Campaign Expenditures and Free Speech

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From the beginning, criticism of the 1976 Buckley v. Valeo1 decision striking down a regulation of campaign expenditures was intense and had only mounted ever since. Now, a critical view of campaign spending "has become mainstream orthodoxy"2 and probably dominates among constitutional law academics.3

The Buckley decision upheld various campaign contribution regulations. In assessing the argument that the regulations were justified as a means to control the potential for appearance and absence of corruption, the Court admitted that these regulations "only entail[ed] a marginal restriction upon the contributor's ability to engage in free communications"4 because contribution limits did not prevent anyone from spending as much as she wished on her own speech. The Court, however, was unconvinced that the anti-corruption rationale justified the Federal Election Campaign Act of 1971's regulation of campaign expenditures. Viewing the limitations on expenditures as "substantial ... restraints on the quantity and diversity of political speech,"5 the Court rejected other offered rationales in support of these regulations. Instead it asserted that "restrict[ion] of speech by some elements of our society" to equalize people's influence on the outcome of elections was "wholly foreign to the First Amendment"6 and that "people [not the government] ... must retain control of the quantity and range of debate on public issues in a political campaign."7

The usual criticism of Buckley follows a standard form the Court gave the wrong answers to the First Amendment questions that it (and its critics) thought the regulation posed.8 Specifically, critics claim that the

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3See, e.g., Leslie Wayne, Scholarly Ask Court to Backtrack Subsidizing Elections on Political Spending, N.Y. Times, Nov. 10, 1996, §1, at 36 (describing efforts led by Ronald Dworkin, Bruce Ackerman, and John DiSi to convince the Supreme Court to overrule Buckley).
4 Buckley, 444 U.S. at 20-21.
5Id. at 19.
6Id. at 45-46. See also id. at 54, 56.
7Id. at 57.
8See, e.g., Ronald Dworkin, The Curse of American Politics, N.Y. Rev. of Books,
Court was wrong to assert that use of money for expressive purposes should be protected as speech under the First Amendment; the Court of Appeals had treated this use of money as conduct. They also argue that the Court was wrong that the goal of equality cannot, as a general matter, justify limits on the expressive liberty of some in order to equalize overall expressive opportunities or to equalize the expressive power of different people.

This Article agrees that Buckley was wrong, but it does not join the critics in claiming that the Court gave the wrong answers to the right questions. Rather, I claim that the Court, and usually its critics, asked the wrong questions—wrong both in a normative or theoretical sense and, equally important, wrong given the Court’s own precedents. To see the flaws in the questions posed by the Court, however, requires a virtual paradigm shift from traditional First Amendment academic discussions.

Any dramatic shift from as accepted approach will meet resistance, but I ask the reader to have patience. At least initially, most will find aspects of my thesis very problematic, if not just plain wrong. The bulk of this Article will attempt to convince readers that, on reflection, they (and legal precedent) in fact agree with my claims.

The thesis begins with two premises. First, "institutionally bound" speech normally and property only receives protection consistent with the institution of which it is a part. For example, legislative debates, committee hearings, judicial proceedings, and agency proceedings are contexts where political speech occurs within legally structured or institutionally bound parts of government. In each of these realms, explicitly political and fully protected speech is often subject to severe limits, justified by the goal of making the particular institutional element of government better perform its democratic and governing functions.

OCT 17, 1996, at 10. But of Vincent Blatt, Free Speech and the Whimby Cype of Fund Yielding: Why Campaign Spending Limits May Not Violate the First Amendment After All, 54 COLUM. L. REV. 1241 (1994) (arguing that issues that the Court did not consider justify a different result).

1See Buckley, 424 U.S. at 16. On this point, the Court both said that it had "never suggested but the dependence of communication on the expenditure of money operates itself to introduce a component element." Id. at 16, and, even if it did, the limitations "would not meet the C'Boles test because the government interests . . . involve 'suppressing communications.'" Id. at 73.


11Previously, marginalizing the state only on the terms of the standard debate, I have of least implicitly approved of the decision in Buckley to allow down expenditure limits, see, e.g., C. Edwin Baker, HUMAN LIBERTY AND FREEDOM OF SPEECH 41-42, 253 (1969).

12Within this analysis, the notion of institution or institutionally bound must not be too expansive, see infra text accompanying notes 95-96, and the institutional boundaries must be properly drawn. Properly drawn the boundaries of the institutionally bound electoral realm will be a crucial but containable aspect of the argument of this Article.
Second, elections are part of a formal, legally structured realm of the governmental apparatus. Campaign speech is a central part of this electoral realm. For this reason, campaign speech must be distinguished from the much broader category of political speech or speech about public issues. At most, campaign speech is an institutionally bound subcategory of political speech. From these two premises, I argue that much legislation regulating campaign finance and campaign expenditures is constitutionally acceptable. Regulations are justified as long as they aim at increasing the democratic quality of the institutionalized process of choosing public officials or making binding legal decisions.

Parts II and III develop these two central claims. Part II discusses institutionally bound speech in general. Part III, the heart of the Article to which some readers may want to skip immediately, argues that electoral speech is often seen and should be seen as institutionally bound and, as such, should be subject to regulation to advance the fairness of elections. The crucial, reasonably contestable part of this argument is treating electoral speech as an integral part of the institutionally bound electoral process rather than viewing political campaigns as part of the broader, generally unregulatable realm of political debate and discussion, the view implicitly adopted in Buckley. There is no unanswerable argument for either conclusion. Still, both the country's actual practices and normative theory can be examined for guidance. After describing this institutionally bound conception of electoral campaigns, Part III.B argues that, except for in Buckley and its progeny, the Court, as well as the legal order as a whole, has generally treated campaigns as part of the institutionalized electoral process rather than as belonging to the broader realm of unregulated political speech. Part III.C suggests that this treatment fits with the most appealing democratic theory of elections. The persuasiveness of this vision must stand on its own—both as normatively appealing and as adequately conforming to widely accepted premises. Parts III.B and III.C describe the approach's appeal and show its doctrinal grounding. Nevertheless, Part III.D provides additional support, elaborating on this notion of democracy through the ideas of Jurgen Habermas, a major twentieth-century philosopher. Thus, I argue that both democratic theory and judicial precedent better support the first characterization of electoral speech and, thereby, undermine Buckley's holding.

The last two sections initiate some important housekeeping. A candidate and, possibly, political parties purposefully enter into the institutionalized electoral realm to gain a chance of achieving the rewards offered by that institution, especially electoral victory. It is less clear how one should think of independent political actors who are not running for electoral office. Part IV offers a preliminary evaluation of this difficult issue of "independent expenditures" in the campaign context. Finally, the First Amendment often protects institutionally bound speech; it only al-
The Court produces results that are at least curious under existing doctrine in three campaign-related areas: content discrimination against electoral speech, conditions imposed on the receipt of governmental campaign funds, and limitation of freedom of association in choosing electoral candidates. Interestingly, these anomalies have gone virtually unremarked in the legal literature—a fact that, I believe, has lent unobserved support for the Buckley analysis. I highlight these oddities in First Amendment holdings as evidence that, within the electoral sphere, doctrinal re-conceptualization is necessary. Although these results can be rationalized within existing doctrine, each puzzle more easily dissolves if one accepts this Article’s rejection of the Buckley holding. Thus, although somewhat tangential to the main argument, these puzzles motivate and implicitly support my First Amendment analysis.

A. Content Discrimination and Campaign Speech

"Political speech, the Court has often noted, is at the core of the First Amendment. 13 Whether that proposition about the First Amendment is accepted, political speech is surely at the core of democracy. 14 Therefore, one might expect that political speech will be specially favored in constitutional adjudication. However, that conclusion is in tension with a second line of authority. Content discrimination is arguably the worst sin under the First Amendment. The Court tells us that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters." 15 "Even though political speech is entitled to the fullest possible measure of constitutional prote-

14 See, e.g., Chief Justice Burger’s observation that “the maintenance of an opportunity for free political discussion is the end that government may be responsible to the will of the people... is a fundamental principle of our constitutional system.” Strauder v. California, 338 U.S. 297, 309 (1951).
there are a host of other communications that command the same respect." The Court continued: "To create an exception for . . . political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination." Foundational cases establishing the prohibition on content discrimination teach that the government cannot treat political speech as special. Any regulation distinguishing campaign speech from other speech should be unconstitutional—or, at least, should be upheld unless it survives a very strict scrutiny.

Combining these two premises is difficult. With only a little slippage, however, they might be reinforcing: all content discrimination is presumptively bad but content discrimination that disfavors political speech is especially bad, requiring the strictest of strict scrutiny. And the facts? Actual case law turns out to be the reverse. The government engages in content discrimination against electoral speech if the speaker is a commercial broadcaster, a public broadcaster, a corporation, a government employee, a local government, and a member of Congress.

17 Id. at 816 (rejecting the argument that Los Angeles should exempt campaign posters from its prohibition on attaching posters to structures such as utility poles).
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[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . . To permit the continued building of our politics and culture, and to assure self-government for each individual, one person are guaranteed the right to express any thought, free from government censorship.

Police Dept v. Mosley, 408 U.S. 92, 95-96 (1972) (emphasis added) (citations omitted). See Abram v. Detroit Bd. of Educ., 413 U.S. 250, 251 n.28 (1977) (collecting cases rejecting use of political-affiliation distinction); see also Barker, supra note 11, 13-23-27 (critiquing the political speech theory of the First Amendment and giving a pragmatic explication of the disavowal of political speech as being special or "core").

But see Simon & Schuster v. N.Y. State Crime Victims Bd., 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring) (powerfully critiquing this usage of strict scrutiny and rejecting the compelling state interest test when the content of non-core speech is the only issue).

A broadcaster must, among other special-campaign-oriented rules, make available his station for use by candidates and the amount she can charge for this use is limited. See, e.g., 47 U.S.C. §§ 315(c)(3), 315(b) (1994).

Although the ban on editorializing by public broadcasters that receive federal funds was struck down in FCC v. League of Women Voters, 468 U.S. 364 (1984), the separate ban on public broadcasting stations endorsing candidates, whether or not the station received federal funds, see 47 U.S.C. § 399 (1984), was not challenged in League of Women Voters.

21See Anderson v. City of Boston, 500 N.E.2d 628 (Mass. 1978) (municipal corpor-
...not had a constitutional right to engage in electoral speech, appeal discredited, 439 U.S. 1060 (1979); see also Sturt v. Illinois, 499 F.2d 164 (7th Cir. 1974) (disallowing limits on local governments' attempts to influence their voters' decisions in good faith and contrasting it to their attempts to hobby elect officials at other levels of government). There is no temptation to cite Lehman v. City of Shaker Heights, 461 U.S. 291 (1974), for the proposition that local governments are also allowed to discriminate against political speech in their policies about taking ads for placement on public property—in particular, on the outside of buses. However, five members of that Court, Justice Douglas and the four dissenters, did not approve content discrimination here.

1 Although abuse is recognized, members of Congress are forbidden from using the franking privilege for "mail matter which specifically solicits political support for the sender or any other person or any political party," 39 U.S.C. § 3310(a)(3)(C) (1994), and see forbidden use of the frank for a certain number of days before an election or primary. See 39 U.S.C. § 3310a(b)(3)(A) (1994).

2 Organizations described under 26 U.S.C. § 501(c)(3) (1994) ("501(c)(3) organizations"), contributions to which are tax deductible for the contributors, must not devote a substantial part of their activities to attempting to influence legislation or to participating in electoral campaigns. See Regan v. Taxation with Representation, 461 U.S. 540 (1983). Similarly, organizations permitted to participate in the federal workers charity fundfolding drive are limited to those that do not "attempt to influence the outcome of political elections or the determination of public policy." Cornellius v. NAACP Legal Defense & Edu. Fund, 480 U.S. 752, 766 (1985).


4 See Greer v. Spock, 424 U.S. 472 (1976). Although the Court did not rely on the distinction, it is interesting that in an earlier case in which the Court reached arguably the opposite conclusion and proscribed the speaker on the military base, the speaker's political speech was not related to a partisan election. See花费 v. United States, 467 U.S. 197 (1984).

5 Most of a group of First Amendment scholars (except me) seemed to find it odd or troublesome when Robert M. O'Connell reported at the First Amendment Scholars Conference that, after the Court held a restriction on funding religious publications out of a student activities fund used to fund various publications by student groups was unconstitutional viewpoint discrimination, Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819 (1995), Virginia responded by eliminating all discrimination against any student publication except for discrimination against partisan political publications. First Amend. Scholars Conference, Washington, D.C. (Nov. 17, 1995).

6 I do not claim that most of these decisions cannot be reconciled within existing doctrine—may come from doctrinal corners that judicial officials—nor do I claim that they were all properly decided. What they do show, however, and what is odd, is the frequency with which the law finds it necessary to pick out electorally oriented political speech for special regulation.
Of course, these examples certainly do not mean that election-oriented speech does not receive constitutional protection. For instance, the state cannot prevent a newspaper from publishing its campaign endorsements on election day, \textsuperscript{25} restrict a candidate in the promises he makes, \textsuperscript{26} or prohibit people from anonymous political leafleting. \textsuperscript{27} This analysis would discuss a proper role for constitutional protection of election-oriented speech in Part V. The point here, however, is that legislatures impose and courts uphold an extraordinary amount of regulation of campaign speech. The regulation of broadcasting illustrates this practice of treating campaign speech as special. Here, content discrimination in relation to campaign speech is rife. The content discrimination advantages some campaign speech even as compared to other political speech. Unlike issue-oriented advocates, \textsuperscript{28} candidates have a right of access to the station's airwaves for their advertising, or at least they do once the campaign has started. \textsuperscript{29} They have a right to have speech favoring another candidate or opposing their candidacy answered on a basis of equality of opportunities. \textsuperscript{30} Moreover, the involvement of government in advocating campaign speech extends further. It limits how much the station can charge for a candidate's access. \textsuperscript{31} And, for these legal purposes, the FCC determines when the campaign has started. \textsuperscript{32}

Some content-based broadcasting rules disfavor electoral-oriented speech, especially station-initiated speech. A station may not present a candidate in a manner that is defined as a "use" without violating an obligation to give all other candidates an equal opportunity to use broadcast time. \textsuperscript{33} Although a station may editorialize on other subjects without

\textsuperscript{25} See N.Y. Times, 364 U.S. 214 (1960).
\textsuperscript{26} See Brown v. Hartigan, 456 U.S. 45 (1982).
\textsuperscript{27} See supra, notes 13 and 15.
\textsuperscript{28} See supra, notes 13 and 15.
\textsuperscript{29} See supra, notes 13 and 15.
\textsuperscript{30} See supra, notes 13 and 15.
\textsuperscript{31} See supra, notes 13 and 15.
\textsuperscript{32} See supra, notes 13 and 15.
\textsuperscript{33} See supra, notes 13 and 15.
\textsuperscript{34} See supra, notes 13 and 15.
\textsuperscript{35} See supra, notes 13 and 15.
\textsuperscript{36} See supra, notes 13 and 15.
\textsuperscript{37} See supra, notes 13 and 15.
incuring any obligation to allow other sides to be heard. If the station endorses a candidate, it must allow other candidates to respond. More extensive restrictions apply to public broadcasting stations’ electoral-oriented speech. These stations are statutorily barred from making editorial campaign endorsements even though they have a constitutional right to editorialism more generally.

