

# STRANGE BREW: METHOD AND FORM IN ELECTORAL SPEECH JURISPRUDENCE

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*To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions.*  
—Justice Benjamin N. Cardozo<sup>1</sup>

## I. INTRODUCTION

As Justice Cardozo frankly concedes in the epigraph, a wide range of concerns and options are implicated in the resolution of cases. Certainly precedent is sought and adhered to when possible (or sensible), but as Cardozo suggests, social norms, values, customs, and observations also play an essential part in structuring judicial outcomes. The result is a “compound” of “ingredients,” legal and extralegal<sup>2</sup> in nature—a “brew” that both accommodates and exhibits the complexity of judicial decisionmaking.

In this Article I provide a comprehensive analysis of the methods of evaluation, the primary modes<sup>3</sup> of reasoning and rhetoric, employed by the

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<sup>1</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921).

<sup>2</sup> See Lee Epstein & Tracy E. George, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324 (1992). As the authors assert in their analysis of the impact of “legal” and “extralegal” influences on Supreme Court decisionmaking, “[i]n making choices between competing precedents, then, other factors are bound to come into play.” The notion that elements beyond legal texts, directives, and customs shape a judge’s understanding and articulation of various cases and controversies was famously acknowledged by Oliver Wendell Holmes, Jr., who asserted “[t]he life of the law has not been logic: it has been experience.” OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881). The “felt necessities of the time,” he contended, “the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.” *Id.*

<sup>3</sup> My use of the term “modes” is informed by Philip Bobbitt’s analysis of the evident “modalities” of constitutional argument, although my meaning is slightly different in this Article. See generally PHILIP

Supreme Court in its review of regulations on freedom of speech during political campaigns and elections. In this assessment of the Court's electoral speech jurisprudence (comprising thirty-seven cases from 1947 to the present),<sup>4</sup> I look both at the elements that structure the Court's outcomes—the ingredients in this strange brew—and offer an explanation for why certain influences have greater significance than others. To return to Justice Cardozo's concerns noted in the epigraph, I both examine the "sources of information" that are "appeal[ed to] for guidance"<sup>5</sup> and explain *why* we see particular methods of reasoning and rhetoric employed over others within this body of law. What is it that leads the Court, or particular justices, to emphasize or appeal to certain methods over others? What is it that might lead the justices to depart from certain modes of argument and evaluation?

A more detailed overview can be found in Part II of this Article, but in essence my argument is twofold. First, I demonstrate that four primary methods of reasoning and rhetoric (the Historical, Empirical, Aspirational,<sup>6</sup> and Pragmatic<sup>7</sup>) are implemented in the evaluation of electoral speech cases and controversies. Second, I argue that the employment of the respective modes is correlated with the *forms* of "speech" in question—that is, whether the expression is that of a political activist, a candidate, a political party, a campaign donation, or some other type of speech or speaker. As I demonstrate in Part IV, there are intriguing patterns evident in these correlations between the method of evaluation and the particular varieties of speech involved.

## II. OVERVIEW OF THE ARGUMENT

As I consider the methods of reasoning and rhetoric that shape the Court's evaluation of electoral speech cases and controversies, it is worth recalling Justice Roberts' famous opinion in *United States v. Butler*<sup>8</sup> (the legal realists' "whipping boy"), depicting the process of judicial decisionmaking as a strictly legal enterprise:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution

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BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE]; PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

<sup>4</sup> A list of the cases considered can be found in Appendix 1 *infra*.

<sup>5</sup> CARDOZO, *supra* note 1, at 10.

<sup>6</sup> My use of this label is influenced by Peter M. Shane's use of term "aspirational," suggesting a view of the Constitution "as a signal of the kind of government under which we would like to live, and interpreting that Constitution over time to reach better approximations of that aspiration." See Peter M. Shane, *Rights, Remedies, and Restraint*, 64 CHI.-KENT L. REV. 531, 550 (1988). Although his argument was addressed to larger concerns (that is, the "morality of aspiration"), my use of the concept of "aspiration" is also informed by that of Lon L. Fuller. See LON L. FULLER, *THE MORALITY OF LAW* 5–13 (2d ed., 1969).

<sup>7</sup> Both philosophical and legal schools of pragmatism inform my use of the term "pragmatic," although it is limited to neither. I mean to imply an approach to free speech questions that eschews abstractions and that is primarily oriented toward preventing or correcting malfunctions within the political process.

<sup>8</sup> See 297 U.S. 1 (1936).

which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. . . . This court neither approves nor condemns any legislative policy.<sup>9</sup>

Despite Justice Roberts' rhetorical flourish—meant to discourage the perception that the Court's decisions were motivated by political concerns in a turbulent era—he does offer a succinct account of the typically disparaged “legal” model of judicial decisionmaking.<sup>10</sup> This “pure” depiction of decisionmaking notwithstanding, most students of the legal process would find it difficult to entirely disregard the political influences, biases, and interests of judicial actors.<sup>11</sup> That said, we should be careful as well not to dismiss the role and significance of doctrine, legal norms, and institutional constraints.<sup>12</sup> This leaves us at the conclusion (sometimes insufficiently acknowledged) that law *and* politics, as well as a variety of other sources and considerations, influence judicial decisionmaking.

While the typology I offer in this Article is not perfect—in that the types are neither mutually exclusive nor entirely exhaustive of *all* the possible sources of influence—it does present the dominant methods of evaluation and articulation that structure judicial decisionmaking in the electoral context.<sup>13</sup> While space constraints and the Court's manner of

<sup>9</sup> *Id.* at 62–63. A similar account, in terms of process, was offered by Edward H. Levi, although he had a definite appreciation for the manipulability of language and the multiple interpretations and directions possible within legal reasoning. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948).

<sup>10</sup> The “meaninglessness of the legal model” has been the source of ire for many students of judicial behavior. See JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 62–64 (1993) [hereinafter SEGAL & SPAETH, ATTITUDINAL MODEL]. See also JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) [hereinafter SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED].

<sup>11</sup> That courts and judicial behavior are influenced by politics is something most have accepted since the early part of the twentieth century when “legal realists” debunked intimations of “slot machine” or “mechanical” jurisprudence and proposed a “conception of law in flux, of moving law, and of judicial creation of law.” See JEROME FRANK, COURTS ON TRIAL 147 (1949). See also Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931). Political scientists have also portrayed the Court as a “political” institution. See, e.g., LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–1947 (1948); GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946–1963 (1965); SEGAL & SPAETH, ATTITUDINAL MODEL, *supra* note 10; SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 10; MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE (1964); Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279 (1957); Epstein & George, *supra* note 2.

<sup>12</sup> As C. Herman Pritchett famously noted, “political scientists who have done so much to put the ‘political’ in ‘political jurisprudence’ need to emphasize that it is still ‘jurisprudence.’ It is judging in a political context, but it is still judging; and judging is something different from legislating or administering.” C. Herman Pritchett, *The Development of Judicial Research*, in FRONTIERS OF JUDICIAL RESEARCH 42 (Joel Grossman & Joseph Tanenhaus eds., 1969). See also LEE EPSTEIN & JOSEPH KOBYLKA, THE SUPREME COURT & LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 33 (1992) (arguing that the “‘myth of the robe’ is a myth, but the robe is a reality”). Finally, it is worth recalling Robert G. McCloskey's reminder that “though the judges do enter this realm of policy-making, they enter with their robes on, and they can never (or at any rate seldom) take them off.” ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 12 (2d ed., 1994).

<sup>13</sup> As with Philip Bobbitt's typology of “modalities of argument,” my categorization “is not a complete list, nor a list of wholly discrete items, nor the only plausible division of constitutional arguments. The various arguments illustrated often work in combination. Some examples fit under one heading as well as another.” BOBBITT, CONSTITUTIONAL FATE, *supra* note 3, at 8.

disposition<sup>14</sup> do not permit me to discuss each of the thirty-seven decisions in detail, what I do provide are samples that typify the respective methods. As noted above, when we see the correlations between the process/method of evaluation and the substance/form of the speech in question, we see some clear patterns and apparent preferences established—patterns which afford us a richer and more nuanced understanding of the nature and outcomes of electoral speech contests.

The following constitute the primary methods of reasoning and rhetoric:

- A. *The Historical Method*: By looking to history as a guide in the evaluation of present speech regulations, the historically-inclined, or custom-oriented, approach places great stock in how speech has functioned and how state regulations have been received in the past. In what environments or situations were these regulations most prevalent? What was the original intent of such statutes? Those justices who look to history or custom take precedent seriously, but look to external sources such as political, literary, or philosophical figures and arguments of *yesterday* for guidance in evaluating restrictions on speech *today*, though this method may lead to tensions in some cases between the alleged historic *principles* of our nation and the actual *practices* of political communities.
- B. *The Empirical Method*: This disposition relies on data and social scientific evidence to speculate as to the *impact* and actual *consequences* of speech regulations. How are campaigns *actually* run? Are elections *really* affected by these rules? In what ways? Do “reform” measures *truly* purify our politics? What amount of evidence is sufficient to satisfy the state’s interest?
- C. *The Aspirational Method*: An aspirational approach to freedom of speech within the electoral process essentially accepts the basic logic and assumptions of the “marketplace of ideas.”<sup>15</sup> It assumes that in the hands of free and rational individuals, and in the absence of state obstruction and intervention, political speech can serve its

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<sup>14</sup> Some cases in this study avoided any significant discussion of the First Amendment issues at stake.

<sup>15</sup> As Justice Holmes noted in his famous dissent:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

noble ends and promote self-government.<sup>16</sup> In this regard, political actors and institutions function well; therefore, free and vigorous expression can be trusted and encouraged in the electoral process.

- D. *The Pragmatic Method*: A different disposition, expressed with vigor in several cases discussed below, posits a grittier, more cautious, and skeptical view of political actors and institutions, conceding that electoral structures and agents are imperfect and susceptible—if not prone—to fraud, corruption, and abuse. While the aspirational approach maintains a rosier view of the place and practice of political expression during campaigns and elections, the pragmatist is more easily persuaded that electoral malfunctions and machinations are possible—even probable (i.e., “men are not angels”<sup>17</sup>)—and that solutions come in the form of deference to the state’s prophylactic measures.<sup>18</sup>

### III. METHODS OF REASONING AND RHETORIC

As Justice Cardozo expressed in his earlier-referenced foray into the nature of the judicial process, deduction and general principles can take a jurist only so far:

We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths; they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge, and tell him where to go.<sup>19</sup>

Something must, we are told, show the judge “where to go.”<sup>20</sup> When deductive reasoning fails to offer clear direction, or when precedent is ambiguous, mixed, convoluted, or otherwise unhelpful, a judge must appeal to some external referent. The mining of historical materials for insights and direction discussed in this section can be undertaken to answer a variety of speech questions.

<sup>16</sup> For a thorough assessment of the “marketplace” metaphor, and an argument for multiple conceptions of this foundational trope (emphasizing liberty, equality, and civility respectively), see Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, 17 J. L. & POL. 489 (2001).

<sup>17</sup> ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS* 322 (Clinton Rossiter ed., 1961).

<sup>18</sup> The pragmatic method accepts that Congress has “both wisdom and experience in these matters that is far superior” to that of the Court; thus, “special deference to its judgment” is appropriate. See *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 650 (1995) (“Colorado I”). It is important to note that the trust in the benign motives of elected officials may evidence the same naïveté the aspirationalist could be accused of demonstrating. The pragmatic method, at any rate, defers to *experience* by and large; thus, legislators are presumed to have the expertise necessary to diagnose and deal with the problems and complications posed by freedom of speech in the electoral process.

<sup>19</sup> CARDOZO, *supra* note 1, at 43.

<sup>20</sup> *Id.*

### A. THE HISTORICAL METHOD

While it should be no surprise to students of the law that judges make use of history for interpretation or justification, my research reveals a contrast *within* the historical method—between the reference to principles, precepts, and designs and the reliance on customs, traditions, and existing practices. Put differently, and to borrow a slogan from sociological jurisprudence, we see a distinction in method between history on the books and history in action. Those advocating the former, as I explain below, find controlling the arguments and ideas that ostensibly define us as a people: how we were *intended* to enjoy freedom of speech, what the appropriate limits were *expected* to be on state regulations, and what the nature and purpose of speech was *anticipated* to be in the context of the electoral process.<sup>21</sup> An appeal to the latter, however, demonstrates an approach less concerned with suppositions and conjecture and more inclined to seek guidance in the actual *practices* of American communities. Thus, while the former method might evaluate the contested legislation by speculating as to what the founding fathers *believed*, the latter concentrates on how subsequent generations have actually *behaved*.

