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MAKING THE LAW SAFE FOR DEMOCRACY: A REVIEW OF “THE LAW OF DEMOCRACY ETC.”

*Burt Neuborne**

THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS. By *Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes*. Westbury, N.Y.: Foundation Press. 1998. Pp. 733. \$49.95.

I.

Henry Hart began his 1964 Holmes Lectures by asking what a “single” would be without baseball. We rolled our eyes at that one, reveling in the maestro’s penchant for the occult. As usual, though, Professor Hart was trying to tell us groundlings something precious. He was warning us that conventional legal thinking, by stressing rigorous deconstructive analysis, can obscure an important unity in favor of components that should be analyzed, not solely as free-standing phenomena, but as part of the unity. Without recognition of the unity, analysis of the components risks being carried on in a normative vacuum that will inevitably be filled by another tie-breaking mechanism, often to the detriment of the larger enterprise. A ban on littering in the park, for example, taken in isolation, might justify stringent prophylactic measures, like a ban on picnicking, or leafleting, or bringing newspapers into the park. Only when the littering ban is subsumed into the larger unity of a law of recreation (or something else) can its scope be properly analyzed.¹ Thirty-five years late, I assume that was what Professor Hart meant when he warned us against thinking about “singles” without thinking about baseball.

Nowhere is Professor Hart’s warning about the potential pitfalls of excessively deconstructive legal analysis more important than in thinking about the law of democracy. Conventional legal analysis has ruthlessly deconstructed democracy into component parts, and analyzed the components with only cursory attention to the larger democratic enterprise. A functioning democracy is, after all, the sum of crucial components — free speech, political equality, liberty, toleration, empathy, self-interest, efficiency, and much more. In the

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1. See *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

fifty-odd years that American courts have struggled seriously with the care and feeding of the democratic process,² however, legal doctrine has paid little attention to democracy as a unifying normative ideal. Instead, the functional reality of democracy in the United States is, and has been, held hostage to the law governing its components. First Amendment analysis dictates the ground rules governing campaign financing without any real attention to what kind of democracy comes out the other end.³ Equal protection analysis dominates voting rights law,⁴ and dictates what kind of representational patterns we can have,⁵ without much, if any, thought about what the effect will be on democracy. In truth, American courts often appear to govern our democracy much like a well-meaning umpire who thinks that rules governing "singles" can be crafted without thinking much about baseball.

Until we begin to think about the law of democracy as an inter-related set of legal principles designed to serve a normative ideal, the quality of American democracy will remain hostage to the law governing its components. That is why publication of *The Law of Democracy: Legal Structure of the Political Process*, the first casebook to treat the legal rules governing the democratic process as a unified field of study, is such a welcome event.⁶ One of the most important functions of an excellent casebook is to identify and reinforce a unity, helping us to approach its components not simply as freestanding doctrinal events, but as integral parts of a greater whole. While *The Law of Democracy* is only the beginning of the process, by persuasively conceiving of the law of democracy as an academic unity worthy of classroom attention, the authors Samuel

2. Somewhat arbitrarily, I date the beginning of modern judicial involvement in the law of democracy as occurring during the late 1940s with the decision in *Colegrove v. Green*, 328 U.S. 549 (1946), followed by the White Primary cases, including *Terry v. Adams*, 345 U.S. 461 (1953). Of course, earlier intersections exist. See, e.g., *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Herndon*, 273 U.S. 536 (1927); *United States v. Guinn*, 238 U.S. 347 (1915); *Giles v. Harris*, 189 U.S. 475 (1903). The earlier cases dealt less with contestable ground rules governing democracy than with the indefensible exclusion of black Americans from the nation's political life, an act of bigotry having little or nothing to do with serious thinking about democracy.

3. See *Buckley v. Valeo*, 424 U.S. 1 (1976). It is probably impossible to overstate the damage to American democracy caused by *Buckley's* insistence on linking free speech and money.

4. *Carrington v. Rash* pioneered the use of equal protection analysis to protect voting rights. See generally 380 U.S. 89 (1965). It turns out that using equality to define voting rights promotes formalism and inhibits thinking about the qualitative aspect of the right to vote.

5. See *Baker v. Carr*, 369 U.S. 186 (1962). Equality-driven representational patterns are vulnerable to manipulation in ways that adversely affect voting quality, while respecting formal equality. See also *Davis v. Bandemer*, 478 U.S. 109 (1986); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

6. An earlier casebook, DANIEL HAYS LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS* (1995), provided an extremely helpful summary of aspects of the electoral process, but did not attempt to link the material in a conceptual whole.

Issacharoff,⁷ Pamela Karlan,⁸ and Rick Pildes⁹ have performed an invaluable service.

Without denigrating the book's generally excellent content, its most important achievement may well be its very existence. By providing academics with a set of challenging and useful teaching materials in the area of democracy, the book helps to establish the law of democracy as an independent field of study. One can expect challenges to the vision (or the lack of vision) projected by this book, but I do not believe that it will be possible to ignore the need for a democracy-centered critique of the various strands of doctrine that coalesce to form the legal matrix for our politics. Moreover, once the teaching of the law of democracy proliferates in our law schools, it is only a matter of time until considerably more serious legal academic discussion of the normative questions surrounding democracy emerges.¹⁰ Now that the important questions that swirl about the law of democracy in a rich mixture of normative debate and descriptive assessment have an academic focus in a discrete field of legal study, we can finally begin thinking about littering, for example, not as a freestanding idea, but in the context of an overarching law of recreation.