Of course, broadcasting is the most regulated media form. The government structured the medium in a manner that normally provides the most profitable content rather than the content other possible structures would have provided: for example, content that the public wants, or that the citizen needs. This intentionally created, structural bias, however, may justify governmental mandates to correct partially for these tendencies. Thus, the government has required the broadcast of content concerning public issues and serving children. This structurally created need for intervention does not, however, explain access preferences for current journalistic activities, the coverage is inordinately interpreted by the FCC not to be a “tie” by the candidates and, therefore, the law does not require—maybe constitutionally could not require—equal access for other candidates. A “tie” occurs most obviously when the station supports a candidate by endorsement or by mixing over the facility to a candidate or the candidate’s sponsor. The point requires more discussion, but the distinction between journalistic activities and “ties” where the station becomes a contributing part of a candidate’s campaign might be understood as embodying a notion that the government gives stations licenses to independent journalistic content but not to electoral-oriented political groups. The distinction would explain rules that effectively restrict stations to journalism (of a doctrinally non-partisan sort) and other activities like entertainment but that bar, or at least burden, the stations’ own partisan participation in campaigns.

Although the currently default fairness doctrine, see Syracuse Peace Council v. FCC, 807 F.2d 654 (D.C. Cir. 1989) (holding that the FCC’s requirement that the fairness doctrine no longer served the public interest was neither arbitrary nor capricious), once imposed some obligations of balance, these obligations never equaled the requirements imposed in the campaign context.


paign speech as compared to other political content. Moreover, even in a regulated medium, if political speech is at the core of the First Amendment, burdening or restricting a station's own campaign-oriented speech is an especially odd practice. This content discrimination is an anomaly unless there is something constitutionally special about campaign speech.

B. Unconstitutional Conditions and Buckley

A second anomaly in First Amendment jurisprudence involves the campaign financing upheld in Buckley. The law conditions a presidential candidate's receipt of substantial federal campaign funds on the candidate's agreeing not to exercise her constitutional right, first recognized in Buckley, to spend unlimited amounts on her campaign speech. From the perspective adopted in striking down expenditure limits, this required non-exercise of a First Amendment right should seem to be an unconstitutional condition. Of course, sometimes to condition the receipt of government benefits on the non-exercise of a constitutional right is permissible, and sometimes it is not. The unconstitutional conditions doctrine is admirably in some dispute. My own view is that a broadened version of the principle developed in Grayned v. City of Rockford correctly resolves most of these unconstitutional conditions issues. In Grayned the Court held that in determining whether the City's regulation of speech on public property was permissible, "the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Similarly, a condition that restricts a constitutionally protected activity should only be permissible if


48 Neither the briefs nor any opinion discussing the Court's holding discuss this as an arguable unconstitutional condition, apparently because no one had predicted the doctrinal complexity that led to the intricate mix of features of the law that the Court did and did not uphold. For see Buckley v. Valeo, 424 U.S. 1, 249 n.16 (1976) (Burger, C.J., dissenting in part) (observing that by severing the statutory provisions and upholding this condition the Court 'imposed . . . limitations on qualifying for public funds' that it had found "unconstitutionally inhibits a candidate's . . . First Amendment right"). (I thank Fred Gers for this observation.)

49 Among the useful introductions are Kathleen M. Sullivan, Unconstitutional Conditions, 103 HARV. L. REV. 1419 (1989) (arguing that the unconstitutional conditions doctrine is incorrect and should be used more often as it provides vital protection to basic liberties); Seth F. Kreitzer, Allocation Sanctums: The Problem of Negative Rights in a Positive State, 132 U. PA. L. REV. 1219 (1984) (explaining the differences between taxes and fees and their effects on constitutionally protected rights). 50 408 U.S. 104 (1972).

51 Id. at 116. Determining constitutional status on the basis of this "crucial question" is what I call the "Grayned principle."
the activity is fundamentally incompatible with the purpose for which the government makes the resource available. For example, the government should not be able to condition a job on an employee not engaging in certain speech unless the speech in some way interferes with her performance or the efficient operation of her office. Likewise, the government should not prohibit a student from engaging in particular speech unless "necessary to avoid material and substantial interference with schoolwork or discipline."24

In unconstitutional condition analysis, the purpose of the government's use of public resources may not be to prevent or to buy out the person's exercise of her constitutional right; rather, the purpose must relate to some permissible, affirmative goal—that is, a goal other than suppressing a person's exercise of her choice. The permissible purpose of government employment or government contracts is job performance. Thus, these "benefits" may be conditioned on not speaking in a manner that interferes with job performance, but the purpose of these benefits may not be to usurp the employee's or the contractor's choice of political party allegiance. Likewise, the government apparently may encourage childbirth by paying for childbirth expenses and not paying for abortions. It presumably may not suppress or penalize a woman's choice by conditioning other benefits that she would otherwise obtain on her not having an abortion.25 A local

24This should not be surprising. Both time, place, and manner regulations (at issue in Gompers) and unconstitutional conditions deal with the fact that the government generally must respect people's constitutional interest in expression but also must be able to use its resources to pursue public purposes.

25The Court limits this principle to cases where the employee's speech refer to a matter of public concern. Interpreting this limitation can be controversial, with the Court splitting 5-4 in its characterization of the speech. See, e.g., Rake v. McPherson, 463 U.S. 378 (1987) (self-handicapping favoring the assassination of the President was promoted to speech as a matter of public concern); Caspari v. Myers, 461 U.S. 128 (1983) (asking a questionnaire on the management style of a D.C. not speech on a matter of public concern). It is not clear to what extent the Court's concern with a person's speech as a matter of public concern in the case of Gompers might apply here.

26See ROBERT C. FIST, CONSTITUTIONAL DOMAINS 237, 250 (1995). This reasoning is applicable to cases where a government regulates speech on a matter of public concern, where governmental authority is most likely to be abused and least likely to be justified. Note that whatever its merits, Paul's argument does not imply rejection of the Gompers principle, nor are its assertions incompatible with the notion that judicial review of the speech, not just the speech itself, can be incompatible with the legitimate governmental purposes.


A substantial constitutional question would arise if Congress had attempted to
government may condition its payments on the newspaper running its advertisement but not on the newspaper's abstaining from editorializing against the current administration. In each example the Constitution bars the government from mandating the behavior, but in some instances it may pay to obtain favored performances. The fact that determining whether the government has the option to pay is whether its objective is a permissible goal. Payment involves an unconstitutional condition if its purpose is to prevent or penalize the exercise of a constitutionally protected choice. Moreover, attributing an impermissible purpose to the condition is appropriate if the condition is not necessary to obtain the legitimate aim.

There can be no general constitutional complaint about the government's providing candidates with campaign funds nor with conditioning the funds on their being used in the campaign. Both the provision and this condition serve constitutionally permissible purposes—for example, making it easier to run for office, increasing the likelihood that the public will gain access to a candidate's views, or assuring that poorly financed campaigns can present their case to the public. The Court, however, never took up the unconstitutional condition analysis nor considered any justification for limiting the total expenditures of those accepting public funds. It did explain that the funding was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and encourage public discussion and participation. . . ." However, these permissible goals hardly explain a restriction on expenditures.

withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion . . . . A refusal to fund such activity, without more, cannot be equated with the imposition of a "penalty" on that activity.


"Although the States may have no "right" to receive certain legal advertising from the County Board of Supervisors, it would violate the Constitution for the Board to withhold public monies, in the form of its advertising . . . in retaliation for the newspaper's exercise of first amendment rights" by publishing editorials and news stories critical of the Board and its members. Harris v. McCollum, 790 F.2d 1235, 1237 (9th Cir. 1986). Withholding advertising for reasons detrimental to the newspaper's exercise of its constitutional rights, for example, disapproval of the newspaper's labor policies, does not present this issue. See Alameda Newspapers v. City of Oakland, 95 F.3d 1406 (9th Cir. 1996).

The distribution (as opposed to the provision) of public funds could be unconstitutional without. See, e.g., Buckley v. Valeo, 424 U.S. 1, 229-34 (1976) (Robinson, J., concurring in part and dissenting in part).

Buckley, 424 U.S. at 93-96.

Probably the best explanation for the financing combined with the condition is to fulk the extent that candidates and public officials become primarily fund raisers rather than political deliberators. See Blais, supra note 9, at 1300. The Court cited a Senate report noting this goal. see Buckley, 424 U.S. at 91, but never invoked it as an explanation of
The most obvious reason to condition the funding on specified spending limits is either to equalize the amount that the candidates spend or to set ceilings on total expenditures. These purposes, according to the Court in Buckley, are unconstitutional. The goal of "reducing the allegedly skyrocketing costs of political campaigns" is impermissible in that the "First Amendment denies the government the power to determine that spending to promote one's political views is wasteful, excessive, or wasteful.\textsuperscript{41} Equalization is an impermissible justification, in that "restric[t[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."\textsuperscript{42}

Conceivably, the expenditure limit could have been designed to prevent corruption—that is, without the limitation the candidate will want private funds and thus be vulnerable to a donor's demands. However, the Court rejected the argument that the interest in stopping corruption could either explain or justify limits on expenditures. This purpose was properly served, according to the Court, by provisions that prohibited "contributions" above a certain (potentially corrupting) size. Moreover, to the extent that this condition prevents expenditures of a candidate's own funds, it is at best unclear how spending those funds could be corrupting. Likewise, the condition could not be explained by a goal of providing public funds to those who otherwise could not present their case to the public. Not only is the condition unrelated to that goal, but the law explicitly provides money to those without need.

In sum, given Buckley's explanation for why the purposes behind direct limits on campaign expenditures are constitutionally impermissible, the most plausible rationale for the condition renders it unconstitutional. The two holdings, that limits on expenditures are unconstitutional but the condition that tries to achieve such a limitation is constitutional, simply seem inconsistent. Something needs to give. That something could be the Buckley Court's failure to understand that public financing as well as the many content-based regulations of electoral speech noted in Part I.A complicate the propriety of governmental authority to structure the electoral process to make it fair.

\textsuperscript{41} Buckley, 424 U.S. at 57.

\textsuperscript{42} Id. at 55–59. Injection of restrictions on expenditures would seem to follow from the reasoning the Court gave: the First Amendment "was designed to secure "the widest possible dissemination of information from diverse and antagonistic sources," and "to secure utterance interchange of ideas . . . ."" id. at 49 (citations omitted). At other times, the Court did not so overtly reject the legitimacy of the interest in equalization but rather said it was "clearly not sufficient to justify" the restriction of rights and said that the "First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." Id. at 54.
C. The White Primary Cases

Terry v. Adams,43 the last of the white primary cases, presents yet another constitutional anomaly. In Terry and related cases, the Court struck down various means of excluding blacks from participation in the only meaningful election in most parts of Texas—the Democratic primary. Terry itself is possibly best understood as legal realism par excellence—after finding the race-based exclusion to be unconstitutional in case after case,44 the Court was not about to allow Texas to circumvent its holdings.45 When faced with the Jaybird Democrats, who made all white voters in the county members but excluded all blacks, the Court held their primary unconstitutional.

But where was the “state action” required under the Fourteenth or Fifteenth Amendment? State law did not create or regulate the Jaybirds. The state gave no significance whatsoever to the winner of the Jaybirds’ primary. Rather, the winner could apply if he wanted, which he always did, to be a candidate in the Democratic Party primary, which he always won. The Court had previously found that the Democratic primary was intertwined in the state’s operation of its electoral system.46 The Democratic primary winner was, for example, automatically placed on the general election ballot. However, the Jaybird primary winner was not automatically listed nor even designated as the Jaybirds’ choice on either the Democratic primary or the general election ballot. A candidate received no special treatment or official advantage by the state or the Democratic Party because of the Jaybirds’ favor. Justice Frankfurter, speaking for himself, surely cannot be convincing in concluding that state action exists because state election officials voted in the Jaybird primary.47

It is difficult to identify any state (or Democratic Party) participation or even an objectionable failure to act. What should or even could the state have done? Although statutes sometimes limit associational rights, especially in criminal and commercial contexts,48 formally, the First Amendment right of association allows private individuals to associate with those

43 345 U.S. 461 (1953). Unless otherwise noted, the facts described below are taken from this case.
45 This may overstate the Court’s resolve. The Court could not settle on a majority opinion and, although it eventually voted 4-1 that the Jaybirds’ primary was unconstitutional, their initial votes were 5-4 in the other way. See Mark Tushnet & Kent Levin, What Really Happened in Brown v. Board of Education, 91 Columbia L. Rev. 1067, 1097-901 (1991).
47 See Terry, 345 U.S. at 475-76 (Frankfurter, J., dissenting opinion).
48 See, e.g., Roberts v. United States Jaycees, 468 U.S. 609 (1984) (holding constitutional an order issued pursuant to a state act requiring the organization to accept women
whom they choose for various purposes, including political. Most constitutional commentators would think that freedom of association means, at least, that a group of people concerned about good government could meet and choose one among them to run for office. The chosen person could then, on her own, enter a party primary. The others, if they wanted, could vote for her. These are all constitutionally protected activities, and exactly what the Jaybirds did.

Political parties and primaries are clearly integral to the governmental- tially sponsored, controlled, and regulated election process. State law extensively regulates the activities of political parties—"associations" that sponsor candidates in the state-operated election process. Typically states automatically put winners of the major parties' primaries on their election ballots. Although political parties have constitutional rights derived from their members' First Amendment rights, these parties are also sometimes limited both substantively and even constitutionally in order to promote a fair and wise electoral process. Possibly these limitations on parties are constitutionally permissible "condition" imposed on the opportunity to appear on the ballot and to receive official state recognition within its electoral process. The problem in the Jaybird case, however, is that the Jaybirds, in contrast to the Democratic Party, did nothing that had any legal or official significance. Of course, reality was different. The Jaybird candidate was, with one exception, unopposed, in the Democratic primary and, for over sixty years, was always elected. Possibly Perry should be given a restricted reading emphasizing this unique reality. The unconstitutionality may reflect Texas's constitutional

as members. An association that the government wants to make criminal is usually labeled a conspiracy. See, e.g., United States v. Barnes, 371 U.S. 401 (1962).


Arguably, these rights could also be seen as flowing from the guarantee of a republican form of government.


The dissent in Tinker does not distinguish what political parties can be subject to regulation in their ballot expression; rather the dissent makes basically an unconstitutional condition argument. One provided, a party's right to grant a nominee on tax ballot cannot be conditioned on its adhering to different from that of another party since this burdens on the party's associational rights does not serve legitimate state purposes but instead operates to reward the "robust competition in ideas and government's policies that 'is at the core of our electoral process and of the First Amendment Quotations.