#### 1. *Custom, Practice, Tradition*

The appeal to tradition is a generally conservative method of evaluating electoral speech laws—“conservative” not necessarily in terms of policy preferences, but rather in terms of a philosophical mood or disposition that urges caution, prudence, and deference to the past.<sup>22</sup> By looking to how things have been done before, this approach places great trust in antecedents and expects that the cycle of received wisdom has, within itself, curative qualities. The gradual, moderating tendencies of time, experience, and trial and error provide, in other words, the most reliable measure of the sagacity of a particular practice or policy.<sup>23</sup> It is in this spirit that the U.S. Supreme Court, in the earliest case considered in this study, accepted the imprecision and uncertainty of the laws pertaining to

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<sup>21</sup> While “original intent” typically carries with it a conservative connotation, in the electoral speech context, both “liberals” and “conservatives” appeal to the presumed intentions of the drafters of legislation.

<sup>22</sup> Wilson Carey McWilliams has argued:

[A] conservative is someone inclined to cherish what has been received, and to transmit an inheritance, not strictly unaltered, but in a way that preserves continuity, a link with the past and with origins. Conservatives value rituals, the old ways of doing and remembering, and they hold up examples from the past as models for aspiration, footsteps on a path to excellence that is both tried and distinctively one’s own.

Wilson Carey McWilliams, *Ambiguities and Ironies: Conservatism and Liberalism in the American Political Tradition*, in *MORAL VALUES IN LIBERALISM AND CONSERVATISM* 176–77 (W. Lawson Taitte ed., 1995).

<sup>23</sup> One of the most vocal advocates of a tradition-oriented approach is Justice Scalia, who, though thoroughly critical of the notion of a “Living Constitution,” still acknowledges that past practices and the “original meaning of the text” may not always provide the answer. In freedom of speech cases involving “new technologies,” for example, the best the Court can do is “follow the *trajectory* of the First Amendment . . . to determine what it requires,” an enterprise that moves beyond the clear directives of past practices and necessitates “the exercise of judgment.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 45 (Amy Guttman ed., 1997) (emphasis added).

the proper realm of political activity for governmental employees, thus deferring to the discretion of elected representatives and noting that “[c]ourts will interfere only when such regulation passes beyond the general existing conception of governmental power.”<sup>24</sup> “That conception,” the Court noted, “develops from practice, history, and changing educational, social and economic conditions.”<sup>25</sup>

In a similar vein, Chief Justice Burger argued in *Greer v. Spock* that the Court’s resolution of a challenge to a ban on the distribution of political literature and various other electioneering activities should be guided by long-held values, customs, and practices of American culture.<sup>26</sup> In his concurrence, the Chief Justice supported the historic “insulation” of the military and emphasized that “[p]ermitting political campaigning on military bases cuts against a 200-year tradition of keeping the military separate from political affairs, a tradition that in my view is a constitutional corollary to the express provision for civilian control of the military in Art. II, § 2, of the Constitution.”<sup>27</sup> Custom informed doctrine in this case; in the absence of clear precedential dictates, the Court appealed to the past and found our longstanding practice of distinguishing members of the armed forces from those of the general populace controlling.<sup>28</sup>

In *Greer*, the Court found justification within tradition for setting the military base outside the perimeter of the metaphorical “marketplace of ideas.” In *Burson v. Freeman*, the Court permitted treatment of the area surrounding the polling place as “off-limits” to free speech and expression.<sup>29</sup> Mary Rebecca Freeman, a political activist, desired to campaign for her candidate outside the polling place, but was prohibited from doing so by Tennessee’s Electoral Code, which barred electioneering within a one hundred-foot radius of the door to the polling place.<sup>30</sup> In its defense, the State presented an array of evidence demonstrating its compelling interest in preventing electoral fraud and intimidation at the polls,<sup>31</sup> evidence that was ultimately persuasive to a Court that lacked precedential guidance. Writing the plurality opinion for the Court, Justice Blackmun acknowledged that strict scrutiny was the appropriate standard of review.<sup>32</sup> He indicated, however—relying almost exclusively on the state’s catalog of abuses from the distant past—the regulations could be justified as prophylactic efforts to preserve voting rights and the integrity of the electoral process.<sup>33</sup> Specifically, Blackmun appeared to be most influenced by scholars’ vivid accounts of electoral abuses from the distant

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<sup>24</sup> *United Pub. Workers of America v. Mitchell*, 330 U.S. 75, 102 (1947).

<sup>25</sup> *Id.*

<sup>26</sup> 424 U.S. 828, 841 (1976) (Burger, J., concurring).

<sup>27</sup> *Id.* Justice Powell expressed similar thoughts. *See id.* at 847 (Powell, J., concurring).

<sup>28</sup> As we will see below, in this and other cases where “tradition” is invoked and found to be instructive, the dissenters cast a more critical eye toward “things as they have always been” and suggest that “tradition,” while a laudable point of reference in many cases, is not equal to “necessity.”

<sup>29</sup> 504 U.S. 191, 211 (1992).

<sup>30</sup> *See id.* at 194.

<sup>31</sup> *See id.* at 198–99.

<sup>32</sup> *See id.* at 198.

<sup>33</sup> *See id.* at 200–06.

past. The opinion, in fact, relies almost exclusively on eight history books, each focusing on the intimidation generated by political “machines” and the prevalence of electoral fraud throughout the nineteenth century.<sup>34</sup>

Blackmun was careful to note that Tennessee had, at the end of the previous century, undergone a period of electoral reform and had adopted the Australian secret ballot system as well as an “off-limits” zone around the polling place.<sup>35</sup> Amended in 1972, this legislation proscribed the display and distribution of campaign material and the solicitation of votes within one hundred feet of the entrance to a polling place.<sup>36</sup> Based principally on a history of abuse in the American electoral process—the sins of the past—Blackmun found that the State had satisfied the burden of strict scrutiny, and the “campaign free zone” was deemed constitutional.<sup>37</sup>

One of the more interesting elements of this decision is that while Blackmun, like Justice Scalia,<sup>38</sup> provides concrete evidence of past abuses in the United States, his opinion does not concentrate on specific problems within the state of Tennessee. That is, Blackmun’s appeal to history in this case was both figuratively and literally more “global” in nature; he located historic abuses in various American states and foreign countries, and then inferred from the aggregate that the particular state restrictions in question must be necessary.<sup>39</sup>

In another appeal to the directives of tradition and custom, in *McIntyre v. Ohio Elections Commission* Justice Scalia made it clear that “[w]here the meaning of a constitutional text (such as “the freedom of speech”) is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine.”<sup>40</sup> While speech by anonymous sources—in this case, an anonymous leaflet distributed at a school board meeting<sup>41</sup>—might theoretically fall under the protective shadow of the First Amendment, for Justice Scalia and those inclined toward tradition and custom, a truer measure of the constitutionality of electoral speech laws is gained by surveying the actual practices of the American people.

In this case, Scalia (joined by Chief Justice Rehnquist) chastised the majority for invalidating a “species of protection for the election process

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<sup>34</sup> See *id.* Blackmun’s opinion begins with a discussion of the *viva voce* method of voting, popular in the colonial period, and then proceeds through a review of the transformation to the paper ballot, the parties’ creation of their own ballots, the similar problems that foreign countries faced in their elections, and the eventual (near) universal adoption of the Australian ballot in the United States.

<sup>35</sup> See *id.* at 205–06.

<sup>36</sup> See *id.*

<sup>37</sup> *Id.* at 206.

<sup>38</sup> See *id.* at 214–16 (Scalia, J., concurring). Justice Scalia’s concurrence looked to history for guidance. First, he offered “restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot.” He found compelling that “[b]y 1900 at least 34 of the 45 States (including Tennessee) had enacted such restrictions” and “most of the statutes banning election-day speech near the polling place specified the same distance set forth” by the Tennessee statute at issue. Further, he noted, “the streets and sidewalks around polling places have traditionally not been devoted to assembly and debate.” *Id.*

<sup>39</sup> See *id.* at 200–06.

<sup>40</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting).

<sup>41</sup> See *id.* at 337.



that exists, in a variety of forms, in every state except California, and that has a pedigree dating back to the end of the 19th century.”<sup>42</sup> Absent evidence of the people’s clear practices in this regard, he argued, inferences drawn from historical documents, arguments, culture, and asserted principles might be controlling.<sup>43</sup> But a governmental practice that “has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality.”<sup>44</sup>

Scalia relied on the same method, though he pursued it to a different end, in *Republican Party of Minnesota v. White*.<sup>45</sup> In this recent case dealing with Minnesota’s restrictions on the campaign speech of judicial candidates, Scalia again appealed to tradition, though his investigation of the historical materials lead him to conclude that state prohibitions of this sort lacked the requisite roots of custom. “It is true that a ‘universal and long-established’ tradition of prohibiting certain conduct creates a ‘strong presumption’ that a prohibition is constitutional,” he noted, quoting his own dissent in *McIntyre*, but added that “[t]he practice of prohibiting speech by judicial candidates. . . is neither long nor universal.”<sup>46</sup> Indeed, he explained, “[a]t the time of the founding, only Vermont (before it became a State) selected any of its judges by election.”<sup>47</sup> While more states began providing for judicial elections during the period of Jacksonian democracy, the Court pointed out that it could locate “no restrictions upon statements that could be made by judicial candidates (including judges) throughout the 19th and the first quarter of the 20th century.”<sup>48</sup> Judicial elections were generally partisan, the majority concluded; thus, candidates typically not only discussed legal and political issues, but also openly embraced party affiliations. While speech doctrine failed to direct the Court in any clear direction, tradition provided some guidance; where the law was imprecise, uncertain, or ambiguous, custom and the existing practices of the American people—over time—provided an extrinsic source of guidance, an essential extralegal element of reasoning and rhetoric.

## 2. Principles, Precepts, Presumptions

As opposed to an emphasis on *practices* within American communities throughout history, the investigation of historic *principles* looks more to the

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<sup>42</sup> *Id.* at 371. By the time of World War I, twenty-four states had laws prohibiting anonymous political speech of the sort at stake in this case, with the earliest enacted in 1890. *See id.* at 375–76. Further, Scalia added, the United States federal government and the governments of England, Australia, and Canada have similar prohibitions. *See id.* at 381.

<sup>43</sup> In cases of uncertainty such as this, Scalia indicated in his dissent, “constitutional adjudication necessarily involves not just history but judgment: judgment as to whether the government action under challenge is consonant with the concept of the protected freedom (in this case, the freedom of speech and press) that existed when the constitutional protection was accorded.” *Id.* at 375.

<sup>44</sup> *Id.*

<sup>45</sup> 536 U.S. 765 (2002).

<sup>46</sup> *Id.* at 785.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

broad precepts, themes, and values that underwrite American democracy.<sup>49</sup> It is this invocation of general principles that often generates a tension with the custom-oriented pursuit. We see, in other words, an active debate regarding the appropriate *manner* of historical guidance in several of these cases.

*Greer* and *Burson*, for example, demonstrate a tension between the majority and the dissenters, one that maps onto the distinction between principle and practice. Specifically, in *Greer* (wherein the majority ruled that military bases could be marked “off limits” to various political speech practices), the dissenters argued forcefully that “tradition” does not imply “necessity.”<sup>50</sup> While the government’s position appealed to logistics, the mere fact that a certain practice (or prohibition) has long been in place, the dissenters argued, offers no indication that it should *still* be in place.<sup>51</sup> But more fundamentally, as Justice Marshall argued in his separate dissent, the majority’s deference to custom suppressed the more significant and defining American spirit of freedom and openness:

The First Amendment infringement that the Court here condones is fundamentally inconsistent with the commitment of the Nation and the Constitution to an open society. . . . The Court, by its unblinking deference to the military’s claim that the regulations are appropriate, has sharply limited one of the guarantees that makes this Nation so worthy of being defended.<sup>52</sup>

In the same spirit, the dissenters in *Burson v. Freeman* (the “campaign-free zone” case) questioned the majority’s apparently instinctual correlation of past *practice* with contemporary *necessity*:

[The plurality’s defense of the challenged polling place restrictions] is deeply flawed; it confuses history with necessity, and mistakes the traditional for the indispensable. The plurality’s reasoning combines two logical errors: First, the plurality assumes that a practice’s long life itself establishes its necessity; and second, the plurality assumes that a practice that was once necessary remains necessary until it is ended. . . . We have

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<sup>49</sup> As Justice White explained in his dissent in *Citizens Against Rent Control v. Berkeley*, a case wherein the Court found unconstitutional a municipal ordinance limiting (to \$250) contributions to committees formed to support or oppose ballot measures, a proper evaluation of the electoral speech in question must consider the historic (founding) principle of the particular electoral institution—in this case the initiative:

The interests which justify the Berkeley ordinance can properly be understood only in the context of the historic role of the initiative in California. . . . From its earliest days, it was designed to circumvent the undue influence of large corporate interests on government decision-making. . . . The role of the initiative in California cannot be separated from its purpose of preventing the dominance of special interests. That is the very history and purpose of the initiative in California, and similarly it is the purpose of ancillary regulations designed to protect it. Both serve to maximize the exchange of political discourse.

