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Election Campaigns and Democracy:

A Review of James A. Gardner,

What Are Campaigns For? The Role of Persuasion in Electoral Law and Politics

RICHARD BRIFFAULT†

What are election campaigns for? Not much, according to Professor James A. Gardner—or, at least, not nearly as much as the critics of American election campaigns would have us believe. In his new book, *What Are Campaigns For? The Role of Persuasion in Electoral Law and Politics*,¹ Professor Gardner contends that instead of serving as settings for extended discussion or in-depth reflection concerning political beliefs, the ideal election campaign does little more than make it more likely that the voter will cast a ballot consistent with the beliefs that he or she held before the start of the campaign. Nor, to turn to the subtitle of Professor Gardner’s book, is there much role for persuasion in electoral politics. “[V]oters are not persuaded during a campaign to embrace, or even in most cases to contemplate, ideas that are unfamiliar or that challenge their existing beliefs.”² Instead of a forum for debate and persuasion, a campaign is really just an exercise in, to use his words, “tabulation,” that is, “counting heads.”³

This may sound like a grim description of elections, and the set-up for a jeremiad bemoaning the sorry state of American democracy. But Professor Gardner’s elegant analysis of the theory and practice of election campaigns is far from that. His point, and it is an important one, is not to

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1. JAMES A. GARDNER, *WHAT ARE CAMPAIGNS FOR? THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS* (2009).

2. *Id.* at 104.

3. *Id.* at 182.

criticize election campaigns but to diminish the centrality of campaigns for democracy by situating campaigns within the broader continuum of democratic practices. As long as there are opportunities for deliberation, debate, and exposure to conflicting beliefs in society generally, the lack of persuasive discussion in campaigns is not of great moment. To be sure, there may not be adequate exposure to contending points of view, challenges to majoritarian beliefs, or engagement in thoughtful political discussion in civil society generally. But for Professor Gardner that is the real problem to be addressed, not what does or does not go on in election campaigns.

In making his case for the limited function of election campaigns, Professor Gardner proceeds both descriptively and normatively. He succinctly reviews extensive literatures in political history, political sociology, and political theory. He finds that the ideal of the deliberative campaign, in which voters reason with and attempt to persuade one another about important political issues, is a relatively recent one.⁴ He then distills several decades of empirical political science to find that voters “almost never change their beliefs and opinions to any significant degree *during campaigns*.”⁵ Instead, voters bring to campaigns political beliefs that develop over a lifetime.⁶ These beliefs are relatively stable and unlikely to be changed by something as transient as an election campaign. As Professor Gardner explains, “studies demonstrate that attempts to persuade voters during election campaigns face extremely significant obstacles in the form of cognitive biases, information-processing strategies, and social dynamics that together work with exceptional power to stabilize an individual’s beliefs.”⁷ Turning to the scholarship concerning democratic theory, Professor Gardner considers the multiple contemporary variants of democratic theory and finds that none of them—even those that give great

4. *Id.* at 13-43.

5. *Id.* at 86.

6. *Id.* at 92-93.

7. *Id.* at 94.

weight to deliberation generally—require deliberative elections. “[D]eliberative democracy requires only that meaningful public deliberation about pressing issues of public concern occur at some times and in some forums,”⁸ he writes. “[T]hose times and forums need not coincide with opportunities available during formal campaigns for public office.”⁹

In short, we can have a healthy democracy without deliberative election campaigns. That is a good thing as, given the way political public opinion forms and only slowly changes, we are unlikely to have “campaigns in which citizens actually open themselves to a deep form of persuasion.”¹⁰

Professor Gardner observes that “[a]lthough the significance of *elections* for democracy is a common point of emphasis in many theoretical accounts of democracy, election *campaigns* are surprisingly undertheorized.”¹¹ I suspect this point is as true for election law scholarship as it is for democratic theory, so election law specialists are surely indebted to Professor Gardner’s erudite effort to provide a scholarly framework for legal analysis of election campaigns. And a central theme of the book—that election campaigns have to be seen within the context of political public opinion formation and democratic action more generally—is surely correct. Democracy goes on all the time—in rallies, blog posts, online social networks, community organizations, town hall meetings, letters to representatives, and calls to radio talk shows. Elections are not all there is to democracy.

Yet, in seeking to counter the tendency of some writers to make elections the focal point of democracy and to set such a high deliberative bar for election campaigns that our campaigns cannot possibly measure up, Professor Gardner may have gone too far in the other direction. Elections are not just another blip on the democratic radar screen;

8. *Id.* at 134-35.

9. *Id.*

10. *Id.* at 10.

