as equalizing political influence); and of course the members of Congress who enacted FECA, see, e.g., H.R. REP. NO. 93-1239, at 3 (1974) ("Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign."). Political science research seems to support this unobjectionable proposition. See Rebecca Morton & Charles Cameron, *Elections and the Theory of Campaign Contributions: A Survey and Critical Analysis*, 4 ECON. & POL. 79, 81 (1992) ("The massive quantities of monies gathered by candidates do seem to increase the probability of election of the receiving and spending candidate, incumbent or challenger.").

rational biases or naked self-interest; or by some other mechanism not well understood. Whatever the linkage, however, the Court—along with Congress—assumes that money works in campaigns, and that there is a rough proportionality between spending and votes.¹⁹⁹ It is this assumption that drives the Court's doctrinal commitment to the principle that campaign spending by candidates for elective office, or their supporters, cannot in any circumstances be limited.²⁰⁰ Candidates, the Court presumes, simply must be entitled to spend as much as they want in order to secure as many votes as they can get. Spending limitations, on this view, severely disrupt the campaign process by limiting the ability of candidates to campaign as hard, as intensely, and as thoroughly as they wish.

The second assumption driving the Court's campaign finance jurisprudence is that a candidate's *receipt* of money during an election campaign reflects support for that candidate, and that this support indicates to some degree acceptance of the candidate's ideological and policy positions by the contributors who provide the funds. As the Court has put it, "[a] contribution serves as a general expression of support for the candidate and his views."²⁰¹ In this sense, contributing to a candidate is constitutionally similar to joining a political party: both represent a kind of loose affiliation based on shared political beliefs.²⁰² As with spending, the relation between contributions and support is assumed to be rough, but also linear: the more support candidates enjoy among the electorate the more contributions they will receive, and the more contributions they receive the more widespread we may assume their support to

199. Occasionally the concern is expressed that the spending-to-votes conversion ratio differs systematically for different classes of candidates—for example, that incumbents find it easier to translate their spending into votes, or that minor party candidates must spend more than major party candidates to achieve the same benefit. *See, e.g.,* *Buckley v. Valeo*, 424 U.S. 1, 31-35 (1976) (per curiam). Although some members of the Court have occasionally raised these issues, such concerns have never worked their way systematically into the Court's First Amendment jurisprudence, which generally assumes a rough, across-the-board parity among candidates. *See id.*

200. The one exception to this rule is campaign spending by corporations and labor unions, discussed below.

201. *Buckley*, 424 U.S. at 21.

202. "Making a contribution, like joining a political party, serves to affiliate a person with a candidate." *Id.* at 22.

be. Indeed, the Court is so strongly committed to its conception of the proportionality of support to contributions that it has used that relation as a justification for permitting an outright ban on certain kinds of campaign contributions.

Public concern with the influence of money in electoral politics emerged in the late nineteenth century contemporaneously with "[t]he concentration of wealth consequent upon the industrial expansion in the post-Civil War era."²⁰³ By the height of the Progressive Era, this concern focused especially on the role of large corporations, which were widely thought to have exercised undue influence on electoral politics in many states.²⁰⁴ In response to these concerns, Congress and some states enacted laws aimed at restricting the ability of corporations to participate in politics. The first such federal statute, the Tillman Act of 1907,²⁰⁵ barred corporate contributions to any candidate for federal office, a prohibition that has been carried forward in successive federal statutes including the Corrupt Practices Act of 1925,²⁰⁶ and the Federal Election Campaign Act of 1971,²⁰⁷ and remains on the books to this day.²⁰⁸ The Supreme Court has consistently upheld such prohibitions.²⁰⁹

203. *United States v. UAW*, 352 U.S. 567, 570 (1957).

204. *See, e.g.*, DE WITT, *supra* note 42, at 113 (1915) (describing Progressivism as concerned with the "struggle between the people and the corporations to decide which should control the government and for what purposes"); JOSEPH P. HARRIS, *CALIFORNIA POLITICS* 3-5 (4th ed., Chandler Publ'g Co. 1967) (1955) (describing a period in the late nineteenth and early twentieth centuries in which California state government was essentially controlled by the Southern Pacific Railroad); HOFSTADTER, *supra* note 7, at 5 ("Its [Progressivism's] general theme was the effort to restore a type of economic individualism and political democracy that was widely believed to have existed earlier in America and to have been destroyed by the great corporation and the corrupt political machine . . .").

205. Publicity of Political Contributions Act, ch. 420, 34 Stat. 864 (1907), *amended by* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 2 U.S.C. § 441b (2000 & Supp. III 2003)).

