INTRODUCTION

The Constitution of Electoral Speech Law

THE ELECTION NIGHT PARTY was still going strong when I left at two o'clock in the morning. Oversized check marks, set against the background of the newly instituted (though now institutionalized) "blue"- and "red"-state graphics, provided intermittent consolation or consternation—depending on one's political orientation—and suggested that slowly, but surely (right?), *someone* would be named the winner and bring the festivities to a proper close. But, of course, when the country woke up the next day, there still was no president-elect. Thirty-six days *later*, however, there was—and *how* this came to be is a story of legal wrangling, political innovation, and constitutional development authored primarily and (in)famously by the U.S. Supreme Court.[1]

With the Court effectively awarding the election of 2000 to George W. Bush, in 7–2 and 5–4 splits, respectively, on the critical issues of the constitutionality of existing recount standards and the potential for employing better standards to resolve the dispute, this five-week constitutional drama brought to the forefront the significance of election laws in general (e.g., ballot design, recount schedules, and statutes governing the hours of polling places, standards for ascertaining voter "intent," etc.), and specifically the role and reach of the U.S. Supreme Court as an institution that—through its interventions and interpretations—sets the terms, structures the rules, supervises, and ultimately "constitutes" the electoral process in the United States. In accepting this case for review and rendering its decision literally and figuratively at the eleventh hour (saving the republic, for some commentators),[2] the Court established a precedent—a historical, if not a legally binding one[3]—for Supreme Court endeavors into what is arguably the most profound and consequential "political thicket" in this nation's electoral process: the selection of the president of the United States.[4]

Books and articles by esteemed scholars and analysts have exhaustively covered this case and its conjectured consequences,[5] and so my intention in revisiting *Bush v. Gore* is not to reconsider the decision on its merits, or to contemplate its impact necessarily,[6] but simply to showcase it as one of the most vivid illustrations of the manner by which the Supreme Court constitutes the process within and by which politics occurs in the United States. Such constitutive possibilities have been well documented in studies of reapportionment;[7] of the role of parties;[8] the development of the ballot box in America;[9] the Court's treatment of racial identity in redistricting cases;[10] the politics of proportional representation;[11] the evolving understandings of "equality" expressed by and inferred from the Court's engagement with political process cases;[12] evaluations of a particular Court's "vision of political representation";[13] historical and critical surveys of the Court's involvement in voting rights disputes;[14] and various other elements of election law and their implications for American campaigns and elections. But what has not received sufficient treatment—the theme to which this book is addressed—is the nature and process of freedom of *speech* within the course of campaigns and elections, or what I will refer to as *the constitution of electoral speech law*.

THE CONSTITUTION OF ELECTORAL SPEECH LAW

Given that constitutional guarantees have their "fullest and most urgent application precisely to the conduct of campaigns for political office,"[15] one might expect special protection for this variety of speech,[16] because it implicates both the method by which citizens deliberate (speak) and the means established to facilitate the translation from voice to action in a self-governing system (the institutions and structures of the electoral process—the "bedrock of our political system").[17] So, I contend, such speech is unique because of its situation within and impact upon the electoral process, necessarily requiring consideration of the customs, values, and inclinations associated with the maintenance of democratic forms, institutions, and practices *themselves*.

Put differently, electoral speech is more than simply speech *about* politics; significantly, the adjudication of free speech cases during campaigns and elections arises within an environment of the state's propri-

etary authority and as such is conditioned by and rooted in concerns for order,[18] integrity,[19] and participatory parity,[20] for example, in that such interests comprise so much of the law of democracy. And thus we have something of an irony: while this class of communication is by definition "political," and hence deserving of an elevated degree of protection, it is also inextricably "procedural," in that it necessarily arises in the midst of the electoral *process*, meaning that the state's regulatory antennae are also extended in a manner that would not necessarily appertain to other forms of speech, or even other varieties of political speech seeking purchase in environments beyond the electoral arena.

Electoral Speech Constitution(s)

Manifest in at least four interrelated ways in this study, my use of "constitution" relates first and perhaps most obviously to the "speech" clause of the First Amendment to the United States Constitution and the various ways this provision has been construed since about the middle of the twentieth century, when the first state restriction on electoral speech was reviewed. We will see, however, that the emphasis is more directed at the period since the early 1970s, when such cases came to be regularly reviewed in *constitutional* terms, as opposed to merely along the lines of statutory interpretation.