454 U.S. 290, 310 (1981).

<sup>50</sup> 424 U.S. 828, 856 (1976) (Brennan, J., dissenting).

<sup>51</sup> As Justice Brennan elaborated, “the Court gives no consideration to whether it is actually necessary to exclude all unapproved public expression from a military installation under all circumstances and, more particularly, whether exclusion is required of the expression involved here. It requires no careful composition of the interests at stake.” *Id.* at 856.

<sup>52</sup> *Id.* at 873 (Marshall, J., dissenting).

never regarded tradition as a proxy for necessity where necessity must be demonstrated. To the contrary, our election-law jurisprudence is rich with examples of traditions that, though longstanding, were later held to be unnecessary. For example, [poll taxes, substantial barriers to candidacy such as petition requirements, property-ownership requirements, and onerous filing fees] . . . were all longstanding features of the electoral labyrinth. . . . [Finally] even if we assume that campaign-free zones were once somehow ‘necessary,’ it would not follow that, 100 years later, those practices remain necessary. Much in our political culture, institutions, and practices has changed since the turn of the century.<sup>53</sup>

Here, Justices Stevens, O’Connor, and Souter demonstrate with vigor the contrast between principle and practice, refusing to accept the sacrifice of the former to the latter. As in the *Greer* case, the dissenters accused the *Burson* majority of failing to appreciate the historic American commitment to openness, especially in the metaphorical marketplace of ideas. Certainly machinations were still *possible*, they urged, but the spirit of the First Amendment required openness in the interest of a vibrant democracy.<sup>54</sup>

In a similar appeal to our nation’s transcendent values and operating principles, and in obvious tension with Justice Scalia’s nod toward tradition, both Justice Stevens’ majority opinion and Justice Thomas’ concurrence in *McIntyre v. Ohio Elections Commission* are informed by their interpretation of historical dictates and expectations.<sup>55</sup> For Justice Stevens and the majority, Margaret McIntyre’s case was about more than just a politically active mother taking on the school board with anonymous leaflets. What was involved here was a deeper, more significant, and historically rooted right of authorial license—a right to employ the means and rhetorical devices appropriate to the expressive interests at stake.<sup>56</sup> But the justices also found instructive the spirit and guiding principles of the First Amendment (as opposed to the practices and traditions of the states) as they upheld the right to withhold individual identity during acts of public expression. As Justice Stevens wrote for the majority, “Anonymity is a shield from the tyranny of the majority.”<sup>57</sup> “It exemplifies the purpose behind the Bill of Rights,” he continued,

and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.<sup>58</sup>

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<sup>53</sup> 504 U.S. at 220–22 (Stevens, J., dissenting).

<sup>54</sup> See *id.* at 228.

<sup>55</sup> See, e.g., *McIntyre*, 514 U.S. at 370 (Thomas, J., concurring) (stressing an original understanding that anonymous political speech would be protected).

<sup>56</sup> See *id.* at 342 (noting the frequency and value of anonymous or pseudonymous literature).

<sup>57</sup> *Id.* at 357.

<sup>58</sup> *Id.*

For the Court, sublime and transcendent *principles* of human expression and communicative liberty acted as a complement to the theoretical and historical intentions of the Bill of Rights. In this regard, Mrs. McIntyre simply found her place in the long line of advocates who brought their ideas to “market” under the cover of anonymity.<sup>59</sup> Indeed, the historic parallel for her claim was that of “Publius” (the pseudonym invoked by James Madison, Alexander Hamilton, and John Jay in the *Federalist Papers*), thus affording her an iconic example to counter the dissenters’ reliance on existing state practices.

### B. THE EMPIRICAL METHOD

What amount, degree, or form of evidence is sufficient to justify a restriction on free speech rights during political campaigns and elections? The question is straightforward enough, though the answer is hardly so apparent. As we will see below, the debate regarding the nature and scope of the evidentiary burden in electoral speech cases is similar to that discussed in the previous section. My analysis of the Court’s employment of data, evidence, and statistics in electoral speech cases shows some interesting patterns and curious uncertainties within this body of law.

At an abstract level, we see a jurisprudential tension and confrontation between normative inclinations and empirical findings, between guiding principles and measured precision.<sup>60</sup> That is, we see a query that underscores our entire discussion: With speech never having been accepted as an *absolute* right, the question is to what *degree* should constitutional questions regarding the nature, limits, and purpose of free speech be informed by empirical estimations of “effect,” by approximations of “harm,” or by judicial, legislative, or mass public conjecture? Donald Horowitz has emphasized the general limitations of courts in this regard, accusing them of being unfit to process “specialized information,”<sup>61</sup> and has questioned the capacity of courts to proceed with care at the intersection of law and social science:

These general problems indicate that the fit between law and social science is not a comfortable one and will not be for some time. Excessive reliance on behavioral data poses risks for adjudication but often relevant behavioral materials do not exist. Rarely does there seem to be a good mesh. Yet in spite of these basic problems, courts pay too little attention to social facts and, when they do, they obtain and process their materials in a generally unsatisfactory way. Every so often, behavioral material is

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<sup>59</sup> Ironically, though this case carved out sweeping protections for anonymous political speech, Mrs. McIntyre never intended to withhold her identity! A printer error cut off her name and address from some of the fliers which were then inadvertently mixed in with the others that included the required information. See Brian Pinaire, *A Funny Thing Happened on the Way to the Market* 210 (2003) (unpublished Ph.D. dissertation, Rutgers University) (on file with author).

<sup>60</sup> Data have, of course, been employed to evaluate constitutional questions in several important and controversial cases in the past—and in ways that underscore the issues and concerns posed in this section of the article. Consider, for example, Louis Brandeis’ famous brief in *Muller v. Oregon*, 208 U.S. 412 (1908); the modern “authority” of Kenneth Clark’s research in *Brown v. Board of Education*, 347 U.S. 483 (1954); and, the famous “Baldus Study” in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>61</sup> See DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 25 (1977).

available or potentially available to inform a court's decision, but it is rarely used effectively.<sup>62</sup>

Other scholars have challenged the Supreme Court more directly for failing to consider the relevant data when evaluating constitutional questions. In his discussion of the Court's reapportionment cases, for example, Martin Shapiro criticized the justices for failing to assume the role of "political scientist," analyzing the "actual political conditions in each state" when considering the question of representation.<sup>63</sup> In similar fashion, scholars of the Court's electoral process jurisprudence have faulted the Court for failing to ground its assumptions in the available social science data.<sup>64</sup>

Within the context of these concerns, my analysis of the Court's employment of the empirical method in electoral speech jurisprudence can be arranged according to the following basic subsidiary questions:<sup>65</sup>

1. *The Evidentiary Burden*: What *type* and what *amount* of evidence is deemed sufficient to justify a restriction on speech rights?
2. *A Constellation or a Cluster of Stars?*: Do the data presented *actually* demonstrate the alleged problem?
3. *Show Me the Data!*: What is the function of evidence in cases wherein data *cannot* be presented?

#### 1. *The Evidentiary Burden*

With respect to the imprecise standard regarding the quality and quantity of evidence necessary to support a burden on electoral speech rights, we can see two general tendencies. In certain cases, the Court accepts as sufficient a surprisingly scant amount of evidence. In other cases, the Court acknowledges the evidence presented, but seemingly accedes that *no* amount of evidence could satisfy the state's heavy burden in such cases. We can see in the more recent campaign finance cases, for example, situations in which the Court was satisfied with relatively little evidence as it upheld restrictions on speech.

Consider, for example, *Nixon v. Shrink Missouri Government PAC*, wherein the Court upheld Missouri's limits on contributions to candidates for state office.<sup>66</sup> Modeled after those found constitutional in the

<sup>62</sup> *Id.* at 276.

<sup>63</sup> See SHAPIRO, *supra* note 11, at 248–50.

<sup>64</sup> See, e.g., Douglas Amy, *Entrenching the Two-Party System: The Supreme Court's Fusion Decision*, in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 142 (David K. Ryden ed., 2000); Cynthia Grant Bowman, *The Supreme Court's Patronage Decisions and the Theory and Practice of Politics*, in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 124 (David K. Ryden ed., 2000); *The Supreme Court as Architect of Election Law: Summing Up, Looking Ahead*, in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 267, 278 (David K. Ryden ed., 2000); Elizabeth Garrett, *Leaving the Decision to Congress*, in THE VOTE: BUSH, GORE & THE SUPREME COURT 38, 43 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

<sup>65</sup> While data are remarked upon or employed in a variety of cases, this section will discuss only those where the basic themes are most visible and ripe for analysis.

<sup>66</sup> 528 U.S. 377 (2000).

paradigmatic campaign finance case *Buckley v. Valeo*,<sup>67</sup> but with lower limits for several offices, the Missouri regulations, too, sought to cleanse state politics of the corruption—and, importantly, the *perceived* corruption associated with large financial donations to political candidates. In his majority opinion, Justice Souter, rejecting the empiricist orientation of the court of appeals, concluded that the statute could not be declared void simply because the state had not produced empirical evidence of corrupt practices.<sup>68</sup> To the contrary, the “quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”<sup>69</sup> The *Buckley* case had previously established the fact that the “appearance of corruption” was a compelling state interest.<sup>70</sup>

Thus, Souter reasoned, the state of Missouri was justified in its efforts to address what it *presumed* were the cynical perceptions of the public.<sup>71</sup> But what infuriated the dissenters in this case, and what forces us to wonder what degree of proof satisfies the evidentiary burden, was the way that Souter’s reasoning was grounded in conjecture and speculation.<sup>72</sup> While admitting that “majority votes do not, as such, defeat First Amendment protections,” Souter found persuasive several imprecise measures: An earlier initiative effort (preceding the state law), aimed at establishing contribution limits, had passed with 74% of the vote; the co-chair of the state legislature’s Interim Joint Committee on Campaign Finance Reform testified in an affidavit that large contributions have “the real potential to buy votes”; the academic literature was mixed and inconclusive as to whether or not contributions were linked to corruption; and the timing and context of the passage of the law were compelling because several newspaper editorials discussed various recent questions of impropriety regarding corporate contributions and state contracts.<sup>73</sup>

But while Justice Souter and the majority accepted a diminished “quantum” of evidence from the state, the dissenters in this case, and especially Justice Thomas, wondered how the Court could possibly be content with such an anemic evidentiary showing.<sup>74</sup> Where, for example, was the proof of any *actual* harm to the political process? Where was the actual *proof* of “corruption”?<sup>75</sup> Of course elected officials respond to and reflect their constituents’ and contributors’ interests, Thomas reasoned—that is called representative democracy! And even if it was alleged that

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<sup>67</sup> 424 U.S. 1 (1976).

<sup>68</sup> See *Shrink*, 528 U.S. at 391.

<sup>69</sup> *Id.*

<sup>70</sup> 424 U.S. at 45.

<sup>71</sup> See *Shrink*, 528 U.S. at 390–95.

<sup>72</sup> See *id.* at 405–30 (Kennedy, J. & Thomas, J., dissenting in separate opinions).

<sup>73</sup> See *id.* at 393–95.

<sup>74</sup> See *id.* at 419.

<sup>75</sup> In an earlier campaign finance case, Justice Breyer had asked a similar version of this question. Where, he wondered, was the “*special* corruption problem in respect to independent party expenditures”? Inferences and assumptions were insufficient to meet the burden in this case, in other words; there must some kind of discrete and demonstrable evidence of corruption that is specifically correlated with the political party as the particular “speaker” in such cases. See *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 618 (1996) (“Colorado I”).

certain contributors received special treatment or disproportionate attention, *how* would this be measured or proven? Further, since when has an *apparent* public perception of impropriety been sufficient to trump political speech rights? Such estimations were beyond the justices' capacity, according to Thomas, because "courts have no yardstick by which to judge the proper amount and effectiveness of campaign speech."<sup>76</sup> Short of *actual* empirical evidence of quid pro quo corruption, he asserted, neither the courts nor the legislature should impede upon cherished First Amendment freedoms.<sup>77</sup>

In other cases considered in this study, by contrast, the Court has been provided *actual* empirical evidence to justify state restrictions on electoral speech, yet has been unwilling to accept such proof as sufficient to satisfy the state's evidentiary burden. For example, the Court has considered two cases involving Colorado's efforts to regulate the initiative petition process. In the first, *Meyer v. Grant*, the Court was presented with evidence detailing the prevalence of fraud involving payments to petition circulators at the signature-gathering stage.<sup>78</sup> In the second case, *Buckley v. American Constitutional Law Foundation*, the Court reviewed a host of regulations meant to reform the process by requiring increased disclosure of information and thus offering the voters more to consider as they evaluated certain propositions.<sup>79</sup>

In the *Meyer* case, Justice Stevens, writing for a unanimous court, explained that because protection for First Amendment rights is "at its zenith" in cases like this, the state's burden was "well-nigh insurmountable."<sup>80</sup> The Court was not persuaded by the state's position that the prohibition against payments to circulators was necessary to preserve the integrity of the electoral process; but what is particularly germane to the discussion in this section is Stevens' declaration that "[n]o evidence" had been offered to support the claim that paid professional circulators are "any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot."<sup>81</sup> And yet, during the trial in Federal District Court, the State had offered several instances of fraud and dubious "sales" techniques that it asserted were the result of the financial incentives offered to circulators.<sup>82</sup> Further, the State had provided statistical evidence demonstrating that the prohibitions had little or no negative effect on the number of propositions that reached the ballot.<sup>83</sup> Still, a unanimous U.S. Supreme Court found the

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<sup>76</sup> *Shrink*, 528 U.S. at 427.

