

Are Campaign Consultants Valuable?

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Campaign consultants perform a Jekyll and Hyde role in electoral politics. On one hand, they make critical decisions that lead to election day victories, such as crafting the candidate-defining phrase describing President George W. Bush as the “compassionate conservative.”¹ On the other hand, they use tactics that ultimately harm democracy, such as strategically arranging for voters to receive phone calls right before the election asking if they would “be more or less likely to vote for [Candidate X] if [they] knew her staff is dominated by lesbians?”² Neither the glorifying view that campaign consultants are indispensable,³ “an essential part of election campaigns,”⁴ nor the vilifying view that they harm democracy can actually be arrived at without first analyzing how campaign consultants impact electoral politics and our democracy.

Laying out some foundational facts helps this analysis. First, academics disagree on who even counts as a campaign consultant.⁵ This Essay considers a campaign consultant a “professional who is engaged primarily in the provision of advice and services (such as polling, media, creation and production, and direct mail fundraising) to candidates, their campaigns, and other political committees.”⁶ This broad definition of campaign consultants accommodates the different types of campaign consultants that exist, includ-

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¹ Adam Nagourney, *Strategists as Stars*, N.Y. TIMES, July 15, 2007, at WK1.

² This situation actually occurred in the 1994 Texas gubernatorial campaign between Governor Anne Richards and Republican challenger George W. Bush. Julian Borger, *The Brains*, GUARDIAN, Mar. 9, 2004, § G2, at 2. In the campaign consulting business, this tactic, called push polling, involves “disseminating negative (and usually blatantly false) information about an opponent in the guise of a poll.” Candice J. Nelson et al., *Hired Guns or Gatekeepers of Democracy?*, in SHADES OF GRAY: PERSPECTIVES ON CAMPAIGN ETHICS 75, 81 (Candice J. Nelson et al. eds., 2002).

³ Charles S. Clark, *Political Consultants: Are Advisers and Handlers Harming Democracy?*, 6 CQ RESEARCHER 867, 867 (1996).

⁴ James Thurber, *Are Campaign Pros Destroying Democracy?*, 19 CAMPAIGNS & ELECTIONS 54, 54 (1998); see also James A. Thurber, *Introduction to the Study of Campaign Consultants*, in CAMPAIGN WARRIORS: THE ROLE OF POLITICAL CONSULTANTS IN ELECTIONS 1, 2–3 (James A. Thurber & Candice J. Nelson eds., 2000) [hereinafter Thurber, *Intro to Campaign Consultants*].

⁵ Compare RAYMOND D. STROTHER, FALLING UP: HOW A REDNECK HELPED INVENT POLITICAL CONSULTING 12 (2003) (“All one needs to open a practice are a business card and some contacts in one of the political party offices who know even less than you.”), with Stephen K. Medvic, *The Effectiveness of the Political Consultant as a Campaign Resource*, 31 PS: POL. SCI. & POL. 150, 150 (1998) (“[A] political consultant is anyone who worked in two or more congressional and/or state-wide campaigns . . . or is a member of the American Association of Political Consultants.”).

⁶ Rebekah Herrick & Christine Pappas, *The Role of Political Consultants in State Legislative Races* 4 (Apr. 2, 2009), http://www.allacademic.com/meta/p363382_index.html (unpublished manuscript, on file with the Harvard Law School Library).

ing those focusing on media, polling, fundraising, and general strategy,⁷ and so enables consideration of more actors than would a more restrictive definition. Second, the campaign consulting industry consumes a great deal of money. The Center for Public Integrity estimated that “money going to . . . consultants amounted to more than half of the total spending” in the 2003–2004 federal elections.⁸ Though it is unclear what portion of this money went to consultants themselves,⁹ as opposed to purchasing media coverage, the point remains that campaign consultants claim and control a significant proportion of the total campaign expenditure. Finally, professionalization of campaigns has increased noticeably at all levels,¹⁰ and there are no signs of this trend halting.

Given these foundational facts, Part I describes the impact campaign consultants as a group have on the electoral process and our democracy.¹¹ Part II then evaluates whether campaign consultants are a valuable part of both the electoral process and our representative democracy, and through this evaluation exposes a difficulty: how to measure consultants’ positive impact on election results against their negative impact on democracy. This difficulty of comparing an ability to win races with damage to democracy suggests asking whether it is possible for consultants simultaneously to benefit democracy and ensure their candidate’s victory. Part III addresses this new question by drawing on theories of democracy, capitalism, and law, as well as by making a comparison with corporate lawyers. Despite initial promise that the answer to this question is yes, this Essay ultimately concludes that maintaining effectiveness in order to ensure a candidate’s victory cannot concurrently guarantee democracy’s betterment. This result unmaskes an underlying issue of whether consultants should even be held accountable to democracy in the first place, bringing back into prominence the difficulty posed in Part II, namely how to choose between the values of democracy and winning.

⁷ James A. Thurber et al., *Portrait of Campaign Consultants*, in *CAMPAIGN WARRIORS*, *supra* note 4, at 11. These different consultants distinctively impact campaigns, a point that should not be forgotten. See Dennis W. Johnson, *The Business of Political Consulting*, in *CAMPAIGN WARRIORS*, *supra* note 4, at 39.