The invocation of "constitution" in the second sense appreciates the manner by which "practices are *constituted* by concepts" in the political world,[21] and emphasizes the particularly "constitutive" significance of electoral speech law[22]—or how, in other words, this body of law "constitutes,"[23] or structures,[24] the terms of our electoral process and thus conditions the (s)election of the agents populating and animating the institutions that draft, execute, and interpret the laws in the first place. Put differently, "before the first vote is cast or the first ballot counted, the possibilities for democratic politics are already constrained and channeled," because the acts of self-government "must operate through pre-existing laws, rules, and institutions," meaning that "the kind of democratic politics we have is always and inevitably itself a product of institutional forms and legal structures."[25] Thus, "a paradox rests at the core of democratic politics: this politics is in part a contest over the structure of state institutions,

and yet those very institutions define the terms in which the contest of democratic politics proceeds."[26] The Supreme Court—as the "architect of election law"[27]—has the power, then, to tangibly and formatively affect "how the electoral process works and how effectively it satisfies its democratic objectives."[28]

Still though, the "constitutional" process—that is, the *act* of constitution—often requires a blueprint of sorts: a kind of theoretical overview for the project; a design that details its features, intentions, and purposes. To wit, the Court, in its electoral process decisions, has offered a host of political theories to justify its conclusions—theories which have been criticized as lacking in coherence at the abstract *and* applied levels;[29] as being too scattered to allow for coherence or development;[30] as flowing from incomplete information,[31] or from "faulty assumptions";[32] and as working with models, expectations, and values that may be unacknowledged or unrealized.[33] At the same time, the Court has also been *applauded* for not acceding to *one* distinct "theory" of politics,[34] and at least one justice famously refused to "freeze" in any specific "theory of political thought" with respect to the nature and attendant structures of representation.[35]

In a third sense, the use of "constitution" portrays my interest in investigating the basic *nature* (i.e., "constitution" in a more organic sense) of the Court's essential understanding of free speech rights within this domain. We have been told, for example, that the "free exchange of ideas provides *special* vitality to the process traditionally at the heart of American constitutional democracy—the political campaign."[36] Does this imply that there exists a theoretical core from which we might divine a *distinct* vision for the place, power, and potential for expression within the electoral process? What is the essence of the above "vitality"? That is, what are those values that appear to both orient and animate this body of law, or those principles that simultaneously conceive and condition the course of its development?

Fourth and finally, I wonder *how* the Court's understanding of electoral speech law is "constituted"—that is, not what the constitution *is*, but how it comes to be that way. Specifically, my interest is in how the Court's reasoning is both realized and rendered, or the manner by which conclusions

are arrived at and articulated. In uniting these various "constitutional" inquiries then, we will see that the attention is distributed between the *elements* that comprise and the *episodes* that facilitate the constitution of this body of law.[37] It is by way of this convergence of "elemental" and "episodic" analyses—where the concepts, confluences, modes, and contours divined from the universe of cases meld from the top-down with the organic investigation of the origins, considerations, developments, and configurations of outcomes in key cases coming from the bottom-up—that the constitution of electoral speech law is best adduced.

The Constitutional Universe

While the Supreme Court has for some time reviewed electoral *process* cases,[38] its consideration of electoral *speech* cases did not begin until 1947. Since that time, the domain has come to include a total of thirty-nine cases,[39] flowing from various communicants and distributed across five distinct *dimensions* of speech (see below), wherein the Supreme Court either reviewed a law that specifically restricted freedom of speech during campaigns and elections, or where a more general law restricted freedom of speech as *applied* within the course of the electoral process. My focus in this study is on only those cases wherein the *primary* (though not necessarily exclusive) claim involves a constitutional challenge (on speech grounds) to a state or federal law restricting expression during campaigns and elections, as opposed to merely a request for statutory interpretation, for example.

