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[1]

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[2] 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[3] of reasoning and rhetoric, employed by the

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[1] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921).

[2] *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.*

[3] 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),[4] 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"[5] 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,[6] and Pragmatic[7]) 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*[8] (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).

[4] A list of the cases considered can be found in Appendix 1 *infra*.

[5] CARDOZO, *supra* note 1, at 10.

[6] 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).

[7] 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.

[8] *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.[9]

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.[10] 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.[11] That said, we should be careful as well not to dismiss the role and significance of doctrine, legal norms, and institutional constraints.[12] 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.[13] While space constraints and the Court's manner of

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[9] *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).

[10] 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].

[11] 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.

[12] 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).

[13] 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.

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.[21] 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.[22] 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.[23] 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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[21] 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.

[22] 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).

[23] 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."[24] "That conception," the Court noted, "develops from practice, history, and changing educational, social and economic conditions."[25]

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.[26] 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."[27] 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.[28]

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.[29] 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.[30] In its defense, the State presented an array of evidence demonstrating its compelling interest in preventing electoral fraud and intimidation at the polls,[31] 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.[32] 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.[33] Specifically, Blackmun appeared to be most influenced by scholars' vivid accounts of electoral abuses from the distant

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[24] United Pub. Workers of America v. Mitchell, 330 U.S. 75, 102 (1947).
[25] *Id.*
[26] 424 U.S. 828, 841 (1976) (Burger, J., concurring).
[27] *Id.* Justice Powell expressed similar thoughts. *See id.* at 847 (Powell, J., concurring).
[28] 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."
[29] 504 U.S. 191, 211 (1992).
[30] *See id.* at 194.
[31] *See id.* at 198–99.
[32] *See id.* at 198.
[33] *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.[34]

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.[35] 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.[36] 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.[37]

One of the more interesting elements of this decision is that while Blackmun, like Justice Scalia,[38] 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.[39]

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."[40] While speech by anonymous sources—in this case, an anonymous leaflet distributed at a school board meeting[41]—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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[34] *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.

[35] *See id.* at 205–06.

[36] *See id.*

[37] *Id.* at 206.

[38] *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.*

[39] *See id.* at 200–06.

[40] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting).

[41] *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."[42] 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.[43] 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."[44]

Scalia relied on the same method, though he pursued it to a different end, in *Republican Party of Minnesota v. White*.[45] 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."[46] Indeed, he explained, "[a]t the time of the founding, only Vermont (before it became a State) selected any of its judges by election."[47] 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."[48] 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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[42] *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.

[43] 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.

[44] *Id.*

[45] 536 U.S. 765 (2002).

[46] *Id.* at 785.

[47] *Id.*

[48] *Id.*

broad precepts, themes, and values that underwrite American democracy.[49] 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."[50] 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.[51] 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.[52]

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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[49] 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).

[50] 424 U.S. 828, 856 (1976) (Brennan, J.,dissenting).

[51] 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.

[52] *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.[53]

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.[54]

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.[55] 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.[56] 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."[57] "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.[58]

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[53] 504 U.S. at 220–22 (Stevens, J., dissenting).
[54] *See id.* at 228.
[55] *See, e.g., McIntyre*, 514 U.S. at 370 (Thomas, J., concurring) (stressing an original understanding that anonymous political speech would be protected).
[56] *See id.* at 342 (noting the frequency and value of anonymous or pseudonymous literature).
[57] *Id.* at 357.
[58] *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.[59] 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.[60] 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,"[61] 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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[59] 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).

[60] 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).

[61] *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.[62]

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.[63] 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.[64]

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:[65]

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.[66] Modeled after those found constitutional in the

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[62] *Id.* at 276.
[63] *See* SHAPIRO, *supra* note 11, at 248–50.
[64] *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).
[65] 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.
[66] 528 U.S. 377 (2000).

paradigmatic campaign finance case *Buckley v. Valeo*,[67] 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.[68] 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."[69] The *Buckley* case had previously established the fact that the "appearance of corruption" was a compelling state interest.[70]

Thus, Souter reasoned, the state of Missouri was justified in its efforts to address what it *presumed* were the cynical perceptions of the public.[71] 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.[72] 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.[73]

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.[74] Where, for example, was the proof of any *actual* harm to the political process? Where was the actual *proof* of "corruption"?[75] 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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[67] 424 U.S. 1 (1976).
[68] *See Shrink*, 528 U.S. at 391.
[69] *Id.*
[70] 424 U.S. at 45.
[71] *See Shrink*, 528 U.S. at 390–95.
[72] *See id.* at 405–30 (Kennedy, J. & Thomas, J., dissenting in separate opinions).
[73] *See id.* at 393–95.
[74] *See id.* at 419.
[75] 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."[76] 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.[77]

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.[78] 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.[79]

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."[80] 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."[81] 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.[82] 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.[83] Still, a unanimous U.S. Supreme Court found the

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[76] *Shrink*, 528 U.S. at 427.
[77] *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").
[78] 486 U.S. 414 (1988).
[79] 525 U.S. 182 (1999).
[80] *Meyer*, 486 U.S. at 425.
[81] *Id. at* 426.
[82] *See* Grant v. Meyer, 741 F.2d 1210, 1213 (10th Cir. Colo. 1984).
[83] 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.[84]

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.[85]

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.[86] 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.[87] 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.

[84] *Id.* at 425.

[85] 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).

[86] 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").

[87] 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.[88] 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."[89] 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."[90]

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.[91] 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%.[92] 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."[93]

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.[94] 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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[88] *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.
[89] *Ark. Educ. Television Comm'n*, 523 U.S. at 681.
[90] *Id.*
[91] *See id.* at 684 (Stevens, J., dissenting).
[92] *See id.* at 685.
[93] *Id.* at 692 (emphasis added).
[94] 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.[95]

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 jurisprudes 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,[96] 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.[97]

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[95] *Id.* at 208.

[96] See *supra* note 10 for a review of the major studies of judicial behavior.

[97] 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