⁸ Sandy Bergo, *A Wealth of Advice: Nearly \$2 Billion Flowed Through Consultants in 2003–2004 Federal Elections*, *CTR. FOR PUBLIC INTEGRITY*, Sept. 26, 2006, <http://projects.publicintegrity.org/consultants/report.aspx?aid=533> (on file with the Harvard Law School Library) (“About 600 professional consultants were paid more than a combined \$1.85 billion in the 2003–2004 federal campaign.”). While at first glance, the dollar figure seems excessive, the amount spent on campaigns pales in comparison to the amount spent on advertising by commercial interests. See Johnson, *supra* note 7, at 43 (pointing out that in 1996, the largest commercial interest, General Motors, spent \$1.71 billion in media advertising).

⁹ See Kenneth P. Vogel, *Consultant Spending Saps Clinton Campaign*, *POLITICO*, Feb. 21, 2008, <http://www.politico.com/news/stories/0208/8619.html> (on file with the Harvard Law School Library).

¹⁰ See Clark, *supra* note 3, at 872.

¹¹ “Democracy” is a contested term. This Essay uses the term to represent the idea of one person, one vote—each person votes for the candidate whom he or she believes will best represent him or her in government. Part II further elaborates on what a vibrant democracy demands from consultants.

It is important to keep in mind that campaign consulting will continue for the foreseeable future.¹² Given the ubiquity of consultants, understanding their impact on democracy is important. Though this Essay leaves open both the specific standard of behavior to which consultants should be held accountable and the related problem of how to enforce a given standard of behavior,¹³ a better understanding of their role provides guidance for reforming the campaign consulting industry in order to increase its value both to the electoral process and to our democracy.

I. HOW DO CAMPAIGN CONSULTANTS IMPACT ELECTORAL POLITICS AND OUR DEMOCRACY?

Addressing consultants' impact involves looking at criticism and praise directed toward them. Importantly, most of the criticisms result from the techniques and strategies campaign consultants currently employ. One common criticism accuses campaign consultants of driving up the cost of campaigns.¹⁴ Increasingly, campaigns force candidates to devote a great deal of time to gather funds to pay for, among other things, expensive consultants.¹⁵ This problem is exacerbated by the fact that mystery shrouds the activities of campaign consultants,¹⁶ as well as by a lack of transparency as to how much

¹² The Supreme Court refused even to permit caps on campaign expenditure. See *Buckley v. Valeo*, 424 U.S. 1 (1976). A law completely banning the use of campaign consultants would violate the First Amendment to a greater degree. Of course, politicians and interests groups could in theory collectively decide to stop using consultants, but this scenario is not realistic. In high stakes litigation, parties rely on the best expert lawyers they can afford. Similarly, in high stakes politics, where politicians control vast appropriations, it makes sense for those running for office to professionalize their campaigns as much as possible and rely on the "experts."

¹³ Voluntary cooperation and adherence to standards of behavior appears highly unlikely. Regulation presents one option but also implementation difficulties. Unlike some professions, campaign consulting exists mostly unregulated. See Nagourney, *supra* note 1. The unregulated nature makes enforcing even a simple code of ethics difficult. See Nelson et al., *supra* note 2, at 90. Another option exists in the form of voter constraints—voters reject bare-knuckle consultancy by voting for the other candidate. Some combination of the two might also be feasible, such as where voters receive education as to problematic behavior and then vote based on observed behavior. For ideas on creating a regulatory framework, see S.F., CAL., CAMPAIGN AND GOVERNMENTAL CONDUCT CODE ch. 5, §§ 1.500–545 (2010), available at <http://www.sfethics.org/ethics/2009/06/campaign-consultant-ordinance.html> (laying out a system of registration, a code of conduct, and enforcement mechanisms).

¹⁴ See Thurber et al., *supra* note 7, at 32; Bergo, *supra* note 8.

¹⁵ See Bergo, *supra* note 8 ("We know the person with the most money wins. So let's go make sure we're the person with the most money," says Joe Trippi, the manager and consultant for Howard Dean's presidential bid."). One might argue that cause and effect are reversed. The high cost of campaigns cause candidates to rely on experienced professionals to run campaigns, instead of just relying on friends. This statement contains some truth since candidates expect expensive campaigns and so they know to hire consultants. However, evidence that a great deal of campaign spending goes to consultants suggests that consultants actually caused the increased cost.