Given these parameters, my review does not include some cases that may appear worthy, such as the late nineteenth-century case *Ex parte Curtis*,[40] involving transfers of money within the sphere of politics; a Depression-era case involving ongoing federal attempts to stamp out corruption in state elections (*Burroughs and Cannon v. United States*);[41] a mid-twentieth-century case involving restrictions on political lobbying (*United States v. Harriss*);[42] a case involving the nature of the contributions to union funds used for political purposes (*Pipefitters Local Union No. 562 v. United States*);[43] the well-known "right of reply" case, *Miami Herald Publishing Co. v. Tornillo*;[44] and, the "as-applied" case (as *anticipated* in *Buckley v. Valeo*'s discussion of disclosure and the rights

of smaller political parties), *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*.[45]

As a frame of reference for considering this relatively "young" but quickly expanding universe, consider that, as Richard Hasen has demonstrated, from 1901 to 1960 the Supreme Court decided with a written opinion an average of 10.3 general election law cases per decade, or about 0.7 percent of all its decisions during that period. In the time between 1961 and 2000, however, the number of cases increased to sixty per decade, or about 5.3 percent of all the decisions during this time span.[46] Within this context, note

FIGURE 1.1 *The Universe of Electoral Speech Cases*

The Vinson Court (June 1946–September 1953) → 2 cases
Rate: One case decided every 3.5 years

United Public Workers of America v. Mitchell (1947)
United States v. Congress of Industrial Organizations (1948)[a]

The Warren Court (October 1953–June 1969) → 4 cases
Rate: One case decided every 4 years[b]

United States v. Auto Workers (1957)[c]
Mills v. Alabama (1966)
St. Amant v. Thompson (1968)
Red Lion Broadcasting Co. v. FCC (1969)

The Burger Court (June 1969–September 1986) → 16 cases
Rate: One case decided every 1.06 years

Monitor Patriot Co. v. Roy (1971)
Ocala Star-Banner Co. v. Damron (1971)
United States Civil Service Commission v. National Association of Letter Carriers (1973)
Lehman v. City of Shaker Heights (1974)
Buckley v. Valeo (1976)
Greer v. Spock (1976)
Hynes v. Mayor of Oradell (1976)
First National Bank v. Bellotti (1978)
California Medical Assn. v. FEC (1981)
CBS, Inc. v. Federal Communications Commission (1981)
Citizens Against Rent Control v. Berkeley (1981)
Brown v. Hartlage (1982)
Common Cause v. Schmitt (1982)[d]
FEC v. National Right to Work Committee (1982)
Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent (1984)
FEC v. National Conservative Political Action Committee (1985)

The Rehnquist Court (September 1986–September 2005) → 15 cases
Rate: One case decided every 1.27 years

FEC v. Massachusetts Citizens for Life (1986)
Meyer v. Grant (1988)
Eu v. San Francisco Cty. Democratic Central Committee (1989)
Austin v. Michigan Chamber of Commerce (1990)

that, as Figure I.1 demonstrates below, following the first electoral *speech* case in 1947, there was one more during the Vinson Court (one case every 3.5 years); there were four cases during the sixteen terms of the Warren Court (one case every 4 years); after which there was a dramatic increase in the Court's constitution of this domain, with sixteen cases during the seventeen terms of the Burger Court (one case every 1.06 years), and fifteen cases during the nineteen terms of the Rehnquist Court (one case every 1.27 years), with two cases thus far for the Roberts Court (one case every 0.5 years), and one case awaiting oral argument as this book goes to press.[47]

Renne v. Geary (1991)[e]
Burson v. Freeman (1992)
McIntyre v. Ohio Elections Commission (1995)
Colorado Republican Federal Campaign Committee v. FEC (1996)
Arkansas Educational Television Commission v. Ralph P. Forbes (1998)
Buckley v. American Constitutional Law Foundation (1999)
Nixon v. Shrink Missouri Government PAC (2000)
FEC v. Colorado Republican Federal Campaign Committee (2001)
Republican Party of Minnesota v. White (2002)
FEC v. Beaumont, et al. (2003)
McConnell v. FEC (2003)

The Roberts Court (September 2005–present) → 3 cases
Rate: One case decided every 0.5 years