206. Corrupt Practice Act, 1925, ch. 368, sec. 301, 43 Stat. 1053, 1070-74 (1925), *amended by* Federal Election Campaign Act of 1971.

207. Federal Election Campaign Act of 1971.

208. *See* 2 U.S.C. § 441b(b)(2)(C) (2000).

209. *See* *Burroughs v. United States*, 290 U.S. 534 (1934); *United States v. UAW*, 352 U.S. 567 (1957); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982).

The main concern underlying congressional efforts to exclude corporate money from electoral politics is not that ideas backed by corporate speech are unworthy of public consideration; corporate speech, the Court has held, is as capable as speech from any other source of contributing to lively public debate on important political issues, and therefore enjoys the same protection under the First Amendment as political speech by individuals.²¹⁰ Instead, according to the Court, the concern has been that corporations, because of "the special advantages which go with the corporate form of organization," are able to accumulate "substantial aggregations of wealth,"²¹¹ and that their access to such wealth could provide corporations with "an unfair advantage in the political marketplace."²¹² Laws banning electoral spending and contributions by corporations, the Court has explained,

aim[] at . . . the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas. . . . [Such laws ensure that electoral] expenditures reflect actual public support for the political ideas espoused by corporations.²¹³

The problem, then, is not that corporate-backed speech and corporate-backed candidates should not be heard, but

210. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775-86 (1978); see also *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986).

211. *Nat'l Right to Work Comm.*, 459 U.S. at 207.

212. *Mass. Citizens for Life*, 479 U.S. at 257. For a different account of the rationale behind Progressive-era restrictions on corporate political expenditures, see Adam Winkler, "Other People's Money": Corporations, Agency Costs, and Campaign Finance Law, 92 GEO. L.J. 871 (2004) (arguing that the main rationale for such prohibitions was to protect corporate shareholders, not the political marketplace).

213. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). This concern has been sufficient to permit an outright governmental ban on independent corporate expenditures in support of candidates for federal office, a much more serious kind of limit than caps on contributions to candidates because, in the Court's view, limitations on independent spending suppress speech much more directly than limitations on contributions. *Buckley v. Valeo*, 424 U.S. 1, 19-21 (1976) (per curiam). Recently, the Court confirmed what seemed obvious: if concern over possible dangers to the electoral process arising from corporate aggregations of wealth is sufficient to justify prohibiting independent corporate expenditures on behalf of candidates, then the same concern is a fortiori sufficient to justify prohibitions on corporate contributions to candidates. *FEC v. Beaumont*, 539 U.S. 146, 159-60 (2003).

rather that they should not be heard excessively—more than they in some sense “should” be heard—and that the degree to which an idea “should” be heard during an election campaign corresponds to the degree of “actual public support” for the idea in question. That is why, in the Court’s view, limiting the introduction of corporate wealth into the electoral arena serves ultimately to preserve “the integrity of the marketplace of political ideas.”²¹⁴ In the end, then, the Court’s jurisprudence of campaign contributions rests on a highly significant premise: the belief that how well candidates *should* be doing in election campaigns depends to some degree on how well they are *already* doing.

Contrary to the Court’s rhetoric, its two major assumptions—that campaign spending is correlated to votes and that campaign contributions are correlated to support—together presuppose, and to some extent institutionalize, a system of electoral politics in which election campaigns are highly unlikely to serve as occasions for the endogenous formation of public opinion. Instead, election campaigns are much more likely to function in a way that simply identifies, and transforms into political authorization, exogenously formulated opinions that voters bring with them to the campaign phase. This is because, under the constitutional rules developed by the Court, political ideas that are

214. *Mass. Citizens for Life*, 479 U.S. at 257. Although the same reasoning certainly justifies regulatory limits on contributions to candidates by rich individuals, the Court has instead upheld limitations on *individual* contributions by reference to their potential both to corrupt candidates through the exchange of contributions for quid pro quo political favors, and to create an appearance of such corruption. *E.g.*, *Buckley*, 424 U.S. at 26-27. The Court’s failure to look beyond the corruption justification has led to a strange doctrinal anomaly: its refusal to permit regulatory limits on the amount of money that individual candidates can spend on their own campaigns. *Id.* at 53-54. The Court has invalidated such restrictions essentially on the ground that candidates cannot, by contributing unlimited personal resources to their own campaigns, corrupt themselves. *Id.* at 53. Or, as Justice Scalia tartly pointed out in his dissent in *Austin*: “Why is it perfectly all right if advocacy by an individual billionaire is out of proportion with ‘actual public support’ for his positions?” *Austin*, 494 U.S. at 685 (Scalia, J., dissenting). In its most significant campaign finance decision since *Buckley*, however, the Court suggested that its thinking may be evolving in a way that recognizes some equivalence in “the role that corporations, unions, and wealthy contributors play in the electoral process.” *McConnell v. FEC* 540 U.S. 93 (2003); *see also id.* at 138 (“[Section] 323, in the main, does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders.”).