11. *Id.* at 118.

moreover, there is more activity that can be properly described as involving persuasion in election campaigns than fits Professor Gardner "tabulative campaign" model.¹² This critique has implications for Professor Gardner's recommendations for election campaign law. Consistent with his view that election campaigns are not so central for democratic debate, Professor Gardner contends that we ought to feel freer to regulate campaigns. As he puts it:

[L]owering our aspirations for campaigns also opens constitutional space for much more extensive and indeed highly intrusive regulation of the campaign process. Were we to jettison the idea that campaigns . . . must be important forums for meaningful political debate and persuasion, extensive regulatory oversight of the campaign arena could no longer be seen as deeply threatening to core democratic values.¹³

If, however, more is happening in an election campaign than merely "tabulating public opinion as accurately as possible,"¹⁴ then the argument for increased regulation, particularly of campaign finance, which is the election law subject to which Professor Gardner gives the greatest attention, must fail.

My first point is that although Professor Gardner is right to remind us that election campaigns are only one episode of the larger unfolding democratic saga, he fails to acknowledge adequately that elections play a unique role in democracy because they make decisions that bind an entire polity for a period of time. Elections choose the public officers who make, enforce, or adjudicate laws. In the case of voter-initiated ballot propositions, voters actually enact laws directly. An election's outcome directly affects what government does thereafter. Elected officials hold office for terms of years. Voter-enacted laws remain law until overturned or changed by the voters at a subsequent election. That is, of course, the whole point of selecting government and making laws by popular election.

12. *Id.* at 147-89.

13. *Id.* at 171.

14. *Id.* at 172.

Moreover, elections can matter. Political public opinion may be relatively stable and popular beliefs on the major issues of the day may evolve only slowly, but elections, even those decided by modest margins, can result in sharp shifts in public policy that have major consequences for society. George Bush's narrow election in 2000 led directly to deep tax cuts and ultimately to the invasion of Iraq. Barack Obama's election in 2008 led to the enactment of major health care reform legislation. Had either the 2000 or 2008 elections come out differently, the public policy results would surely have been very different. Elections matter—they have consequences—in a way different from other forms of democratic deliberation.

Professor Gardner implicitly acknowledges this distinction but in a way that suggests that the election decision is actually *less* important than more general democratic deliberation. He notes that “elected representatives are by definition a kind of instrumentality that polities use to advance their aims” so that “the decision about which representative to elect is therefore to some degree intrinsically a decision about a choice of means” not of broader public ends.¹⁵ With the election merely about means rather than ends, the campaign is likely to unfold in “a thin, instrumental mode in which voters will find it unnecessary to discuss or even to contemplate their deeper conceptions of collective ends.”¹⁶ Yet this merely “instrumental” electoral event will have binding consequences for the “collective ends” that the resulting government may choose to pursue when it wields state power.

To be sure, to say that elections matter does not address Professor Gardner's central contention that election *campaigns* do not matter, or, at least, that they do not matter much. Here my disagreement with Professor Gardner is less with what he says—his argument that the votes of most people most of the time reflect their pre-campaign beliefs and predispositions is surely well-

15. *Id.* at 138.

16. *Id.* at 139.

grounded in the political science literature—than with the way he says it. Specifically, the problem grows out of the way he sets up the dichotomy between persuasive/deliberative campaigns and tabulative campaigns, and, in particular, the extensive territory that his use of the term tabulative covers. In Professor Gardner's terminology campaigns are either "persuasive/deliberative" or "tabulative." In persuasive campaigns, voters make up their minds about fundamental political questions regarding public ends during the course of a campaign based on the information provided and the rational, fact-based arguments made during the campaign. In a persuasive campaign—again using Professor Gardner's terminology—public political opinion would be campaign-endogenous; that is, voters' beliefs about significant issues would be determined during the campaign by a process of reasoned public-regarding assessment of the contents of campaign messages, perhaps in discussions with other voters. Any campaign in which this does not occur—in which, specifically, voters do not reconsider and change fundamental political beliefs—is not persuasive but is, instead, tabulative. In a tabulative campaign all that happens is that voters learn to sort themselves and line up behind the candidates according to their pre-campaign—their "campaign-exogenous"—beliefs. The goal for the design of such a campaign is only to make sure the voter is tabulated accurately, that is, that he or she votes for the candidate, party, or position on a ballot proposition that best tallies with his or her campaign-exogenous beliefs.

At times, Professor Gardner's insight into campaigns is occluded by his use of the term tabulative to describe anything that does not meet the high standard of persuasion-as-reconsideration-of-fundamental beliefs. Thus, near the end of the book he writes "a tabulative campaign is not primarily about forming or influencing public opinion; it is about counting heads. Such a campaign is therefore largely administrative, even ministerial, rather than political."¹⁷ Well, this reflects a very narrow—dare I say, idiosyncratic—definition of "political," much as the

17. *Id.* at 182-83.

persuasive/tabulative dichotomy is based on a very narrow definition of persuasive and a very broad definition of tabulative.