In an earlier white primary case, the Court held unconstitutional the denial of membership to blacks by a party that, under state law, sponsored candidates on the general election ballot. See Smith v. Allwright, 321 U.S. 649 (1944) (overruling the unanimous decision in Grovey v. Toomer, 295 U.S. 423 (1935))

obligation to prevent the long-term maintenance of a practice of a group of white voters, the Jaybirds, dealing to keep blacks from having any meaningful role in the selection of Democratic Party candidates. Or possibly Terry should be restricted to situations where the party's candidate is effectively assured election (which only occurs in one-party jurisdictions), because then the exclusionary practice deprives black voters of any chance for meaningful participation.

Still, even if read restrictively, the difficulty remains how to understand the Jaybird as state actors. If the Court treats state-created electoral processes as encompassing only such "official" and obviously legally structured elements such as the ballot, districting, and vote-counting rules, then the Jaybirds' association looks like protected private activity. From this perspective, the Court's holding is doctrinally impeccably. The constitutional anomaly can only be explained in realist fashion: a desirable result achieved by ignoring doctrinal niceties. However, another possible conceptualization of the electoral process causes the doctrinal difficulty to evaporate. The governmentally institutionalized process of choosing office holders creates the role of voter and electorally oriented functions of parties. The institutionalization encompasses all elements and roles, including that of the Jaybird association and the behavior of the voters.

[But see Moore v. Republican Party, 116 S. Ct. 1186, 1205-06 (1996) (rejecting this approach of Terry). Both the plurality and concurrence in Moore expressly cited Terry with approval even though Terry was unnecessary for the decision in Moore since in the latter, the state was involved in putting the party's choice on the general election ballot.]

This claim might seem extraordinary. For example, would it mean that it is unconstitutional for a voter to ban her vote on racist reason? Maybe—through such a rule, like some constitutional norms that a conscientious legislator surely follow, might not be properly enforced by the judiciary. See Paul v. Davis, 474 U.S. 201 (1986). The Constitution's limitations on that is beyond the question here. For Terry is a different question. Terry is that the constitutional obligation would be breached by judicial enforcement because they are always alternative long ago explained in a vote for a candidate. Moreover, the incentives of legislative's virtual minimization when a law is most understood as serving an unconstitutional purpose, the same in case of voters' selection. If their action as a discrimination is found to be an unconstitutional purpose, see Robinson v. Maloney, 417 U.S. 228 (1974); see also Renton v. Beach, 116 S. Ct. 1501 (1996). Viewing the Constitution as applying to the voter's role is also very compatible with many people's experience of having an obligation to behave in a public-oriented rather than merely private-interested way when they vote, an experience that parallels many politicians' experience of needing to explain side positions in terms of public-speaking reasons rather than favoring interest groups' rat making. The conclusion also fits well with the demands of a republican theory of democracy.

This analysis, however, may be too restrictive of voters' constitutionally permissible behavior in their choice of candidates. Even though white the Fourteenth Amendment's laws cannot be adopted, legislators, even in their official capacity, presumably have a right to argue, and speak, in favor of such laws, with the idea that the Constitution should be amended to do away with the constitutionality of the Fourteenth Amendment. If legislators have the right to express themselves that way and to favor the repeal of constitutional protections, but do not have a constitutional right (under the present Constitution) to pass certain laws, presumably a voter has an ambiguous right to vote for these "racist"
Only the governmentally created structure brings forth the electorally oriented behavior such as the Jaybird primary. Under this conceptualization, the Jaybird's exclusionary association is part of a state-created process that violates the right to vote on the basis of race. Essentially, the Court in Terry adopted this broad conception of the electoral institution—a view consistent with much precedent but, as will be noted below, inconsistent with a crucial aspect of the Buckley decision.

II. Speech within Governmental Institutions

Part I examined doctrinal anomalies that could be dissolved if elections were viewed as a special realm that can—and sometimes, as in the last white primary case, must—be structured in order to achieve a more complete democracy. However, this argument fits poorly within current First Amendment analyses, which are often described as either strictly evaluating content restrictions on speech or less strictly scrutinizing time, place, and manner regulations. Admittedly, these analyses have more recently been supplemented with the view that content regulation is more permissible in some discrete circumstances, often involving what have been described as non-public fora. But purely elections are not non-public fora. I claim that this popular approach to First Amendment doctrine inadequately explains the Court's decisions and distorts the analysis of campaign finance regulation. Therefore, this section will describe how First Amendment analysis regularly does and should take account of the need of institutions to regulate speech in order to function properly.

A. Institutionally Bound Speech

A popular doctrinal device divides most speech issues into two categories of "tracks"—roughly, cases where the law aims at particular content and cases where instead it merely regulates the time, place, or manner of speech. Within the first category, the primary doctrinal question is

\[\text{candidates but not a right, under existing Fourteenth Amendment law, to themselves violate the Fourteenth Amendment by adopting a "strict law in a stereotypical or, as they did in Terry, by excluding blacks from voting or meaningful political participation.}]

\[\text{I do not suggest that the Court consistently adopted this view—its opinions either suggest an intellectual struggle without ever developing a coherent understanding of how to conceptualize the electoral process. Rather, this interpretation is offered as an explanation for why the result the Court still achieved to reach its double-track right. Indeed, cases, when decided correctly, can make very good law.}]

\[\text{These two categories largely correspond to directions involved in the "two-track" analytic popularized by Laurence Tribe. Its first track involves cases where "government action aimed at communicative impact has sometimes having adverse effects on communicative opportunity." LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 797 (2d ed. 1988).}]}\]
whether the First Amendment protects this content. When the answer is "yes," some judges and commentators would go no further and conclude the case\(^9\) while others would continue by applying "strict scrutiny." The speech content considered might involve, for example, obscenity, fighting words, commercial speech, defamatory speech, labor organizing, the names of crime victims, judicially inadmissible criminal confessions, speech that creates some danger, racist speech, or artistic speech.\(^8\) Debates about content categories have long been popular among academic theorists. The appropriate treatment and definition of content categories require abstract doctrinal moves that cry out for theoretical justification.

Cases involving the second category of time, place, or manner restrictions raise much messier, yet seemingly less theoretically interesting, issues. Any law might prevent someone from engaging in her preferred manner of communication, but that fact cannot automatically mean that the law is invalid.\(^3\) Even though the protected status of the speech content is not in dispute, "fair accommodation" with other interests is necessary.\(^4\)

In contrast to the first, at least, in addition to this traditional mapping, I suggest that greater doctrinal clarity results if, first, it is recognized that portions of the social environment are "institutionally bound" in some strong sense and other portions are not; and, second, it is acknowledged that within governmentaly created, institutionally bound spheres, restrictions on speech are permissible that would not be permissible in the unbounded arena.\(^5\) Moreover, the permissibility of specific limits reflect


\(^8\) Of course, categorization can never be purely a matter of stating "content"—context is always important to meaning and, hence, to the content category. The false about free is different in a line in a play satirizing free speech doctrine than in a context where it is likely to cause panic. The same words about NATO can be overly political speech or a line in a grand historical romance novel, an unprotected obscene work, or a car advertisement. No words, ever, will fit a particular First Amendment category independent of context.

\(^3\) The First Amendment could mean that the government should not pass a law aimed at abridging speech, so that a valid law that in fact restricts expression must be aimed at a larger category of behavior, for instance noise, that concerns the government, cf. United States v. O'Brien, 391 U.S. 367 (1968) (upholding a conviction for burning a draft card because of its independent noncommunicative impact). This requirement would prevent the government from focusing its regulatory efforts on speech, often a strict of regulatory analysis, but rather on a larger category, thereby giving speech some protection by associating it with other activities that the government may too want to regulate. See Linde, supra note 79.


\(^5\) This Article is limited to issues involved in governmentaly created institutions. Various "private" institutions, like business entities, often restrict speech. Although the
the particular institution involved. That is, restrictions are permissible only to the extent necessary for the proper functioning of the institutionally bound arena—ideally, to use the language of Grouped referred to in Part I, "the crucial question [should be] whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." 48

A brief but important comment must be made about "institutions" and "institutionally bound." These concepts are necessary to explain existing constitutional doctrine and are helpful in understanding why certain expression-limiting rules should be acceptable while others should not. The troublesome aspect of using these concepts is the ease with which they can be used loosely and unhectorically to cover more and more contexts with a consequent widening of the realm of regulation and narrowing of room for dissent. As explained, all speech occurs within a particular context. 49 Context, as well as the reader's or listener's historically rooted perspective—her "horizon"—always affects the meaning of literal statements. Words have no meaning outside their (often implicitly assumed) context. Context also always provides a basis for determining appropriateness. Some speech is always inappropriate in the particular context. For those favoring the status quo, inappropriate speech usually will seem dysfunctional. 50 But these facts about context do not mean that the speech is always or normally institutionally bound, at least not as the concept is used here. Thus, these facts do not imply that "appropriateness" can be legally enforced. In most of life, appropriateness is upheld voluntarily when participants find upholding it is habitual or to their mutual advantage. Individual liberty means that those who dissent, those who object to the existing context, can rebel by not conforming. 51 They use speech not only to convince traditionalists to change but also to embody change. If this freedom is to be maintained and institutionally bound

legal order facilitates the creation of these entities, there is also a sense in which they are privately created. Given the governmental action requirement, the First Amendment is usually not thought to restrict this behavior. Of course, a robust system of freedom of expression may require legal protection of expression within these "private" institutions. In contrast, especially when the restrictions on speech would be permissible within governmentally created institutions, the government may be able to require private institutions to restrict certain types of speech—for example, an employer's morality or sexually harassing speech. Or maybe it can do so for certain types of private entities—for example, profit-oriented entities or even voluntary associations where the restriction on speech does not conflict with the associations' expressive purposes. All such questions about speech within private institutions are beyond the scope of this Article.


49 See supra note 80.


51 See Stephen P. Shapiro, The First Amendment, Democracy, and Romance (1990); Baker, supra note 11; Kiers, supra note 88.
speech is to be subject to regulation, "institutionally bound" must refer to something much narrower than "context.

The concept of "institutionally bound" refers to situations where resources and activities are authoritatively organized to further or accomplish particular objectives within a limited realm of social life. Institutional realms are structured either by law or by legally backed authoritative decisions. They are purposely designed to advance particular functional objectives. Within these realms, rules—including rules related to speech—are introduced to help achieve those objectives. People who act and speak within these institutionally bound contexts usually understand the realm's goals or functions; usually, their presence either is legally mandated (e.g., in prisons, in primary schools, or in courts as defendants and subpoenaed witnesses), or, when voluntary, is compensated with pay or with special opportunities (like the election of their preferred candidate). Schools, military bases, prisons, and all governmental employment—as well as all state institutions involved in governing, which will be taken up in the next section—illustrate institutionally bound contexts. Brief references to several of these contexts can exemplify my thesis about institutionally bound speech.

Often, restrictions on institutionally bound speech can be analyzed as (sometimes constitutional) conditions on the receipt or use of government resources. For example, restrictions on the speech of government employees can be viewed through either lens. Employment is an institutionally bound context in that it is a specially, legally structured realm designed for specific purposes into which a person enters episodically with an understanding of its purposes. If society is to accomplish public projects, employees must be subject to job performance requirements. Among these requirements may be bars on certain speech as inconsistent with job performance or mandates of engaging in job-related speech. A government receptionist (like a receptionist in the private sector) often must provide information and must do so without being insulting. These re-

As used here, "institutionally bound" corresponds closely to Jürgen Habermas's conception of the "system's world," while "non-institutionally bound contexts" refer to the "life-world," a usage I will invoke soon. See supra note 162.

My usage also closely resembles Robert Post's emphasis on the distinction between government action involving management and that involving governance, and his argument that full, traditional First Amendment doctrine applies only to the second. See, e.g., Post, supra note 52. His characterizations, however, are arguably misleading. It seems strange, for example, to follow Post in thinking of the New England town meeting as a matter of management and not of democratic governance. See id. at 271–74. Likewise, when town meetings, can be reasonably viewed as involving an institutional framework but it should be troubleshooters to argue that a democracy should conserve of its elections as "disparate dedicated to instrumental conduct" id. at 200, which for Post would be necessary to make the managerial perspective cohere so as to permit regulation of speech. Of course, in a democracy, elections have a dual aspect: people express values within them and use them to instrumentally choose leaders.
requirements are legitimate, however, only because of the job's purpose—because of the institutional context. In contrast, government regulation of a teacher's speech should be impermissible where his speech cannot "be presumed to have in any way either impeded [his] proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." 39

There are at least two reasons to consider "institutionally bound" as a doctrinal concept either separate from or more encompassing than this unconstitutional condition analysis. First, unconstitutional condition analysis is most consistently understood to apply only to restrictions accompanying some specific benefit—a job or grant—that a person receives. The idea of "institutionally bound" covers additional contexts, such as institutions like prison, primary schools, or courts that the person sometimes does not enter voluntarily. Here, there is no possibility of take-it-or-leave-it as there is, at least potentially, in most unconstitutional condition contexts. Moreover, to passage the later discussion, some contexts provide opportunities—like electing someone or being elected, or talking at a governmentally sponsored meeting—that do not involve the type of benefit to which unconstitutional condition analysis is normally applied. Second, the notion of an institution that is structured to achieve particular goals or advance particular projects helps clarify and limit the justification for restrictions on speech.

Still, the doctrinal implications of "institutionally bound" are similar to those of unconstitutional condition analysis and time, place, and manner or forum doctrine. Each allows but limits restrictions on speech. A single normative premise explains and unifies these doctrinal approaches: the government must be able to engage in defined projects and to use public resources to pursue legitimate ends. This premise explains the need sometimes to allow even content-based regulation in institutionally bound contexts and in the conditions imposed on the receipt of benefits. The premise also explains the permissibility of time, place, and manner regulations.

Combining the First Amendment with this central normative premise leads to three important corollaries that apply to all three of the analyses discussed above—restrictions on institutionally bound speech; time, place, or manner regulations; and unconstitutional conditions. First, no irrelevant or unnecessary restriction on speech is justified. Thus, something like the Grayned principle, which originated in approving a time, place, or manner regulation—namely, a noise restriction in the area around a school while the school was in session—properly reappears in the other two doctrinal areas. Within unconstitutional condition analysis (consider employment

cases) or institutional realms (consider the Tinker formulation for schools96), the Grayned principle is useful for analyzing the connection between the purpose of the institution itself and the proposed restrictions. Like any doctrinal rule, application of the Grayned maxim can be controversial. However, better than a general balancing formula, this approach at least focuses on the proper concerns, allowing the government to use its resources and organizational capacities to advance public goals but otherwise preventing it from restricting speech.97

Second, the government’s purposes in its projects or in its use of its resources must be constitutionally permissible. More specifically, the government can pursue various conceptions of the good, including sponsoring its own views (with grants or in choices of curricula, for example). If it cannot, however, have a purpose to suppress or penalize the exercise of a constitutionally protected choice. People cannot be hired by government or placed in schools as a means to make them shut up or vote in a particular way.