the most popular and widely held *before the campaign starts*, and the candidates who espouse them, will begin with an enormous advantage—the pole position, so to speak. The Court's First Amendment jurisprudence, that is to say, goes a long way toward guaranteeing that ideas that are formed and widely held exogenously to the campaign will prevail during the campaign.

The process works in the following way. If, as the Court assumes, money is what enables candidates to deliver campaign speech, then any contribution received by a candidate before or shortly after the inception of the official campaign must by definition be donated on the basis of a point of view that is exogenous to—has been formulated before the commencement of—the election campaign. It follows that candidates who enter the campaign supporting positions that are the most popular before the campaign begins will have an initial advantage. First, they will attract more donations than their opponents before the campaign starts and during its earliest phase. Then they will use this money to communicate ideas that already enjoy widespread support among the electorate. Such ideas will likely appeal to more voters than competing, less popular ideas advanced by other candidates, an effect that may be expected to elicit further rounds of financial contributions from ideological supporters. This additional support will multiply the initial advantage these candidates already enjoy by allowing them to communicate their message more broadly and intensely. These further rounds of communication then produce further rounds of contributions, producing additional communication, and so on.

This cycle, moreover, is unlikely to be disrupted because, by upholding contribution limits but invalidating spending limits, the Court has ensured that the rich will be unable to fund broad dissemination during a campaign of an idea that is not already popular.²¹⁵ On its own assumptions, then, the Court's ideal campaign finance system is likely to operate more as a vehicle for identifying and ratifying exogenously held public opinion than as a vehicle for

215. The only exception is if the rich person decides to run for office personally. This is because, under *Buckley*, government may not limit how much money individuals spend out of their own pockets on their own campaigns. *Buckley*, 424 U.S. at 51-54. However, not every rich person with an idea—even a good idea—is able or willing to run for public office.

the endogenous formulation of public opinion through reflection and deliberation during the campaign process. Any candidate who attempts to promote political ideas endogenously through a process of exposure and debate during the campaign itself will start off at a great, and possibly insurmountable, disadvantage. For the Court, however, this is as it should be because, as we have seen, in the Court's view the extent to which an idea "should" be communicated during an election campaign is proportional to the degree of support that the idea already enjoys among voters.

Campaign speech, on this model, does not serve primarily as a transmitter of ideas, or as a mechanism for the forging of majority opinion. Rather than serving as a producer of inputs to an electoral system antecedent to the "real" electoral system of balloting and counting, campaign speech itself in a sense *is* the electoral system.²¹⁶ It is tabulative; it functions as a way of toting up who supports what view, not as the medium in which support for competing points of view is determined in the first instance. Campaign speech, under the First Amendment, is thus the end of a process rather than its beginning.

III. CONSEQUENCES OF THE INSTITUTIONALIZATION OF THE TABULATIVE CAMPAIGN

If, despite its public rhetorical commitment to the deliberative election campaign, the American constitutional and legal order actually institutionalizes campaigns that are heavily weighted toward tabulation at the expense of deliberation, is that necessarily a bad thing? Of course, there is always a problem of sorts when the law's actions fail to match its publicly proclaimed commitments, but, aside from this unwelcome public hypocrisy, should we be concerned on the merits? Although a full answer to that question is beyond the scope of this Article, I touch very briefly in this part on some of the issues raised by the law's direction in this area.

216. In this sense, campaign speech functions in a way not all that dissimilar from the ancient Spartan practice of "The Shout," in which the group that shouted the loudest was able to carry an election for its candidate. Plutarch, *Lycurgus*, in 1 PLUTARCH'S LIVES 85 (Arthur Hugh Clough ed., 1961); see also JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* 23 (1995) (describing the procedure).

A. Democratic Legitimacy

Certainly the most serious problem that a defect in our election laws could cause is some kind of deficit in democratic legitimacy. If Americans profess a commitment to deliberative election campaigns, yet possess a set of legal institutions that give them instead campaigns that are merely tabulative, does this shortfall threaten in any way the democratic legitimacy of the electoral system—and by implication the legitimate entitlement of those elected under it to rule? Almost surely not.