<sup>77</sup> *See id.* at 425–26. Reiterating these general criticisms, Justice Thomas again chastised the majority for its shrinking evidentiary requirements in *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 466–68 (2001) ("Colorado II").

<sup>78</sup> 486 U.S. 414 (1988).

<sup>79</sup> 525 U.S. 182 (1999).

<sup>80</sup> *Meyer*, 486 U.S. at 425.

<sup>81</sup> *Id.* at 426.

<sup>82</sup> *See Grant v. Meyer*, 741 F.2d 1210, 1213 (10th Cir. Colo. 1984).

<sup>83</sup> Colorado presented evidence showing that the prohibition on payments to circulators did not seriously impact the number of propositions that reached the ballot. In fact, of the twenty-four states that permitted the initiative process, Colorado ranked fourth in terms of how many propositions reached

evidence presented to be inconclusive—suggesting, without much explication, that the State had not provided *enough* proof, and implying, with a harrumph, that this “well-nigh insurmountable” burden could, perhaps, *never* be overcome.<sup>84</sup>

In a similar vein, the Court in *Buckley* rejected several elements of the regulatory scheme Colorado instituted in response to the *Meyer* decision. With paid petition circulation and incidents of fraud on the increase in the early 1990s, the State devised a series of requirements that again sought to preserve the integrity of this phase of the initiative process. But despite the several incidents of fraud presented at trial, the Supreme Court, in an opinion authored by Justice Ginsburg, again seemed dismissive of the evidence on record, and was once more unhelpful—even cryptic—in its explication of the State’s evidentiary burden.<sup>85</sup>

## 2. *A Constellation or a Cluster of Stars?*

Scrutiny of the use of data in the Court’s electoral decisions reveals how the justices can look to the same body of evidence but draw distinctly different conclusions.<sup>86</sup> As we will see below, perceptions, interpretations, and inferences from data vary widely on the Court. Consider, for example, the above discussion of the central questions that sustain the campaign finance debate: Does a high *correlation* between financial contributions and “access” to, or “responsiveness” of, elected officials suggest “corruption” in the political process, or is it evidence of a well-functioning *representative* democracy?

In *Arkansas Educational Television Commission v. Forbes*, the Court was asked to consider the state-owned television broadcasters’ decision to limit participation in a televised debate to only the two major party candidates for the Third Congressional District—thus precluding the independent candidate, Ralph Forbes, from reaching the viewing audience even though he had qualified for the ballot.<sup>87</sup> The Court, finding for

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the ballot—despite the fact that twenty other states and the District of Columbia *permit* payments to circulators. See *Meyer*, 486 U.S. at 418 n.3.

<sup>84</sup> *Id.* at 425.

<sup>85</sup> As Justice O’Connor explained in her part-concurrence/part-dissent, “contrary to the Court’s assumption . . . this targeted disclosure is permissible because the record suggests that paid circulators are more likely to commit fraud and gather false signatures than other circulators.” Justice O’Connor goes on to cite several government officials who testified at the trial that more incidents of fraud are associated with paid circulation. She quoted respondent William C. Orr, the executive director of American Constitutional Law Foundation, Inc., who stated at the trial that “volunteer organizations, they’re self-policing and there’s not much likelihood of fraud. . . . Paid circulators are perhaps different.” 525 U.S. at 225–26. See also Daniel Lowenstein and Robert Stern’s insightful critique of the *Meyer* decision, wherein Mike Arno, owner of American Petition Consultants, concedes that volunteer circulators are less prone to cheating because “they’re not there for the money, they’re there for the cause.” Daniel Hays Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L.Q. 175, 188 n.70 (1989).

<sup>86</sup> This phenomenon is perhaps most striking in the campaign finance context. See, for example, the disjuncture between Justice Souter’s and Justice Thomas’ interpretations of the trial declarations offered up by former elected officials and political aides (Leon Billings, Timothy Wirth, and Robert Hickmott) with respect to the relationship between political parties and their candidates. See *Fed. Election Comm. v. Colo. Republican Fed. Campaign Comm’n*, 533 U.S. 431, 458–60, 478–81 (2001) (“Colorado II”).

<sup>87</sup> 523 U.S. 666 (1998).



Arkansas Educational Television Commission (“AETC”), explained that this particular type of debate was not a traditional public forum and also relied on simple calculations: To allow *all* interested candidates an opportunity to participate would generate the quintessential “Chairman’s Problem,” wherein the collective result would be *less* speech, not more.<sup>88</sup> Numbers, in other words, were the key considerations: the data indicated that in the 1988, 1992, and 1996 presidential elections, “no fewer than 19 candidates appeared on the ballot in at least one State.”<sup>89</sup> And thus, the Court reasoned, “[w]ere it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates’ views at all.”<sup>90</sup>

The dissenters, however, interpreted these data in a very different light. For them, the majority misjudged the significance of Forbes’ financial resources and his anticipated impact on the election.<sup>91</sup> While he was labeled as “not a serious candidate” by the AETC staff, the dissenters noted that the Republican victor in the Third District race in 1992 received only 50.22% of the vote while the Democrat received 47.2%.<sup>92</sup> Thus, an independent candidate like Forbes *could* still have a very significant effect on the election in such a divided district, even if he was unlikely to win the seat. Further, while the majority tacitly accepted the AETC staff’s evaluation of Forbes’ financial resources—concluding that his limited financial backing suggested diminished viability as a candidate—the dissenters again drew the inverse conclusion: “[T]he fact that Forbes had little financial support was considered as evidence of his lack of viability when the factor might have provided an independent reason for *allowing* him to share a free forum with wealthier candidates.”<sup>93</sup>

### 3. *Show Me the Data!*

One of the remarkable elements of the *Burson* case, discussed in more detail in Part III.A above, was the fact that the Court, inquiring as to the availability of statistics and data to justify the state’s “campaign-free zone,” found that the evidence was *incapable* of being provided—given the long tradition of these laws—and *still* upheld the zones as constitutionally sound efforts to protect the right to vote.<sup>94</sup> As the majority explained:

As a preliminary matter, the long, uninterrupted, and prevalent use of these statutes make it difficult for States to come forward with the sort of proof the dissent wishes to require. The majority of these laws were adopted originally in the 1890’s, long before States engaged in extensive legislative hearings on election regulations. The prevalence of these laws,

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<sup>88</sup> See Bertrand de Jouvenel, *Seminar Exercise: The Chairman’s Problem*, 55 AM. POL. SCI. REV. 368, 368–72 (1961). In this fascinating theoretical exercise, de Jouvenel portrays the difficulties inherent in any effort to afford all speakers an “equal” voice in matters of public concern.

<sup>89</sup> *Ark. Educ. Television Comm’n*, 523 U.S. at 681.

<sup>90</sup> *Id.*

<sup>91</sup> See *id.* at 684 (Stevens, J., dissenting).

<sup>92</sup> See *id.* at 685.

<sup>93</sup> *Id.* at 692 (emphasis added).

<sup>94</sup> *Burson v. Freeman*, 504 U.S. 191, 206–08 (1992).

both here and abroad, then encouraged their reenactment without much comment. The fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who can testify as to what would happen without them. Finally, it is difficult to isolate the exact effect of these laws on voter intimidation and election fraud. Voter intimidation and election fraud are successful precisely because they are difficult to detect.<sup>95</sup>

In other words, the “long period of time” satisfied the state’s burden and thereby released the state from the obligation of empirically demonstrating the *continued* necessity of these zones.

But there are many issues in these cases that cannot necessarily be empirically demonstrated. What would distinguish these other issues (i.e., showing a causal link between large financial contributions and diminished public confidence, or proving that anonymous speech discourages vigorous public debate) from the Court’s relaxed evidentiary requirement in *Burson*? Did the Court draw the right inferences from the lack of data presented, or should such restrictions be subject to an even more rigorous standard? In a broader sense, what these cases illustrate is the general imprecision and inconsistent manner with which the Court appeals to data, the ambiguity of its holdings (with respect to the guidance offered to lower courts and political actors), the problems associated with multiple interpretations of the same statistical “evidence,” and the questions that must be confronted when the Court extrapolates from “missing” data in certain situations.

### C. THE ASPIRATIONAL METHOD

Most individuals seem to accept the notion that justices’ personal views, policy-related or otherwise, influence their views of the law—at least to *some* degree. While some sociological jurists advanced this argument to its extreme (i.e., all that matters is “what the judge had for breakfast”), we can assume from Senate confirmation hearings—and the open discussion of likely court nominations during presidential campaigns, for example—that most Americans believe that a judge’s personal values, perceptions, and experiences will influence her behavior on the court. Accepting that the nature and extent of the influence of personal characteristics and biases on judicial decisionmaking is the subject of considerable disagreement amongst scholars,<sup>96</sup> I argue in the next two sections that the justices’ individual assessments of the intentions, design, and operations of the electoral process *itself* significantly influence their understanding of these issues.<sup>97</sup>

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<sup>95</sup> *Id.* at 208.

<sup>96</sup> See *supra* note 10 for a review of the major studies of judicial behavior.

<sup>97</sup> The concept of “corruption” in campaign finance provides an excellent example of how the evaluation of various electoral speech regulations requires the jurist to invoke some transcendent mental image of how the electoral process is *supposed* to operate. “Corruption,” in other words,

is thus a loaded term: you cannot call something corrupt without an implicit reference to some ideal. In order to employ the concept of corruption in the context of a political

In this regard, I am emphasizing what Professor Richard Pildes has called “judicial culture”—or, the “empirical assumptions, historical interpretations, and normative ideals of democracy” held by the justices.<sup>98</sup> In cases involving contestable democratic principles and practices, “judicial culture” necessarily influences conclusions of law:

The cultural attitudes judges bring toward these kind of questions surely influence, if they do not completely dominate, how judges respond to empirical claims and open-ended precedents—which is why, perhaps, most justices end up consistently on the same side of these cases, despite differences in facts, partisan consequences, and precedents among the various cases involving democracy that have recently been before the Court.<sup>99</sup>

In this section of the Article I focus on a particular “judicial culture”—paying attention to arguments and assertions that express an overriding faith in human nature and man’s capacity for self-governance; a spirit of optimism that idealizes vigorous and active citizenship; a trust in the potential of our electoral institutions; and a belief that, under the right conditions, political speech serves the ideals of representative government. This “aspirational” approach acknowledges that corruption and abuse are possible where speech liberties are concerned. Occasional bad apples, however, do not make for a tainted barrel: a free society, according to this perspective, should start from rosier assumptions rather than the more guarded, skeptical, and deferential judicial culture discussed in the following section.

My analysis of the aspirations expressed in these cases can be arranged according to two basic themes: 1) a trust and faith in the capacity of the *people* to be self-governing and to properly enjoy freedom of speech in an open society, and 2) a belief in the potential of the electoral *process* to serve the aims of democratic governance. We begin, in this first section, with a discussion of the Court’s emphasis on the rational qualities of *individuals*—a vision of citizens capable of making difficult decisions and seeing liberty through to its proper end.

### 1. *The People*

Dissenting in *Austin v. Michigan Chamber of Commerce*, Justice Scalia chastised the majority for failing to appreciate the discerning qualities of the American citizen.<sup>100</sup> “The premise of our system,” he reminded those justices who supported the state’s efforts to muffle the corporate voice, “is that there is no such thing as too much speech—that the people are not

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controversy, such as that over campaign finance, one must have some underlying notion of the pure, original or natural state of the body politic.

Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 128 (1997).

<sup>98</sup> Richard H. Pildes, *Democracy and Disorder*, in *THE VOTE: BUSH, GORE & THE SUPREME COURT* 140, 142 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

<sup>99</sup> *Id.* at 151.

