

Preface

AS A GOOD FRIEND and teacher of mine determined in the preface to one of his books (and this would be the only thing that his opus and my modest effort have in common), “every book needs an excuse . . .”¹ And so the excuse I offer for *The Constitution of Electoral Speech Law* is that the complexity and distinction of this legal domain have not been sufficiently appreciated (or examined), meaning that electoral speech has tended to be subsumed within either the general categories of “free speech” or “electoral process” jurisprudence. In failing to evaluate electoral speech law as the particular intersection of both its contributing doctrinal lines, one misses what I contend is its two-fold significance for American democracy: that it implicates the means by which a polity deliberates and makes decisions (freedom of expression), and it keeps those structures and practices in place to record collective preferences and reflect the public will (campaigns and elections). Thus, *my* “excuse” for this work confronts us every election day; with every broadcast of the evening news during campaign season; every time we attend a campaign rally; perhaps each time we hope to be involved in the political process, but are confined by the nature of our employment; as we distribute leaflets, post signs, or write checks in support of our preferred candidate; and through the myriad other means by which we attempt or desire to express ourselves within the electoral process.

Before proceeding to elaborate on the substantive aims of this work, allow me to state what this book is *not* about. This study is not a work of normative theory. It is not my intention here to devise a system of meta-principles—airtight in the abstract—only to apply them to the considerations and conclusions of the Supreme Court, which would, of course, be faulted for failing to have decided particular cases within my proffered theoretical parameters or in accord with my political or philosophical disposition. Books and law review articles setting out some grand design

for free expression in this mode are legion; and, while I draw upon the insights and perspectives in these works, as I explore the constitution of this body of law, my purpose is comprehension not prescription.

Nor do I intend this book to be a partisan or otherwise castigatory assault on judicial review, jurisprudence, or decision-making methods. My study will perhaps leave some to be critical of the Supreme Court's rulings in certain cases, but I leave such conclusions to the reader. I certainly address the important questions regarding the role of the Court—or courts—in a democracy, but I do so as a scholar intrigued by the distinct problems, origins, development, and implications attendant to this legal domain, rather than as an advocate hoping to coax or cajole the Court in one direction or another.

What I do intend here is to provide a thorough investigation of the constitution of electoral speech law in the United States. An understanding of, and appreciation for, the principles and parameters of this domain requires attention to the universe of relevant cases considered by the United States Supreme Court; it requires an exploration of the nature of the high Court's conclusions; it calls for scrutiny of the tactics and techniques by which such appraisals are articulated; it necessitates a thorough review of the modes of argument and analysis that facilitate the cultivation of certain understandings of the issues in question; and it benefits from a probing of the above predicates in the form of in-depth case studies. What it obliges, in short, is a study of both the *elements* and *episodes* that comprise and facilitate the constitution of electoral speech law in the United States.