Randall v. Sorrell (2006)
Wisconsin Right to Life v. FEC (2006)
FEC v. Wisconsin Right to Life (forthcoming, 2007)

a Note that in this case, while the parties offered constitutional challenges to the Federal Corrupt Practices Act, the Court resisted this invitation and limited its review to considering whether the indictment in question charged acts within its scope. See 335 U.S. 106, 110.

b It is worth noting that while there were only four electoral speech cases decided during Earl Warren's tenure as the chief justice, one of them, *Red Lion Broadcasting Co. v. FCC*, was of great consequence in several domains. Note as well that the latter three (of the four) were decided during what Lucas Powe, Jr., has deemed "History's Warren Court," a term apparently directed at law professors who came of age in the 1960s and who have a tendency to simply associate this Court with the progressive rulings with which they agree, while failing to acknowledge the historical context in which those decisions were rendered and the various external political influences that made them possible in the first place. That this is news to academic lawyers is unfortunate, because, as Powe appropriately acknowledges, this is something that "political scientists have been preaching for decades on end." See *The Warren Court and American Politics* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2000), 209–462, 500–501.

c As it did in *CIO*, and despite being urged to assess the First Amendment implications of 18 U.S.C. § 610, the Court once more found that a "refusal to anticipate constitutional questions is peculiarly appropriate in the circumstances of this case." 352 U.S. 567, 591.

d Per curiam opinion (no written judgment); 4-4 affirmation of the district court decision finding for the respondents, with Justice O'Connor not participating.

e The Court found the issue in *Renne* to be nonjusticiable and thus avoided consideration of the First Amendment issues, though the dissent vigorously rejected this conclusion.

But it is important for analytical purposes to extricate from the general class of electoral speech law the specific forms (i.e., "dimensions") of "speech" desiring entry to the electoral marketplace of ideas. As we will see in later chapters, approaching the universe in these terms sheds important light on the various understandings of electoral expression adopted by the individual members of the Court vis-à-vis other cases implicating similar claims. As Table I.1 demonstrates, the domain includes five cases involving *political activists*, advocating a cause or issue, as distinguished from those *candidates* (or their agents) attempting to communicate with the public—of which there are eleven instances. There are eighteen cases involving *money* as the speech form in question, broken down more specifically by the form of the "speaker" who challenged the law (e.g., committees, political parties, corporations, or multiple actors). There are three cases involving the distinctly "speech" (as opposed to "press") rights of *newspapers*, and there are two cases pertaining to "speech" (as opposed to "association") interests of *political parties*.

TABLE I.1 *The Dimensions of Electoral Speech Law*

Activist	Candidate	Money	Newspaper	Party
Mitchell	*St. Amant*	*CIO*	*Mills*	*Eu*
Letter Carriers	*Red Lion*	*Auto Workers*	*Ocala*	*Renne*
Meyer	*Shaker Heights*	*Buckley*	*Monitor Patriot*	
McIntyre	*Greer*	*Bellotti*		
ACLF	*Hynes*	*CARC*		
	CBS	*CMA*		
	Hartlage	*Common Cause*		
	Taxpayers	*NRWC*		
	Burson	*NCPAC*		
	AETC	*MCFL*		
	White	*Austin*		
		Colorado I		
		Shrink		
		Colorado II		
		Beaumont		
		McConnell		
		WRTL		
		Sorrell		

CONSTITUTIONAL ELEMENTS

The notion that the "law" is conditioned by devices, articles, and concerns beyond (or perhaps *besides*) "logic," with rules based on more than "syllogisms," was, of course, famously announced by Justice Oliver Wendell Holmes, Jr., who found at least as much explanatory leverage in the "felt necessities of the time," the "prevalent moral and political theories, intuitions of public policy, avowed or unconscious, [and] even the prejudices which judges share with their fellow-men" as an account for the "life of the law."[48] Indeed, since the early legal realists,[49] scholars have known that "the development of legal doctrine is as firmly rooted in politics, institutional change, judicial personalities, social context, and organizational dynamics as it is in logic, historical precision, and formal argumentation."[50] Such are the sorts of elements—legal and extralegal—that comprise the constitution of the law in general.[51] Thus, I am interested in such characteristics, not simply to acknowledge their presence, but rather to take stock of their particular instances and influences in understanding how they coalesce in an elemental sense to structure this body of law. As we will see in the chapters to follow, and in the subsections below, predominant foci in this regard are (a) constituent concepts; (b) the confluences of these organizing concepts; (c) rhetorical modes of analysis, argument, and articulation; and (d) cognitive contours affecting images, preferences, persuasion, and perception.