Third, although presumably implicit in the first two observations, any restrictions on speech justified by these analyses can only extend over a quite limited social domain.

B. Speech within Institutions of the Governing Processes

Within institutions of democratic governance, acceptable regulation of speech, including content regulation, is ubiquitous. Restrictions occur, for example, at the arguable center of a democratic deliberation: in Congress and before its committees. Of course, members of Congress may “not be questioned in any other Place,” at least in the sense of legal liability as opposed to personal accountability, for their speech in these contexts.98 But this protection is not based on the First Amendment. This protection also does not prevent the Congressional member’s speech from being authoritatively restricted in “that” place by Congressional rule. Moreover, the Speech and Debate Clause does not protect the speech of witnesses before Congressional committees.99

Political speech, either in Congress or before its committees, may be ruled out of order. A legislative chamber can cut off debate and vote. A

96See supra text accompanying note 54.
97Doctrinal tools are less likely in choice and mid-level analysis, as many tests do, to the extent that they directly embody the normative premises that ought to control. See Baker, Terrence R., Broadcasting, supra note 46, at 114-27.
98U.S. CONST. art. I, § 6 (Speech and Debate Clause).
99Although the Speech and Debate Clause is written in terms of protecting “Senators and Representatives,” id., and was once thought to be personal in nature, it has been interpreted functionally to apply to Congressional aides to the extent they are involved in enlisting a member of Congress in core legislative functions, see Green v. United States, 496 U.S. 606 (1990), but no suggestion that it protects witnesses is plausible.
passionate advocate may be barred because the committee refuses to call her as a witness. This refusal may even be based on her viewpoint. If called, her speech at the hearing may be restricted in subject matter. And she may be told to stop speaking because her time is up. To the extent the committee allocates time to opposing sides, speech is regulated in terms of viewpoint. In other words, brief redactions make obvious that speech of both public officials and private citizens is extensively restricted within these legally constructed institutions of the governing process. Of course, the institution's speech restrictive rules are not beyond criticism. Criticism normally takes the form of arguing that the restriction does not serve the goal of promoting effective deliberation or is unfair to some participants or to those excluded. Such criticism periodically leads to changes in the speech restrictive rules. The point, however, is that regulation of speech, including content regulation of political speech, is allowed in order to improve the functioning of this legally structured institution of governance.55

Within other governing institutions, the specific reasons for speech-restrictive rules change in accord with the institutions' different functions and capabilities, but the same general observations apply. Restrictions must further the proper functioning of the particular process of government and the particular type of deliberation at stake. A courtroom, for example, is like the streets and parks in that it is a place "traditionally open" and where the public has a right to be for First Amendment purposes.56 Nonetheless, a combination of court rules and the judge's exercise of discretion (often reviewable) determines who speaks and whether particular content is barred because of, for example, its irrelevancy, repetitiveness, prejudicial quality, or lack of foundation. The First Amendment generally protects a person's right not to speak and not to associate.57 in

54 Sometimes witnesses refuse to speak on First rather than Fifth Amendment grounds. Arguably, the key to when these claims are upheld is the Court's view that the compelled speech not only bars First Amendment functions but also does not serve any legitimate legislative function—suggesting the dual of this section, that involvement on First Amendment right are permitted in institutional contexts but only to the extent necessary for the proper functioning of the institution. Compare Barron v. United States, 360 U.S. 109 (1959) (upholding contempt for refusing to answer) and United States v. Wyman, 360 U.S. 72 (1959) (same, with DeGregory v. Attorney General, 363 U.S. 825 (1960) (rejecting compelled disclosure) and DeGregory v. Florida Legislative Investigating Comm., 372 U.S. 639 (1963) (error). The Court explained in DeGregory that "the First Amendment protec2 the power to conduct an inquiry without holding a trial in advance and without relation to existing need." DeGregory, 384 U.S. at 830 (emphasis added) (citing Watkins v. United States, 354 U.S. 178, 197-200 (1957)).


order to further the functioning of the courts, however, a person may be called as a witness and required to testify truthfully. Few think this required speech violates freedom of speech,17 in large part, I suggest, because of its institutional context. Of course, sometimes a courtroom restriction on speech or mandate of speech can be illegal or unconstitutional. The objection, however, is usually not that it violates the First Amendment's free speech guarantee but that the restriction or mandate denies due process or a similar institutionally relevant right, such as the right to call and confront witnesses or the right not to testify against oneself.18 Courts sometimes even regulate what people involved in its proceedings say outside the courtroom. In so doing, they ought to be limited both by the First Amendment and by inherent lack of judicial authority. Even if the court has authority over participants for, at least, voluntary participants, this authority should only allow restrictions that contribute to the fairness and effectiveness of the judicial process. For example, in Gontile v. State Bar of Nevada,19 the Court concluded that "lawyers representing clients in pending cases" may be subject to restrictions beyond what could be applied to the public because of their "fiduciary responsibility" not to act to the detriment of the secured or of the fair administration of justice.20 The Justices dissenting on this point argued about what speech is inconsistent with this institutional context. The dissenters noted the difference between the defense attorney, on the one hand, and the prosecutors and police, on the other. They emphasized a defendant's possible interest in having an attorney represent her before the public.21 Their disagreement with the majority about the defense attorney's role might be seen as implicitly recognizing the Constitution's protection of the defendant against being silenced or hidden by an oppressive government, an argument that could be based on either the First Amendment or a broad interpretation of the Sixth Amendment's guarantee of a public trial.22

18See U.S. CONST. amend. V and VI.
19It should hardly be an unconstitutional abuse of government power to silence an attorney's out-of-court activities of government agents in her proclamations of innocence. In contrast, consider the court order forbidding newspaper publication of information gathered through discovery, which the newspaper claimed was a prior restraint, that was upheld by the Court in Seattle Times Co. v. Software, 467 U.S. 20 (1984). The Court relied on the newspaper's choice to use discovery, a source of gaining information that the government provided access to only for purposes of litigation.
21Supra id. at 1074. Note that there were dissenting opinions on different rulings of the case. This was the majority view on this point.
22See id. at 1055-56 (opinion of Kennedy, Marshall, Blackmun, & Stevens, JJ.)
23A defendant's right to a "public trial," see Gannett Co. v. DePue, 443 U.S. 368 (1979), could be understood as a right not only to have the formal and open, but also
Despite broad power to regulate speech to make institutional governing and deliberative processes work properly, some speech directed at those processes can fall outside the borders of an institution and into the broader public realm. Within this broader public realm, regulation is not permitted, or, at least, normal protective rules apply. For instance, speech criticizing legislative or committee practices is fully protected. Likewise, outside the courtroom, authority over non-participants, and arguably over non-voluntary participants, should be either non-existent or narrowly limited.\footnote{See supra note 59.} As these examples make clear, and as Parts III and IV will emphasize in relation to electorally oriented speech, determining institutional boundaries is a crucial part of First Amendment analysis.

III. Electoral Speech

In this Part, I argue that the overall electoral process, including campaign-oriented speech, should be viewed as a special governmental institution. While this claim can hardly be disputed as to aspects of the election itself (e.g., districting, vote counting and structuring of the ballot), there is a possible alternative to my view of the election campaign as a part of the governmental structure of institution. Electoral speech might be viewed as influencing elections but, unlike ballots, polling places, and districting, as not being an institutionally bound part of the governing process. Campaign speech could be treated like citizens' criticism or advocacy relating to Congressional debates or judicial proceedings. This second view was implicitly adopted by the Court in \textit{Buckley} when it struck down expenditure limitations, but not when it upheld conditions placed on public campaign funding. Under this second view, to treat campaign speech as part of the governmental structure electoral process is to confuse the private, constitutionally protected, expressive activities of people with the activities of government itself. Therefore, after developing the first view, I will respond to the second possibility in Part III.B by observing that, except for the decision in \textit{Buckley} and its progeny, existing precedent follows the first view in treating campaign speech as part of the institutionalized realm. Then I will argue in Parts III.C and D that democratic theory supports this treatment of campaign speech. If this first view of elections is accepted, various campaign regulations including

\textbf{not to be gagged in speaking to the public about the government's attempt to take her out of civil society.}
limits on expenditures and related activities should generally be acceptable.

A. The Institutionalized Electoral Realm

Elections are legally structured institutions designed to further the governing process. Most overtly, elections are designed to choose office holders, especially legislators and chief executives. After noting that "the rights of voters and the rights of candidates do not lend themselves to neat separation," the Court explained that "the function of the election process is to 'winnow out and finally reject all but the chosen candidates' [and that to attribute to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently]." More generally, the rules that structure the electoral process, including some rules that restrict or disfavor certain speech and certain constitutionally protected associations609, are designed to further various institutional goals: most centrally, to choose good office holders, but also to respect the equal right of various people to be involved in the process; to make the process efficacious and workable; to create and justify the belief that the process is fair; and, according to some theorists, to stimulate deliberation and reflection about the public good.

Possibly the crucial issue for this Article is the boundary between this institutionalized electoral realm and general civic or public life. Or, in a more self-conscious constitutional formulation, the issue involves legislative bodies' authority to determine this boundary. Specifically, should or may the legal order treat a candidate's campaign as part of this institutionalized electoral realm and, therefore, subject to regulation in order to better achieve the realm's democratic goals or purposes? And should other speech oriented toward the election or defeat of candidates, or adoption or defeat of ballot measures, be included as part of this institutionalized realm? Alternatively, should the legal order treat the candidate's and other people's electorally oriented speech as a part of the broader


610For example, the Court recognizes that not counting absentee ballots disfavors certain poorly financed or vastly different in terms and positions, and they do not fit the standard interpretation of "law."
non-institutionalized social world where regulation aimed at protected categories of expression is largely impermissible? In this second view, electoral speech is virtually definitive of political speech. In contrast, in the first view, for which I argue, campaign speech, unlike the broader general category of political speech, is a narrower, limited purpose, institutionally bound subcategory that is appropriately subject to regulations that support the integrity and the effective and fair functioning of the electoral institution.

An analogy illustrates this first view. Within job application processes, employers routinely regulate speech. Applicants are often required to speak—to take tests, write essays, or give illustrative performances of their abilities. Their speech is also limited. Each candidate is often given the same fixed time for the test. Applicants that get to the interview stage are often each given roughly the same amount of time, as determined by their potential employer, in which to charm the employer and to present their case for being chosen. Each is typically prohibited from getting outside help during these tests or interviews, although paying for education or coaching ahead of time is usually perfectly proper. Letters of recommendation are sometimes solicited, sometimes excluded. Rules sometimes try to insulate the hiring process from influence by the applicant’s friends or relatives.189 The rules often try to increase the likelihood that the person doing the hiring is influenced only by information provided by the applicant or information properly supplied about the applicant by a fair process (combined, necessarily, with all the values, permissible prejudices, and goals the employer brings with her to the employment decision). This framework, involving overt limitations on speech, is designed to choose the “best” job applicant, although sometimes various other considerations also shape the rules—for example, streamlining the process, benefiting the employer’s family, or making the process fair.

In one possible view of elections, the opportunity to engage in an electoral campaign is the method created to allow people to apply for particular jobs. The electorate is the employer. Elections are democratic mechanisms for the electorate to choose which applicant to hire. Examined this way, electoral campaigns are part of the institution of elections—like tests or interviews. The campaigns should be subject to regulation to improve the democratic nature of the process. Buckley is wrong. Appropriate regulations of campaign-oriented speech would be permissible.

This perspective, however, is not the only way to view electoral campaigns. The second view mentioned above treats elections as a period of heightened value debate and political opinion formation. In this view,

189 Cf. Santos v. Republican Party, 495 U.S. 70 (1990) (holding that conditioning hiring and promotion decisions on public employees’ political affiliation infringed upon their First Amendment rights).
the very democratic legitimacy of electoral results might depend on the
government not imposing limits on this aspect of politics. No government
should tell a free people how much electoral activity is too much or tell
an individual that she should limit her involvement. Buckley is right.

Given these two alternative understandings of political campaigns, it
is appropriate to ask descriptively whether the legal order dominantly
adopts one or the other and to ask normatively which it should adopt.
First, however, I need to comment on implications of an earlier observa-
tion, where I noted that a hiring choice depends not just on the job
applicants' qualifications as disclosed by the application process but also
on "all the values [and] prejudices ... the employer brings with her." 
These values and prejudices will influence the kind of performance she
wants from her employee, her view about what type of person will pro-
vide the best performance, and her view about what evidence best bears
on predictions about such future performance. For example, the employer
might most want wisdom in her employee and might believe that wisdom
occurs mostly among the elders. Or, maybe instead she desires strength
and energy and believes these qualities are mainly present in youth. She
might consider integrity crucial or want a person committed to the pursuit
of particular values. She must decide whether past sexual infidelity is a
relevant consideration. Clearly, there are a host of possible considerations
that can and, she may believe, should affect her evaluation of a job
applicant.

If the election is a hiring process, the electoral campaign equates to
a job interview. In contrast, politics in a broader sense attempts to influence
the employer's judgment about the qualities for which to look when
considering applicants—or, in a slightly different image, involves the
employer's discursive reflection about what goals to pursue or factors to
consider when choosing office holders. In this view, politics hardly per-
tains to rating Clinton's marital fidelity but could encompass discussion
of whether sexual history is a relevant criterion. Politics clearly encom-
passes discussion, deliberation, and advocacy concerning political values
that implicitly and, sometimes, directly influence the criteria people use
for evaluating candidates and office holders. In many respects, this broader
"politics" can be more important and even more significant for the out-
come of elections than the electoral campaign itself. Moreover, just as the
factors influencing an employer's hiring decision may reflect her entire
background, this broader realm of politics is virtually seamless with the
electorate's life experience. This realm of experience and discourse is not,
should not, and could not be institutionalized in the way the hiring process

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128 Cf. Buckley v. Valeo, 424 U.S. 1, 57 (1976) (noting that "the First Amendment
denies the government the power to determine that spending to promote one's views is
wasteful, excessive, or untrue").
or the election itself is. A free and vibrant society must allow a person to use any resources that she has to try to influence opinions about what the institutionalized decision-making process should aim for. As to this broader realm, the Court in Buckley was right to assert the illegitimacy of silencing some in order to equalize the voice of others and the illegitimacy of the state deciding to limit the resources people can devote to these questions.

The analogy to the job application suggests the possibility of recognizing a broad world of politics wherein speech is virtually unregulated and, simultaneously, a narrow institutionalized realm of elections that is legally structured to support the fairness and effective functioning of this element of the governing process. Many democrats long for greater popular participation in democracy at the same time they despise at the banality of modern election campaigns. I share both sentiments. Some comfort and, even more important, appropriate responses to this situation can result if these democrats narrow their conception of the role of elections and expand their recognition of the importance of this broader public life.