7. Charles Tilford McCormick Professor of Law, University of Texas School of Law.

8. Professor of Law and Roy L. and Rosamond Woodruff Morgan Research Professor, University of Virginia School of Law.

9. Professor of Law and Roy F. and Jean Humphrey Proffitt Research Professor, University of Michigan Law School.

10. Among those questions are: Why is democracy preferable to other forms of government? What is it that we hope to achieve by turning to democracy instead of to some other form of government? What version of democracy best advances the values that incline us towards democracy in the first place? How should we define the electorate? Is voting a right, a duty, or a privilege? Should the onus of registration be borne by the individual? Is voter registration in advance of an election still necessary? What would happen if we moved to same-day registration? Why isn't election day a holiday? Why not vote on the weekend? Why not vote on the Internet? What does it mean to cast a meaningful vote? Do perennial losers in politically gerrymandered districts have a real vote? How do we decide which interests are entitled to representation? What is the role of a protest vote? Should (must) the ballot be enriched to include "none of the above"? Who should be able to run for office? What is the role of major political parties? What roles do minor parties play? How should we staff the electoral process? Is it healthy to allow the two major parties to administer our electoral processes? How should we finance democracy? Should restrictions be placed on extremely wealthy participants in the name of equality? In the name of preventing corruption? Should we subsidize aspects of the campaign? What do we mean by fair representation? What is the responsibility of a representative? Should we have term limits? What is the role of groups in establishing representation? Is race different from other group characteristics? When, if ever, should we move from single-member districts to forms of at-large representation? Should we be experimenting with aspects of proportional representation? What role do groups play in the democratic process? What is the role of direct democracy? How can we improve the quality of democratic discourse? And, what is the relative role of courts, legislatures, and the people in answering these questions?

II.

Despite its occasionally arbitrary organization, *The Law of Democracy* teaches quite well. I attempted a course in the law of democracy before the book's publication. The absence of a carefully selected set of edited cases forced students and the instructor to reinvent the wheel each semester. As anyone who attempts to teach in a new field can attest, the burden of putting together teaching materials is extremely daunting. My efforts to assign voluminous, unedited case readings were only partially successful. As a practical matter, therefore, the book's publication makes a demanding course on the law of democracy generally available for the first time.

The Law of Democracy opens with a short but challenging Chapter entitled "Introduction to the Selection of Democratic Institutions" built around an apportionment case — *Lucas v. Forty-Fourth General Assembly of Colorado*.¹¹ In *Lucas*, Colorado voters approved an apportionment scheme that favored rural districts in allocating seats in the State Senate. The apportionment plan, which significantly deviated from the one-person, one-vote standard, was adopted by a majority of the voters in every Colorado county, including the urban counties receiving disproportionately low representation. The authors present students with excerpts from Chief Justice Warren's now-conventional defense of the one-person, one-vote principle, and two dissents by Justices Clark and Stewart, raising institutional and philosophical challenges to a single approach to apportioning both houses of the legislatures of the fifty states. The authors use the opinions skillfully to raise troubling questions about the role of courts in setting the ground rules for democracy. Characteristically, the chapter is more successful in raising doubts about the institutional competence of courts than it is in introducing students to normative arguments in favor or against certain conceptions of democracy. Indeed, if *The Law of Democracy* has a serious flaw, it is a seeming reluctance to go beyond judicial opinions to explore the fundamental normative questions of democracy that underlie the cases. But more about that later.

I also have a minor quibble with confining the Introduction to *Lucas*, which seems to me a bloodless case that does not reflect the passion that often surfaces in democracy litigation. I find it helpful to pair *Lucas* with a second case¹² involving another judicial effort to define basic democratic ground-rules.

11. 377 U.S. 713 (1964) (reprinted at pp. 3-11). In the teaching literature, *Lucas* is often overshadowed by its more illustrious companions such as *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964).

12. I use *Romer v. Evans*, 517 U.S. 620 (1996).

The introductory chapter gives way to Chapter 2, entitled "The Right to Participate," an exploration of the struggle to establish a constitutionally protected right to vote. The chapter opens with provocative cases a century apart upholding denial of the right to vote to women¹³ and convicted felons,¹⁴ and continues with cases like *Harper v. Virginia State Board of Elections*¹⁵ and *Kramer v. Union Free School District No. 15*¹⁶ that establish the modern contours of the right to vote. While the material in the chapter is thorough and analytically precise, it suffers, I believe, from three weaknesses: a curious failure to discuss the potential doctrinal underpinnings of a constitutional right to vote;¹⁷ a reluctance to explore the qualitative dimensions of voting;¹⁸ and a reluctance to confront broadly the normative question of who should be allowed, encouraged, or required to vote.¹⁹ The chapter continues with an exhaustive historical treatment of the struggle for black enfranchisement,²⁰ and closes with a tease — eight pages on the problem of declining voter turnout, especially at low income levels.

The sad fact is that fifty years of judicial struggle to remove formal barriers to voting have not resulted in a robust level of voter

13. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875).

14. See *Richardson v. Ramirez*, 418 U.S. 24 (1974).

15. 383 U.S. 663 (1966) (reprinted at pp. 42-47).

16. 395 U.S. 621 (1969) (reprinted at pp. 47-53).

17. As *Harper* and *Kramer* illustrate, the Warren Court turned to the fundamental rights aspect of the Equal Protection Clause to fill the void in the constitutional text. What would happen if voting and running for office were perceived as quintessential acts of speech and association? See *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Does the guarantee of a "republican form of government" provide a basis for developing the law of democracy, despite the *dictum* in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849)? Is there a nontextual conception of democracy similar to the nontextual concepts of "Our Federalism" and "the doctrine of separation of powers" that awaits judicial development? Will evolving notions of customary international law ever provide judicial protection for democratic values?

18. The Supreme Court appears to have adopted an extremely narrow conception of voting, limiting it to a formal, instrumental opportunity to choose the winner in an election, and rejecting any effort to infuse it with qualitative, expressive or associational values. See *Burdick v. Takushi*, 504 U.S. 428 (1992) (finding no constitutional right to cast write-in ballot); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding ban on the ability of minor party to endorse major party candidate because minor party adherents are free to vote for preferred candidate on a major party line).