¹⁶ See Stephen K. Medvic, *Professionalization in Congressional Campaigns*, in CAMPAIGN WARRIORS, *supra* note 4, at 91.

campaign consultants earn.¹⁷ Critics blame the increased cost of campaigns on consultants' overreliance on paid media.¹⁸ These critics wonder if more ads are necessarily better and point to the conflict of interest when consultants receive a commission for the advertisements,¹⁹ causing them to go "ad-crazy."²⁰

Campaign consultants also take criticism for the ways in which their strategies affect democracy. The focus on fundraising to pay for expensive campaigns increases the possibility of special interests that contribute to campaigns controlling officials as opposed to officials serving the people.²¹ The increased cost of elections further presents an entry barrier for the less affluent.²² Consultants also hinder voters from getting to know the actual candidate by shielding candidates from unscripted contact with the media.²³ A perhaps contradictory criticism accuses consultants of often downplaying the issues and instead focusing elections on the candidates themselves.²⁴ Defenders of campaign consultants disagree that consultants deserve blame for any shift in focus toward candidates. The focus on candidates occurs because voters get bored with the issues. Consultants merely "transpose that lack of interest" from voters, creating "virtually content free" themes.²⁵ In other words, they simply cater to the demands of voters.

Critics further argue that campaign consultants harm democracy by encouraging negative campaigning, which discourages voter turnout.²⁶ Defenders, in response, ask if it is clear that negative ads are necessarily worse

¹⁷ See Vogel, *supra* note 9; see also Tim Dickinson, *The Enemy Within*, ROLLING STONE, Apr. 5, 2007.

¹⁸ See Steven A. Holmes, *Rising Costs Fuel a Partisan Senate Debate on Campaign Spending*, N.Y. TIMES, Apr. 23, 1990, at A13; see also Robert E. Hogan, *Voter Contact Techniques in State Legislative Campaigns: The Prevalence of Mass Media Advertising*, 22 LEGIS. STUD. Q. 551, 553 (1997).

¹⁹ For example, Democratic media consultants working on the 2004 presidential campaign pocketed "as much as ten percent of every dollar spent on TV ads." Dickinson, *supra* note 17. Not all consultants work on commission. GOP consultants in the 2004 presidential campaign, for example, received a flat fee. *Id.*

²⁰ Dickinson, *supra* note 17; see Sandy Bergo, *Airtime is Money: Basing Pay on Ad Spending Could Create a Consulting Conflict of Interest*, CTR. FOR PUB. INTEGRITY, Sept. 26, 2006, <http://projects.publicintegrity.org/consultants/report.aspx?aid=535> (on file with the Harvard Law School Library).

²¹ See Steve Behar, *Eliminate Special Interests in Elections*, <http://beharfornewyork.com/eliminate-special-interests-in-elections.html> (on file with Harvard Law School Library); see also TAVIS SMILEY & STEPHANIE ROBINSON, *ACCOUNTABLE: MAKING AMERICA AS GOOD AS ITS PROMISE* 154 (2009) ("'One man, one vote' can hardly compete with 'one man, \$1 million.' The implication is clear: democracy loses when our polling places become secondary to the size of our bank accounts.").

²² See Jonathan Clayborn, *Does Big Money Yield Victories?*, WASH. DAILY NEWS, Mar. 7, 2010, <http://wdnweb.com/articles/2010/03/08/news/doc4b92f50b9f9d5030891799.txt> (on file with Harvard Law School Library).

²³ See Clark, *supra* note 3, at 872.

²⁴ See Herrick & Pappas, *supra* note 6, at 6. This focus on candidates might not contradict the criticism that consultants "hide" the candidate since the focus could be on a manufactured persona crafted for the candidate.

²⁵ *Id.*

²⁶ See Clark, *supra* note 3, at 869.

than other ads. Some research indicates that negative ads might actually contain more policy and issue content than do positive ads.²⁷ Critics also accuse campaign consultants of reducing issue debates to sound bites,²⁸ but defenders blame the media and the fact that TV “dumbs down” everything, not just political campaigns.²⁹

In addition, critics argue that campaign consultants corrupt the science of opinion polling,³⁰ so that candidates end up too responsive to public opinion and polling. However, assuming polling accuracy, is it necessarily detrimental for candidates to care intensely about what the public thinks, especially since they supposedly represent the public? Critics further blame consultants for suppressing voter turnout³¹ and marginalizing volunteers to spectators since the sophisticated technology that consultants bring presents a major obstacle for participatory democracy.³² Also harmful is the lost dynamic of an exchange of ideas caused by consultants’ use of rhetorical formulas that discourage reflection and discussion, freeze public opinion in place, and polarize and inflame voters.³³ Critics seem to blame consultants for nearly every problem with the political campaign system.

On the other hand, campaign consulting defenders contend that use of consultants actually improves our democracy.³⁴ These defenders point out that consultants make complicated issues easier for voters to grasp, enabling greater voter engagement.³⁵ They also explain that consultants do not tell candidates what positions to take, but merely tell them what issues to focus on.³⁶ Even if, in effect, consultants end up setting issue priorities, because consultants use polling data, the issues turn out to be more in touch with voters’ needs. Therefore, letting consultants set issue priorities actually improves debate and benefits the public by directing limited resources to discussion of the issues that matter most to voters.³⁷ In the end, candidates better understand the desires of their constituents, thereby improving democracy.

²⁷ See Nelson et al., *supra* note 2, at 77.

²⁸ See Thurber, *Intro to Campaign Consultants*, *supra* note 4, at 1.

²⁹ See Clark, *supra* note 3, at 884.

³⁰ *Id.* at 865.

³¹ See Thurber, *Intro to Campaign Consultants*, *supra* note 4, at 1.