Although both election campaigns and this broader politics are indispensable, they have differences, even though overlapping, roles to play. Democracy depends on the existence of both a structured realm of democratic government and a broader realm of unregulated politics as well as on vital, appropriate interactions between them. Political opinion generated by politics in the broad sense must be converted into political power. The specific, institutional role of the electoral realm is as an instrument of this conversion. Legal structuring of the electoral system, including regulation of speech opportunities within elections, should be designed to improve this process. In contrast, any governmental intervention in the broader political realm should only be supportive, never restrictive, of liberty.

B. Judicial Treatment of Elections

Clearly, many people today hold the second view of elections. They see elections as the center: almost the totality, of popular participation in politics. Still, the prominence of this view may reflect the social group examined. It may be particularly prevalent inside the Capitol's "Bellevue." In contrast, non-politicals active in substantive political debate and activists associated with particular issues are more likely to hold the first view: the heart of politics lies in a broader public sphere and thus elections, at best, merely implement the public opinions developed in that broader realm. Note counts of uninformative opinion, however, do not provide appropriate guidance on choosing between these views. One way to test the appropriate purchase of these different conceptions of election campaigns is to examine the views implicit in the legal order and in Court opinions.113 As a matter of

113 For example, the dissent in McHaye v. Ohio Elections Commission quoted the
legal precedent, the Court's treatment shows whether Buckley is consistent with our constitutional commitments. Moreover, since the Court's decisions were usually reached under the pressure of justiciability and with the attention necessary to evaluate pragmatically in concrete circumstances the needs of a workable democracy, they should provide some guidance as to where wisdom on the issue lies.

This section cursorily engages in an examination of such precedents. Of course, one must initially note that in its holding respecting expenditures, Buckley implicitly viewed political campaigns as part of a broad realm of political speech not generally subject to regulation. But since this holding is under examination, the question is its consistency with other case law. Buckley did not even take up the possibility of viewing electoral speech as part of an institutionally bound governing process. My claim is that if failing to do so, it deviated from most relevant prior and subsequent case law. This is made readily apparent through reference to the anomalies with which this Article began. These anomalies disappear if the cases are seen through the lens of this first view of electoral campaigns.

The frequent content discrimination against electoral-oriented speech discussed in Part I.A, even if technically explicable under standard doctrine, becomes more comprehensible under the view that the state's special and legitimate interest in regulating the electoral process, including electoral speech, justifies regulation to assure the fairness and openness of elections. The rules that the Court upheld protected the purity and fairness of the electoral process. Acceptance of this content discrimination implicitly treats partisan campaign speech as an institutionalized part of government.

regulation of anonymous campaign speech "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" as indicating the practical wisdom of upholding these restrictions 514 U.S. 224, 371 (1995) (Scalia, J. dissenting). This evidence about views implicit in the legal order was relevant. Interestingly, the dissent's conclusion that anonymous campaign literature can be prohibited conforms generally to my claim that speech in the electoral realm is subject to regulation as behalf of fair elections. Additional evidence of the power of this view of elections comes from the observation that 47 states apparently maintained laws restricting anonymous campaign speech until 1995 despite the 1969 decision providing First Amendment protection for anonymous leaders. See Tobe v. California, 362 U.S. 60 (1960). Nevertheless, another this history nor this view of electoral speech justifies the dissent's position. A history of disempowerment does not gain authority by its long accepted nature. Regulation of electoral speech should be invalidated if it narrows rather than opens electoral processes. This factor properly persuaded the majority. For many people and groups on the margins of power, the people most in need of First Amendment support and the people most likely to be excluded from the political process, the opportunity to participate anonymously can be crucial. See supra Part I.

This institutional focus also clarifies considerations that show when regulation is impermissible, thereby supporting arguments that some restriction may have been improperly upheld. See infra Part V.
The same is true for the law in Buckley conditioning receipt of public campaign funds on the recipients conforming to speech-restrictive rules. Upholding these rules makes sense if the electoral speech is properly subject to government regulation promoting electoral fairness and openness. Of course, just as with more direct limits on electoral speech, these conditions should still be subject to judicial examination. For example, if these regulations supplied resources insufficient to inform the electorate or allocated funds in a manner that decreased the openness of the electoral process, the conditions should be struck down. Still, the conditions' constitutionality is most easily explained by a view of the electoral process directly contrary to the view implicit in Buckley's holdings concerning campaign expenditures.

That two inconsistent views are implied by the same case is certainly odd. This contradiction is somewhat easier to understand since the Court never focused on the unconstitutional conditions issue. Still, given a contradiction, the element that received explicit attention should normally be treated as more authoritative. However, I suggest that this context is exceptional. The doctrinal option for viewing campaigns offered here, even if implicit in much case law, had not been clearly formulated and thus was not a tool readily available for judicial use. Given available doctrinal and theoretical constructs, the Court was perfectly right to say that promoting equality by restricting the speech of some people is generally impermissible. However, the question of whether this general First Amendment premise should not apply to the special governmentally structured institutional sphere of elections was not likely on the Court's conscious agenda. Going back to the public funding issue, people's reflective belief, both then and now, is apparently that this practice is constitutionally acceptable. What the Court felt compelled to do in regard to the potential unconstitutional condition may be more telling than what traditional doctrinal tools lead it to say and do in respect to direct regulation.

If electoral campaigns are an element of the institutionalized governing process, exclusion of a racial group would be unconstitutional discrimination. Thus, this view explains the result in the last of the white primary cases, Terry v. Adams. More generally, this view reflects the legal treatment of political parties. Existing judicial doctrine often allows regulation of political parties and their access to the ballot. Regulations are upheld when they promote the legitimate aims of improving the operation of the electoral process—although the Court otherwise protects associational rights.118

11845 U.S. 461 (1983); see discussion supra Part I.C.
119Cf. Daniel Hay Lovenstein, Associational Rights of Major Political Parties: A Skeptical Inquiry, 71 Tex. L. Rev. 174 (1993) (arguing that properly recognized associational rights are at stake less often than is commonly recognized and favoring greater power for the statutory regulation of parties).
More explicit attention to two examples mentioned in Part I.A will conclude this section. First, as noted earlier, broadcasting is subject to extraneous content-based rules concerning campaign-oriented speech.140 Whatever the significance of any distinction between broadcasting and print,141 only the government’s interest in structuring electoral campaigns can justify its regulations that burden broadcaster speech while promoting and equalizing candidates’ and their supporters’ electoral speech. Moreover, the recent demise of the fairness doctrine in broadcasting provides further evidence that the constitutionality of content-based speech rules depends at least as much on their involving electoral speech as their involving broadcasting. In 1981, the Supreme Court upheld a candidate’s right of access to broadcast stations once the campaign had begun and the FCC’s authority to determine when the campaign had started.142 This decision cast no doubt on the legal challenge to the fairness doctrine as gathering force.143 When the challenge finally succeeded,144 neither the FCC nor the courts seemed to consider relevant the recent Supreme Court decision, CBS v. FCC, upholding virtually identical requirements in the campaign context.145 This silence is difficult to explain except on the ground of special governmental authority in relation to electoral speech.

Finally, the Court has upheld limitations on corporate electoral speech. Some read Austin v. Michigan State Chamber of Commerce146 as directly rejecting the First Amendment premises of Buckley limiting the state’s

140See supra text accompanying notes 34–37.
141See, e.g., Baker, Pacella, supra note 46 claiming that even though most existing regulations of broadcasting is constitutional, the basis of government authority differs little between broadcasting and print.
142One apparent difference between the media is relevant here. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court struck down a law providing a right of reply. The Court gave alternative rationale: (1) the right of reply penalized and, hence, could enter the paper’s political speech and (2) it interfered with constitutionally protected editorial autonomy. More recently, in a decision inconsistent with its editorial autonomy rationale, the Court explained Tornillo solely in terms of the penalty/determination concern. See Turner Broadcasting Sys. Inc. v. FCC, 521 U.S. 520 (1997). Even this latest interpretation of Tornillo might be thought to pose problems for existing broadcast regulation since the accuracy standards of equal opportunities for candidates is analogous to Tornillo’s right of reply. Nevertheless, the constitutionally salient fact that the provision would deter broadcast coverage is significantly reduced by, first, the exemption of mass reporting and news broadcast from the equality mandates and, second, by the grant of a right of access, which permits the broadcaster to respond to the equality mandate by furnishing coverage.
146The fairness doctrine’s requirement of coverage for important issues (the “coverage” requirement) is analogous to candidates’ right of access; its requirement that all sides be presented (the “balance” requirement) is analogous to candidates’ right of equal opportunities.
power to counter the distorting influence of concentrated wealth. However, this reading will not work. The Court explicitly based its decision on the presence of "the unique state-conferred corporate structure," as a factor not implicated by the individuals in Buckley. It left wealthy shareholders free to spend their money on political speech through, for example, a corporate-financed PAC. The Court also rejected the suggestion that its goal of equalization was behind the law; nowhere did it complain about the political role of amassed wealth in general as opposed to wealth held by the question-oriented corporation. Apparently, the Constitution, contrary to the earlier holding in First National Bank v. Bellotti, allows the government to regulate these corporations' political speech. Admittedly, Austen might contentiously be read as consistent with both Buckley and Bellotti, given the danger of candidate corruption created by corporate political expenditures. In this sense, preventing corruption is a state interest justifying regulation. Buckley only found that the danger did not exist (or did not to such an extent) in cases of expenditures by individuals, and Bellotti only found the danger did not exist in relation to corporate support for ballot measures. However, the Court never suggested this dubious line of reasoning.

Instead, Austen ignored the key marketplace of ideas premise of the Bellotti majority—that the First Amendment protects the speech because of its capacity to inform and that this capacity is independent of the identity of the speaker. Instead, Austen adopted virtually all points made by the Bellotti dissent. The key justification for the law, the Court repeatedly said, was that the corporation's expenditures were "not an indication of popular support . . . but reflect instead the economically motivated decisions of investors and customers." This complaint is not the egalitarian objection to the wealthy exercising disproportionate influence. Rather, it is that the corporate treasury does not necessarily reflect political commitments of either consumers or even wealthy owners. The Court accepted the legitimacy of the state's concern that views expressed in the electoral arena should reflect real people's actual support. This holding neither directly conflicts with nor affirms the general First Amendment premise of Buckley, namely that equalization of speech opportunities does not justify suppression of people's speech. The holding, however, does treat the need to create a fair and effective electoral process as justifying special rules restricting speech. Austen's acceptance of rules structuring the realm of campaign expression has broad implications. The Court can

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hardly stop short of the conclusion that the electoral context permits speech limitations that would not be permissible elsewhere. Here, in its view of the electoral sphere, not in its more general First Amendment premises, Austin conflicts with Buckley. Like all the case law discussed here and in Part I, Austin implicitly accepts the view that campaign speech is part of a legally recognized, institutional realm in which speech can be regulated—in this case, a sphere that can be opened to the views of people but (partially) closed to those of corporations—in order to improve the democratic character of elections.

C. Normative Theory of Elections

In the end, the justification for the Court's treatment of electoral speech as especially subject to regulation depends on the purpose attributed to elections and on the relation of elections to democratic politics, within the normative theory of democracy to which the country is (or should be) committed. This section defends the Court's treatment of electoral speech in cases other than Buckley on the basis of a conception of politics as ubiquitous and of elections as serving a narrower translation function. I argue that elections should be designed and regulated in order to promote the accuracy of the translation of public will into efficacious political power. Another, possibly more common, view treats elections as the center of politics. A society's politics occurs primarily during elections and takes the form of campaign speech. Elections are where people consider government policies, debate the public interest, and form their political values. Politics, basically, is elections. Here I argue that this second, election-centered view is less normatively and pragmatically desirable.

The first non-electoral-centered conception treats politics, even politics relevant to government, as much more widespread. This politics encompasses the non-campaign and pre-campaign political activities that cause shifts in public opinion—public opinion being the political ground on which most electoral candidates compete to stand. Politics includes individual and group efforts leading up to the American Medical Association or American Bar Association taking positions on important medical or legal policy issues. It includes nurturing racial pride and awareness and encompasses all aspects of feminist consciousness-raising, political activities reflected in an election's gender gap or racial block voting. Politics occurs most prominently in face to face discussion and in mobilization oriented around specific themes or interests: civil rights, feminism, the environment, gay rights, abortion, housing policy, victims' rights, free trade, labor policy, military intervention, public education, or welfare. Both the substance and practice of this politics—as well as the public good, one of politics' subjects—are continual subjects of media reporting.
and commentary. Moreover, this non-electoral-centered version of politics, as opposed to the campaign-centered conception, casts a wide net to include virtually all culture within the political. Cultural activities and sources, including discussion, mobilization, and the media, are central elements of what has commonly been called the "public sphere." This broad view of politics partially justifies what may have seemed cavalier about my earlier characterization of elections as "employment decisions." In the second view of politics, this characterization seems to trivialize both elections and the electoral campaigns that this view treats as the heart of politics. But given a robust public sphere in which activists, religious groups and other associations, media, and cultural players struggle and in which people's informal and unvarnished discussions and reflections lead to their political values and perspectives, elections can be seen as a functional element of popular government designed to select appropriate public officials responsibly. Elections, including campaigns, are structured aids through which public opinion flows when being converted into political power.

Of course, the first, favored view is consistent with increased discussion of public issues during election periods and with campaigns playing a role in this process (although I know of little evidence that most campaign speech makes any effective contribution to meaningful discussion of public issues). And this view does not imply that the office holder's task is merely to execute a public will formed independent of the election. Rather, this view is consistent with varying understandings of representation, including both the "independence" model—the legislators, once elected, should take responsibility for reaching independent judgments—and the theory that office holders should be closely responsive to, even if they do not mirror, a public opinion formed through a broad, participatory public dialogue. Still, according to this first view, the primary purpose of electoral campaigns, like "the purpose of counting, counting, and recording votes[,] is to elect public officials, not to serve as a general forum for political expression." Many practical considerations favor this non-electoral-centered view. The dismal state of public discourse within existing electoral campaigns needs little demonstration. There are constant efforts to improve this

118 See PUBLIC OPINION AND THE COMMUNICATION OF CONSENT (Thomas L. Glasser & Charles T. Bosley eds., 1965) containing essays describing different conceptions of public opinion, most of which regard the collection of sensing public opinion as something that could be identified with polling results or surveys.
situation, with proposals ranging from voluntary reform of and innovation in journalistic practices to voluntary or legal changes in how broadcast time is made available and to public financing combined with various speech-oriented "strings." Many of these reforms have promise and should be pursued. However, this non-electoral-centered view of politics offers the comfort that a democratic society does not need to put all its democratic chips on the bet that it can turn elections into an adequate forum for society's self-sufficient public deliberations. A key advantage of this conception is that by treating campaigns as not the central realm of a politics that must be unregulated and free of government but as governmentally sculpted events instrumentally designed to promote rationality and fairness, this first view justifies rather than blocks appropriate innovation that tries to improve election's openness and fairness.