19. Although cases denying the right to vote to women and convicted felons raise the issue provocatively, there is no systematic exploration of competing theories of suffrage. Should less-educated voters be encouraged to vote? Should voting be a duty?

20. Throughout the book, the authors struggle with a genuine dilemma: Whether to stress general democratic theory or the struggle for black enfranchisement? The history of the systematic disenfranchisement of African Americans is the most egregious failure in our democratic past. Its importance in any casebook about democracy is obvious. Moreover, many of our most difficult contemporary democracy law issues are shaped by the desire to overcome that history of racial exclusion. Treating the narrative of African-American exclusion as a separate topic, however, interferes with a coherent theoretical presentation. In my opinion, Chapter 2 on the Right to Participate is weakened by failing to integrate the story of African-American disenfranchisement into the general question of how the electorate is to be defined.

participation. Less than half the eligible electorate voted in the last Presidential election.²¹ The turnout for the most recent Congressional elections was thirty-six percent.²² Often, state and local turnouts are even lower. Worse, turnouts are skewed by race and economic status, so that the voting electorate is much richer and whiter than the nation.²³ Many believe that extremely low levels of voter turnout, especially among the poor, threaten the moral integrity of the democratic process. While it is refreshing to see the issue raised at all, the leading casebook on the law of democracy should spend more time and intellectual energy considering why poor people do not vote, and whether anything can, or should, be done about it.

Chapter Three, entitled "The Reapportionment Revolution" is a thorough treatment of the rise of the one-person, one-vote principle, taking students from *Colegrove v. Green*²⁴ through *Baker v. Carr*²⁵ and *Reynolds v. Sims*.²⁶ The authors perceptively note that the one-person, one-vote principle protects formal voting equality, but is vulnerable to gerrymanders and other techniques that maintain formal equality but erode voting power. The chapter includes thoughtful material on apportioning local government and closes with an excellent discussion of the United States Senate as an example of a defensible apportionment that radically departs from one-person, one-vote standards.²⁷

I have three quibbles with the Reapportionment Chapter. The first is an organizational disagreement about the best place to discuss so-called "limited purpose" elections that permit only a small slice of the population to vote.²⁸ The authors treat limited purpose elections as a problem in local apportionment. I find it more useful to introduce the issue as a problem in defining the electorate, which would be better dealt with in a more ambitious chapter on the the-

21. See Barbara Vobejda, *Just Under Half Of Possible Voters Went to the Polls*, WASH. POST, Nov. 7, 1996, at A30.

22. See Terry M. Neal & Richard Morin, *For Voters, It's Back Toward the Middle*, WASH. POST, Nov. 5, 1998, at A33; Committee for the Study of the American Electorate, *Turnout Dips to 56-Year Low* (Nov. 6, 1998) <<http://tap.epn.org/csae/cgans4.html>>.

23. See Lynne M. Casper & Loretta E. Bass, *Voting and Registration in the Election of November 1996*, U.S. Census Bureau Pub. P20-504, July, 1998, at 6; Jan E. Leighley & Jonathan Nagler, *Socioeconomic Class Bias in Turnout, 1964-1988: The Voters Remain the Same*, 86 AMER. POL. SCI. REV. 725, 728 (1992); Todd G. Shields & Robert K. Goidel, *Participation Rates, Socioeconomic Class Biases, and Congressional Elections: A Crossvalidation*, 41 AM. J. OF POL. SCI. 683, 686-88 (1997).

24. 328 U.S. 549 (1946) (reprinted at pp. 117-21).

25. 369 U.S. 186 (1962) (reprinted at pp. 122-33).

26. 377 U.S. 533 (1964) (reprinted at pp. 135-43).

27. Political scientists are fond of noting that Providence, Rhode Island probably has more political power in the Senate than the entire State of California.

28. See *Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

ory of suffrage. Second, except for the thoughtfully edited judicial opinions, the Reapportionment Chapter has little or no material on the normative questions of what constitutes fair representation, what groups or interests deserve representation, or what the duties of a representative should be.²⁹ I find it difficult to assess the one-person, one-vote principle in a normative vacuum. Finally, the chapter ends just when it is becoming interesting. Once the formalistic limits of one-person, one-vote have been so convincingly demonstrated, it makes far better pedagogic (and analytic) sense to move immediately to techniques that comply with formal voting equality, but erode real-world voting power, like vote dilution, vote fragmentation, racial gerrymandering, and political gerrymandering. That material is presented extremely well almost 200 pages later in Chapter Six ("Majority Rule and Minority Vote Dilution"), Chapter Seven ("Racial Vote Dilution Under the Voting Rights Act"), and Chapter Eight ("Redistricting and Representation"), three of the strongest chapters in the book.³⁰

The long hiatus between the one-person, one-vote cases in Chapter Three, and the vote dilution/gerrymandering issues in Chapters Six, Seven, and Eight, is due primarily to a 100-page exegesis on the preclearance provisions of Section Five of the Voting Rights Act, requiring so-called "covered jurisdictions" to obtain clearance from the Justice Department before altering their election laws.³¹ The exhaustive approach to the preclearance chapter is repeated in the section in Chapter Two dealing with black disenfranchisement, and Chapter Seven on the workings of Section Two of the Voting Rights Act. While the treatment of the material is uniformly excellent, as I have suggested, an organizational tension exists between the authors' understandable desire to chronicle the struggle for black enfranchisement and the more general problems of democratic theory posed elsewhere in the book. Preclearance is

29. Excerpts from Hanna Pitkin's classic text on the meanings of representation would be an obvious candidate for inclusion. See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967).