Where a society selects its rulers by electing them, the principal necessary condition of the regime's democratic legitimacy is that the individuals who wear the mantle of official power be, in some rough sense, those who are in fact preferred by the people.²¹⁷ As Madison said of the minimally sufficient conditions for republican government: "It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people."²¹⁸ From this perspective, a well-functioning tabulative electoral system surely satisfies the minimal conditions for democratic legitimacy because, by hypothesis, the purpose of such a system is to do nothing more than accurately to count the preferences of individual voters and to install as rulers only those for whom the voters, through their votes, collectively express a preference. These voter preferences may be campaign-exogenous, and they may be untested by meaningful campaign deliberation, but they are the voters' preferences nonetheless; consequently, whatever else one may say about such preferences, one cannot say that their observance is inconsistent with the requirements of democracy.

217. See, e.g., DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed . . ."); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 134-42, 197-98, at 69-75, 100-01 (C.B. Macpherson ed., 1980) (1690) (setting out liberal theory of governmental legitimacy based on consent and characterizing rulers who lack such consent as usurpers). Of course, this definition is the source of many well-known difficult problems involving defining the relevant polity, choosing voter qualifications, defining the polity's relevant preferences, and so on. See, e.g., ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 119-31 (1989). I pass over these difficulties here.

218. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

To be sure, proponents of more deliberative forms of democracy argue that meaningful deliberation can *enhance* the legitimacy of electoral democracy by giving citizens an opportunity to explore the foundations of their political opinions, give proper consideration to the interests and opinions of others, and in general arrive at better-informed, more democratically respectful, and simply higher-quality understandings of their own interests and opinions than they are likely to attain under a purely tabulative system.²¹⁹ Yet, so far as I know, no one goes so far as to maintain that an electoral system that responds accurately to voter preferences that have not been forged and tested in some kind of campaign-endogenous deliberative process is for that reason alone democratically illegitimate.²²⁰ On the other hand, many political theorists maintain that an electoral system that accurately counts campaign-exogenous preferences fully satisfies the conditions of democratic legitimacy, and indeed some claim that such a system is the *sine qua non* of democracy.²²¹ These considerations suggest

219. For representative examples of the linkage made in theories of deliberative democracy between deliberation and legitimacy, see, Amy Gutmann, *The Disharmony of Democracy*, in *DEMOCRATIC COMMUNITY* 148 (John W. Chapman & Ian Shapiro eds., 1993) ("Deliberative democracy legitimates the collective judgment resulting from deliberative procedures . . ."); BARBER, *supra* note 18, at 170 (arguing that norms of political judgment are produced by an ongoing process of deliberation and are legitimized by that process); SUNSTEIN, *supra* note 198, at 72 (1993) (arguing that respect is due only to the considered judgments of a democratic polity reached under the conditions appropriate to democratic choice); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE* 21 (Alan Hamlin & Philip Pettit eds., 1989) ("[F]ree deliberation among equals is the basis of legitimacy.").

220. Even Jürgen Habermas, probably the theorist most insistent on the link between deliberation and legitimacy, has recognized the need for social and legal processes that authoritatively end disagreement and chart a course of collective action, over the opposition of a minority if necessary. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 150 (William Rehg trans., 1996) ("Politics cannot coincide as a whole with the practice of those who talk to one another in order to act in a politically autonomous manner. . . . The concept of the political in its full sense also includes the use of administrative power within the political system, as well as the competition for access to that system. The constitution of a power code implies that an administrative system is steered through authorizations for rendering collectively binding decisions."). Similarly, see *id.* at 176-86, 306.

221. This is of course the critical assumption of Downsian political economy, and of the entire edifice of public choice theory built upon it. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 7, 17-30 (1965).

that, whatever else we may think of our tabulative campaign institutions, we may with some confidence set aside any doubts about their legitimacy.

B. *Can We Do Better?*

A campaign system that falls short of a widely held social expectation seems to cry out for improvement. When those very improvements to the system may also yield enhancements of democratic legitimacy, consideration of reform seems all the more urgent. Consequently, the question arises: can we do any better? Can we, that is, by altering the legal environment, institutionalize the kind of deliberative electoral campaign to which we aspire? Although this is an extraordinarily complex question that I cannot answer here, I do wish to point out that empirical political science offers reason to be skeptical.