Constituent Concepts

Chapter 1 examines two constructs—"electoral superintendence" and the "marketplace of ideas," the former an admittedly more expansive notion (or trend) than a precise "concept" as such, and the latter the primary metaphor adopted by the U.S. Supreme Court in its freedom of expression jurisprudence since about the mid-twentieth century. "Superintendence" in this respect serves as shorthand for the general regulation of the processes of democracy, forecast by footnote 4 in the *Carolene Products* case, while the "marketplace of ideas" concept is derived from what one scholar has referred to as a "canonical" dissenting opinion,[52] by Justice Oliver Wendell Holmes, in *Abrams v. United States*.[53] Finding that the expression of Abrams and his colleagues did not constitute a "clear and present

danger," Holmes famously posited that when men came to realize that time had "upset many fighting faiths," they would come to "believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by *free trade in ideas*," and that the "best test for truth is the power of the thought to get itself accepted in *the competition of the market*. . . ."[54] As we will see, "superintendence" and the "marketplace of ideas" are the critical conceptual constituents in the constitution of electoral speech law, and thus this chapter serves to establish their context and consequences.

Conceptual Confluence

As a way of explaining why and how the constituent concepts examined in Chapter 1 have shaped the constitution of electoral speech law, I open Chapter 2 with a discussion of what I refer to as "confluence," in order to offer a theoretical account for the phenomenon by which the core concepts of electoral process and free speech law meet, merge, and develop as one distinct entity, within this domain—and, critically, how this is manifest in the form of competing *conceptions* of the marketplace of ideas.[55] In this regard, the integration and implications of confluence are informed by the notion of "conjuncture,"[56] particularly as I emphasize not simply the *intersection* of ideas,[57] or "streams" of thought, but also the *joining together* of the two and the reciprocal implications realized as these relatively autonomous lines of doctrine mutually constitute—and consistently *re*-constitute—each other within the electoral arena.[58]

As a function of this confluence, what we will see, in Daniel Polsby's terms, is the "multivalency of the First Amendment,"[59] whereby the basic market principle (stressing exchanges—via "free trade"—in the pursuit of the social good) remains intact, but yields new manifestations as the calibration is adjusted in the confrontation with novel complications in practice. In a certain sense, this tracks the movement observed by Jack Balkin in his discussion of "ideological drift," wherein "legal ideas and symbols will change their political valence as they are used over and over again in new contexts"[60]—though here what has "drifted" is not so much the "political valence" of the concept, as it is the particular *core* speech value around which the marketplace framework is constructed. To imag-

ine this effect in perhaps more familiar terms, consider the analogy to the modern economic marketplace.

Individuals seeking to trade goods and carry out commercial activities in the United States face a wide range of regulations ostensibly intended to encourage, rather than restrain, transactions.[61] And, with the exception of the most libertarian-minded economists,[62] most seem to accept some measure of government supervision of the economy (e.g., the Federal Reserve or the Federal Trade Commission) and the prophylactic structures, restrictions, and rules in place to discourage monopolization, corruption, collusion, intimidation, chicanery, or any other putative tendencies of laissez-faire platforms. At the same time, most would still think of the American economy as a "free market" and would still conceive of this nation as encouraging an open exchange in goods and services. In the same way, alternative conceptions of the speech marketplace concept still assume and encourage "free" exchanges, but they take seriously the potential for "market failures" and stress the state's role in sustaining values in addition to (not instead of) the liberty of speakers, such as opportunities for broader participation and access, or the promotion (or discouragement) of certain forms of speech based on their perceived effects on the democratic process.[63]