³² See Clark, *supra* note 3, at 873 (“Mrs. Jones and her teenage kids can’t go down to the congressman’s corner headquarters and volunteer to make his TV spots.”).

³³ Nelson et al., *supra* note 2, at 79. For example, the push to single-issue voting gets voters agitated about issues that represent only a tiny fragment of the candidate’s eventual legislative duties and are not representative of the broad swath of issues the candidate could potentially address. Moreover, the issues inflate interests, such as abortion, that a single legislator can do very little about. This inflation disserves democracy by obscuring the candidate’s views at large. See Sanford A. Lakoff, *DEMOCRACY: HISTORY, THEORY, PRACTICE* 196 (1996).

³⁴ See Nelson et al., *supra* note 2, at 76.

³⁵ See *id.*

³⁶ See Herrick & Pappas, *supra* note 6, at 6.

³⁷ See *id.*

Critics, however, paint a different picture, arguing instead that consultants do not get issue priorities from voters. Rather, consultants “prime voters” by finding the issues where “a candidate has an electoral advantage, creating a message and strategy around those issues, and disseminating that message.”³⁸ Also, critics contend that consultants might give mistaken or biased information to the candidate.³⁹ One study indicates that, counterintuitively, candidates relying on consultants possessed a less accurate perception of their districts.⁴⁰

A different line of criticism accuses consultants of caring too much about their personal interest and winning.⁴¹ Though some consultants feel they actually keep campaigns on the high road,⁴² the fixation on winning sometimes results in consultants committing ethical violations and employing unsavory tactics.⁴³ Even if consultants did not invent these unsavory tactics, critics believe that consultants favor and encourage their use.⁴⁴ Though this criticism clearly does not apply to all consultants, their collective reputation nevertheless gets damaged.

Despite all these criticisms, consultants undoubtedly benefit electoral politics by valuably assisting with the practicalities of running effective campaigns. Not only is campaign scheduling an art,⁴⁵ but consultants also bring direction and discipline to the campaign.⁴⁶ Moreover, consultants find the language that best conveys the candidate’s message and play an integral part in defining the candidate.⁴⁷ Perhaps but for consultants, candidates would repeatedly make the same campaign mistakes.

Arguably, the greatest impact of consultants, beyond the concrete effects they have on campaigns, is the current perception that they are essential to political victory.⁴⁸ This perception reveals itself through the fact that every serious candidate for a major office hires consultants. Even many state and local elections now employ campaign consultants. How accurate is the perception that consultants are necessary,⁴⁹ though clearly not sufficient, to achieve victory? Obviously, if neither side used consultants, one candi-

³⁸ Medvic, *supra* note 16, at 100.

³⁹ See Herrick & Pappas, *supra* note 6, at 7.

⁴⁰ See *id.* at 16.

⁴¹ See Sandy Bergo, *The More Media, the Better . . .*, CTR. FOR PUB. INTEGRITY, Sept. 26, 2006, <http://projects.publicintegrity.org/consultants/report.aspx?aid=539> (on file with the Harvard Law School Library).

⁴² See Nelson, *supra* note 2, at 76.

⁴³ See *id.* at 80–81.

⁴⁴ See Clark, *supra* note 3, at 881.

⁴⁵ See *id.* at 878.

⁴⁶ See D. W. JOHNSON, *NO PLACE FOR AMATEURS* 11 (2001).

⁴⁷ See DAVID DULIO ET AL., *VITAL SIGNS: PERSPECTIVES ON THE HEALTH OF AMERICAN CAMPAIGNING* 62–63 (2005); see also Nagourney, *supra* note 1.

⁴⁸ See Clark, *supra* note 3, at 867–69. While this perception applies to hiring campaign consultants in general, it does not apply to every type of consultant since, as mentioned before, not all consultants contribute equally.

⁴⁹ See Paul Hermson, *Hired Guns and House Races: Campaign Professionals in House Elections*, in *CAMPAIGN WARRIORS*, *supra* note 4, at 65.

date would still emerge victorious on election day. Usually at least one side hires consultants, but does hiring consultants increase the likelihood of winning? Since rarely will only one side hire consultants, answering this question may involve analyzing whether hiring more professional consultants produces better results. Given the scarcity of research addressing the question, any conclusion remains tentative.

Sparse scholarship exists concerning whether hiring consultants leads to positive election results. Research for this Essay uncovered only two studies, both focusing on House races.⁵⁰ According to these studies, in House races, “the more types of consultants hired to assist with various aspects of the campaign, the better candidates will do at election time.”⁵¹ Though campaign consultants cannot eliminate the advantages of incumbency, “they can make the difference between victory and defeat in some House elections.”⁵² Presumably, one can extend these findings to other types of races.

The lack of research available about consultants’ impact at other levels of government necessitates investigating other campaign-related outcome measures, which can serve as proxies for election success. A prominent theory suggests that hiring professionals leads to political victory due to their impact on fundraising. Research confirms that campaigns that hire more professional consultants raise more money⁵³ because hiring consultants increases the candidate’s credibility with donors.⁵⁴ Since consultants help candidates bring in more money and spending money increases the chances of winning,⁵⁵ then logically, hiring more consultants leads to increased chances of winning.⁵⁶ This theory, however, fails to take into account two factors that affect election results: incumbency and candidates with private sources of funding. Nevertheless, an increased fundraising capability further supports the idea that consultants positively impact election results.