Political scientists have long studied the ways by which individual voters come to hold their political opinions, and one of the most robust findings in the field, replicated over and over in many different contexts, is that individual political opinion displays a remarkable degree of stability, meaning that it is highly resistant to change—in particular, to the kinds of changes that candidates might hope to induce through persuasive speech communicated during an election campaign. One source of this stability lies in commonplace cognitive biases. For example, one form of cognitive bias identified in numerous studies is a kind of selective attention that causes people to attend most carefully to information with which they are already familiar or with which they already agree, and to ignore unfamiliar or challenging information.²²² Another kind of cognitive bias causes voters to misinterpret information to which they do attend so as to make it seem more consistent with their ex-

222. See, e.g., DORIS A. GRABER, *PROCESSING POLITICS: LEARNING FROM TELEVISION IN THE INTERNET AGE* 19 (2001); Joanne M. Miller & Jon A. Krosnick, *News Media Impact on the Ingredients of Presidential Evaluations: A Program of Research on the Priming Hypothesis*, in *POLITICAL PERSUASION AND ATTITUDE CHANGE*, *supra* note 8, at 79; Herbert F. Weisberg & Steven H. Greene, *The Political Psychology of Party Identification*, in *ELECTORAL DEMOCRACY* (Michael B. MacKuen & George Rabinowitz eds., 2003).

isting beliefs than is actually the case.²²³ Both of these biases work against the possibility of persuasion during election campaigns.

Another reason for the stability of political opinion is that a voter's social environment has an important influence on what information he or she is likely to encounter. Even when voters desire political information and affirmatively seek it out, they tend, understandably, to look for it mainly in their own immediate environs, where the information that is readily available is biased in favor of the dominant views within that particular social setting. This environmental selectivity causes a perpetuation of the initial bias, meaning that any given social environment "tends to reproduce the existing distribution of opinion."²²⁴ Voters, moreover, as social beings, inhabit a world in which changes in a person's opinions or attitudes have "social repercussions."²²⁵ Because people have strong reasons entirely independent of their political beliefs to remain in good standing with their social group, "[p]olitical discussion . . . becomes the vehicle through which dominant preferences within the larger community are transmitted to the individuals who are members of that community."²²⁶ This social dynamic, then, also works against the likelihood of changing political opinions during a campaign.

If these and other mutually reinforcing phenomena constrain the possibility of persuasion during election campaigns,²²⁷ then there is reason to doubt that altering the legal institutional structure in which campaigns take place

223. See ROBERT HUCKFELDT & JOHN SPRAGUE, *CITIZENS, POLITICS, AND SOCIAL COMMUNICATION: INFORMATION AND INFLUENCE IN AN ELECTION CAMPAIGN* 141-42 (1995); MICHAEL A. MILBURN, *PERSUASION AND POLITICS: THE SOCIAL PSYCHOLOGY OF PUBLIC OPINION* 111-12 (1991); POPKIN, *supra* note 14, at 38; Miller & Krosnick, *supra* note 222, at 79.

224. HUCKFELDT & SPRAGUE, *supra* note 223, at 53.

225. ELIHU KATZ & PAUL F. LAZARSFELD, *PERSONAL INFLUENCE: THE PART PLAYED BY PEOPLE IN THE FLOW OF MASS COMMUNICATIONS* 66 (1955).

226. HUCKFELDT & SPRAGUE, *supra* note 223, at 160.

227. Other influences that tend to insulate political opinion from change include the cognitive practice of "on-line processing," Marco R. Steenbergen & Milton Lodge, *Process Matters: Cognitive Models of Candidate Evaluation*, in *ELECTORAL DEMOCRACY*, *supra* note 222, at 148-49, and the phenomenon of "rational ignorance," DOWNS, *supra* note 13, at 265-72.

would produce campaigns that are significantly more deliberative than those we have under the present regime.

C. *The Locus of Democratic Politics*

Another implication of the law's apparent structural bias toward tabulative over deliberative election campaigns is that it alters our understanding of where democratic politics actually occurs. The concept of a thickly deliberative election campaign presupposes that public political opinion is formed, to a significant extent, during the campaign period. On this view, the campaign itself is conceived as an extraordinarily significant forum for the play of democratic politics; it is the main event, the one place where citizens and partisans can be expected most seriously and most intensely to deliberate together and to attempt to persuade one another to their respective points of view. As a result, in a world with deliberative campaigns, a logical strategy for electoral success is to invest most or all of the resources available for persuasive communication during this period.