Most importantly, this non-campaign-centered view of politics holds out a realistic promise of a society with a vital political life. If the second, election-centered view of politics were accepted, the purportedly widespread assumption that campaign costs are out of control, with too much presently being spent, should be quite disturbing. Few people committed to participatory democratic government believe that the immumerable, complicated political issues facing the country receive too much popular attention. In the most recent cycle, the estimated $2 billion spent by all presidential, House and Senate campaigns combined was less than the $2.58 billion that a single company, Philip Morris, spent during one year marketing its products. Slightly a democratic society's popular deliberations about its policies and directions need the use of more resources than does the promotion of a single company's consumer products. It is less obvious, however, that important differences between individual candidates, say for President, are so numerous and complicated that they require more consideration than they get now. (More intelligent consideration—a worthy goal of many innovative journalists—is another matter.)

The concern provoked by the comparison between total campaign expenditures and Philip Morris's marketing expenditures reflects the electoral campaign-centered view of politics. From the favored non-electoral perspective, this is the wrong comparison. Rather, the political expenditures analogous to corporate advertising are all the resources devoted to stimulating involvement in or advocating views about public issues. The


120 For this comparison I do not include the considerable fees (which is a major expense) that individuals, who are solicited by the media or by advocacy organizations, then spend talking about these issues with family or friends. Nor did I include the time
Sierra Club or NAACP or NOW or local advocacy and associational groups' expressive and political activities, even if unrelated to specific electoral campaigns, often are quite related to choices people make when evaluating political parties or candidates, as well as related to the public opinion to which both elected and appointed officials properly respond when in office. Agreeing with Justice Brandeis that "the greatest menace to freedom is an inert people," I still suspect that not enough time and resources are spent on this much broader category of political speech. About this category the Court in Buckley was right to say "the First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise ... [The people ... must retain control over the quantity and range of debate on public issues ...]." Only when the Court added to the end of the last sentence the words "in a political campaign" did the Court in Buckley take the controversial position that my last section argued was inconsistent with the Court's more general treatment of elections and electoral campaigns.

Thus, although I would quarrel with the conclusion, the widespread belief that candidates and their supporters spend too much money on political campaigns is plausible. This notion could reflect a reasonable belief that campaign expenditures are the wasteful result of a winner-take-all contest rather than a reflection of a public need for more information about or discussion by the candidates. Campaigns, particularly for the major parties, have become primarily, although not exclusively, instrumentally created activities aimed at victory, not at democratic deliberation. Popular resistance to campaign expenditures may be partly due to their instrumental tendency to commodify politics. In contrast, considerable non-commodified electoral discussion exists in speech not paid for by candidates or their supporters. Large monetary expenditures on campaign-relevant speech include those of the media that produce and then publish or broadcast purportedly informative, reflective news and features about the campaign. The central non-commodified resource expenditure is the time spent in the individual face to face interactions of people not personally part of the campaign.

The non-electoral-centered view of politics recognizes that the locus of real democratic potential lies in the popular and comparatively reflec-
D. Between Democratic Opinion Formation in the Public Sphere and institutionally Structured Democratic Will Formation

Normatively, the best way to conceptualize campaign-oriented speech depends on a historically contextual assessment of empirical democratic possibilities. I sketch a rough assessment, relying primarily on Jürgen Habermas’ recent work. Normatively, I should note that neither this account nor the discussion in Part III.C (both of which justify the position argued here) need be unassailable. The account only needs to be more persuasive than an account of democracy that would locate electoral speech on the opposite side of the boundary between the institutionalized electoral realm and the broader, unregulated part of the public sphere. Constitutional doctrine turns on envisioning electoral speech one way or the other. A mistake in either direction—one that would allow or one that would disallow regulation—potentially injures democracy. Risk aversion cannot justify the choice to place certain speech within or outside the institutionalized...
realm of elections. At least, it cannot be a justification unless a mistake in one direction can be shown to be more inherently dangerous. 138

For a collective to adopt laws or make other decisions requires some institutional arrangement at least to identify what behavior amounts to adopting or deciding. No such requirement is necessary, however, for people to reason and thereby generate an elusive and ephemeral public opinion. Given the possibility of conceiving electoral speech as part of either an institutionalized realm of democratic “will-formation” or a largely unregulated sphere of public “opinion-formation,” the choice ought to turn on which characterization best supports popular sovereignty. That should be the issue. The answer is not obvious, but I think the better view supports the first conception.

In the final analysis, democracy and legitimate law require that law be based on the discursively formed views of the public of citizens. 139 Realistically, the public’s practice of discursively forming views is not limited to elections and the institutions of government—realms in which popular participation is empirically quite limited. Rather, legitimate law requires an origin in the communicatively generated power that “springs from the interactions among legally institutionalized will-formation and culturally mobilized publics.” 140 Habermas emphasizes that interaction between institutionalized processes, on the one hand, and public opinion developed within unregulated public spheres, on the other, is central for the existence of democracy and legitimate law. More specifically, he argues that democracy and legitimate law require that communicative influence flow from these public spheres of civil society at the periphery to the institutionalized structures of government at the core.

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138 As to some few speech issues, this book can be met. See Vincent Blasi, The Pathological Perspective and the First Amendment, 85 COLUM. L. REV. 449 (1985). Nevertheless, even (1) the continued existence of broad unregulated politically oriented public spheres, (2) courts’ availability for striking down campaign regulations that limit issues or speech content and regulations that consist in rather than open up the electoral process, (3) the obvious political reversibility of any citizen, and (4) a vibrant democracy’s arguable dependence on reform, the campaign context is as unlikely area to predict that a wrong judgment that regulation is constitutionally permissible is more dangerous than a wrong judgment the other way. One might even argue that the opposite—that given the above observations, rule exists suggests the Court might defer to legislative action.

139 "Under postmetaphysical conditions, the only legitimate law is one that emerges from the discursive opinion- and will-formation of equally estancnshed citizens . . . ." HABERMAS, EPN, supra note 137, at 608. Habermas’s emphasis on “discursively formed” may appeal to adopt a “republican” conception of democracy. Habermas, however, forcefully rejects that characterization. Although his “discursive theory of democracy” explicitly takes from both republican and liberal conceptions, it differs from and adds to both. Habermas emphasizes that democratic processes can include and, given the obvious pluralism of modern states, should include bargaining and compromises as well as moral, ethical, and pragmatic discourses. See, e.g., id. at 278–79, 296–302, 452.

140 Id. at 301.
For this flow from the periphery to the core to occur and to dominate depends, first, on the existence both of unrestrained and largely uninstitutionalized public spheres\(^1\) and of institutionalized processes of democratic governance; second, it depends on the nature and quality of interaction between the two. Institutionalized governmental bodies must be permeable to the public—a public that "finds a basis in the associations of a civil society quite distinct from both state and economy alike.\(^1\)" That is, in a constitutional democracy, the "official" circulation of power begins with people reasoning within the "wild" or "anarchic" structures of procedurally unregulated public spheres\(^1\) in which communication is unrestricted.\(^1\) Here, public opinion, that is, public opinion not in a statistical but in a public reasoning sense,\(^1\) responds to problems or issues originating in private experiences in the lifeworld. This public opinion then passes through the sluices or filters of institutionalized democratic procedure, becoming the input for parliamentary opinion and will-formation.\(^1\)

In contrast to this "official" circulation, the flow of communicative power could be, and systems theory predicts that it will be, in the opposite direction.\(^1\) Rather than responding to the initiatives of the public, the administrative state may use communications as a means to extract loyalty from the citizenry.\(^1\) Realistically, the flow is likely to go in both directions and the relative prominence of each will be variable.\(^1\) Since flows of communications originating in the institutional core can create routines and relieve some of the unavoidable complexity of the tasks of government in modern society, arguably the key issue is whether the state's "settled routines remain open to innovative impulses from the periphery."

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\(^1\) Only see "largely uninstitutionalized" because of the media, which are issue-based in being institutionalized within the economy (or sometimes within the state) as well as being crucial instruments of the public sphere.

\(^2\) See id. at 501.

\(^3\) See id. at 508.

\(^4\) See id. at 513. See also Public Opinion and the Communication of Consent, supra note 128.

\(^5\) These procedures also have a cleansing role in that, as empirical evidence continues, illegitimate-producing matters should pass through more entities. See Habermas, BFP, supra note 137, at 359, 355 n.38.

\(^6\) Id. at 356. Functional systems treat whatever is outside the system as environment to be instrumentally manipulated to serve systemic aims. Thus, the public sphere is susceptible to manipulative exercises of power by entities oriented by the systemic logic of the market as well as the state, laws (such as the Michigan statute punishing corporations from making independent expenditures supporting or opposing candidates for state office, upheld in American Civil Liberties Union of Michigan v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990)) that restrict the political influence of interest-based entities attempt to impede this interference by the market, and the First Amendment attempt to impede interference by the State.

\(^7\) See id. at 483.
especially "in cases of conflict" that occur when there is a "consciousness of crisis." 130

In this procedural conception of democracy, the categorization of electoral speech should reflect a judgment about which placement will facilitate communicative power circulating in the direction required by popular sovereignty and legitimate law. One possibility, namely the electoral-centered view of politics described above, would test electoral speech as a central aspect of public communication within procedurally unregulated public spheres. Regulation of election campaigns, it is feared, would only enhance the administrative state's capacity to extract loyalty—an assessment that leads to the cynical description of campaign finance reform as "incumbent insurance schemes." 131 Alternatively, existing electoral speech as part of the procedurally regulated institutional processes of "will-formation" may help these democratic institutions to work fairly. Regulation may lead to elections being more responsive to views developed by unrestricted communications in the public sphere.

Headway in this debate depends on having empirical information or engaging in plausible speculation. At what points in the process is the proper democratic circulation of communicative power most vulnerable? Can appropriate placement of electoral speech reduce the dangers? Primary dangers include: (1) lack of visibility—the possibility that the unregulated public sphere will not be broad or vibrant enough to involve people in considering public issues, formulating problems, proposing responses, and mobilizing to gain the attention of the institutionalized structures of governmental will-formation (failure here was Brandeis' fear); (2) colonization, manipulation, or distortion—the possibility that concentrations of non-discursive power in either the economic or administration systems, acting to serve their own system's needs, will distort the connections between public opinion processes and institutionalized decision-making processes; and (3) lack of connection—the possibility that public opinion will become disconnected from influence on political power, leaving the

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130 Id. at 357.
131 The claim is that reforms will inevitably be pro-incumbent due to incumbents' ability to use their position to see that only pro-incumbent laws are adopted. In the absence of this account in part because most electoral finance reform laws are adopted by voters in initiatives or referenda after having been rejected by legislatures. Moreover, when 90% of incumbents for Congress are re-elected, see, e.g., Financing of Campaigns '96, L.A. Times, Nov. 13, 1996, at B6, it becomes reasonable to think that it is now more desirable to consider whether a reform will make the electoral process better rather than whether it will supply incumbents with unneeded protection. Despite the fact that these in office have gone through the existing system, those legislators who sponsor reform may have decided that as representatives they want to do something else than engage in continual fund raising.

132 See supra text accompanying note 133.
state system independent of the public opinion developed in unregulated, egalitarian public spheres.\textsuperscript{153}

The vitality of these public spheres is of utmost importance. Since nothing logically requires treating electoral-oriented speech as part of unregulated public spheres, the crucial empirical question is whether conceptualizing electoral campaigns as an unregulatable part of these spheres would increase their vitality. There are several reasons why the answer is probably no. Relieving a sphere of the burden of decision can facilitate discursive opinion formation. The need to reach a decision diverts attention to outcomes, and this focus encourages strategic rather than discursive behavior. This phenomenon is well illustrated by elections, where strategic considerations often discourage candidates from seriously and clearly discussing difficult, controversial issues.

In order to relieve the public sphere’s opinion formation processes of the burden of decision, electoral campaigns could be treated as a procedurally regulatable part of the governing process. As Habermas observes:

\begin{quote}
[The] processes of opinion-formation . . . cannot be separated from the transformation of the participants’ preferences and attitudes, but they can be separated from putting these dispositions into action. [Thus,] communicative structures of the public sphere relieve the public of the burden of decision making [which is] reserved for the institutionalized political process.\textsuperscript{154}
\end{quote}

These considerations may explain why Habermas consistently treats elections as part of the institutionalized realm of will-formation.\textsuperscript{155}

\textsuperscript{153} Cf. Habermas:

The constitutionally regulated circulation of power is qualified if the administrative system becomes independent of communicatively generated power, if the social power of functional systems and large organizations (including the mass media) is converted into illegitimate power, or if the life-world resources for spontaneous public communication no longer suffice to guarantee an uncoerced articulation of social interests.

HABERMAS, BPN, supra note 137, at 386.

\textsuperscript{154} See id. at 361–62. (The core area of political system is formed by the functional institutional complex of administration . . . judicial system, and democratic opinion- and will-formation [which includes parliamentary bodies, political elections, and party competition] . . . . [This center is] distinguished from the periphery in virtue of formal decision-making powers and veto prerogatives . . . .” (emphasis added)). See infra id. at 485.

\textsuperscript{155} Although Habermas does not consider campaign regulation in this book and does not unambiguously include electoral speech (as opposed to the elections themselves) within the institutional complex, this lack of attention could merely reflect the placement
A key rationale for treating particular discourses as within an institutionalized realm is that the speech aims directly at influencing legally efficacious decision-making. This aim is at inherent in electoral-oriented speech as it is in speech within court proceedings, agency hearings, legislative debates, and, more controversially, lobbying. In each case, conceptualizing the speech as within an institutional realm allows regulation to improve the quality of the legally efficacious decision-making. This rationale also covers speech directly and is primarily oriented toward influencing citizen voting. Systematic strongly becomes electoral speech towards efficaciousness rather than discerniveness. This for this reason, electoral is likely to be especially inadequate as realms of discursive politics and public opinion-formation. For a society to treat elections, rather than, for instance, the activities of associations oriented toward public issues, as its primary realm of discursive politics could impoverish and degrade politics. Public spheres would suffer.

neering obvious, particularly given ubiquitous campaign finance regulation is most modern democracies. See, e.g., DAVID W. ARANOFF & GEORGE H. AVERY, POLITICAL MONEY: A STRATEGY FOR CAMPAIGN FINANCING IN AMERICA 156-74 (1975); K. VON BEYME, POLITICAL PARTIES IN WESTERN DEMOCRACIES 196-211 (1982); ELIZABETH MILLER & CHARLES FUNSTONE, TELEVISION AND ELECTIONS 17 (1992); EMILY ZER PALMIERI, CAMPAIGN FINANCE, IN DEMOCRACY AT THE PULL 138 (David Butler et al. eds., 1981).

19This mimicry toward being "efficient" rather than "discursive" certainly does not imply that either voluntary or non-voluntary regulatory attempts to make electoral speech more substantive are not worthy goals. For example, a useful reform could be to mandate that broadcasters provide free broadcast time for candidate debates. (To provide candidates free TV time and prohibit paid campaign advertising on TV would reduce the demand for campaign funds and thereby reduce the pressure for ignoring or getting around finance regulations. Such a result would contribute greatly to making finance regulation work.) This goal also fully justifies some recent journalistic initiatives, including the substantive journalistic evaluation of campaign ads.