<sup>100</sup> 494 U.S. 652 (1990).

foolish but intelligent, and will separate the wheat from the chaff.”<sup>101</sup> Government need not patronizingly restrict particular voices to protect the people; trusting in the citizen’s ability to make distinctions and draw conclusions is preferable, according to Scalia, because it returns power to the ultimate source and sustenance of any healthy democratic society: rational and engaged individuals.<sup>102</sup> With equal vigor, Justice Scalia reasserted this claim in his recent dissent in *McConnell v. FEC*. As he put it:

The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth. Given the premises of democracy, there is no such thing as *too much* speech.<sup>103</sup>

And yet, it was just such a rational and engaged individual who was shut out of the speech marketplace in the “campaign-free zone” case, *Burson v. Freeman*.<sup>104</sup> Rebecca Freeman, a longtime political activist and campaign worker, routinely advocated at the polling place for her candidates and causes because she had heard that “about 15% of the voters come to the polls undecided and that you can sway their vote” at the polling place.<sup>105</sup> For Ms. Freeman, then, the area around the polling place was the ideal location to interact with and persuade voters, especially regarding lower-salience issues, questions, and offices for which they may still be undecided. While the pragmatic method discussed below might lead one to accept the state’s concern regarding the *potential* for fraud—viewing *interactions* as *interference*—from an aspirational perspective, as Justice Stevens indicates, “The hubbub of campaign workers outside a polling place may be a nuisance, but it is also the sound of vibrant democracy.”<sup>106</sup>

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<sup>101</sup> *Id.* at 695.

As conceded in Lincoln’s aphorism about fooling “all of the people some of the time,” that premise will not invariably accord with reality; but it will assuredly do so much more frequently than the premise the Court today embraces: that a healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak, and who may not.

*Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 258–59 (2003) (Scalia, J., dissenting).

<sup>104</sup> 504 U.S. 191 (1992).

<sup>105</sup> See Pinaire, *supra* note 59.

<sup>106</sup> *Burson*, 504 U.S. at 228 (Stevens, J., dissenting). Justice Ginsburg expressed a similar trust in the nature of the exchange between citizens engaged in the initiative petition process. Writing for the majority in *Buckley v. Am. Const. Law Found.*, Justice Ginsburg concluded that several of the state’s regulations meant to discourage fraud in the petition process constituted “undue hindrances to *political conversations* and the exchange of ideas.” 525 U.S. 182, 192 (1999) (emphasis added). Despite suggestions to the contrary—in the form of academic and anecdotal evidence implying that petition circulation amounts to little more than deceptive “sales pitches,” as opposed to “political conversations”—Justice Ginsburg emphasized and imagined (aspired to) the potential for genuine citizen-to-citizen discussions of issues and the vigorous grassroots, participatory benefits theoretically intended by the institutions of direct democracy. *See id.*

In the same spirit, Justice Stevens, in *McIntyre v. Ohio Elections Commission*,<sup>107</sup> the anonymous political pamphleteering case assessed in Part III.A above, made the case for the individual as the final and proper judge of truth and falsehood, of good and bad propositions. Writing for the majority, he offered:

Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read the message. And then, once they have done so, it is for them to decide what is 'responsible,' what is valuable, and what is truth.<sup>108</sup>

In the same tone as Scalia in the *Austin* case, though significantly involving a qualitatively different *form* of speech (see Part IV below),<sup>109</sup> Justice Stevens asserted that the *people* must be trusted to make such difficult determinations. The citizen/"consumer" in the "marketplace," in other words, is quite capable of evaluating the "products" that compete for his or her attention, no matter how they are presented.

*Some* engaged in the exchange of ideas might exploit the system, to be sure; but such abuses are not, according to this aspirational approach, endemic to the system. Justice Black made this clear in his dissent in *United Public Workers v. Mitchell*.<sup>110</sup> In this case, the Court upheld provisions of the Hatch Act that prohibited federal employees from "taking any active part in political management or in political campaigns."<sup>111</sup> Justice Black argued strongly that the Court had proceeded under the wrong assumptions.<sup>112</sup> Certainly there exists the *potential* for corruption in the political process, Black conceded, but *anticipated* impropriety should hardly be the starting premise:

It is argued that it is in the interest of clean politics to suppress political activities of federal and state employees. It would hardly seem to be imperative to muzzle millions of citizens because some of them, if left their constitutional freedoms, might corrupt the political process. All political corruption is not traceable to state and federal employees. Therefore, it is possible that other groups may later be compelled to sacrifice their right to participate in political activities for the protection of the purity of the Government of which they are a part.

It may be true, as contended, that some higher employees, unless restrained, might coerce their subordinates or that government employees might use their official position to coerce other citizens. But is such a possibility of coercion of a subordinate by his employer limited to

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<sup>107</sup> 514 U.S. 334 (1995).

<sup>108</sup> *Id.* at 348 n.11 (quoting *New York v. Duryea*, 76 Misc. 2d 948, 966–67 (1974)).

<sup>109</sup> Recall, however, that Justice Scalia vigorously dissented from the majority in *McIntyre*, finding that the traditions and existing *practices* of the forty-nine states and federal government trumped the aspirational faith in the people's discerning faculties.

<sup>110</sup> 330 U.S. 75 (1947).

<sup>111</sup> *Id.* at 79 n.3 (internal citation omitted).

<sup>112</sup> *See id.* at 112–15 (Black, J., dissenting).

governmental employer-employee relationships? The same quality of argument would support a law to suppress the political freedom of all employees of private employers, and particularly of employers who borrow money or draw subsidies from the Government. . . . *It hardly seems consistent with our system of equal justice to all to suppress the political and speaking freedom of millions of good citizens because a few bad citizens might engage in coercion.*<sup>113</sup>

That is, while offenses are *possible* in the political system, the dictates and expectations of vigorous citizenship should be controlling in such cases. Punishing *all* for the potential crimes of *some*, in other words, was a backwards approach that misconceived the ultimate source of legitimate governmental authority.

It is this spirit of citizen-sovereignty that Justice Thomas has repeatedly espoused in electoral speech cases, but especially in campaign finance cases. In *Nixon v. Shrink Missouri Government PAC*, Justice Thomas lamented the majority's continued adherence to inconsistent and improper first principles.<sup>114</sup> By again accepting a restriction on political speech rights—in the form of limits on contributions to candidates for state office—the Court had rejected the standard of the free and self-governing individual that serves as the foundation for American democracy. The right to free speech, Thomas argued, “is a right held by each American, not by Americans en masse.”<sup>115</sup> To accept the notion that some candidates' free speech rights could be restricted, so long as others were still intact, “[flies] in the face of the premise of our political system—liberty vested in individual hands safeguards the functioning of our democracy.”<sup>116</sup> The Constitution, Thomas concluded, “leaves it entirely up to *citizens* and *candidates* to determine who shall speak, the means they will use, and the amount of speech sufficient to inform and persuade.”<sup>117</sup>

The assumptions and perceptions that the justices bring to these cases shape their understanding of the place and limits of freedom of speech in the electoral process. A vision of citizens engaged in the political process that is more inclined to pragmatically concede that the “bad man” will take advantage of speech liberties is obviously more inclined to support the state's proposed reform measures; but a set of beliefs and values that aspires to (and hopes for) the best—one that sees the glass as half full, rather than half empty—is more willing to stomach the occasional indiscretions of *some* for the greater good of *all*. This disposition not only promotes an abiding faith in the power of the individual to comprehend, digest, and evaluate political issues and situations, it also encourages faith in the capacity of American political *institutions* to fulfill their democratic mission.

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<sup>113</sup> *Id.* at 112–14 (emphasis added).

<sup>114</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 420 (2000) (Thomas, J., dissenting).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (emphasis added).

## 2. *The Process*

The aspirational method of reasoning and rhetoric posits that campaigns and elections can and do function as intended, so long as freedom and openness are preserved. This disposition is predicated on the assumptions about human nature explored above, but it extends these values, and this faith, to our electoral institutions and political practices. With free and open input, the people—evaluating candidates within campaigns and casting their votes in elections—can and do generally arrive at a desirable result; both the citizen and the political system can and do benefit, in other words,<sup>118</sup> from a regulatory approach that imagines our political practices in the best possible light, that trusts the electoral process to deliver optimal results, and that finds the electorate capable and rational.

This spirit is evident in the Court's treatment of cases pertaining to state restrictions on the amount and form of information—and the type and variety of speech—that reaches the voters. As we see the Court indicating in these cases, for the electorate to make wise and informed decisions, it must be able to consider speech and expression in its multiple forms. The First Amendment, as Justice Brennan reiterated in *Brown v. Hartlage*,

embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is simply not the function of government to 'select which issues are worth discussing or debating' in the course of a political campaign.<sup>119</sup>

Thus, while abuses may occasionally occur, the electoral process is still best served, and functions in its best capacity, when speech and expression are generally uninhibited.

Justice Stewart sounded this theme, demonstrating faith in the capacity of a free and open electoral process, in *Monitor Patriot Co. v. Roy*.<sup>120</sup> *Roy*, which extended the *New York Times v. Sullivan*<sup>121</sup> reasoning to candidates for political office, expressed aspirations typical of those that frame classic marketplace of ideas reasoning: campaigns and elections function at their best, and achieve their desired ends, when the voters have the most complete information. Thus, Stewart reasoned, "it is by no means easy to

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<sup>118</sup> "We have never insisted that the franchise be exercised without taint of individual benefit," the Court explained in *Brown v. Hartlage*, a case that determined that a candidate's promise to lower salaries if elected could not constitutionally be enforced as a violation of Kentucky's Corrupt Practices Act (prohibiting the offering of material benefits to voters). "[I]ndeed," Justice Brennan's majority opinion continued, "our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare." 456 U.S. 45, 56 (1982).

<sup>119</sup> *Id.* at 60 (internal citations omitted).

<sup>120</sup> 401 U.S. 265 (1971).

<sup>121</sup> Considered against the background of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," the *Sullivan* Court declared that public officials could not recover damages for a defamatory falsehood absent proof that the statement was made with "actual malice." 376 U.S. 254, 270, 279–80 (1964).

see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks.”<sup>122</sup>

In this spirit the Court optimistically claimed in *Citizens Against Rent Control v. Berkeley* that full disclosure, *by itself*, had the capacity to preserve the integrity of the electoral process.<sup>123</sup> Over a vociferous dissent from Justice White, the majority found unconstitutional the municipal limit of \$250 on contributions to committees formed to support or oppose ballot measures. As we will see in the discussion of the pragmatic method below, the dissent was concerned with the power of corporations and special interests to overwhelm the electoral process.<sup>124</sup> Yet, such concerns were unwarranted, the more aspirational majority concluded. The electoral system contains within it self-correcting qualities; therefore, deficiencies are addressed best by citizen-participants in the political process:

Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate’s committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure. . . . The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed.<sup>125</sup>

More recently, Justice Kennedy embraced this notion of openness in his concurrence in *Republican Party of Minnesota v. White*.<sup>126</sup> Recall that in this case the Court found unconstitutional Minnesota’s restriction on judicial campaign speech, finding that such limits deprived voters of important information as they evaluated the records and interests of candidates for judgeships. While the majority seemed to acknowledge that certain conflicts of interest attached to the unique situation of an “impartial” judge running for office and addressing controversial issues of public concern, Justice Kennedy’s concurrence underscored his faith in the voters and the self-regulating qualities of free exchange in the electoral process. “If Minnesota believes that certain sorts of candidate speech disclose flaws in the candidate’s credentials,” he wrote, “democracy and free speech are their own correctives. . . . Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts.”<sup>127</sup>

But while lofty aspirations urge us to accept that a free and open electoral process can and does work efficiently and appropriately, there is a more particular message expressed in several of the Court’s decisions: the notion that a broad range of speech and expression is deserving of protection and that information can and should come to the voters from an array of sources. In this spirit, Justice Powell, in *First National Bank of*

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<sup>122</sup> *Monitor Patriot Co.*, 401 U.S. at 275.

<sup>123</sup> 454 U.S. 290, 295–96 (1981).

<sup>124</sup> *See id.* at 305–06 (White, J., dissenting).

<sup>125</sup> *Id.* at 299–300.

<sup>126</sup> 536 U.S. 765 (2002).

<sup>127</sup> *Id.* at 795.