That the law gives us tabulative campaigns rather than deliberative ones suggests, of course, that little in the way of meaningful persuasion is likely to occur during the campaign period, and that resources invested in campaign-specific attempts to persuade voters to change their opinions are therefore unlikely to yield good results. However, the fact that public political opinion is likely to be campaign-exogenous does not by any means imply that the political opinions of individual voters are permanently fixed and incapable of change; it means only that public opinion is not formed primarily during *campaigns*—that it is formed, in other words, primarily on other occasions, most likely in the course of everyday political life.²²⁸ The main ef-

228. Zaller, for example, argues that a voter's "predispositions are at least in part a distillation of a person's lifetime experiences, including childhood socialization and direct involvement with the raw ingredients of policy issues, such as earning a living, paying taxes, racial discrimination, and so forth." JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 22-23 (1992); see also BENJAMIN I. PAGE, *WHO DELIBERATES? MASS MEDIA IN MODERN DEMOCRACY* 6-7 (1996) (arguing that campaign information supplied by the media is "supplemented and amplified to varying degrees by personal experience and by conversations with friends, neighbors, and coworkers."); POPKIN, *supra* note 14, at 22 (1991) (advancing a "by-product theory of political information: the information

fect, then, of substituting tabulative for deliberative election campaigns is probably not to destroy or diminish democratic politics, but rather to shift their locus from the confined realm of the election campaign to the broader realm of the political. And although electoral success in a regime of tabulative campaigns likely cannot be won solely by influencing public opinion during the campaign period, it can very likely be won by influencing public opinion over a much longer term through attempts to persuade voters during the course of ordinary politics.

Is this a bad thing? It is bad if one thinks for some reason that formal election campaigns ought to be the principal focus of democratic life, but there is no *a priori* reason to prefer an episodic democratic politics, confined mainly to elections and their associated campaigns, to a steadier and more sustained democratic politics conducted as an element of daily life in a republic. On the other hand, there may well be reasons rooted in institutional considerations to prefer one format for democratic contestation over the other. For example, efforts to persuade voters during the formal campaign period may, consistent with the First Amendment, be subjected to considerable regulation.²²⁹ In contrast, efforts to persuade voters in the course of ordinary political life are under the First Amendment largely immune from government regulation.²³⁰ This in turn suggests that the kind of public political opinion that actually influences electoral outcomes under a regime of tabulative campaigns is forged less under the highly structured and regulated conditions of election campaigns than under conditions that much more closely approximate a virtually unregulated marketplace of ideas. This might be a good thing. On the other hand, many of the problems that concern campaign regulators, such as

that people acquire to negotiate their daily lives is later applied to their political judgments and choices.”).

229. For a recent, vivid illustration of the degree to which electoral politics may constitutionally be regulated, see the Bipartisan Campaign Reform Act of 2002 (McCain-Feingold Campaign Finance Reform Act), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.), and the Court’s decision sustaining most of its provisions in *McConnell v. FEC*, 540 U.S. 93 (2003).

230. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting that the First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).

inequality of resources, apply just as much or more between campaigns as during them, and one might therefore conclude that the kind of politics associated with tabulative campaigns is worse than the kind of politics associated with deliberative campaigns because the former gives free rein to forms of unfairness that can be more readily, and constitutionally, managed within the narrower confines of a periodic campaign season. I do not intend by these observations to endorse one political structure over another; I mean only to identify a problem and suggest a way of thinking about it.

D. *The Critique of Electoral Regulation*

Finally, the law's bias toward tabulative over deliberative campaigns has potential implications for the kinds of criticisms that scholars have leveled at various aspects of the regulatory structure of democratic politics. For example, restrictive ballot access laws, as we saw earlier, have often been criticized for excluding minor parties and independent candidates from meaningful participation in elections, thereby narrowing the scope of campaign debate and discussion to ideas advanced by the major parties and their candidates.²³¹ This is a concern that presupposes the campaign-endogenous formulation of public political opinion. If, however, the regulatory structure of campaign law creates tabulative rather than deliberative campaigns, and the main purpose of the campaign is simply to identify and tabulate the campaign-exogenous preferences of the majority as they exist at the inception of the campaign, then little is lost by declining to take steps to expose voters during the campaign to ideas they do not already hold. In these circumstances, we can afford to be a good deal less concerned about the exclusion of minor parties and independents *from campaigns*, so long as they have a fair opportunity to persuade voters of their views between elections, in the course of everyday politics.

231. *E.g.*, Hasen, *supra* note 58, at 840; Issacharoff & Pildes, *Politics as Markets*, *supra* note 61, at 683-87; Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of Jenness v. Fortson*, 1 ELECTION L.J. 235 (2002); John B. Anderson et al., *Presidential Elections—The Right to Vote and Access to the Ballot*, 29 NOVA L. REV. 571 (2005).