Another theory tries to explain positive election results by suggesting that hiring consultants increases voter share, although contradicting research exists.⁵⁷ While some research suggests that even after accounting for the impact of money and quality of candidates, each additional consultant hired increased the voter share by 2.5%, other research suggests no effect.⁵⁸ These

⁵⁰ See *id.* at 88; Medvic, *supra* note 16, at 101–04.

⁵¹ Medvic, *supra* note 16, at 104.

⁵² Herrnson, *supra* note 49, at 88.

⁵³ See *id.* at 76.

⁵⁴ See Medvic, *supra* note 5, at 150; see also Nagourney, *supra* note 1.

⁵⁵ See *supra* note 15.

⁵⁶ Not addressed here is the problem of the cycle of liabilities, which contends that “in order to purchase professional assistance, candidates need money; yet money flows more freely to those candidates who are deemed viable; and viability can most easily be established by building a professionally run campaign.” Medvic, *supra* note 16, at 104.

⁵⁷ See James A. Thurber, *The Study of Campaign Consultants: A Subfield in Search of Theory*, 31 PS: POL. SCI. & POL. 145, 147 (1998).

⁵⁸ See *id.*

disputed findings do not further the idea that hiring consultants leads to better election results.

Due to the dearth of supporting research, perhaps the perception that consultants increase the likelihood of election victory is just that, a perception. This (mis)perception is fueled by the tendency to give too much credit to consultants when the candidate wins and too much blame when she loses.⁵⁹ Additional wood for the fire comes from consultants' often large egos, which perhaps lead to exaggerated portrayals of their impact.⁶⁰

Despite likely exaggeration, in the abstract, it makes sense that campaign consultants create positive election results. Just like any other specialty, those with more experience tend to do it better. Consultants gain experience from running many races and so are more effective at getting their candidates elected.⁶¹ One might counter that in reality, consultants are not very effective since "many politicians are often too stubborn to be led around the nose" by consultants and many campaigns hire a group of consultants who often give conflicting advice.⁶² This counterargument merely highlights that the amount of influence varies depending on context,⁶³ but leaves unopposed the assertion that on average, experienced campaign professionals benefit candidates.

Since the existing research as well as abstract reasoning both indicate that campaign consultants help candidates win elections,⁶⁴ one can tentatively declare the perception valid. However, if this perception continues to the point where all campaigns use consultants and hiring consultants becomes a basic campaign prerequisite—and some believe it already has—it will no longer matter if hiring consultants actually increases the likelihood of winning.

⁵⁹ See Dickinson, *supra* note 17.

⁶⁰ See Nagourney, *supra* note 1.

⁶¹ See Medvic, *supra* note 16, at 99.

⁶² Clark, *supra* note 3, at 874.

⁶³ Other variables affecting the amount of influence include the candidate's personality and political experience. See Herrick & Pappas, *supra* note 6, at 10.

⁶⁴ While consultants help candidates win, the glorified individual consultant who comes and masterminds the election victory is a myth. See Medvic, *supra* note 16, at 92. Celebrity consultants like Karl Rove are portrayed as omnipotent. See Borger, *supra* note 2 (describing Rove as the "boy genius" who "masterminded George Bush's transformation from boozing brat to national leader"). Such celebrity consultants are the exception, and "[m]ost political consultants toil in the background, content to ply their craft in anonymity." JOHNSON, *supra* note 46, at 6; cf. Medvic, *supra* note 16, at 93 (proposing reframing how one views campaign consultants). Since consultants learn from experience, each other, and trade magazines, individual differences in consultants' talents are "less fruitful in explaining the outcome of an election than is the use of consultants generally. In other words, a candidate's decision about whether or not to hire a consultant is more important than the decision about whether to hire Consultant A or Consultant B." *Id.* Given the small differences in their abilities, consultants should be treated together as any other campaign factor or resource in studies of their influence.

II. ARE CAMPAIGN CONSULTANTS A VALUABLE PART OF THE ELECTORAL PROCESS AND OUR DEMOCRACY?

The instinctive approach to answering the question of whether consultants are valuable involves weighing the negative and positive impacts outlined in the preceding section. Going through this process reveals an underlying problem, namely the incommensurability of harm to democracy and victory in campaigns. Ultimately, the difficulty of evaluation suggests putting aside the question of whether consultants are valuable in favor of asking a perhaps more insightful question: can a focus on winning campaigns simultaneously benefit democracy?