30. The tension between theoretical coherence and broad narrative coverage of black disenfranchisement is illustrated in Chapter 7, which explores the intricacies of Section 2 racial vote dilution at substantial length. It might be possible to combine the three chapters into a more focused discussion of the intrinsic problems that one-person, one-vote alone cannot resolve.

31. See 42 U.S.C. § 1973(c) (1994). Preclearance zeros in on areas likely to have engaged in improper efforts to disenfranchise minorities, and requires them to obtain Justice Department approval to assure that changes in election laws do not adversely affect minority voters. Preclearance is triggered by a sub-50% voter turnout as of a particular election, coupled with the existence of a "test or device," like a literacy test, capable of being used unfairly to disenfranchise minorities. Ironically, the entire nation met the sub-50% test in the 1996 Presidential election. The states of the old Confederacy, three counties in New York City, several counties in California, as well as Alaska and several counties in the Southwest currently fall under preclearance.

a remarkable success story that altered the political climate of the old Confederacy and made black political participation a reality. Moreover, the preclearance material is a *tour de force*, demonstrating an encyclopedic grasp of theory and practice. It is, however, essentially a digression from the overriding issues of democratic theory posed by the casebook. As an important piece of history, and as an example of an ingenious remedial tool, material on preclearance has an important place in any casebook on democracy. But it does not deserve pride of place.

Inserted between the one-person, one-vote material in Chapter Three and the vote dilution/gerrymandering coverage in Chapters Six, Seven, and Eight, is a curious and only partially successful Chapter on access to the ballot, entitled the "Role of Political Parties." The authors apparently view political parties as intrinsic guardians and gatekeepers of the ballot. Thus, the chapter attempts to do two things at once. It rigorously explores the limits of autonomy enjoyed by political parties and investigates the limits placed on access to the ballot.

There is an important insight in linking political parties to ballot access, because the two major parties often act as a cartel to prevent competition from third parties. *Timmons v. Twin Cities Area New Party*³² is only the most recent example. The effort to conflate political parties and ballot access, however, obscures as much as it reveals. Deciding who should be allowed to run for office and what kinds of ballot choices should be available to the electorate is not necessarily the same thing as deciding how much autonomy political parties should enjoy. And it certainly is not a decision that should be left to political parties. A more conventional approach that explores the ballot access cases beginning with *Williams v. Rhodes*,³³ and critiques the ballot choice issues raised by *Burdick v. Takushi*³⁴ and *Timmons* from the perspective of what it means to cast a meaningful vote, should be an important stand-alone chapter. This presentation should be followed by an exploration of the role major and minor political parties play in the democratic process and a critique of the legal matrix in which parties operate. Until some attention is given to the normative role of political parties, both major and minor, I find it hard to evaluate existing law.

Chapters Six, Seven, and Eight explore the many ways that ideal representation patterns can be compromised. Chapter Eight, concentrating on partisan and racial gerrymanders, is particularly well structured and provides an excellent framework for discussion of the inherent limitations of any system of geographically defined

32. 520 U.S. 351 (1997).

33. 393 U.S. 23 (1968).

34. 504 U.S. 428 (1992).

representation. Once again, though, just as the chapter gets really interesting, it ends. The thread is not picked up until Chapter Eleven, a unique and provocative discussion of potential alternatives to our pattern of single-member, first-past-the-post, majority districting, including cumulative voting, preference voting, limited voting, at-large districting, and proportional representation.

Chapter Nine is a bare-bones treatment of money and politics that provides a basic introduction to issues posed by efforts to regulate campaign financing, but that falls substantially short of the comprehensive coverage given to other areas of democracy law. The chapter reproduces only three Supreme Court opinions — *Colorado Republican Federal Campaign Committee v. FEC*,³⁵ *First National Bank of Boston v. Bellotti*,³⁶ and *Austin v. Michigan State Chamber of Commerce*³⁷ — none of which deal with contribution limits. If this was a chapter in a Constitutional Law casebook, the coverage would be adequate, especially since the authors' notes consistently pose thoughtful questions; but in a casebook devoted to the law of democracy, the coverage of money and politics is distinctly thin.

In part, my dissatisfaction with the scope of the chapter on money and politics reflects a personal concern that disparity of wealth is among the most important issues facing American democracy. That massive inequalities tied to wealth exist in our political system is beyond dispute. The most obvious tilt towards wealth is our constitutional commitment to a laissez-faire campaign financing system that maximizes the political power of extremely wealthy individuals and corporations.³⁸ Under our existing campaign financing system, American political campaigns are predominantly funded by the top of the economic tree, with dramatic consequences for skewing the political agenda, selecting the candidates, affecting the outcome of elections, changing the course of legislative debate, and altering patterns of access to public officials. Despite heroic efforts to control the size and source of campaign contributions, massive loopholes have evolved that permit corporations and extremely wealthy individuals to pour unlimited sums into the electoral process.³⁹ Incumbents regularly out-

35. 518 U.S. 604 (1996)(reprinted at pp. 620-29).

36. 435 U.S. 765 (1978)(reprinted at pp. 633-43).

37. 494 U.S. 652 (1990)(reprinted at pp. 649-55).

38. The Supreme Court has laid down the basic constitutional rules governing campaign financing in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). I have inveighed against the analysis in *Buckley*. See Burt Neuborne, *Buckley's Analytical Flaws*, 6 J.L. & POLY. 111 (1997); Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L.J. 1 (1997); Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789 (1998).