The problem of campaign resource inequality also looks different when campaigns are understood as tabulative rather than deliberative. The usual complaint about unequal campaign resources is that the side with greater resources has an advantage.²³² When campaigns are understood as deliberative, such an advantage seems unfair because it gives the side with greater resources more extensive opportunities to persuade voters to its point of view. As a result, critics maintain, whenever candidates have significantly unequal resources with which to campaign a real danger arises that elections will turn not on the merits of the candidates' ideas but on the wealth of their supporters.²³³

If, however, campaigns are understood as tabulative, inequality of campaign resources looks much more benign. Now, by hypothesis, campaign resources are spent not to persuade voters, but merely to mobilize existing supporters by transforming campaign-exogenous voter preferences into actual votes. Candidates who take exogenously popular positions, and thus have more supporters, will of course require more resources to mobilize those supporters, and consequently there is nothing sinister about the leading candidate having a greater ability than his or her less popular rivals to transform support into cash, cash into mobilization effort, and mobilization effort into votes. In a tabulative campaign, the main goal is accuracy, and if the costs of mobilization are roughly similar for all voters regardless of their views, then the most accurate results will be obtained when candidates command resources in direct proportion to their campaign-exogenous public support.²³⁴

Even in a tabulative campaign, of course, resources can be maldistributed when candidates command resources proportionately greater than their campaign-exogenous public support for no reason other than that they happen to have access to large sums of money. However, the harm of

232. See *supra* Part II.D.

233. See *supra* note 198.

234. Conservative critics of campaign finance reform have been making a similar argument for years, although on the very different presupposition that campaign speech is persuasive. See, e.g., SMITH, *supra* note 12, at 42-43, 73-76; Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1059 (1985).

such maldistribution is likely to be less when campaigns are tabulative than when they are deliberative, at least if we make the plausible assumption that mobilization is cheaper than persuasion—that it costs less to mobilize a supporter than to create one.²³⁵ Under these circumstances, candidates can make far more effective use of a disproportionate “excess” of money if their goal is persuasion than if it is mobilization, from which it follows that, to the extent campaigns are seen as tabulative rather than deliberative, the urgency of equalizing campaign spending is reduced.

The idea that campaigns might be tabulative rather than deliberative also has implications for the influential critique of judicial oversight of the electoral process advanced recently by Professors Samuel Issacharoff and Richard Pildes. In a series of articles, Issacharoff and Pildes argue that the main principle guiding judicial construction of the Constitution in election law cases should be the preservation of meaningful electoral competition.²³⁶ Analogizing to economic principles of antitrust, they maintain that courts should police electoral competitiveness by taking a presumptively critical view of electoral laws and practices that result in “partisan lockup,”²³⁷ by which they mean laws and practices that entrench incumbent power-holders by insulating them from serious electoral challenge.

If election campaigns are deliberative, the logic of this critique is straightforward: challengers should have a fair chance during the campaign to persuade the electorate of reasons to turn out incumbents, as well as a fair prospect that, should they succeed in persuading the electorate, legal obstacles will not unduly impede their ability to assume power. On this view, devices such as ballot exclusion and partisan gerrymandering are presumptively suspicious because they suppress the ability of challengers to reap the benefits of successful campaign persuasion of voters—in the former case by preventing challengers from collecting votes

235. This assumption seems justified if for no other reason than voters who have been persuaded still also have to be mobilized.

236. Issacharoff & Pildes, *Politics as Markets*, *supra* note 61; Pildes, *Political Competition*, *supra* note 61; Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB. POL’Y 91 (2000); Issacharoff, *Gerrymandering*, *supra* note 61; Pildes, *Foreword*, *supra* note 61.

237. Issacharoff & Pildes, *Politics as Markets*, *supra* note 61, at 716-17.

in the first instance, and in the latter case by preventing challengers from reaping the benefit of votes cast in their favor.²³⁸

The possibility that election campaigns might be purely tabulative, however, presents certain problems for the anti-entrenchment approach because it raises questions about what, precisely, election laws and practices might be guilty of entrenching. If the purpose of a campaign is not to create or forge majority public opinion but merely to identify and empower it, then any problem of "lockup" that arises may not be partisan, but simply majoritarian. To be sure, the use by a *minority* of legal tools to entrench itself in power raises especially serious and troubling problems when campaigns are tabulative rather than deliberative because, by hypothesis, campaign persuasion is no longer an available antidote, even in theory, to minoritarian attempts at self-insulation. But when electoral laws do nothing more than "entrench" the opinion of a campaign-exogenous majority, it becomes much more problematic to characterize such laws as entrenching "partisans" or "incumbents"; a partisan or incumbent who is supported by, and whose power is therefore derived from, a majority stands on a very different footing from one who lacks majority support.²³⁹ Under these circumstances, Pildes and Issacharoff's concerns about unfair competition are still well taken, but can no longer be satisfied by a theory of *electoral* competition; instead, their goal of fair competition requires a theory of *political* competition, much more broadly conceived. While undoubtedly capable of justification, such an extension of their theory would be far from trivial.