Part I outlined the toll that the use of consultants has exacted on the electoral process in general and democracy in particular. The preceding section also considered the contrary argument: that consultants actually benefit democracy. To evaluate fully whether the use of consultants hurts or benefits democracy requires first determining an idealized electoral process with which to compare. In such an idealized electoral process, voters become engaged in the campaign by hearing what candidates really think on issues and become involved, if not more actively, at least by voting based on an informed choice. A vibrant democracy requires, at a minimum, conduct on the part of those running campaigns that encourages citizens to vote and gives citizens an accurate sense of the candidates and their positions.⁶⁵

Given these minimal requirements, the balance of evidence favors the conclusion that consultants mostly damage our democracy. As described in Part I, consultants prohibit voters from getting to know the candidates and their views and turn off potential voters with tactics such as negative campaigning. Also, the increased cost of campaigns and the resulting need to fundraise creates the perception—if not the reality—of special interests controlling officials, which further turns away voters. While clearly some of the election problems lie with the media, voters, and the candidates themselves, consultants exacerbate the problem.

Even from a theoretical point of view, an inherent tension seems to exist between campaign consulting and democracy. If democracy is based on the idea of people exercising autonomy in deciding who can best represent them,⁶⁶ campaign consulting appears to impinge upon the autonomy of the people.⁶⁷ Consulting involves manipulation, such as using polarizing advertisements that mislead voters and rhetorical formulas that discourage

⁶⁵ One possible electoral process involves no campaigning at all and, instead, people simply voting on a predetermined day. This kind of electoral process would alleviate many problems, such as officials devoting too much time to fundraising and catering to special interests. Despite these benefits, campaigns serve important functions, such as giving voters a chance to hear what candidates have to say in order to make informed decisions.

⁶⁶ See *supra* note 11.

⁶⁷ Interestingly, consultants claim to respect voter autonomy. See Thurber, *supra* note 7, at 17.

reflection and discussion, as well as heavy reliance on polling data in order to tell voters what they want to hear. The pervasive use of polling appears to be an attempt to game the system by preventing informed voting based on the candidate's true views. In addition, due to the pressures to raise money to fund expensive campaigns, candidates end up listening more to wealthy special interests than to the ordinary voter. Campaign consulting, entangled by stratagems and propelled by money, degrades the purity of one person expressing her voice via her one vote.

Before completely censuring consultants, any evaluation of their negative impact on democracy needs to also take into account the fact that limitations exist on their power and influence over voters. Regardless of strategy and skill, consultants can only persuade, not dictate choices. The voter exercises ultimate agency on whether and for whom to vote. Candidates also need to be held accountable. Despite what consultants recommend, the decision of what actions to take rests ultimately with the candidate. Additionally, one can argue that the overall influence of campaign consultants is small since the consultant's role usually ends when the campaign ends—how the elected candidate governs afterwards matters more for the health of our democracy. Although these arguments validly question the extent to which consultants influence campaigns, they leave undisturbed the conclusion that consultants still negatively impact democracy.

Countering this negative impact, the first section also outlined the practical help consultants give campaigns. Today, most campaigns are impossible to run without professionals. Professional consultants bring “direction and discipline to the campaign,”⁶⁸ as well as expertise in advertising and fundraising, both indispensable cogs of the modern election machine. The difficulty in even imagining running campaigns without consultants in the majority of elections signals their value. Perhaps more importantly, hiring consultants seem to impact election results positively.

After outlining these effects, the next step in answering whether consultants are valuable involves weighing the negative effect on democracy against consultants' practical utility and ability to win races. But how is one to weigh such incommensurable impacts? Whether one sees consultants as valuable or not seems to hinge on whether one values victory or democracy. Arbitrarily choosing between the two feels unsatisfactory, but can one rationally compare them?

A further complication is that even supposing one decides (somehow) to value democracy more and therefore decides that campaign consultants lack value due to their negative impact on democracy, at the end of the day campaigns will continue to hire consultants precisely because of their practical usefulness and ability to win elections. Perhaps, then, the question of whether consultants are valuable provides little insight, and instead one

⁶⁸ See JOHNSON, *supra* note 46.

should ask whether a focus on winning can simultaneously benefit democracy.

III. CAN CONSULTANTS' FOCUS ON WINNING SIMULTANEOUSLY BENEFIT DEMOCRACY?

The possibility that consultants can both assist clients in an adversarial environment and simultaneously benefit democracy appears at first a fantasy, but an appeal to theories of democracy, capitalism, and law, as well as a comparison with lawyers negotiating a corporate deal, give hope to this prospect.⁶⁹ This possibility ultimately gets extinguished, however, because consultants will likely face a situation where restrictions on “harmful” strategies benefit democracy but also harm their candidates on election day. Given the likelihood of this situation, prioritizing winning an election cannot coexist with the goal of promoting democracy. This dilemma indicates that before one can answer whether consultants are valuable, one needs to first decide whether consultants should be accountable to democracy, whether their strategies should be restricted in ways that potentially compromise their effectiveness in order to further democracy. In other words, one needs to decide if consultants should be held accountable to democracy or only for winning elections, the same choice discussed at the end of Part II.