39. The two most egregious loopholes: (1) allowing unlimited "soft-money" contributions from any source, including corporations and labor unions, to political parties, as long as the money is not used directly in a federal candidate's campaign; and (2) allowing unlimited

raise and outspend challengers by as much as sixty-to-one. Indeed, fully twenty-five percent of House seats, and an even greater number of state legislative seats, are uncontested in part because no challenger can raise enough money to wage a credible campaign.⁴⁰ Access to the mass media is beyond the financial means of most candidates challenging the reigning party duopoly⁴¹ and beyond the means of many major party challengers seeking to unseat an entrenched figure.⁴²

Moreover, an equally potent, if less obvious, wealth advantage flows from U.S. laws governing registration and voting that, alone among the world's developed democracies, place the inertial obligation on the prospective voter to register in advance of the election, and force working people to vote on a workday.⁴³ Burdening voting with significant transaction costs does more than diminish voter participation; it skews the voting electorate towards wealthy and educated voters who are more likely to overcome multiple transaction costs in order to vote.⁴⁴ Not surprisingly, our actual pattern of voter participation reflects the predicted shift toward low voter turnouts,⁴⁵

(and undisclosed) spending on so-called "issue ads" that do everything but use the "magic words" "vote for" or "vote against" in an obvious effort to cause the election or defeat of a particular candidate. The resulting practice *de jour* is to make huge soft money contributions from corporate treasuries to political parties for use in funding issue ads to run in connection with specific elections. The Republican Party has gone so far as to argue that the soft money issue ads can be coordinated with the candidate and still remain beyond the scope of the FEC. See *Republican Natl. Comm. v. Federal Election Comm.*, No. 98-5263, 1998 WL 794896 (D.C. Cir. Nov. 6, 1998).

40. Gerrymandering to favor incumbents does not hurt either. In the most recent election, The State of New York managed to achieve a 100% incumbency reelection rate in both houses of the legislature. It must be because New Yorkers are so pleased with the career politicians who govern us.

41. That we have a formal duopoly is indicated by *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding ban on multiple-party or fusion candidacies for elected office); see also *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding ban on write-in voting).

42. Ballot access rules in connection with primary challenges can be so restrictive that only an enormously wealthy challenger can achieve ballot status. See *Rockefeller v. Powers*, 78 F.3d 44 (2d Cir. 1996), *cert. denied*, 517 U.S. 1203 (1996) (invalidating New York's ballot access laws governing Republican Presidential primaries, thus permitting the first Republican Presidential primary in New York State's history).

43. See NELSON W. POLSBY & AARON WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES IN AMERICAN POLITICS* 8-11 (9th ed. 1996) (citations omitted); Jonathan E. Davis, Comment, *The National Voter Registration Act of 1993: Debunking States' Rights Resistance and the Pretense of Voter Fraud*, 6 TEMP. POL. & CIV. RTS. L. REV. 117, 118 (1997) (citations omitted).

44. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* (1988); see generally RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* (1980).

45. Commentators found the 36% turnout in the most recent national elections cause for alarm. See Michelle Stevens, Editorial, *An Exercise in Democracy*, CHI. SUN-TIMES, Nov. 8, 1998, at 37, available in LEXIS, News Library, CHISUN File. See RICHARD M. SCAMMON ET AL., *AMERICA VOTES 22: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS*, 1996, at 1 (1998); RICHARD M. SCAMMON & ALICE V. MCGILLIVRAY, *AMERICA VOTES 21*, 1994, at 1 (1995). The turnout in 1996 was 49%, and in 1994 was approximately 37%. See PIVEN & CLOWARD, *supra* note 44, at 54, 125 (citations omitted). The highest turnout in the 20th century was 65% in 1960; the lowest prior to the 1990s was 49% in 1920

with disproportionately high participation by wealthy, well-educated voters, and disproportionately low participation by the poor and less well educated.⁴⁶

Why is our political system so rigged in favor of wealth? The story we usually tell ourselves is that wealth-driven political inequality is a necessary consequence of our liberal constitutional system. We can't cut back on the ability of the wealthy to dominate electoral politics because it would be a violation of our First Amendment commitment to political autonomy.⁴⁷ At least that's what *Buckley* tells us. And we cannot prevent skewing the voting rolls in the direction of the wealthy because the idea of a legal duty (as opposed to a formal right) to vote is a constitutional nonstarter as a violation of political autonomy, despite the fact that we tolerate compulsory jury service,⁴⁸ compulsory education,⁴⁹ compulsory military service,⁵⁰ compulsory taxation,⁵¹ and

and 1924. Turnouts in Europe average between 75 and 80% and approach nearly 95% in Australia. See POLSBY & WILDAVSKY, *supra* note 43, at 9 (citations omitted).

46. See *supra* note 24. A third tilt toward the wealthy in our system is the use of a winner-take-all, single member districting that often submerges the political interests of the poor within a larger, more middle-class constituency. The relationship between apportionment and the fair representation of the poor is beyond the scope of this paper, though very much within its spirit.

Finally, restrictive ballot access laws and substantial candidate filing fees can have the effect of limiting candidates to economically comfortable contestants. Even if an under-financed group achieves ballot status, it often has been forced to spend its campaign treasury on satisfying restrictive ballot access rules.

47. For a representative sampling of the often excellent literature arguing that any restriction on the right of wealthy individuals to spend unlimited amounts in support of a candidate violates the First Amendment, see Bradley A. Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul*, 30 CONN. L. REV. 831 (1998) (arguing that reform proposals infringe on First Amendment freedoms); Bradley A. Smith, *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POLY. 1 (1997) (same); Kathleen M. Sullivan, *Political Money and Freedom of Speech: A Reply to Frank Askin*, 30 U.C. DAVIS L. REV. 663 (1997) (same); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 31 U.C. DAVIS L. REV. 1083 (1998) (same).

48. Ironically, in *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Supreme Court invalidated an effort to make jury service optional for women, holding that it violated the equal right of women to be subject to compulsory jury service. I have no quarrel with *Taylor*, but the case does illustrate the curious difference between our view of jury service and voting. Why should one be compulsory and the other not only purely voluntary, but subject to onerous transaction costs?

49. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (permitting compulsory education to be satisfied by private school); but see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Amish from compulsory high school education on religious grounds).

50. See *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding compulsory military service for men; rejecting the argument that women have a right to be drafted); *Gillette v. United States*, 401 U.S. 437 (1971) (rejecting conscientious objection to a particular war as relief from responsibility of military service); *Welsh v. United States*, 398 U.S. 333 (1970) (upholding conscientious objection when spurred by deeply held religious or moral beliefs); *United States v. Seeger*, 380 U.S. 163 (1965) (same).

51. See *United States v. Lee*, 455 U.S. 252 (1982) (rejecting effort to obtain exemption from social security taxes on religious grounds).

compulsory cooperation with the census.⁵² We even tell ourselves that we cannot eliminate the double transaction costs for registration and voting because it would risk electoral fraud and insert the government too directly into the political process, even though six states have either abolished voter registration or moved to same-day registration on Election Day.⁵³ The net result is a democratic process that is formally equal in theory, but dramatically unequal in practice. One hopes that future editions of *The Law of Democracy* will focus more intensely on the role of wealth in American democracy.

The Law of Democracy closes with an innovative and thoughtful chapter on direct democracy, contrasting direct and representative democracy. Curiously, the direct democracy chapter contains two of the richest democracy cases — *Romer v. Evans*⁵⁴ and *U.S. Term Limits, Inc. v. Thornton*.⁵⁵ While both cases involve controversial provisions enacted through direct democracy, I wonder whether the underlying issues of political discrimination against unpopular minorities in *Romer* and efforts to deal with the built-in incumbent advantage in *Thornton* are best treated as issues of direct democracy, or as much more pervasive issues of democratic governance.

III.

Thus far, the minor criticisms of *The Law of Democracy* I have ventured are primarily cosmetic and border on the querulous. Disagreement over organization, emphasis, and pedagogy should not obscure my genuine admiration for the excellence of the materials, and my wholehearted endorsement of the casebook. There is, however, a real flaw in *The Law of Democracy*, a flaw shared by the democracy jurisprudence the casebook so artfully reflects and critiques. Each purports to deal with the law of democracy without engaging in a normative inquiry as to what conception of democracy

52. In *Legislature of California v. United States House of Representatives*, the Supreme Court dismissed the appeal of a D.C. Circuit decision interpreting the Census Act to forbid statistical sampling techniques as a correctional device in the 1990 decennial census. See *Department of Commerce v. United States House of Representatives*, 11 F. Supp. 2d 76 (D.C. Cir. 1998), *dismissed sub nom.* *Legislature of Cal. v. United States House of Representatives*, 119 S. Ct. 1022 (1999).

53. North Dakota abolished voter registration in 1951. See N.D. CENT. CODE § 16.1-02 (1997) (repealing registration law via 1951 N.D. Laws, ch. 264 § 3). Idaho, Maine, Minnesota, New Hampshire, and Wisconsin have same day voter registration. See IDAHO CODE § 34-408A (Supp. 1998); ME. REV. STAT. ANN. tit. 21-A, § 122 (West Supp. 1998); MINN. STAT. ANN. § 201.061(3) (West Supp. 1999); N.H. REV. STAT. ANN. § 654: 7-a (Supp. 1998); WIS. STAT. ANN. § 6.29 (West 1996).

54. 517 U.S. 620 (1996) (reprinted at pp. 689-91) (holding that amendment adopted by referendum in Colorado violated the Equal Protection Clause because it discriminated against homosexuals).

55. 514 U.S. 779 (1995) (reprinted at pp. 695-705) (holding that states can not create term limits for Congress members and changes in qualifications for Congress can only be made through constitutional amendment).

the courts should seek to defend. I fear that any attempt to forge a law of democracy without a normative conception of what democracy should be cannot yield coherent results.

In his decision for the Court in *Colegrove*, and his dissent in *Baker*,⁵⁶ Justice Felix Frankfurter warned that American judges have no business intervening in politics, even to correct massive malapportionment. He warned that, lacking an explicit textual mandate, federal judges seeking to defend democratic values would necessarily function as amateur political scientists imposing personal views about the best way to organize a democracy. The outcome of such a subjective and undisciplined process, he warned, would be both flawed democracy and erosion of respect for the judiciary.

Justice Frankfurter was profoundly wrong in arguing that federal judges have almost no role in preserving a fair democratic process. Reinforcing democracy is among the judiciary's most important tasks. Self-interested political majorities can hardly be trusted to set fair democratic ground rules that risk sweeping them from power.⁵⁷ Our sorry history of selective disenfranchisement of vulnerable minorities, ballot manipulation, electoral bribery, gerrymandering, and campaign dishonesty makes clear that unreviewable majoritarian control of the machinery of democracy invites erosion of underlying democratic values. In the end, Justice Frankfurter's warning to judges to avoid the "political thicket" simply licenses entrenched majorities to manipulate the rules of the game to keep themselves in power.⁵⁸

Justice Frankfurter was all too right, however, in predicting that judges would fail to develop a coherent approach to protecting democracy. In the thirty-seven years since *Baker*, American judges, accepting Justice Frankfurter's injunction that the Constitution's text does not authorize judicial development of a normative vision of democracy, have failed to posit a coherent model of the democracy they seek to protect. Lacking normative coherence, the "democracy" cases betray precisely the rootless activism predicted by Justice Frankfurter. Sadly, the judiciary has been overly timid when protecting democracy called for boldness; and hyperactive when the democratic process desperately needed a little judicial restraint. For example, judges have protected a narrowly defined,

56. See *Colegrove*, 328 U.S. 549, 556 (1946); *Baker*, 369 U.S. 186, 280-92 (1962) (Frankfurter, J., dissenting).

57. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 78 (1980).