238. See *id.* at 683-87 (criticizing anticompetitive ballot access restrictions); Issacharoff, *Gerrymandering*, *supra* note 61 (criticizing partisan gerrymandering as anticompetitive); Pildes, *Foreword*, *supra* note 61, at 117 (criticizing ballot access restrictions); *id.* at 55-83 (criticizing partisan gerrymandering).

239. Granted, any legal regime that claims accurately to measure campaign-exogenous public opinion must confront difficult indeterminacy problems. See, e.g., S.I. BENN & R.S. PETERS, *PRINCIPLES OF POLITICAL THOUGHT* 397 (1959) ("The will of the people cannot be determined independently of the particular procedure employed, for it is not a natural will, nor is it a sum of similar wills of persons sharing a common interest, but the result of going through a procedure which weighs some wills against others."). I set these aside here because they apply to all electoral regimes, and because they get at a problem that is distinct from the kind of entrenchment that concerns Pildes and Issacharoff.

CONCLUSION

Sometimes the law delivers what it promises, sometimes not. In the case of election campaigns, the law publicly proclaims a strong commitment to a widely held social conception of what election campaigns ought to be. In that understanding, campaigns ought to be deliberative in that their characteristic activity should be the practice of thoughtful and reasoned persuasion. Instead, the laws and jurisprudential doctrines structuring American election campaigns are built around a very different assumption: that the purpose of campaigns is primarily to tabulate exogenous voter preferences, and that political actors cannot reasonably expect, and therefore need not by law enjoy, meaningful opportunities during the campaign period to persuade voters to their points of view. Reasoned persuasion, in this environment, can thus be expected to play at most a minor, supporting role in most campaigns. Nothing in the law affirmatively prevents persuasion from occurring, but certainly the architecture of campaign law does nothing to facilitate it, and in some cases throws up obstacles to persuasion that may well be significant.

Three conclusions seem to follow from this state of affairs. First, although this odd and unexpected inversion in our legal institutions is unsettling, it does not mean that we somehow lack a meaningfully democratic electoral system—only that we lack one that fully meets our aspirations for democratic self-rule. So long as leaders assume power in accordance with the collective preferences of the electorate, the system may properly be called democratic, though where these preferences are entirely or mainly campaign-exogenous it is clearly democracy of a thinner variety. Second, if our legal institutions fall short of our aspirations, it is appropriate to ask whether some kind of institutional reform might push our democratic practices closer to our aspirations. This is a problem that proponents of deliberative democracy have been slowly and steadily pursuing,²⁴⁰ but

240. Among the institutional reforms that have been proposed are deliberative juries, FISHKIN, *supra* note 216; a new popular, deliberative branch of government, ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004); and a national holiday ("Deliberation Day") dedicated to popular debate and discussion, ACKERMAN & FISHKIN, *supra* note 57.

the analysis presented here suggests that the problems go deeper than they might have thought. Moreover, social science research on the ways in which individuals form political opinions may suggest reasons to be pessimistic, at least insofar as the goal of reform is limited to changing practices related specifically to election campaigns.²⁴¹

Finally, both of these conclusions counsel us to keep a watchful eye on a different venue: non-electoral politics. If election campaigns function in practice only to tabulate campaign-exogenous opinion, then we may need to look very carefully at the institutional environment in which citizens arrive at these exogenous views. That a political opinion is formed outside of the campaign process does not necessarily make it a poor quality opinion, but neither does it make the opinion a good one. Consequently, even if we were to become resigned to accepting campaign-exogenous opinion as the inevitable input to electoral processes, we would still be justified in scrutinizing the institutional setting in which citizens formulate their political views for evidence of the same kinds of problems that presently prompt many students of American democracy to criticize its campaign and electoral practices.

241. Much recent work concerning implementing deliberative democracy is in fact directed not to electoral politics, but to the ordinary politics of government policy and action. This is true, for example, of Fishkin's deliberative juries, which typically advise on policy rather than electoral issues, and Leib's popular branch, which is integrated into the routine functioning of government. See *supra* note 240.