Theories about democracy, capitalism, and law all suggest that norms of wanting to win can have social utility, changing the choice from an either/or proposition between helping democracy or winning to a both/and proposition. One theory of democracy, classical pluralism, explains that nongovernmental groups use their resources to vigorously pursue and maximize their interests.⁷⁰ This competition is healthy, protects democratic rights, and results in policies positive for the citizenry in the long run.⁷¹ Theories of capitalism and law similarly support the idea that a drive to win can have social benefits. Capitalism, which animates so much of the American democratic tradition, presupposes that partisan self-interest makes the economy work well.⁷² Likewise, the adversary model in law assumes that the partisan agenda of clients results in systematic justice.⁷³

Research on lawyers also supports the possibility of simultaneously benefiting democracy and the candidate's prospects. Despite surface dissimilarities such as formal education lengths, membership requirements, every-

⁶⁹ If it is decided that a focus on winning can be reconciled with democracy, this Essay leaves open, as stated previously, both a precise standard of behavior for consultants that will allow both candidates and democracy to benefit and how to enforce this standard.

⁷⁰ See DAVID HELD, *MODELS OF DEMOCRACY* 192 (1987).

⁷¹ See *id.*

⁷² See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 400 (1880) (“By pursuing his own interest, [the individual] frequently promotes that of the society more effectually than when he really intends to promote it.”).

⁷³ See Robert Gilbert Johnston & Sarah Lufano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L. REV. 147, 147–48 (2002).

day practices, and different practical goals, lawyers share many similarities with consultants. In particular, both face similar criticism since lawyers are also critiqued for only caring about personal self-interest,⁷⁴ as well as for contributing to the breakdown of the legal system in which they participate.⁷⁵ Most importantly, since theoretically lawyers can benefit or harm the legal system,⁷⁶ much of the criticism stems from the strategies they employ.

These similarities increase the relevance of studies concerning cooperation by lawyers, and in particular, studies on corporate lawyers. One might argue that, given the winner-take-all nature of an electoral contest, elections are more like litigation contests than corporate practice. While this argument contains merit, corporate lawyers and campaign consultants still share substantial similarities—consultants need to manage complex campaigns involving a great deal of negotiation and strategy similar to corporate deals, such as a hostile takeover of a competitor. More importantly, the available research focuses on corporate lawyers, and this Essay uses the research to evaluate the potential for simultaneously furthering democracy and the candidate's prospects.

One study suggests that if one side of a corporate deal employs a lawyer and the other side does not, then the lawyer can get a better deal for the client.⁷⁷ However, if both sides employ lawyers, no difference in end result appears as compared with a situation in which neither side employs lawyers.⁷⁸ This study suggests that lawyers are not inherently valuable for the client, and similar to the classic prisoner's dilemma,⁷⁹ lawyers make their clients better off only after they create value through cooperation.⁸⁰ Lawyers can create value by thinking creatively in terms of tax law or other laws so as to increase the overall amount of dividable resources or to enable greater efficiency in the division. This approach shifts the understanding of "winning" from figuring out how to divide the resources so that one side gains an advantage over the other, to how to create more total resources to divide up so that both sides end up better off.

This study seems applicable to campaign consultants as well. Part I suggests that if one side hires campaign consultants, that side is benefited. However, if both sides hire campaign consultants, the advantage is likely neutralized; nevertheless, both sides will continue to use consultants out of

⁷⁴ See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents*, 94 COLUM. L. REV. 509, 511 (1994).

⁷⁵ See Lisa Rikard, *Our Broken Legal System and Its Impact on Competitiveness*, INST. FOR LEGAL REFORM, June 27, 2008, http://www.instituteforlegalreform.com/component/ikr_president_corner/55/article/33.html (on file with the Harvard Law School Library).

⁷⁶ See WENDY MURPHY, AND JUSTICE FOR SOME: AN EXPOSÉ OF THE LAWYERS AND JUDGES WHO LET DANGEROUS CRIMINALS GO FREE 4 (2007).

⁷⁷ See Orley Ashenfelter & David Bloom, *Lawyers as Agents of the Devil in a Prisoner's Dilemma Game* 16–21 (Nat'l Bureau of Econ. Research, Working Paper No. 4447, 1993).

⁷⁸ See *id.* at 21.

⁷⁹ See HENRY MILNER, SOCIAL DEMOCRACY AND RATIONAL CHOICE: THE SCANDINAVIAN EXPERIENCE AND BEYOND 52–53 (1994).

⁸⁰ See Gilson & Mnookin, *supra* note 74, at 512.

fear that their opponent will employ one, like a “nuclear arms race” where no one is willing to “unilaterally disarm.”⁸¹ Similar to the prisoner’s dilemma in which cooperation furthers the best interests of both parties, it might be beneficial for the candidates and for democracy if both sides cooperated and agreed not to use certain tactics, such as push polling, and created guidelines for consultants similar to the American Bar Associations’ Model Rules of Professional Conduct. As applied to campaign consultants, the study indicates that consultants should “create value” for their clients through cooperation.

Maybe opposing campaigns can reap benefits both for the democratic system and their own campaigns by working together. Perhaps the campaign consulting field should also shift its understanding of “winning.” Since the state of our democracy affects everyone and politicians are repeat actors in this system, campaigns should consider the impact of the electoral process on voters and democracy rather than just seeing “winning” as a zero-sum game decided on a single election day. The long-term interest of improving democracy should be added to the short-term interest of winning—without preserving democracy, what is left for the elected candidate to govern? With this new understanding of winning, consultants can “create value” by focusing on improving democracy by giving the public a better understanding of the candidates, getting more people involved, and increasing the number of voters.