Put differently, an approach of this sort "recognizes the possibility that, just as a restraint of trade is sometimes lawful because it *furthers*, rather than restricts, competition, so a restriction on speech, even when political speech is at issue, will sometimes prove reasonable," as Justice Stephen Breyer has recently argued in the context of the Court's campaign finance jurisprudence.[64] The affirmative role for the state in this sense is to facilitate free(r) trade by acting, as Owen Fiss has argued, "as the much-needed countervailing power, to counteract the skew of public debate attributable to the market and thus preserve the essential conditions of democracy," meaning that intervention is designed not to supplant the market, nor to perfect it, but rather to "supplement" it and act as a "corrective."[65] Growing out of the notion of "free trade" as originally theorized by Justice Holmes then, we will see in Chapter 2 evidence for three distinct though nonmutually exclusive models: the *classic*, *equality*, and *custodial* conceptions of the marketplace of ideas.

Rhetorical Modes

Whereas the focus in the first two chapters is the nature and development of the central conceptual elements in electoral speech law, Chapter 3 is addressed to the orientation and significance of the rhetorical modes of argument and articulation invoked by the justices in the process of *constituting* this body of law. Borrowing from the approaches of both Philip Bobbitt, who in his *Constitutional Fate* a generation ago set forth six "archetypes" of constitutional argument legitimizing judicial review, and more recently Erwin Chemerinsky, who has reasserted the importance of the fact that "Supreme Court opinions are rhetoric" because they convey "reasoned arguments intended to persuade,"[66] my focus is on only those primary forms that arise within and organize this legal domain, namely the *historical*, *empirical*, *aspirational*, and *precautionary* modes.

As we will see, the historical constitution of electoral speech law makes appeals to the past, as one would expect, but does so in a manner that diverges in important ways with respect to the merits of institutional *practices* versus inferred historical *principles*. The thrust of the empirical constitution, evident most often in campaign finance cases, is to stress the nature of evidence itself—not the amount of evidence or its persuasive value, necessarily, but rather the qualitative variety of evidence required to rationalize restrictions on electoral expression, as well as the epistemological implications of justifying state action when the requisite "proof" is either inaccessible or inconceivable. The aspirational constitution of the law governing freedom of speech during campaigns and elections is, as the name would suggest, premised on the notion of "aspiration" as the operant posture for the review of electoral speech restrictions. By contrast, a precautionary mode, while not necessarily "pessimistic," starts from less sublime assumptions about the people and processes that comprise electoral politics, and thus paints a picture of democratic life as functioning best with certain safeguards in place.

Cognitive Contours

Chapter 4 continues the investigation of elements by examining the significance of the actions, incidents, implements, and influences most salient in facilitating the constitution of this body of law in a cognitive sense.

Central to this portion of the overall examination is the notion that our political discourse "is constituted not only by concepts and the kinds of statements and assertions that they make possible but also—and arguably, even more deeply—by the *imagery* that gives these concepts their place and point."[67] And so, I argue here that the justices of the Supreme Court have something fairly distinct "in mind," so to speak—that is, some working "mental construct"—when they assess free speech claims: a "something" in the form of speech images that underlie the Court's rulings and that shed light on the nature and process by which this body of law is constituted.[68] A central premise here is that while "speech" in the sense of *a* "speech," or "speakers," is tangible—something we can see, hear, or feel—"*freedom* of speech" exists as an abstraction; and, as such, requires coloring in (or fleshing out), and generally an "imagination" of its particular forms to give it meaning and substance. In this vein, as Steven Winter argues, legal actors need "something like a cognitive map of the cultural models and other social constructs that animate thinking and decisionmaking among lawyers, judges, and laypersons alike."[69] Drawing on Winter's analogy, then, one might envision this chapter as a "cartographic" effort to discern and depict these "contours."