As Professor Gardner repeatedly acknowledges, an awful lot of what could reasonably be called persuasion can go on in our tabulative campaigns. As he notes:

[B]ecause voters may not necessarily know how to decide which set of actions and policies will best achieve the ends that they want elected officials to pursue, candidates may attempt to persuade voters “to make new connections between specific problems and specific offices”—to persuade voters, that is to say, of the political salience of certain information and ideas.”¹⁸

In other words, a voter may be deeply committed to the free market economy and unwilling to contemplate any ideas that would shake that belief, but may be uncertain whether that commitment entails more or less regulation of the financial services industry or bailouts for big banks, and he or she may be open to persuasion on that point. Or a voter may be committed to expanding health insurance coverage but may be unsure whether the best way to do that is through health savings accounts, an individual mandate, or a public insurance program. Candidate, party, or political committee efforts to get voters to back one of these policy options or another strike me as persuasive, but because they don’t attempt to get voters to reconsider fundamental commitments, Professor Gardner would dismiss campaigns built around such efforts as still merely tabulative and thus, “administrative,” “ministerial,” and “political.”

To be sure, many campaign messages may not even attempt to persuade voters of the merits of a specific policy but instead focus on the positions, experiences, record in office, character, or personality of particular candidates. The goal of such campaigns is, as Professor Gardner explains, to influence the voter’s determination of which candidate “will most reliably do what I think should be done.”¹⁹ Yet, surely, this too involves appeals to a voter’s deliberative capacity. A voter still must make the decision

18. *Id.* at 106 (quoting SAMUEL L. POPKIN, *THE REASONING VOTER* 45 (1991)).

19. *Id.* at 105.

whether to vote and, if so, for whom. This decision may closely follow, and may be predictable from, the voter's pre-campaign beliefs or predispositions, but it still involves some sort of decision. Only after that decision is made can there be tabulation.

Professor Gardner dismisses as merely tabulative, and not involving deliberation or persuasion, any campaigning that does not entail consideration and, especially, voter *re*-consideration, of fundamental political commitments. But this misses the point of an election, which is not a society-wide seminar on political issues but the collective decision of who should wield public power and whether specific ballot measures should be enacted into law. Determining whether specific candidates or policies best advance the political beliefs of the voters is the kind of deliberation most appropriate to the election decision. And persuasion aimed at influencing that decision is campaign-appropriate persuasion. By denying that campaigns involve anything that can be considered to involve deliberation or persuasion, Professor Gardner has fallen for what he calls the Campaign Critique—the “view that campaigns ought to serve as forums for some kind of meaningful public deliberation on important political issues”²⁰—which his book challenges. In emphasizing that campaigns do not meet his definition of deliberation or persuasion, he eliminates all deliberation or persuasion from campaigns. But a better definition of the purpose of a campaign might be that it ought to enable the voters to make an intelligent decision concerning the questions they are actually asked to decide. In which case, some of the activity that Professor Gardner labels tabulative might be seen as persuasive. Or perhaps the difficulty is based on what counts as “important political issues.” Professor Gardner never actually addresses that. But if tax cuts, health insurance reform, or financial services regulation are “important political issues,” then at least some of our campaigns are at least partly persuasive or deliberative and not merely tabulative in the administrative or ministerial sense used by Professor Gardner.

20. *Id.* at 2.

Again, I don't want to overstate my disagreement with Professor Gardner. The literature he discusses shows that the votes of most voters can be predicted based on their pre-existing views, commitments, and predispositions; relatively few voters change their minds during campaigns, and in the many elections that are not close the campaign may not matter much at all. But some elections are close. In some elections, some voters may not be sure which candidates or policies best suit their predispositions. Voters may change their minds concerning which candidate to support or whether to bother voting at all. Some campaigns do affect electoral outcomes—and the government and the public policies that come out of the election—even if not all campaigns do. These elections may not reach the rarified level of persuasive or deliberative that Professor Gardner articulates, but it does not seem right to characterize them as merely tabulative, especially if tabulative is equated with “administrative” or “ministerial.”

This not just a question of semantics as it is evident that Professor Gardner's view that campaigns have the minimal deliberative content and persuasive effect captured by his use of the term tabulative has influenced his approach to election campaign law. According to Professor Gardner, his book is “in the end primarily an inquiry into the condition of the constitutional law of election campaigns,”²¹ and Professor Gardner examines a number of election law topics, particularly campaign finance law.²² Consistent with his view that campaigns do not have much consequence, he suggests that we be less concerned about the dramatically unequal campaign resources current campaign finance law permits. If campaigns were really deliberative, then unequal resources would give the side with the greater war chest “more extensive opportunities to persuade voters to its point of view,” which seems “unfair.”²³ But if “public opinion is understood as campaign-exogenous, and campaigns as tabulative, inequality of campaign

21. *Id.* at 118.