58. Ironically, it was Justice Frankfurter, writing for the Court in *Lane v. Wilson*, who argued that sophisticated stratagems aimed at disenfranchising blacks were subject to judicial invalidation. See 307 U.S. 268 (1939).

strictly formal right to vote,⁵⁹ but have balked at developing a robust, affirmative right to vote that would confront the fact that the law currently skews American electoral participation radically toward the wealthy and well-educated, and denies voters a chance to use the ballot expressively. Judges have announced a watered-down version of a right to run for office,⁶⁰ but have allowed the so-called right to be encumbered with so many restrictions that, in many jurisdictions, it is prohibitively difficult for anyone except a major party candidate to qualify for the ballot. Judges have imposed ground rules for campaign financing⁶¹ that distinguish between campaign contributions and campaign expenditures, erecting a disastrous system that no rational legislature would have enacted. Judges have enforced a purely formal right to equal representation,⁶² but have refused to measure substantive representational fairness.⁶³ Judges have both protected and attacked political parties,⁶⁴ but have not attempted to develop a theory of the roles of major and third parties in a vibrant democracy. Judges have celebrated the importance of political discussion, but have done little or nothing to assist in improving the quality of political discourse.⁶⁵

The pragmatic consequences of the democracy cases have also been very disappointing. Despite judicial efforts to protect the formal right to vote, voting participation is at an all-time low, varies dramatically by class and race, and is declining. Despite the enunciation of a formal right to run for office, the Court has acquiesced in legally enforced duopoly control of American politics by the two major parties, and has upheld restrictions that render it prohibitively expensive for third parties and independents to reach the ballot. Despite recognition that corrupt campaign contributions and massive wealth disparity pose a threat to the democratic process, the Court has placed campaign finance reform in a straight-

59. See, for example, the material at Chapter 2. Pp. 17-115.

60. See, for example, the material at Chapter 4.

61. Chapter 9. Pp. 616-64.

62. Chapter 3. Pp. 116-85.

63. Chapters 6, 7, and 8. Pp. 367-440, 441-545, 546-615.

64. Chapter 4. Pp. 186-263.

65. *The Law of Democracy* does not attempt a systematic exploration of efforts to regulate campaign discourse directly, presumably because the First Amendment obstacles appear insurmountable. See, e.g., *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995) (invalidating Ohio's ban on anonymous leafletting during election). Whether noncontent-based restrictions may be imposed on campaign speech in return for campaign subsidies remains an open question. *Brown v. Hartlage*, 456 U.S. 45 (1982) (invalidating penalty for candidate's failure to adhere to campaign promise); *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating ban on Election Day editorials); *Compare Rust v. Sullivan*, 500 U.S. 173 (1991) with *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). See *Buckley v. Valeo*, 424 U.S. 1 (permitting voluntary subsidy to be conditioned on limits on individual contributions but not on campaign expenditures, independent expenditures, or expenditures out of candidates' own funds).

jacket that condemns us to a political process that looks more like an auction than an election. Despite formal adherence to a principle of representative fairness under the rubric "one-person, one-vote," the Court has permitted massive reciprocal political gerrymandering that leaves much of the nation in noncompetitive election districts;⁶⁶ has allowed incumbents to stack the deck in favor of re-election; and has forbidden efforts to enhance the representative power of racial minorities. Despite repeated recognition of the central role of political discussion in our democracy, the Court has declined to play a role in improving the quality of electoral discourse.

Is this the best that law can do? I think not.

IV.

If the judiciary is to carry out the critical function of protecting democracy, it must be prepared to develop and defend the coherent normative model of democracy latent in the constitutional text. Otherwise, judicial protection of democracy will continue to resemble Justice Frankfurter's derisive description of *ad hoc* amateur political science. Contrary to Justice Frankfurter's assertion, I believe that the constitutional text reveals a normative vision of democracy that is amenable to coherent judicial articulation and enforcement.

Although it is not completely silent about the mechanics of democracy, a conventional reading of the body of the Constitution does not yield a normative theory of democracy.⁶⁷ The constitu-

66. See CENTER FOR VOTING AND DEMOCRACY, MONOPOLY POLITICS (1997) (demonstrating that many elections are so uncompetitive that they are, for all intents and purposes, uncontested).

67. Article IV, Section 4 guarantees a republican form of government to the states. Article I, Section 2, Clause 1 requires periodic election of members of the House of Representatives and keys voting for the House of Representatives to the electorate for the most numerous house of the relevant state legislature. Article I, Section 2, Clause 2 establishes age, citizenship, and residence requirements for election to the House. Article I, Section 2, Clause 3 incorporates the infamous three-fifths compromise that counts each slave as three-fifths of a person for apportionment purposes; provides for decennial enumeration; and imposes a numerical minimum on the size of a House district. Article 1, Section 2, Clause 4 authorizes state governors to provide for interim elections to fill House vacancies. Article 1, Section 3, Clause 1 provides for two Senators from each state to be selected by the state legislatures. Article 1, Section 3, Clause 3 establishes age, citizenship, and residence requirements for election to the Senate. Article 1, Section 4, Clause 1 reserves to Congress the final power to regulate the "Time, Place and Manner" of Congressional elections, except for the place of electing Senators. Article 1, Section 4, Clause 2 requires that Congress assemble at least once each year. Article 1, Section 5, Clause 1 vests Congress with power to judge the "elections, returns, and qualifications of its own members." Article 1, Section 5, Clause 2 empowers each House of Congress to expel members on a two-thirds vote. Article 1, Section 5, Clause 3 provides for publicly recorded votes and a public record of debates. Article 1, Section 6, Clause 1 provides for protection against arrest during the legislative session and establishes the speech or debate privilege shielding legislators from liability for performing legislative functions. Article 1, Section 6, Clause 2 prohibits members of Congress from holding other federal public office or from being appointed to a federal job created, or enhanced

tional text, however, contains not a word about the substantive right to vote or to run for office, nor about what constitutes fair representation. Indeed, the only explicit affirmative protection of democratic participation in the body of the Constitution is the prohibition in Article VI on the use of a "religious test" as a "qualification to any office or public trust under the United States."⁶⁸

The virtual silence in the body of the Federal Constitution about the substantive aspects of democracy is not surprising. The idea of a national Bill of Rights had not yet been broached. The initial assumption of the Founders was that each state would develop its own model of democracy, with the federal institutions elected in accordance with the respective state visions. The only checks on the states were the republican guarantee clause, the religious test clause, and the negative pregnant contained in the qualifications clause.