Still, the continual calls for journalistic coverage to be main issue and less bare race oriented or other race oriented may be older than often recognized. Because of party dignity, in most general elections (as opposed to primaries), many people, surely most people who are especially interested in public affairs, already know for whom they will vote before they hear the candidates' campaign speeches and their "vigorous but vague" substantive pronouncements. For these people, the real "news" is who is winning, not for issues. Issues were properly the subject of discussion and public mobilization *ex* earlier, non-electoral stage. Interestingly, these directly committed voices are often the leaders of the chorus calling for more issue-oriented coverage. Despite the large number of need or personal desire for more information about the candidates' positions, this call understandably relies on their desire that the public be more substantively informed of, and informed about, public issues. Of course, possibly the democratic role of news is to serve be comparatively small group of swing voices rather than also large already committed part of the voting public. This role, however, probably conflicts with the market logic directing the media to serve the broader audiences. See BAKER, supra note 44.

20Heremans consistently emphasizes such associations as crucial elements of the public sphere. Thus, he argues "the communicatively generated power of popular sovereignty "springs from the size-action among legally institutionalized will-formation and culturally mediated politics. "Hatuey find a basis in the associations of a civil society quite distinct from both state and economy sides." HEREMANS, above note 137, at 301. See also, e.g., id. at 307, 355-56, 358, 366, 372, 485.
An election’s power of decision creates an additional reason for not treating it as part of the unregulated public sphere. This power makes electorates obvious targets for power centers that aim to subvert elections’ egalitarian decision-making role. Organized power centers, located in the systems’ realms—the market or the administrative state—have both systemic and ideological interests in controlling all elements of opinion and, hence, all informal processes of public discussion. The payoff, however, is often especially high within the electoral sphere, and a vote, a short term behavioral act, is potentially more manipulatable than long term beliefs, values, and attitudes. In contrast, the need to be discursively persuasive as opposed to merely behaviorally effective is often greater in those realms of political discourse where discussion, not decision, is key. Unlike legally effective decisions (including votes), “[p]ublic opinion can be manipulated but neither publicly bought nor publicly blackmailed.”

The “burden of decision” tends to increase pressures on speech to become dominantly strategic rather than value-based communication, and the “power of decision” makes the electoral realm an especially prominent target for distinctive manipulation by system realms. These negative influences are reasons not to want campaigns to be classified within the unregulated public sphere. Including electoral speech within the unregulated public sphere is likely to reduce the quality and vitality of political life there.

Additionally, great advantages flow from treating electoral speech as part of an institutionalized complex of governing. Democracy depends on successfully designing institutional arrangements or devices to facilitate the effective and appropriate influence of public opinion (developed in unregulated public spheres) on institutionalized will-formation. Such devices include petitioning, appealing before administrative agencies and legislative bodies, lobbying, and bringing lawsuits. However, elections provide the paradigmatic method of turning opinion, communicatively developed within the public sphere into political power. Like with the use of other devices, the legitimacy of the political power created in elections depends in large part on the procedural circumstances of its creation. The aim ought to be “linking governmental administration to communicative power and incentivizing it better against illegitimate power.”

To do this, the electoral process should be structured to be maximally sensitive to communicatively developed public opinion rather than merely reflective of the “social power of functional systems and large organizations.”

This sensitivity is precisely the proclaimed goal and potential effect of

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128 Id. at 364.
129 Id. at 410.
130 Id. at 366.
campaign finance reform, including prohibitions on corporate involvement and other regulation of campaign contributions and expenditures. The above considerations are based on a particular normative understanding of democracy. Democracy depends on a vibrant public sphere that, in the mid, exercises controlling influence on governmental "will-formation." The process depends on "speech" through which public opinion flows. These rules are generally institutionalized and designed to promote the flow's effectiveness, fairness, openness, and direction. The electoral process, including electoral campaigns, is a central part of this design. Treacting election-oriented speech as subject to regulation on behalf of the democratic functioning of an institutionalized electoral realm responds to major dangers facing popular sovereignty. First, this treatment recognizes that locating electoral campaigns within the unregulated public sphere is unnecessary. Treating them as part of the institutionalized realm can be fully consistent with democracy. This conclusion is indicated by

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162Campaign finance reform could be, as its critics fear, used as a means of furthering distanciation control by the administrative state. Of course, this abuse is only one of many ways that the administrative state could advance such a goal. In any event, the possibility that the state could reform campaign finance for bad reasons and in bad ways justifies the authority of the judiciary to evaluate specific challenges to particular reforms. But if the potential good of reform is significant, this danger should not justify prohibiting all such reforms. See C. Edwin Baker, Private Power, the Press, and the Constitution, 10 CON. COMMENTARY 521 (1993).

163Of Pard, supra note 13. Post argues far managerial-structures do not assume, but "structures of self-governance" do assume, that citizens are autonomous. Id. at 284. See also id. at 200. Presumably, election and electoral speech would be, for Post, within the structure of self-governance, although this may be uncertain after his characterizations appear in New England town meetings, legislative sessions, and committee hearings within the realms of non-regulation. See id. at 226, 271, 274-75. Thus, in his careful and powerful critique of Owen Fiss's and Carl Bums's arguments for regulation of public speech, Post identifies a "sharp anomaly" in "regulating democratic elections on the premise that voters are not autonomous..." Id. at 288. Post views managerial control of even discrete realms as deeply inconsistent with the necessary assumption of autonomy.

Id. at 287-89.

In contrast to the constant opposition between management and self-government that Post describes, an alternative maps the categories of "autonomy" and "self-control" logic as having different roles. Designers of institutional arrangements should always instrumentally and purposively take into account cause and effect considerations while furthering various value-based concerns, including democratic process values. However, these structures, created by accretively autonomous people, should themselves respect people's "accredited" autonomy. This is roughly the difference, for example, of the micro and macro in Rawls's theory of justice. Justice requires that the basic institution be designed to achieve certain results but also requires people's belief, when acting within such institutions, be respected and rewarded as their own. One failure of Nozick's critique of Rawls was Jones's repeated failure to see this point. See Rowan Rovner., Autonomous, STATE, AND STRUGGLE (1974). Institutional structuring of the electoral process is inherent to the notion of having elections. The structure helps to further effectively and instrumentally the democratic premises of being open, fair, and egalitarian at the same time as the design in respect of people's choices within the structure. A structure that requires speech opportunities within this process is not necessarily inconsistent with the accretion of autonomy to votes.
the practices of most democratic countries\textsuperscript{188} and, except for Buckley and its progeny's treatment of campaign expenditures, by the Court's doctrinal treatment of elections and electoral speech. Second, this treatment relieves the public sphere of the burden of decision, thereby fostering potentially more thoughtful discourse within that realm. At the same time, by removing this decision-making role, it reduces the value and hence may decrease the extent of corruption of the public sphere by instrumentally oriented entities wielding economic or administrative power. Finally, regulation allows law to structure the electoral process in ways that increase its fairness and porosity to public opinion. Regulation may be necessary for elections to perform the crucial democratic role of properly connecting public opinion with institutionalized structures of democratic will formation. It can increase the possibility that the public sphere's communicatively generated public opinion will influence the formal processes of will formation.

Some commentators might accept the above as true in theory but argue that, unlike in other democratic countries, our First Amendment dictates the treatment of electoral speech; therefore, they argue, conceptualizations of electoral speech as within an institutionalized realm should be rejected. Their argument has the logical order wrong. Permissible restraints on speech vary with context. They differ for speech in the streets as compared to speech at the city council meeting or in the courtroom. The reason the permissibility of restraints varies is that First Amendment doctrine applies only after the function of these contexts is characterized. Likewise, the First Amendment or, more accurately, particular theories or understandings of the First Amendment, dictate the legal treatment of electoral speech only after the person applying the First Amendment initially characterizes the electoral context. For that task, democratic theory, not First Amendment doctrine, provides the relevant touchstone.

Post is persuasive in arguing for a broad realm of "ongoing and free processes of communication." Post, supra note 53, at 287. Habermas also describes the democratic necessity of such a realm, which in his analysis would exist in the "lifeworld," primarily in the part of the lifeworld constituted by procedurally unregulated public spheres. However, when Post argues that it is paradoxical to establish "structures of managerial control that violate formal conditions of freedom in order to recuperate democratic values," it seems incapable of theorizing the institutionalized portions of democracy. Post, supra note 53, at 288. In contrast, Habermas describes the democratic necessity, not the paradox, in the existence of procedurally institutionalized governing processes as well as procedurally unregulated public spheres. See, e.g., Habermas, BFN, supra note 137, at 307-08, 307-08, 485-86. Habermas argues the democratic hope lies in the quality of interaction between these two realms.

\textsuperscript{188}See, e.g., sources cited supra note 155.
IV. Independent Expenditures

This Article claims that the determinative issue in a First Amendment challenge to a restriction on campaign speech should be the restriction's effect on the openness and fairness of the electoral process. In the view of elections as an institutionalized realm of democratic government, candidates enter campaigns the way trial participants enter a courtroom, officials enter a legislative hall, or witnesses appear before an agency hearing. Their speech can be legally restricted only by rules that further the proper functioning of the particular institution. Of course, the conception of "proper functioning" and, thus, the permissible content of the restrictive rules, differ between institutional contexts. Rules that close down rather than open up the electoral realm are inconsistent with elections' democratic function. Such rules should be struck down. Unlike in courtroom, no official should determine for the candidate, the electorate, or the courts what is relevant. Similarly, when willingness to participate is reasonably and predictably dependent on anonymity, laws requiring disclosure of identity are presumptively unconstitutional.

In this Article I have not analyzed the constitutionality of particular campaign regulations. Still, though I do not claim to offer any final word, it might be useful to advance some preliminary thoughts about one extraordinarily difficult but important boundary issue. Specifically, should government be able to decide that the campaign includes expenditures made independently of the candidate and of the candidate's party organization but that are directly oriented toward affecting election results? If it can, the presumption is that these expenditures can be properly subject to regulation.

This precise question was not present in the post-Buckley cases because Buckley allowed unlimited expenditures by anyone, including the

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144 See Brown v. Hartlage, 455 U.S. 45, 62 (1982) (holding that when a state seeks to restrict directly the offering of opinions by a candidate the First Amendment requires that the restriction must be supported by a compelling and legitimate Mills v. Alabama, 38, U.S. 214 (1966) (holding that an Alabama law compelling reelection urging readers to vote in a specific way on election day violates the First Amendment); Democracy requires that there be no limit on what people can consider politically relevant, and, hence, what they can consider in elections.

145 There is curious content packed into this notion of "reasonable." Presumably, if the reason for anonymity is the speaker's fear of reprisal or attack, the provision is not reasonable. One might reason that the provision is reasonable if the speaker

candidate, although allowing regulation of the closely related category of “coordinated expenditures” by treating them as the equivalent of contributions. If, however, Buckley were reconsidered, the status of independent expenditures would also have to be reconsidered. Most commentators believe that their regulation is essential to effective campaign finance reform. If a candidate’s supporter cannot directly make a large contribution, she can achieve similar results by spending large sums on advertising that supports the candidate. This expenditure can have almost as much effect on the election result as a direct contribution, and the candidate is almost as likely to know of the support. If monetary contributions create a “corrupting” influence, so can these expenditures. If indirect expenditures are allowed but direct contributions are not, the candidate may spend time and energy, previously devoted to fund raising, to nurturing the good will of those most likely to make independent expenditures. In other words, independent expenditures create a gaping hole in any regulatory limitation on campaign spending. Although some of these parallels between expenditures and contributions may be overstated, the parallels have led some Justices to challenge the distinction between expenditures and contributions. Most importantly from the perspective of this Article, the same concerns with the fairness and the equality of the electoral process that justify regulation of the candidate’s campaign speech apply to at least some categories of independent expenditures. On the other hand, the claim that non-candidates should be able to use their own resources to express their own views is powerful. It would obviously be intolerable to prohibit people at home, in the office, or at the café from talking about an upcoming election, including identifying who they support and why.

By running for office, candidates enter a legally structured realm that offers clear benefits, including a chance to be elected. A possible view is

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104In Buckley and confirming cases, the Court has protected independent expenditures from regulation. See, e.g., Buckley, 424 U.S. at 39–41; FEC v. National Conservative Political Action Comm., 470 U.S. 448 (1985). See also Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996) (holding that the Republican Party’s campaign committee’s expenditures attacks the Democrats’ likely candidates, before the Republicans had chosen their candidate, were protected independent expenditures of the party).

105Justice White thought that constitutionally acceptable rationales for regulating contributions applied equally to independent expenditures. See Buckley, 424 U.S. at 261 (White, J., dissenting in part) (citing in part and dissenting in part) (citing in part). Chief Justice Burger and Justice Blackmun and, more recently, Justice Thomas have concluded that the Court’s distinction between expenditures and contributions is impermissable and, therefore, regulations of contributions should be precluded. See id. at 241 (Burger, C.J., dissenting in part and dissenting in part) (id. at 290 (Blackmun, J., dissenting in part and dissenting in part) (citing in part). Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2325–26 (Thomas, J., dissenting in part and dissenting in part). See also FEC v. Nat’l Conservative Political Action Comm., 470 U.S. at 318–21 (Marshall, J., dissenting).
that voluntary participation in this realm justifies restrictions on their expenditures. Candidates accept conditions designed to make the electoral contest open and fair in return for an opportunity to be listed on the ballot and, potentially, to be elected. In this view, people who are not running for office, but who may have strong political views about appropriate electoral outcomes, have not received a benefit on which to condition a restriction on their speech.

Alternatively, it can be argued that the first view describes the electoral process too narrowly. By creating elections, the state creates not only the opportunity to run but also the opportunity to influence the legal output of elections. Of course, the fact the government creates something cannot justify restricting speech about the thing or restricting speech aimed at ending or changing the creation. All sorts of behavior—all value-based discussions, for example, as well as the totality of people’s life experiences—affect the outcome of elections. At most, the institutionalization of elections can justify regulating behavior specifically directed at influencing these outcomes—for example, speech that is purposefully part of, not a reaction to or critique of, the process the state has created. Even in this category, the opportunity to participate as a voter and citizen or even merely as a person with views and interests is basic in a democracy. The claim, however, is that the government has some power to regulate purposeful participation in what it creates, especially if the regulation serves the creation’s purpose. Therefore, the content of the opportunity to participate in elections should reflect the democratic functioning of the institution. In this analysis, any expenditures instrumentally aimed at affecting the outcome should be subject to regulation to the extent needed to assure the fairness of the elections.

Under any conception of elections, line drawing will be necessary. Theory can only identify important considerations. It cannot give complete guidance for this pragmatic task. Even if theory specifies an acceptable rationale for putting limits on one or the other side of the line, difficult cases are inevitable. This line-drawing difficulty already exists in the wake of Buckley, where the distinction between coordinated and independent expenditures is statutorily and constitutionally crucial. Under

108 In Part II, I noted parallels between time, place, and manner doctrine, unconstitutional condition analysis, and the notion of institutionalized realms, but I observed that the latter category, even if implicit in court doctrine, was seldom discussed as such. My claim here is that the first view was limited by being able only to conceptualize unconstitutional condition analyses and did not have access to the notion of the propriety of regulations within institutionalized realms.