My attention to both preferences and persuasion in this chapter is an effort to better understand the process by which such images are cultivated—that is, how specific visions were constructed and why certain rhetoric was employed. In terms of preferences, legal scholars and practitioners are certainly well aware of traditional theories relying on the ostensible political ideologies of the justices—as well as the inferred implications and/or extrapolated consequences of these values for purposes of decision making. So, too, has scholarship demonstrated the significance of language and rhetoric in shaping perception(s)[70]—and thus one would certainly expect advocates to appeal to a host of potential influences beyond formal legal arguments when attempting to sway courts that sit in judgment of their cases and controversies.[71]

I will outline here and explore in the case study chapters (5 through 8) how the cognitive constitution of electoral speech law is facilitated by *communicative frames*, or "central organizing idea[s] for making sense of relevant events and suggesting what is at issue."[72] In the course of the

argument, what we will see in this exploration of the capacity to shape language, meaning, and emphasis is that the act of framing "essentially involves selection and salience," or the decision to emphasize "some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described."[73]

But working in an obviously related fashion with imagery, preferences, and persuasion, we will also see that *perception* is critical to the cognitive constitution of this domain, especially regarding the "schemata" that condition the way that individuals perceive phenomena. Such schemata, or those "sets of rules or generalizations derived from past experience that organize and guide information processing about ourselves and others in our social experience,"[74] are critical contributing forces in the act of "constitution," particularly in that they serve as a sort of lens, shaping and filtering what the justices "see" in a given case vis-à-vis other would-be images of expression.

CONSTITUTIONAL EPISODES

The case study component of this book attends to key constitutional episodes in an effort to explore how the above elements are manifest, how they coalesce, how they develop, and how they collectively facilitate this constitutive process. My analysis of each episode begins at the point of controversy and traces the case through the lower courts and ultimately to the U.S. Supreme Court, because, as much recent scholarship suggests, an analytical disposition such as this is essential to an appreciation of the contributions and interconnections of *non*judicial institutions, actors, and interests.[75] In looking to case studies for such guidance, I do not purport to have discerned *the* precise arrangements for the causal arrows accounting for particular decisions;[76] rather, I suggest that this nuanced and comprehensive approach to key episodes has explanatory value in that it serves both to isolate the relevant contributions shaping the outcome of the case and to explicate the process by which these elements emerged and evolved in their various permutations.

Each chapter in this section of the book is organized in the same

fashion: After a brief introduction to the controversy, the asserted speech claims and state interests, and the ultimate conclusion reached by the U.S. Supreme Court, I turn to a more detailed examination of the context, concerns, and considerations of each case, taking a step away from the instant dispute to discuss the larger debate(s) within which it is situated and offering some historical and theoretical background for evaluating the matter. Following this, I discuss the development of the case, from the trial or initial proceedings, through the appellate courts, and on to the Supreme Court, tracing the evolution of the issues and setting the stage for the final half of each chapter where I explore the *constitution* of the case, bringing together essential data drawn from interviews with the various participants (e.g., the parties that brought the case, their attorneys, state officials, and other relevant legal and political actors), archival research, rulings at all levels, as well as briefs and various supplemental materials to offer an analytical framework for understanding how the various elements configured the case and ultimately shaped the constitution of the larger domain.

Before reviewing the specific episodes, I should note that they were selected because in at least three ways they are representative of the larger domain. First, with respect to the form of speech involved, I sought a balanced and even distribution by choosing only one campaign finance case (speech as *money*); by selecting two cases involving *activist*-speech (the distribution of leaflets and the solicitation of signatures); and a final case involving traditional *candidate* speech (in this case that of an advocate seeking the last-minute support of voters). As such, my scope incorporates three of the five potential dimensions—but, more importantly, its coverage includes thirty-four of the possible thirty-nine cases (see Table I.1). Second, regarding the Court's ultimate resolution of the controversy, in two of the cases the *asserted* speech interest prevailed, while in the other two the alleged state interest succeeded. And third, two of the cases began in federal district court, while the other two originated in some form of municipal court and then proceeded through the state system on their way to the U.S. Supreme Court.

Where the cases are less representative, I concede, is in regard to their relatively recent adjudication—a choice that was made on account of my

interest in securing interviews with the parties involved in the development of the arguments that defined and helped to constitute the case. (For a brief discussion of interview methods and protocol, see the Appendix.) However, the benefit of erring on the side of gatherable data was that the study allowed for the episodic comparison of three of the four cases (*McIntyre*, *ACLF*, and *Shrink*) amid a stable cohort of Supreme Court justices, a group that sat on the high Court together for a remarkably long and nearly record-setting period from 1994 to 2005.[77]