However, how can this shift in definition be justified? Though in some situations, cooperation can benefit both the candidate and democracy, what should consultants do when faced with a strategy that helps the candidate but harms democracy as a whole? The use of push polling, for example, might help a candidate win but also harms democracy by repelling and misleading voters.⁸² Likewise, if the candidate’s only asset is his physical attractiveness, it helps to focus the election on the candidate and not the issues. Due to the convoluted and uncertain connection between the strategies employed and election day results, consultants want maximum flexibility in action, since even ethical violations could potentially help one side win. Therefore, any restrictions agreed to via cooperation potentially endanger election results. It appears that unlike corporate lawyers who through cooperation still benefit their clients, consultants likely face a different situation where cooperation potentially benefits democracy, but also harms the client on election day.⁸³

⁸¹ See Nick Schwellenbach, *Tracking the Rise of the Political Consultants*, NIEMAN WATCHDOG, Oct. 14, 2006, <http://www.niemanwatchdog.org/index.cfm?fuseaction=show.case.view&showcaseid=0051> (on file with the Harvard Law School Library).

⁸² See Nelson, *supra* note 2, at 81.

⁸³ When facing this situation, consultants are pressured by their clients, the candidates, who would be unlikely to say honestly that they would rather lose an election that informed and empowered the voters than win one that manipulated and abused the voters.

This conclusion that helping democracy or winning remains an either/or proposition can be reconciled with the theories of law, capitalism, and democracy discussed earlier by pointing out that due to the high social costs, a decision was made to minimize the effects of these theories through mechanisms that inhibit an unbridled focus on winning. The adversary system, for example, incorporates rules of professional conduct restricting lawyers. Similarly, our capitalistic economy includes minimum wage laws and other constraints because a sole focus on winning and making a profit may produce unfair results by increasing wealth disparity, social ills, and other negative externalities. With the proper mechanisms to inhibit an unbridled focus on winning by campaign consultants, the desire to win can similarly increase overall social utility.

The inability of consultants to prioritize both the client and democracy reveals an underlying normative question: should campaign consultants only be responsible for getting their clients elected or should they also have an obligation to improve our democracy? The idea that consultants possess some responsibility to the broader political process and should defend the public interest drives much of the previously mentioned criticism directed at them. Neglecting this responsibility through an unbridled focus on winning results in the harms to the electoral process and democracy described in Part I. On the other hand, if consultants should be judged only by their success at getting their candidate elected as some defenders of campaign consultants suggest,⁸⁴ they should receive neither censure for damaging democracy nor pressure to change their tactics. In other words, if they are only held accountable for winning, they do not deserve blame for the negative externalities that campaigns inflict on democracy. This latter view of consultants simplifies the evaluation of impacts discussed in Part II—by removing consultants' negative impact, one can simply conclude that they are valuable due to their practical usefulness and effectiveness. The judgment of what to hold consultants responsible for in essence provides answers to whether or not they are considered valuable.

Interestingly, the discussion seems to have circled back to the dilemma raised in trying to answer the initial question in Part II. If consultants are judged based only on their usefulness and their ability to get their clients elected, they should enjoy the freedom to act in ways potentially harmful to democracy. What is wrong with only caring about winning? In our winner-takes-all electoral process, there are no moral victories, and a losing candidate does not get any portion of the winner's legislative vote. Therefore, it is better for a deserving candidate to win, regardless of what methods are employed by her campaign consultants, in order to effectuate benefits on society through her political agenda as an elected official. On the other hand, if the negative institutional impact on democracy matters more, then consultants should face restrictions that potentially compromise their electoral ef-

⁸⁴ See Nelson, *supra* note 2, at 76–77.

fectiveness.⁸⁵ Put another way, does one place a higher value on winning and the potential for beneficial policies or on the institutional integrity of our democratic system? While the issue of whether consultants are valuable is important, before answering this question one needs to address the logically prior question of values: for what should they be held accountable?

CONCLUSION

Consultants play a crucial role in managing longer and more complex campaigns. Therefore, no serious call exists to get rid of them despite their negative impact on democracy. This negative impact leads to much of the criticism directed at consultants, but before criticizing them and judging their value, one needs to first decide for what should consultants be held accountable. Only after making the conscious choice of prioritizing democracy over electoral success can one with full clarity and effectiveness approach reforming the campaign consulting industry.

⁸⁵ How exactly to minimize the harm to democracy, though important, is outside the scope of this Essay. One potential approach involves each side individually adopting more beneficial strategies. For example, consultants can use the internet to decrease voter apathy by getting voters reengaged. Consultants can also benefit democracy and their candidates by leveraging their experience to get the campaign's messages across in cheaper ways. Since these methods also benefit the candidate come election day, adopting them avoids having to make the choice between democracy and effectiveness. Though individually adopting strategies works as one method of minimizing harm to democracy, only cooperation eliminates the harms to democracy outlined in Part I.