*Boston v. Bellotti*, found that the corporate voice, too, deserved a place in the free and open evaluation of matters of public concern.<sup>128</sup>

The Bank, in this case, wished to spend money in opposition to a referendum, but was barred from doing so by a Massachusetts criminal statute that prohibited various business entities from making expenditures of this sort when the public question did not “materially affect” them. In his decision, Powell expressed a notable faith in the referendum process *itself*, concluding that “[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.”<sup>129</sup> Corporate bodies, he explained, also have the right to “speak” for or against political proposals, because ultimately “the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.”<sup>130</sup> “They may consider,” he continued, “in making their judgment, the source and credibility of the advocate.”<sup>131</sup>

Justice Marshall demonstrated a similar faith in the electoral process in *Eu v. San Francisco County Democratic Central Committee*.<sup>132</sup> In this case, Marshall, writing for the majority, explained that parties, too, have essential First Amendment speech rights in political campaigns and elections. While the state has a legitimate interest in preventing corruption in the process, the Court found, it could not prohibit the governing boards of party committees from endorsing candidates in primary races. Abuse, deal-making, and other sordid activities were surely possible where parties were involved; but, Marshall made clear, a party could still be an essential contributor to the debate:

California’s ban on primary endorsements, however, prevents party governing bodies from stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought. This prohibition directly hampers the ability of a party to spread its message and hamstring voters seeking to inform themselves about the candidates and the campaign issues. . . . A “highly paternalistic approach” limiting what people may hear is generally suspect . . . but it is particularly egregious where the State censors the political speech a political party shares with its members.<sup>133</sup>

Marshall’s views illustrate the significance of the justices’ personal perceptions of, and biases toward, the various forms of speech in the electoral process. While he emphatically supported the rights of parties to communicate their messages in political campaigns,<sup>134</sup> he had a much different viewpoint, for example, when it came to the role of *corporate* participants in the electoral process—a tendency I will discuss more in Part

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<sup>128</sup> 435 U.S. 765 (1978).

<sup>129</sup> *Id.* at 790 (internal citations omitted).

<sup>130</sup> *Id.* at 791–92.

<sup>131</sup> *Id.*

<sup>132</sup> 489 U.S. 214 (1989).

<sup>133</sup> *Id.* at 223–24 (internal citations omitted).

<sup>134</sup> *See, e.g., Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting).

IV below. These same sorts of preferences and inclinations will be evident in our review of the pragmatic method.

#### D. THE PRAGMATIC METHOD

The pragmatic approach to electoral speech regulations, as I refer to it, is informed and inspired by this basic premise: human beings are, to be sure, not angels (and not always or entirely rational), and the process is susceptible to malfunction and abuse. Regulations, revisions, and reforms proposed by legislators (those who draw from their own experiences with and observations of the electoral process) are, therefore, required to preserve right-functioning campaigns and elections. Eschewing abstractions and aspirations in favor of experimentation and, arguably, a more “realistic”<sup>135</sup> perspective, those who employ the pragmatic method understand that individuals and institutions are easily corrupted, or at least confused,<sup>136</sup> and that “common sense”<sup>137</sup> should guide the Court’s consideration of these issues. State regulations, therefore, are essential to police the electoral process and to preserve the integrity of political institutions.

##### 1. *The People*

While not *all* individuals are lacking in rational capacity or are likely to abuse freedom of speech during campaigns and elections, the pragmatic method tends to concentrate on those who are; it is skeptical when confronted with aspirations advancing some romantic vision of political speech, and it is more inclined to find the state’s regulatory efforts to be reasonable and appropriate. While it supports the principle of an informed voting public, for example, it also anticipates trouble, reminding us that “[t]he First Amendment is not a shelter for the character assassinator.”<sup>138</sup> And, while acknowledging that free and open public fora certainly vitalize the electoral process by allowing the people to consider and evaluate competing claims, this method reasons that “simple common sense,” for example, demonstrates that a restricted zone around the polling place is necessary to prevent sinister speakers from casting a “taint of intimidation and fraud”<sup>139</sup> upon voting rights, and cautions that overuse or abuse of

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<sup>135</sup> In his majority opinion in *McConnell v. FEC*, Justice Souter made an appeal to “realism,” incrementalism, and at least the spirit of pragmatism as he explained, “We are under no illusion that B.C.R.A. will be the last Congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day.” 540 U.S. 93, 224 (2003).

<sup>136</sup> Professor James A. Gardner has stated it well: As the Court perceives it, in certain cases, when voters “venture into public to cast their votes . . . [they] become unsure, easily flummoxed, and susceptible to suggestion—in a word, incompetent.” James A. Gardner, *Neutralizing the Incompetent Voter: A Comment on Cook v. Gralike*, 1 ELECTION L.J. 49, 49 (2002).

<sup>137</sup> Criticizing Justice Kennedy’s “crabbed view of corruption,” Justice Souter averred that such narrow conceptions unwisely ignored “precedent, common sense, and the realities of political fundraising exposed by the record in this litigation.” *McConnell*, 540 U.S. at 152.

<sup>138</sup> *St. Amant v. Thompson*, 390 U.S. 727, 734 (1968) (Fortas, J., dissenting).

<sup>139</sup> *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

access also tends to subject citizens to “the blare of political propaganda.”<sup>140</sup>

Expressing a similar sentiment, Justice Scalia, dissenting in *McIntyre v. Ohio Elections Commission* (the pamphleteering case discussed above), saw the potential for serious problems if speakers were allowed to hide under the cover of a supposed right to anonymous speech. “I can imagine no reason,” Scalia wrote,

why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous letter. It facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity. . . . [T]o strike down the Ohio law in its general application—and similar laws of 49 other States and the Federal Government—on the ground that all anonymous communication is in our society traditionally sacrosanct, seems to me a distortion of the past that will lead to a coarsening of the future.<sup>141</sup>

This depiction could not differ more from Justice Stevens’ aspirational, even gushing, exaltation of the noble dissident speaker, the courageous advocate that instantiates our democratic ideals.<sup>142</sup> In Scalia’s rhetoric, we see not the virtuous potential of anonymous speech, but the likely *abuse* of this liberty; rather than being persuaded to accept the version of electoral speech that comes wrapped in the idealistic cover of principles and highest aspirations, we are admonished to reject such imagery in favor of more realistic concessions. On these opposing conceptions rest questions such as: Should freedom of speech in the electoral process be unfettered or carefully monitored? Should the Court start from lofty aspirations, or should it frankly admit to the potential for abuse and accede to state supervision of the process?

## 2. *The Process*

The central concern of the pragmatic method, however, is the vulnerability of the *institutions* of the electoral process itself. More than anything, this mode of reasoning and rhetoric echoes the state’s expressed concerns over the role of money in political campaigns—assuming that with contributions come certain expectations, for example—and it is animated by an overriding interest in preserving the integrity of electoral

<sup>140</sup> *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974).

<sup>141</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 385 (1995) (Scalia, J., dissenting) (internal citations omitted).

<sup>142</sup> As we will see in Part IV *infra*, these two often clash in their dispositions toward different *forms* of speech. In a recently decided door-to-door solicitation case, Justice Scalia scoffed at Justice Stevens’ excessively aspirational depiction of political dissidents who might be inclined not to speak *at all*, if they were required to register with town officials. Responding to Stevens’ assertion that these individuals were “patriotic citizens,” Scalia argued:

As for the Court’s fairytale category of “patriotic citizens,” who would rather be silenced than licensed in a manner that the Constitution (but for their “patriotic” objection) would permit: If our free-speech jurisprudence is to be determined by the predicted behavior of such crackpots, we are in a sorry state indeed.

*Watchtower Bible & Tract Soc’y of N. Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 171 (2002) (internal citations omitted).

institutions and promoting public confidence in government.<sup>143</sup> In this respect, the pragmatist shares the aspirationalist's concern for the future, yet the former finds the latter group to be either shockingly naïve or remarkably oblivious as to the *actual* workings of electoral politics. "In the trenches," the argument would go, politics is not pretty and thus supervision is necessary; accepting the potential for abuse, distortion, and corruption where certain speakers and forms of speech are implicated is necessary to preserve the integrity of our political process and institutions.

To see the degree to which such concerns influence the justices' decisions in these cases is to appreciate how important perceptions, assumptions, and appearances are in the evaluation of electoral speech legislation. Perhaps the most influential case to rely on suppositions and appearances of wrongdoing with respect to the role of money in politics (in this body of law and beyond) is *Buckley v. Valeo*.<sup>144</sup> In this paradigmatic case—wherein the per curiam majority rejected the expenditure limitations of the Federal Election Campaign Act ("FECA") (as amended in 1974), but found the contribution limitations to be constitutional—the pervasive cynicism of the day colored the Court's acceptance of the state interest in preventing both corruption and the appearance of corruption. "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders," the Court acknowledged,

the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one. Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.<sup>145</sup>

What this reasoning underscores is the fundamental skepticism at the heart of this method. Whereas the aspirationalist might be inclined to view contributions as an indication that a candidate and her supporters are committed to the same policies, or that money is the "voice" of the wealthy who lack the time to "speak" in a more conventional sense, the pragmatist arrives at the situation prepared to assume: 1) corruption is possible and/or likely once financial contributions pass a particular threshold, and, perhaps

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<sup>143</sup> Perhaps the most consistent practitioner of the pragmatic method, Justice Byron White explained in *Buckley v. Valeo* that the political process, in its current form, supported abuses of speech liberties and thus demanded reform to preserve the good name of political institutions:

It is also important to restore and maintain public confidence in federal elections. It is critical to obviate or dispel the impression that federal elections are purely and simply a function of money, that federal offices are bought and sold or that political races are preserved for those who have the facility—and the stomach—for doing whatever it takes to bring together those interests, groups, and individuals that can raise or contribute large fortunes in order to prevail at the polls.

424 U.S. 1, 265 (1976).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 26–27.

more importantly, 2) even if there is no evidence of *actual* corruption, most people are likely to *assume* some degree of impropriety and this fact, in and of itself—and regardless of its accuracy—gives rise to a legitimate state interest because it could discourage participation and trust in the political process.

Later campaign finance cases, building on the reasoning set forth in *Buckley*, have continued to rely on this central pragmatist premise and have consistently demonstrated how significant the justices' personal perceptions are to their evaluation of electoral speech legislation.<sup>146</sup> In a recent case balancing speech rights against the dangers of large amounts of money in the political process, *FEC v. Colorado Republican Federal Campaign Committee* (“Colorado II”), the Court expressed the same skeptical sentiment that framed the *Buckley* case.<sup>147</sup> While “independent” expenditure limits on party spending were ruled unconstitutional in “Colorado I,” this case involved expenditures by parties that were “coordinated” with particular candidates. Finding the limitations on such expenditures to be constitutional—because this type of “expenditure” was more akin to an evasive and indirect “contribution”—the five-member majority portrayed its pragmatic assessment of the workings of the political process. The fault in the argument that parties should not be held to such expenditure restrictions, the Court noted,

is not so much metaphysics as myopia, a refusal to see how the power of money *actually* works in the political structure.

When we look directly at a party's function in getting and spending money, it would ignore *reality* to think that the party role is adequately described by speaking generally of electing particular candidates. The money parties spend comes from contributors with their own personal interests.<sup>148</sup>

“What a realist would expect to occur has occurred,” the majority reiterated later in the decision: “Donors give to the party with the tacit understanding that the favored candidate will benefit.”<sup>149</sup> What this case indicates then is the frankness of the pragmatist's appeal to *intuition*—the reliance on assumptions, the understanding of the flaws and loopholes in the process, the expectation that most individuals will (or, at least, that most people *assume* they will) take advantage of the electoral process in such a way, and the willingness to accept reform measures in the form of state-imposed restrictions on speech and speakers of a certain kind.

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<sup>146</sup> Justice Souter made this abundantly clear during the oral argument in the *Shrink PAC* case:

I mean, I assume a couple of things are meant by appearance of corruption, and you know, tell me if I'm wrong. One has been mentioned, and that is, *I think most people assume—I do, certainly—that someone making an extraordinarily large contribution is going to get some kind of extraordinary return for it. I think that is a pervasive assumption.*

Transcript at 11, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (1999) (No. 98-963) (emphasis added).

<sup>147</sup> 533 U.S. 431 (2001).

<sup>148</sup> *Id.* at 450–51 (emphasis added).

<sup>149</sup> *Id.* at 458.

By pragmatic reasoning, the corporate voice, for example, tends to be an overpowering entity that threatens basic democratic principles—a bully with a bullhorn who dominates the process and drowns out the speech of regular citizens. Whereas an aspirational approach might be inclined to view corporations as legitimate participants in a larger public discussion—assuming that a healthy and pluralistic society can accommodate the input of *all* contributors—the pragmatic mode resists such a notion. Reflecting this skepticism, Justice White asserted in *First National Bank of Boston v. Bellotti*, that the electoral process is a special environment—the “essence of our democracy”—and an arena where the public has a heightened interest in preventing “corporate domination.”<sup>150</sup> Furthermore, he explained in *Citizens Against Rent Control v. Berkeley*, allowing corporate involvement (large financial contributions) in referendum measures may conceivably overshadow the efforts of individuals, discourage participation, and undermine public confidence—and these dangers may be recognized even without *causal* evidence of undue influence.<sup>151</sup> What is central here—and for the pragmatist method generally—is the expectation that if the process *can* be misused or abused, it quite often *will* be, and thus some “breathing space” should be accorded to Congress.<sup>152</sup>

But while pragmatic concessions might take seriously the concerns over “war chests”<sup>153</sup> that corporations are capable of amassing and steering toward an “unfair advantage in the political marketplace”<sup>154</sup>—as well as the obvious “distortion”<sup>155</sup> this can cause in the electoral arena—those inclined toward this perspective are concerned, as well, with other practices within the electoral process that tend to, or may *appear* to<sup>156</sup> encourage behavior that sullies the reputation of the institutions themselves. In *Republican Party of Minnesota v. White*, for example, the Court was bitterly split over the speech rights of judicial candidates for office.<sup>157</sup> While the majority aspired to a vision of the public as fully capable of evaluating judicial candidates’ comments, just as they would those of any other individual running for office, the pragmatic dissenters rejected this depiction. In another case, Justice Stevens emphasized the “critical difference between the work of the judge and the work of other public officials,”<sup>158</sup> and criticized the Court for failing to respect the tradition of “disinterestedness.”<sup>159</sup> Justice Ginsburg, however, emphasized the harm

<sup>150</sup> 435 U.S. 765, 802 (1978) (White, J., dissenting).