Burson v. Freeman

The focus of Chapter 5 is *Burson v. Freeman*,[78] a case involving Tennessee's prohibition on "electioneering" (the solicitation of votes and the display/distribution of campaign literature) within one hundred feet of the entrance to the polling place on election day. Desiring both to advocate for a candidate "down the ballot" and to take advantage of the opportunity for last-minute campaigning, generally, Rebecca Freeman challenged this provision of the state's electoral code, alleging that the law violated her First Amendment right to communicate with voters in this quintessentially political environment. But for the state, while the grounds of the polling place may avail themselves to such activities 364 days a year, on *election day* they took on a different character, acting as a kind of embodiment of the premise of a "secret ballot"—meaning that, as the Court agreed, "campaign free zones" of this sort were necessary to protect voters and the process itself, in light of the increased potential for fraud, harassment, and intimidation where electioneering was allowed.

McIntyre v. Ohio Elections Commission

In Chapter 6 we will turn from polling place advocacy to political leafleting and the case of *McIntyre v. Ohio Elections Commission*,[79] inspired by Margaret McIntyre's refusal to pay a $100 fine for distributing "anonymous" fliers outside a school board meeting in the midst of a campaign over a school tax levy, and in violation of the state's electoral code requiring that election materials contain the name and business address of the party responsible for the literature. While the state defended its provision as necessary to police fraud, to facilitate libel prosecutions, and to serve

the public interest in disclosure during political campaigns, we will see that the Court considered her case in light of a long and storied tradition of anonymous political discourse in Western society and issued a ruling with potentially vast implications for multiple constitutional domains. In its essence, *McIntyre* involved the intersection—or clash—of individual privacy and autonomy claims and the state's (and/or public's) interests in having "sunlight" serve as a deterrent for scurrilous speech.

Buckley v. American Constitutional Law Foundation, Inc.

In Chapter 7, we turn to *Buckley v. American Constitutional Law Foundation, Inc.* (*ACLF*),[80] and consider a challenge brought by various parties to several of Colorado's restrictions governing the "petition" phase of the direct democratic process, whereby advocates act as "spokespersons" of sorts and work to procure signatures from registered voters in order to qualify propositions for the general election ballot. *ACLF*, which was essentially a follow-up to *Meyer v. Grant*[81]—also a Colorado case involving restrictions on signature collection decided by the Supreme Court eleven years before—called for the justices to consider requirements instituted in response to the increased reports of fraud (e.g., phony names, misrepresentation of proposition issues, forged signatures) that came in the wake of the *Meyer* decision. In evaluating the new provisions (identification badges, more comprehensive disclosure requirements, and voter registration for circulators, among others), we will see that the Court found that the state had failed to sufficiently justify such restrictions on the capacity for communication with voters during this phase of the direct democratic process.

Nixon v. Shrink Missouri Government PAC

In the final case study, in Chapter 8, *Nixon v. Shrink Missouri Government PAC*,[82] we will examine the state of Missouri's effort to establish campaign contribution limits for state officials paralleling those upheld in *Buckley v. Valeo*. Challenging the $1,000 limit ($1,075, as applied in this case), Shrink Missouri Government PAC argued that the caps on contributions unconstitutionally restricted its ability to support its preferred Republican candidate in the primary election for state auditor. But for the Court, the state had shown that the limits were necessary to diminish (the "appear-

ance" of) "corruption," to encourage more positive perceptions of the political process, and even to facilitate particular *forms* of speech (e.g., *time* as opposed to money) in the electoral marketplace of ideas.

A CONSTITUTION WE ARE EXPOUNDING

Drawing upon the argument developed in the preceding chapters, in the Conclusion I will offer some final thoughts on the significance of this approach and its findings, taking time as well to contemplate *this* constitution in "living" terms as we anticipate some potentially important elemental issues and episodes on the horizon. I will consider the future of electoral speech law in three respects, regarding: (a) its *evaluation* by the justices presently on the Court; (b) its *expansion* and growth as a domain; and (c) its *extension* deeper and wider into existing dimensions of speech questions covered throughout this book. Constitutions, of course, err on the side of "great outlines," as the borrowed title for this chapter reminds us,[83] and so we will consider here how the received outlines of the electoral speech "constitution" of today might bear on the electoral expression debates of tomorrow.