Indeed, given the relatively undeveloped state of democratic political theory in 1787, it would have been miraculous to find a well-developed normative theory of democracy in the body of the Constitution. Conceptions of suffrage were extremely limited. Ideas of representation were in their infancy. Political parties were virtually unknown. Openly running for office was a new, and not altogether respectable, idea.

It fell to the Article VI amendment process to flesh out a normative conception of democracy, beginning with the adoption of the First Amendment. The six textual ideas in Madison's First Amendment — no establishment of religion; free exercise of religion; free speech; free press; free assembly; and the right to petition government for redress of grievances — are a meticulously drawn road map for a functioning democracy. The First Amendment is organized as a series of concentric circles proceeding in orderly steps from protection of the interior recesses of religious conscience to formal political interaction with government. It opens with Establishment Clause protection of conscience, moves to Free Exercise Clause protection of public displays of conscience, continues with Free Speech Protection Clause of expression of ideas by individuals, extends to institutional expression of ideas through a free press, then moves to protecting collective action through free as-

in salary, during their legislative term. Article II, Section 1 establishes the Presidency and Vice-Presidency, with four year terms. Article II, Section 1, Clauses 2 and 3 provide for an Electoral College to select the President, with the number of electors equal to the whole number of Senators and Representatives of each state and Congress setting the time-table for announcing the results. Article II, Section 1, Clause 5 provides for age, citizenship, and residency requirements for the Presidency.

68. U.S. CONST. art. VI, cl. 3.

sembly,⁶⁹ and culminates in protecting formal interaction with the government through petitions for redress of grievances. The rigorous inside-out organization of the six ideas is no coincidence. It is a democratic roadmap. Madison placed each essential element of the democratic enterprise in its natural chronological setting. The First Amendment mirrors the life cycle of a democratic idea, moving from the interior recesses of individual conscience, to discussion and collective action, and culminating in the formal give and take of politics. Madison's vision of the vibrant democracy latent in the unique organization of the First Amendment⁷⁰ remains one of our most valuable guides to the kind of democracy envisioned by the Constitution.

Of the seventeen amendments adopted after the Bill of Rights, eleven deal explicitly with the democratic process.⁷¹ The adoption of the Fourteenth Amendment continued the development of a normative conception of democracy in the Constitutional text.⁷² By explicitly introducing the idea of equality before the law into the Constitution for the first time, the Fourteenth Amendment's Equal Protection Clause reinforced the picture of egalitarian democracy painted by the First Amendment and imposed it directly on the states. Moreover, the often overlooked Section Two of the Fourteenth Amendment explicitly linked voting and fair representation for the first time. Finally, by providing the bridge by which the Bill of Rights was transmitted to the states, the Fourteenth Amendment's Due Process Clause made possible a national ideal of democracy, supplanting the original invitation to each state to develop a separate conception of democracy with a national minimum. Read in conjunction with Madison's First Amendment, the Fourteenth presents the outline of a powerful normative vision of an egalitarian democracy.

The Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments establish and implement the principle of universal suffrage by banning voting discrimination on the basis of race, gender, wealth, or age; and by providing for the direct popular election of Senators, and the participation of the residents of the District of Columbia in the election of the President.

69. At about this point, Justice Harlan dropped a seventh, non-textual idea into the First Amendment — freedom of association. See *NAACP v. Button*, 371 U.S. 415, 454-55 (1963) (Harlan, J., dissenting); *NAACP v. Alabama*, 357 U.S. 449 (1958).

70. No other rights-bearing provision in our constitutional experience, or in the constitutional experience of our sister democracies, bears a similar organizational pattern.

71. Of the six post-Bill of Rights amendments that do not deal with democracy, two, the 18th and 21st, deal with Prohibition; one, the 13th, abolishes slavery; one, the 11th, limits federal jurisdiction over states; one, the 16th, authorizes the income tax; and one, the 27th, limits Congress's power to raise its own pay.

72. U.S. CONST. amend. XIV.

The Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth Amendments “democratize” the Presidency by providing for the separate election of the President and Vice-President, limiting the term of a lame duck President, imposing a two-term limit on the Presidency, and assuring orderly succession in time of Presidential disability. Thus, whatever the failings of the body of the 1787 Constitution, the complete modern text, as amended, is suffused with a normative vision of democracy that views every American as a member of a self-governing community of political equals and that guarantees all members of the polity the equal right to participate effectively in the processes of self-governance.

In *New York Times v. Sullivan*,⁷³ the Supreme Court committed to a normative model of the First Amendment. For thirty-five years the Court has rigorously, some might say ruthlessly, enforced that model. The Court has never made a similar commitment to a normative model of democracy. Until that commitment takes place I fear that the law of democracy will continue to look like Hamlet without the ghost. *The Law of Democracy* displays extraordinary talent and commitment in revealing, clarifying, and critiquing what our law of democracy currently is. I look forward to future editions that grapple as vigorously with what our democracy should be.

73. 376 U.S. 254 (1964).