<sup>151</sup> 454 U.S. 290, 310 (1981).

<sup>152</sup> According to Professor Robert Post, this “space to breathe” is precisely what the Court granted Congress in upholding the Bipartisan Campaign Reform Act of 2002 (“BCRA”) in *McConnell v. FEC*. See Linda Greenhouse, *A Court Infused with Pragmatism*, N.Y. TIMES, Dec. 12, 2003, at A38.

<sup>153</sup> Fed. Election Comm’n v. National Conservative Political Action Comm., 470 U.S. 480, 501 (1985).

<sup>154</sup> Fed. Election Comm’n v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986).

<sup>155</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

<sup>156</sup> *U.S. Civil Serv. Comm’n. v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1972) (upholding restrictions on political involvement by federal employees) (“[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.”).

<sup>157</sup> See 536 U.S. 765 (2002).

<sup>158</sup> *Nat’l Ass’n of Letter Carriers*, 413 U.S. at 798 (Stevens, J., dissenting).

<sup>159</sup> *Id.* at 802.

that speech by these particular individuals would cause to the political process. Judges must fulfill a “magisterial role”<sup>160</sup> in our system, she argued, and are expected to remain above the partisan fray in the interest of preserving the legitimacy of the judiciary. More speech, in other words, is *not* always better, at least not when the uninhibited exchange of ideas and information in the electoral process might actually be *detrimental* to the institutions of our democracy.

#### IV. IMPLICATIONS

What this analysis of the Court’s methods of reasoning and rhetoric suggests is that four primary modes of assessment and argument can be found within the strange brew of influences (ingredients) that inform and accommodate the Court in its evaluation of electoral speech cases. But what are the broader implications of these findings? How does this enrich our understanding of the Court and its electoral speech jurisprudence? What I aver in this part is that understanding *how* the arguments were presented in these cases advances us toward a more comprehensive understanding of *why* particular results were reached. That is, once we see what the primary methods are, we can think in a more sophisticated way about why certain methods were employed above, or in conjunction with others. Why, for example, is history the guide, or justification, in certain cases, while empirical data is the directive in others? Why, in some cases, do jurists adopt a pragmatic posture, while others embrace a method that aspires to the best of people and the process? Moreover, what explains the inconsistent invocation of particular methods? That is, why might we see a fluctuation *between* various modes of argument? What can account for this variation in methodological approaches?

In this part I argue that by looking at the justices of the current Supreme Court, we can see interesting correlations between chosen methods of evaluation and argument and certain *forms* of speech. (See Figure 1 [following Part V] for the five major forms of speech implicated in this body of law.) That is, for certain justices, I contend that the method of reasoning employed depends in large part on the type of speech that is involved, making the particular form of speech perhaps the most significant causal factor. While some justices of the current Supreme Court consistently invoke a certain method, irrespective of the form of speech involved, others seem to allow the form to dictate the method. By sorting out the varieties of speech presented in these cases, and by correlating the methods of reasoning invoked to the forms of speech at stake, we see interesting patterns emerge. (See Figure 2 [following Part V] for a diagram connecting the four methods of reasoning and rhetoric to the five forms of speech represented in this study for each of the justices of the current Supreme Court.)

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<sup>160</sup> *Id.* at 807 (Ginsburg, J., dissenting).

What these correlations suggest is that certain justices show aspirational inclinations when their preferred speech forms are in question, while making pragmatic concessions when disfavored or otherwise suspect forms of speech are under review. Consider Justice Stevens, for example. We can see that, by and large, he adheres to aspirational reasoning when “activists” and “candidates” are the speakers in question, and by contrast shows pragmatic caution when “money” is the manner of speech involved. Justice Stevens’ jurisprudence evinces what might be called a commitment to “citizen”-oriented speech—that is, expression carried out by political activists and candidates for office—suggesting a vision of politics that seeks to deemphasize some outlets of expression (money) while promoting more conventional, interactive varieties of political communication such as leafleting, petitioning, and polling place persuasion. We see, in other words, a commitment to forms of speech that might afford the proverbial “little guy” an opportunity to compete in the speech marketplace.

Chief Justice Rehnquist, for purposes of comparison, generally assumes the pragmatic method when candidates’ and activists’ speech rights are implicated—willing to accept the state’s concerns regarding “bad apples” in the political process—while adopting an aspirational perspective when money (though not corporate money) is the form of speech at hand. Justices Thomas and Kennedy are entirely aspirational in their approach, *not once* invoking what I refer to as the pragmatic mode of reasoning, and rarely rejecting a speaker’s claim at all. These justices seem committed to the aspirational method first and foremost, averring that virtually *all* forms of speech deserve protection in the electoral marketplace. Justice Scalia is nearly always as aspirational and allowing of an open marketplace as Justices Kennedy and Thomas, though these aspirations were trumped by his appeal to the historical method of evaluation in his dissent in *McIntyre* (a dissent that also involved vigorously pragmatic concessions) and his concurrence in *Burson*.

Justices Breyer and Ginsburg, in their electoral speech jurisprudence, show that they are much more inclined toward the pragmatic method across the board, though particularly when money is the form of speech seeking protection. Justice Ginsburg’s reasoning and rulings suggest speech preferences reminiscent of Justice Stevens’ interest in citizen-oriented speech, though Justice Breyer seems more committed to pragmatic evaluation as a method of review for virtually all forms of speech. And Justice O’Connor—consistent with her reputation among followers of the Court—does not show clear methodological preferences, though in three recent cases she has been pragmatic when money is the form of speech in question.<sup>161</sup>

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<sup>161</sup> It is interesting as well to consider the relationship between the various modes of reasoning and rhetoric. While we cannot pretend to know the exact causal sequence or connection between influences in this strange brew, we can see some interesting associations linking the various methods. In the context of campaign finance, for example, we see that justices invoking the aspirational and pragmatic methods generally also employ the empirical method to reach their conclusions. In four recent cases (*Colorado I*, *Shrink PAC*, *Colorado II*, and *McConnell*), justices on both sides of the debate have appealed to data, suggesting that a preference for—or resistance to—money as a form of speech lead



A preference for particular *forms* of speech and a consistent application of a particular *method* (i.e. an aspirational approach) suggest that electoral speech is more complex and nuanced than is sometimes acknowledged in academic studies. The values, insights, and assumptions that provide the analytical and argumentative structure for decisionmaking in this context go beyond the traditional, dichotomous “liberal” vs. “conservative” framework that is a staple of scholarship on judicial behavior and to some extent conventional and/or popular wisdom.<sup>162</sup> Indeed, those justices that we might call the most conservative by traditional measures (Thomas, Scalia, and Kennedy) are actually the most consistent advocates of aspirational reasoning where electoral speech is concerned.<sup>163</sup> Chief Justice Rehnquist, to be sure, is more consistently a pragmatist, though even he shows a committed aspirational outlook on certain (non-corporate and non-legacy-threatening<sup>164</sup>) campaign finance questions. Furthermore, by looking at the recently decided *McConnell* case, we can see that the justices’ votes do not even correspond to the anticipated partisan advantages stemming from the Bipartisan Campaign Reform Act (“BCRA”). To the contrary, the liberals on the Court were—in a pragmatic mode—committed to preserving “reform” legislation that most analysts see as more detrimental to the fundraising efforts of the Democratic Party; meanwhile, the conservatives on the Court were—in an aspirational mode—eager to relieve political actors of such unnecessary state supervision of the electoral marketplace, even though the Republican Party stood to benefit from *upholding* the legislation. What such an example confirms, and what we can draw from our larger study, is that the outcomes in these cases transcend mere ideology or partisanship and speak instead to competing understandings of political life itself, the right-functioning of our polity, and the proper role for the Court to play in structuring the electoral process.<sup>165</sup>

## V. CONCLUSION

Accepting Justice Cardozo’s invitation, this study began as an investigation of the various “sources of information” that offer guidance to the justices as they review electoral speech cases. What are the primary

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the justices to mobilize an empirical argument to justify their preexisting or aspirational or pragmatic dispositions. Or, it could be that a survey of the available social science evidence on the relationship between donors and candidates, for example, played an important role in structuring or otherwise encouraging this disposition. We cannot, unfortunately, know whether the data influenced the disposition or whether the disposition drove the justices to the data.

<sup>162</sup> Segal and Spaeth’s “attitude”-oriented analysis is the most prominent example of this approach to Supreme Court decisionmaking. See generally SEGAL & SPAETH, *ATTITUDINAL MODEL*, *supra* note 10; and SEGAL & SPAETH, *ATTITUDINAL MODEL REVISITED*, *supra* note 10.

<sup>163</sup> See *infra* Fig. 2.

<sup>164</sup> Chief Justice Rehnquist’s upholding of the state contribution limits in *Shrink PAC*—limits pegged to those deemed constitutional in *Buckley*—could be interpreted as part of his effort to cultivate his legacy as Chief Justice, in much the same way that he upheld the principles of *Miranda v. Arizona*, 384 U.S. 436 (1966) against challenge in *Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>165</sup> On the various theories of politics that can be found within the Court’s treatment of election law questions, see Daniel Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS*, 245–266 (David K. Ryden, ed., 2000).

influences, approaches, and methods (ingredients) that comprise this “strange brew”? Furthermore, what is the significance of these elements? How do they react with one another? And how do they ultimately influence the Court’s resolution of these questions? What we have seen is that four primary modes of reasoning and rhetoric structure the Court’s electoral speech rulings; but what we have also seen is that we must consider *forms* of speech—and the correlation and interplay between the two—in order to truly appreciate the complexity of the Court’s electoral speech jurisprudence and in order to enjoy the predictive power that attaches to this more comprehensive evaluation of freedom of speech in the electoral process.

## FIGURE 1: FORMS OF SPEECH

The thirty-seven cases considered in this Article may involve five primary forms of speech:

**1. Activism**

State restrictions on the speech and expressive practices of activists and various political advocates

*United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947)  
*United States v. Congress of Industrial Organizations*, 335 U.S. 106 (1948)  
*United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973)  
*Greer v. Spock*, 424 U.S. 828 (1976)  
*Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976)  
*Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)  
*Meyer v. Grant*, 486 U.S. 414 (1988)  
*Burson v. Freeman*, 504 U.S. 191 (1992)  
*McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)  
*Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999)

**2. Money**

State restrictions on the financing of campaigns, candidates, or causes, including both limits and disclosure/reporting requirements and as applied generally, to parties, corporations, and political organizations

*United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 353 U.S. 943 (1957)  
*Buckley v. Valeo*, 424 U.S. 1 (1976)  
*First National Bank v. Bellotti*, 435 U.S. 765 (1978)  
*Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981)  
*California Medical Association v. FEC*, 449 U.S. 817 (1980)  
*Common Cause v. Schmitt*, 455 U.S. 129 (1982)  
*FEC v. National Right to Work Committee*, 459 U.S. 197 (1982)

*FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986)  
*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)  
*Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996)  
*Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000)  
*FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001)  
*FEC v. Beaumont*, 539 U.S. 146 (2003)  
*McConnell v. FEC*, 540 U.S. 93 (2003)

### **3. Candidates**

State restrictions on the speech of candidates for office, or cases involving the communication of a candidate's message

*St. Amant v. Thompson*, 390 U.S. 727 (1968)  
*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)  
*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)  
*CBS, Inc. v. FCC*, 453 U.S. 367 (1981)  
*Brown v. Hartlage*, 456 U.S. 45 (1982)  
*Arkansas Educational Television Commission v. Ralph P. Forbes*, 536 U.S. 666 (1998)  
*Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)