22. *Id.* at 55-57, 70-82, 174-77.

23. *Id.* at 174.

resources looks much more benign.”²⁴ At most, the candidate with more resources will have an advantage in mobilizing her pre-campaign supporters, but on the assumption that it costs less to mobilize a supporter than to win over a new one, this advantage of more money does not seem that great and “the urgency of equalizing campaign spending is reduced.”²⁵

On the other hand, Professor Gardner contends that the tabulative model, while making campaign money less important, also provides support for a doctrinal shift that would make even “highly intrusive” campaign finance regulation less constitutionally problematic. If we “conceive of a campaign as little more than one phase of an essentially ministerial process of counting heads,”²⁶ then there would be little reason to give campaign speech and campaign spending the powerful constitutional protection the Court currently accords them. “Campaign speech no longer implicates the core democratic process of public opinion formation,”²⁷ but might instead “be analogized . . . to commercial speech aimed at inducing consumption.”²⁸ On the tabulative model, what campaign speech primarily aims to do is “to match buyers with appropriate sellers in an electoral marketplace, and as a result to be an appropriate arena for regulatory action aimed at protecting the efficiency of marketplace sorting mechanisms.”²⁹

This is truly breathtaking. Instead of election campaigns constituting the zenith of democratic political engagement, Professor Gardner would demote them *below* the level of non-electoral political speech; indeed, he would recharacterize them as not even political but commercial. Under the tabulative model, government regulation of campaign speech would be subject not to strict judicial scrutiny, but to a much more relaxed standard of judicial

24. *Id.* at 175.

25. *Id.*

26. *Id.* at 176.

27. *Id.*

28. *Id.* at 177.

29. *Id.*

review. To be sure, other scholars have sought to distinguish electoral speech from other political speech in order to justify greater governmental regulation of the former than the latter,³⁰ and campaign finance law—which regulates campaign money, but not money used in political activity generally—requires the same distinction. But these efforts have relied on the greater justification for regulating electoral campaign spending in the name of democracy, not the relative unimportance of election campaigns.

Professor Gardner's proposal fails for the same reason as his effort to describe all current campaign efforts at persuasion as tabulative. Campaign messages do have persuasive content addressed to the fundamental political questions of who should hold office, what policies should government advance, and whether proposed rules should be adopted. Given the predispositions and cognitive biases of most voters, these messages may often fail to persuade, but persuasion is their aim—if only to persuade voters who already hold the views put forward by the messages to actually vote. This is political speech by any constitutional standard. Professor Gardner's use of the tabulative model to treat electioneering as akin to commercial speech only undermines his effort to persuade us that the tabulative model is the better description of election campaigns. There are many reasons to support greater regulation of campaign finance, but the idea that campaign speech is more commercial than political is not one of them.

The great strength of Professor Gardner's book is that it reminds us to situate our thinking about elections and election campaigns in the theory and practice of democracy. Elections are important, but they are far from the only setting in which democratic engagement occurs. Indeed, the health of our democracy—and of our elections—requires that democracy be practiced widely throughout civil society and public life. We err in placing too much of the weight of

30. See, e.g., Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999).

our democratic expectations on elections, and in focusing efforts to improve democracy so intensely that we fail to address democracy issues in society more broadly. Election campaigns are a phase of democracy—an important phase—but not all there is to democracy.

However, in making these valuable points—and pulling together the empirical and theoretical literatures on which he relies—I fear Professor Gardner goes too far in minimizing what campaigns do and what we can look to them to do. Campaigns have persuasive content, even if voters are, at best, only infrequently persuaded to change their fundamental political beliefs, and they can have deliberative consequences, even if that deliberation involves voter reflection on how specific voting decisions will advance their pre-campaign ends and not voter reconsideration of those ends. Accordingly, the tabulative model—in Professor Gardner's sense of tabulative as administrative or ministerial, not political—cannot provide a fully satisfactory foundation for election law. To the extent that the tabulative model emphasizes the need for a complete and accurate count of voter preferences—and thus focuses on the need to facilitate voting,³¹ to increase the range of voting options available to voters,³² and to make it easier to determine which candidates best satisfy voters' preferences³³—it is surely useful for thinking about election law and policy. But using the tabulative model to deny that election campaigns include messages intended to persuade voter decisions that can affect election outcomes obscures more than it enlightens and will have little effect on campaign law.

31. See GARDNER, *supra* note 1, at 181.

32. See *id.* at 172-74.

33. *Id.* at 181-82.