109 Under Buckley, since contributions could but expenditures could not be regulated, the question of categorization arises. If the money spent was counted as “coordinated” with the campaign, it was a regulatable contribution; if not, it was an independent expenditure. Under the analysis presented here, line drawing is still necessary, but the line is between independent campaign expenditures and more general, independent expendi-
the broader view of the electoral institution suggested above, politically related expenditures of candidates, at least once a campaign has begun, are presumptively campaign-related. For those outside the campaign, a relevant line is between election-related expression and the broader realms of political expression. The permissibility of regulations within institutionally bound contexts (as well as conditions attached to use of government resources) must not expand to regulation of expression within the broader realm of politics and the broader contexts of people's lives. This First Amendment premise must be upheld. In Haber'sman' s terminology, encroachment would amount to objectionable colonization of the life-world by system imperatives. A vibrant, unregulated public sphere must be maintained.

Roughly, I would suggest an approach where the normal activities of people and entities within the "public sphere," activities that encompass discussing all public matters including elections, cannot be limited merely because an election is occurring. All noncommercial person-to-person interactions must be unrestricted. Only the instrumentalism of using monetary expenditures or goods that would otherwise be purchased creates a reliable predicate to treat an activity as potentially a part of the instrumentally oriented electoral campaign as opposed to participation in the broader public sphere.

Even some expenditures to pay for partisan campaign speech must be treated as part of this unregulated public sphere. The press (newspapers and other on-going media, in contrast to special partisan media created just for the period of the campaign and designed just to influence the campaign) must be allowed to engage in unrestricted campaign coverage and comment, including endorsements. Associations that regularly send out newsletters, including politically engaged advocacy organizations, must be able to identify whom they support and the reasons for their support whenever they employ their established media or other regular communication methods. Any attempt to restrict these activities would go beyond campaign regulation and intrude into politics in the wider sense.

\[\text{text. Moreover, as noted below, lines must be drawn between people's and organizations' normal activities within the public sphere and their special campaign-related activities.}\]

\[\text{\textsuperscript{26} The Court has already upheld the government's authority to set the date for at least some purposes. See CBS v. FCC, 453 U.S. 397 (1981).}\]

\[\text{\textsuperscript{27} Whether person-to-person paid communications are subject to regulation presents a different issue. See infra text accompanying notes 185-187.}\]

In contrast, independent expenditures that involve interventions unique to the campaign or at least directed specifically at the election, rather than a mere continuation of individuals' and entities' routine activities within the public sphere, can be subject to regulation or prohibition. This category of expenditures would include all specifically campaign-oriented advertising within the media. It would also include groups' special attempts to spread an electoral message beyond their membership or usual audience, for example, broader than usual distribution of the organization's own media. This category, however, should cover only overtly election-oriented speech.\(^\text{194}\) If the broader realm of politics is to be protected, the regulated expression may not include individual or group discussion and advocacy concerning general political issues, even though this advocacy intensifies during the election period and even though public opinion on these issues aims at affecting, and may actually determine, election results.

This approach will totally satisfy few people. From the perspective of Buckley, it allows intolerable regulation. However, Buckley was out of line with precedent and appropriate First Amendment theory in not seeing that elections are instrumentally designed, institutionally bound realms where appropriate regulations of speech have been and should be permitted. Since Buckley protected all expenditures, the Court has not considered whether to allow limits on "independent" expenditures in a doctrinal context that generally permits limits on "campaign" expenditures. That is, Buckley did not determine constitutionally appropriate boundaries for an institutionalized electoral realm because it recognized no such realm; at least, it did not do so in the portion of its opinion striking down expenditure limits.

For those wanting daily effective campaign regulation, this approach allows too many escape routes, including organizational endorsements, newsletters, partisan advocacy, and the even bigger "loop-hole" of issue-oriented political expenditures. Yet, these all must be allowed if the law is to avoid colonizing the broader public realm. In response to these concerns about unregulated issue-oriented expenditures, two points can be emphasized. First, to the extent that these issue-oriented expenditures are less efficacious for electing a candidate, this reform reduces the incentive for the candidate to orient her campaign around inducing wealthy groups or individuals to spend money on these independent expenditures. In slightly different terms, no regulation of campaign finance can be com-

\(^{194}\) Buckley v. Valeo, 424 U.S. 1, 42-43 (1976). Otherwise, all politically salient speech during an election period would be covered.
ploetely effective. Still, as the marginal value so the candidate of expenditures declines, the incentive to chase the money should decline, and requiring money to be spent in ways that fit these loop-holes should cause such a decline. Second, and possibly more important, from a broader political perspective, money spent in ways that fit the loopholes may have greater marginal value than more money spent on electoral-oriented speech. Since the permitted independent expenditures are issue-based, allowing them encourages the electoral process to be more discursive, more substantive than the current personality-driven, candidate-focused system. To the extent that money follows these loop-holes, the rule works to squeeze money out of campaign trivia and into the expansion of a truly political realm.157

V. Constitutional Protection of Campaign Speech

The approach offered here does not abandon constitutional protection for speech in the campaign context. Rather, this conception of campaigns and their relation to government and democracy changes the First Amendment analysis. The Court should strike down regulations that restrict the democratic character—the openness, fairness, or effectiveness—of the electoral process. As the last Part argued, the Court should also strike down rules that purportedly regulate electoral speech but actually restrict pre-existing public spheres. A ban on election-day endorsements by newspapers, for example, interferes with the press as it operates as an instrument of this broader, constitutionally protected public sphere. Limitations on the promises that candidates are permitted to make to the public improperly narrows the scope of politics.158 Requiring controversial minor parties to disclose the identity of their supporters could improperly restrict the openness of elections, even though the invalidation of such rules

157 A major pragmatic source of resistance to campaign reform comes from the belief that the restricted money will merely reappear in other campaigns. This change, however, could be viewed as a major gain rather than a cause of concern if the money supposed to a manner that made for a richer, more substantive form of discourse politics.

158 See Mills v. Alabama, 384 U.S. 211 (1966) (holding that Alabama's Campaign Practice Act, which provided criminal penalties for publication on election day of editorials urging citizens to vote in a certain way, violated free speech and press guarantees of the First Amendment). A ban on endorsements by participants in a campaign, such as parties or candidates, would also be unconstitutional for limiting the openness of the campaign and for treating certain information as too properly relevant. See Fox v. San Francisco County Democratic Central Comm., 489 U.S. 314 (1989) (striking down certain restrictions on endorsements).

159 See Brown v. Hartlage, 456 U.S. 45 (1982) (upholding that state attempts to restrict a candidate's ideas must be supported by a legitimate and compelling state interest).

160 See Brown v. Socialist Workers Party, 74 Campaign Comm., 459 U.S. 87 (1982) (holding disclosure provisions could not be applied to the Socialist Workers' Party because these provisions violated the First Amendment protection of minority parties from state attempts to compel disclosures).
involves the apparent anomaly of holding that the constitution authorizes and commands a viewpoint-based exemption from an otherwise content-neutral law. 199

The content discrimination implicit in a ban on campaigning within 100 feet of a polling place should be acceptable if, as the Court concluded, the ban is needed to protect the electoral process. 200 The Court reported that such bans were adopted in the late nineteenth century as part of an effort to prevent fraud and intimidation in voting. At that time, a briber standing close to the poll could watch voters marking or depositing their ballots. Employers could observe the candidacies selections of their employees, whom they often brought to the polls. A key reform, adopted at the same time as the bar on electoral speech close to the polls, was the introduction of secret ballot voting and, although this occurred later at some places, closed ballot booths. In contrast to the intimidation that results from voting in public, general First Amendment premises assume that the messages a voter hears do not themselves undermine her autonomy; 201 and nothing in the history reported by the Court suggests otherwise. Nothing indicates how the ban on mere campaign talk close to the polls served the government interest. If the justifiable fear was of people at the polls who had financial or physical power to intimidate or corrupt voters, the speech restrictive rule would be totally ineffective. An observer could intimidate without talking. The evil lay in the ability to observe, not the ability to talk. Beyond secret balloting, a rule to be helpful must keep all people other than voters and election officials a certain distance from the poll. The statutory category of "campaigning" was simply dysfunctional. 202

A much better case can be made for regulating candidates' use of the airwaves. Any realistic hope for effective campaign finance reforms that reduce the supply of campaign funds depends on reducing the demand for campaign resources. 203 Following the example of other western democra-
candidates could be prohibited from purchasing air time and broadcasters could be required to give candidates or political parties free time, possibly in time blocks of mandatory size, for campaign presentations. Without trying to evaluate here the merits of specific proposals, the point here is that well-designed regulations could increase the fairness and possibly improve the quality of campaign discourse. These features should satisfy constitutional standards unless a convincing case could be made that the regulation limits the openness of electoral process. 188

Other issues must also be rethought if the electoral process is viewed as an institutionized realm in which the Constitution permits rules appropriate to its function. For example, under Buckley, the question of whether a state can prohibit the use of paid canvassers to solicit the signatures needed for an "initiative petition" is easy. A unanimous Court can merely cite Buckley for the proposition that paying for speech, which is the central activity involved in soliciting signatures, is fully protected. 189 In contrast, the perspective here treats the initiative process as a structured part of government. Collecting signatures has a specific legal consequence not unlike speech within a court proceeding. Regulation appropriate for the goals of the initiative process should be permissible as long as the political process remains open to democratic citizen involvement. The state could pursue a goal of having strong grass roots support for initiative campaigns by making the campaigns dependent on many people contributing funds used by the non-complying candidate. A well designed reform is likely to use a combination of all three of these methods. 190

In a comparative study of the United States, Denmark, Finland, France, Germany, Italy, Netherlands, United Kingdom, and Israel, only Finland followed the American practice of allowing "free purchase of advertising" for political ads. Except for Italy—which in 1993 adopted legislation prohibiting political advertisements during the four weeks before the election, all the rest allocated free broadcast time according to varying criteria. Most mandated the length of the political broadcasts and several imposed content restrictions. See POLITICAL ADVERTISING IN WESTERN DemoCRATIC PARTY AND CANCENDERS ON TELEVISION 14-17 (Lynda Lee Kaid & Christine Holz-Bacha eds., 1995). Looking forward to the possibility of Precost-Saltshurgh, there may be room for a constitutional argument that keeping the process open requires allowing minor party or non-party groups to advertise. Cf Brown v. Socialist Workers' '74 Campaign Comm., 459 U.S. 87, 88 (1983) (following Buckley in holding that the First Amendment prohibits the government from compelling disclosure by a minor political party that can show a "reasonable probability" that the compelled disclosure will subject those identified to "threats, harassment, or reprisals." (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976))). However, the law might give broadcasters discretion to accept or reject the advertisements and design provisions allowing major party candidates to advertise, but only to the extent that a minor party candidate advertises. See Meyer v. Grant, 486 U.S. 414, 426 (1988) (holding that a prohibition on paid petition circulators violated the First Amendment). In addition, the Court should and did cite Schenck v.Citizens for a Better Env't, 444 U.S. 620 (1980), which invalidated online restrictions on paid solicitation of charitable contributions. See Meyer, 486 U.S. at 442 n.5. The result in Schenck, however, should be distinguished as involving the expression of charities, which is more purely within the public sphere than in an institutionized realm.
uting their own efforts to solicit signatures. The difficult issue concerns whether a ban on paid solicitation unfairly restricts the openness of the process. Some people, for example, those who for physical or other reasons are particularly adept at soliciting strangers, might intensely want to participate but would like to be able to do it by paying someone to stand in for them. Does it improperly restrict the openness of the referendum and initiative process to bar this? Maybe not. But if the answer is "yes," it still might be proper to limit paid canvassing to situations where a single canvasser is paid directly by the person for whom she is a stand-in. In any event, this was a difficult case made easy only by the Buckley precedent.

More generally, the constitutional analysis of the regulation of campaign speech should be analogous to the analysis of regulation of political parties and ballot access requirements: gratuitous restrictions or restrictions that reduce the process' openness are unconstitutional. Any rule, of course, will advantage some and disadvantage others in a competitive context, including the Buckley rule that protects unrestricted spending. No rule is in some sense "natural" or "neutral." The constitutional requirement cannot be "a rule without favoritism." Rather, the Constitution can only require that the rules be appropriate given the purpose of the institution and require that the rules not constrain the broader public sphere.

The most difficult issues will be, first, determining the boundaries of the electoral sphere. That issue, discussed above in terms of "independent expenditures," requires identifying potentially regulatable campaign-oriented speech. Second, the constitutional analyst must determine whether the specific ceiling on expenditures or the content of other speech limitations undermine the effectiveness of elections by unduly restricting the availability of political information or otherwise undermine the openness and fairness of the election by blocking effective challenges to incumbents. Any law shown to have these consequences, as either its purpose or effect, would be presumptively unconstitutional.

The trouble lies in the difficulty of identifying these negative effects, especially given the variability of circumstances between different elections and the incredible difficulty of engaging in "cause and effect" analysis in this context. The courts probably ought to be quite deferential to popular" or legislative judgments about appropriate limits. Political so-

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107 The Court treated a requirement of a sufficiently high number of signatures as an adequate means of serving this state interest in gross from support. See Moyer, 446 U.S. at 425–26. Realistically, however, volunteers involved in soliciting signatures show both a different type and a different level of support than their numbers of signatures. The state should be able to conclude that ballot measures are only appropriate when that support has been shown.

108 Critics of expenditure limits might be tempted to argue that the limits become law only when legislators, always conscious of their need for re-election, see the limits as
Jusions will not be ideal but neither would judicial resolutions or leaving the realm entirely unregulated. Still, the general propriety of regulation within institutionally bound contexts does not mean that the constitution imposes no limits. The constitutional limits follow from the function of the institution involved, here, electoral selection of officials.

If the country's political life is largely encompassed by electoral campaigns, any limits should be intolerable. The gravest danger, as Justice Brandeis argued, is "an inert people." But once electoral campaigns are seen as "merely" a part of a legally structured institution, even if possibly the institution most central to a democracy, the conclusion changes. Then, regulation of campaign speech is no different in principle than other regulations inherent to the holding of elections. All these rules impact on election results, as well as their fairness and openness. But these rules leave unregulated the broader and more basic realm of politics. Unlike its wiser treatment of electoral speech in other cases, the Court in Buckley wrongly treated electoral speech the same as the broader realm of political speech.

"Incumbent re-election insurance schemes." This argument loses force when it is observed that most campaign finance regulatory schemes have been adopted by voters in initiatives after the legislators refused to adopt such reforms. Voters also seem to impose generally lower contribution or expenditure limits than are favored by legislators.

"Both by increasing elections' fairness and responsiveness to the unregulated public sphere and restricting the use of money in elections, campaign regulation may even change incentives in a manner that enhances the vitality of this unregulated realm."