### **4. Newspapers**

State restrictions on the speech rights of newspapers

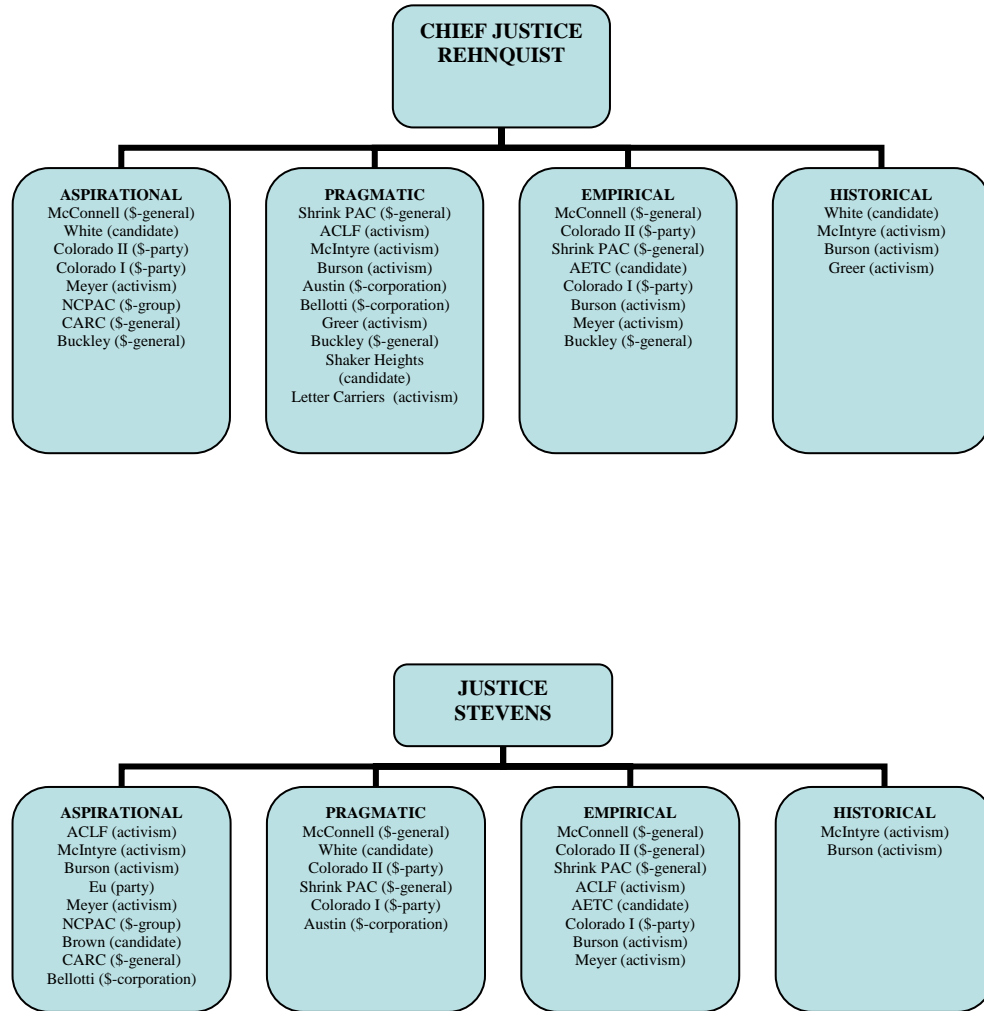
*Mills v. Alabama*, 384 U.S. 214 (1966)  
*Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971)

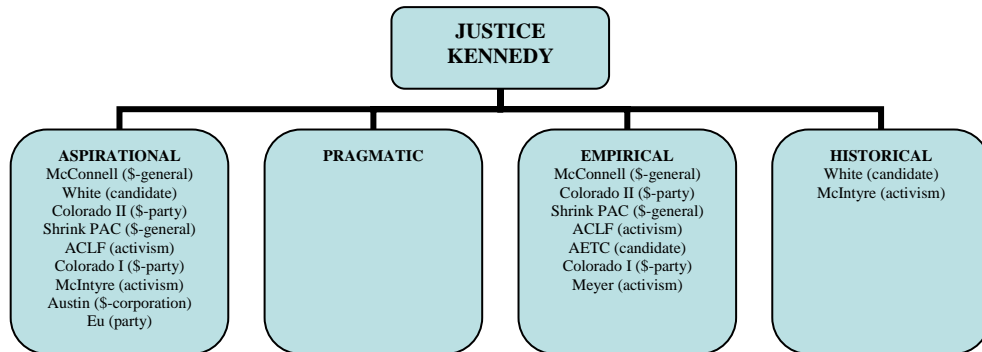
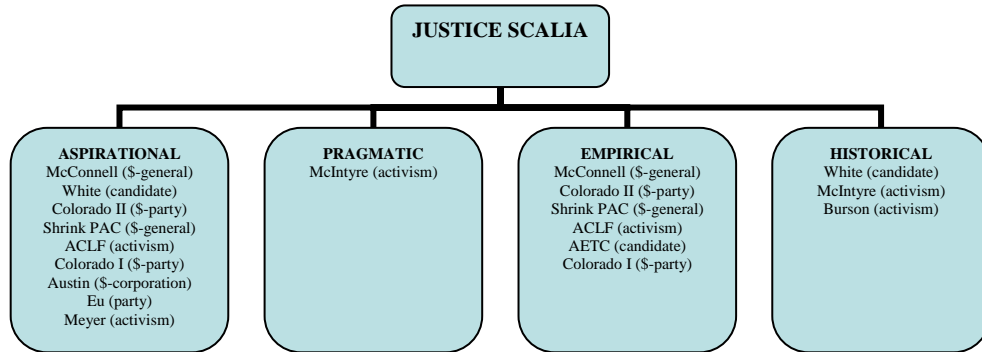
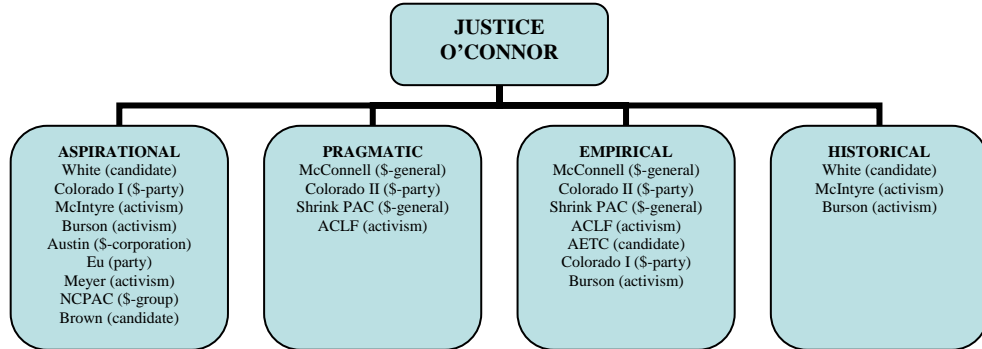
### **5. Parties**

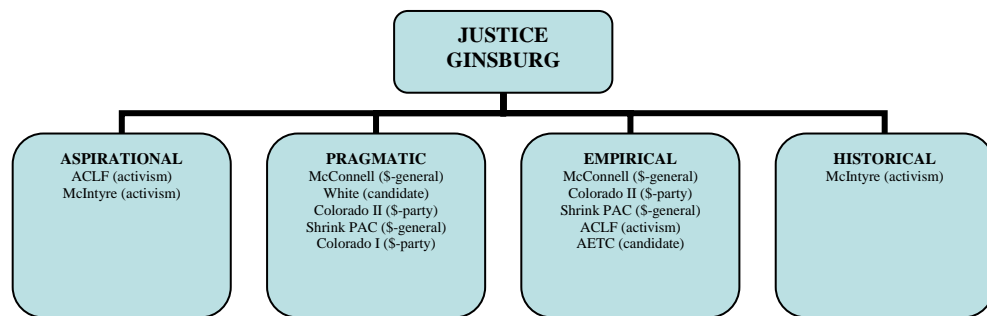
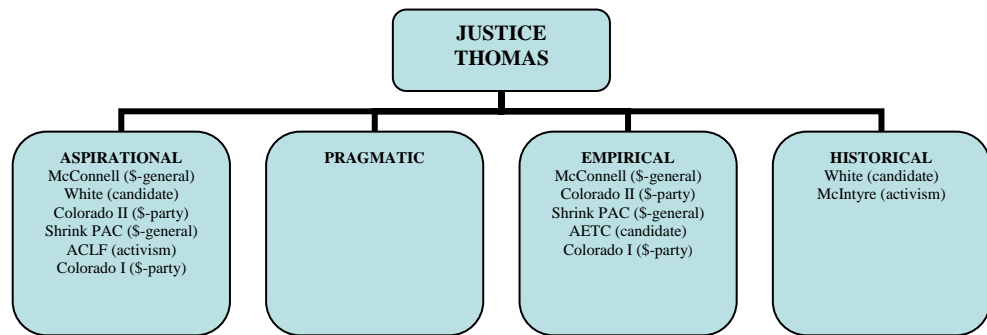
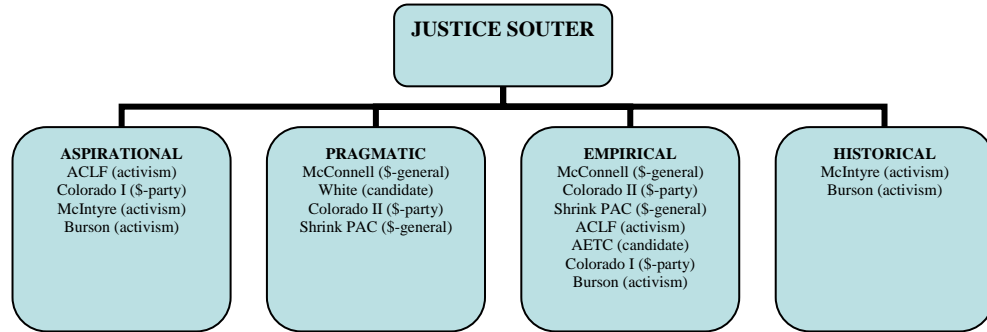
State restrictions on the speech rights of political parties

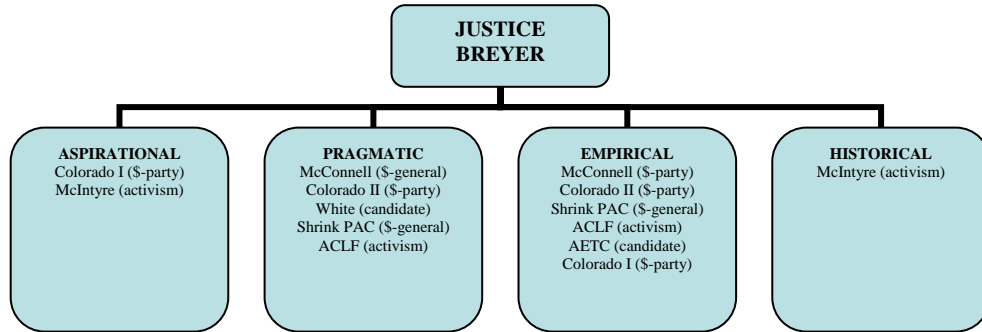
*Eu v. San Francisco Cty. Democratic Central Committee* (1989)  
*Renne v. Geary*, 501 U.S. 312 (1991)

FIGURE 2: THE METHOD / FORM CORRELATION











## APPENDIX 1: U.S. SUPREME COURT ELECTORAL SPEECH CASES

- United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947)  
*United States v. Congress of Industrial Organizations*, 335 U.S. 106 (1948)  
*United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 353 U.S. 943 (1957)  
*Mills v. Alabama*, 384 U.S. 214 (1966)  
*St. Amant v. Thompson*, 390 U.S. 727 (1968)  
*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)  
*Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971)  
*Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971)  
*United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973)  
*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)  
*Buckley v. Valeo*, 424 U.S. 1 (1976)  
*Greer v. Spock*, 424 U.S. 828 (1976)  
*Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976)  
*First National Bank v. Bellotti*, 435 U.S. 765 (1978)  
*Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981)  
*California Medical Association v. FEC*, 449 U.S. 817 (1981)  
*CBS, Inc. v. FCC*, 453 U.S. 367 (1981)  
*Common Cause v. Schmitt*, 455 U.S. 129 (1982)  
*FEC v. National Right to Work Committee*, 459 U.S. 197 (1982)  
*Brown v. Hartlage*, 456 U.S. 45 (1982)  
*Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)  
*FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985)  
*FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986)  
*Meyer v. Grant*, 486 U.S. 414 (1988)  
*Eu v. San Francisco Cty. Democratic Central Committee*, 489 U.S. 214 (1989)  
*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)  
*Renne v. Geary*, 501 U.S. 312 (1991)  
*Burson v. Freeman*, 504 U.S. 191 (1992)  
*McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)  
*Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996)

*Arkansas Educational Television Commission v. Ralph P. Forbes*, 523 U.S. 666 (1998)

*Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999)

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

*FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001)

*Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)

*Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003)

*McConnell v. FEC*, 540 U.S. 93 (2003)