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Not by Election Law Alone

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NOT BY "ELECTION LAW" ALONE

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For too long, the distinct issues of the law of democratic governance were treated as an undifferentiated domain of general constitutional law. The conventional frameworks of individual rights, compelling state interests, First Amendment freedoms, and the ubiquitous debate over the legitimacy of judicial review all made their predictable, and most often uninformative, appearances. Only recently has direct attention been paid to the distinct ways in which rights and political structures, as well as courts and legislatures, come together in the complex legal construction of the institutions and laws governing the political process. Governance, participation, and representation form a dense web in the pervasive contemporary controversies over racially-conscious redistricting, campaign finance reform, government by referendum, access to the ballot, or campaign debates—to name but a few. Although these issues all involve the electoral arena narrowly conceived, they implicate at a more fundamental level the enduring tensions inherited from critical moments in our constitutional history—from Madisonian to Jacksonian democracy, from the obscure but crucial *Giles v. Harris*[1] case to the famous *Carolene Products* footnote,[2] and from *Baker v. Carr*[3] to *Shaw v. Reno*.[4]

Unfortunately, reducing these historical and theoretical issues in the fundamentals of democratic theory to a limited set of regulatory issues that focus on elections and their administrative mechanisms

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1. 189 U.S. 475 (1903).

2. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

3. 369 U.S. 186 (1962).

4. 509 U.S. 630 (1993).

obscures more than it illuminates. It narrows the field to microscopic regulatory details, as if the more fundamental choices about conceptions of democracy that underlie particular regulatory policies are fixed. "Election law" runs the risk of signaling to potential newcomers a tedious focus on the narrow regulatory questions of most interest to political junkies and also of encouraging a conceptualization of the field that meets these overly narrow expectations. What makes this field exciting, and what links it back to constitutional law and forward to new arenas of democratic participation, is taking democracy itself out of the background and placing it squarely at the center of our inquiries.

To understand that project, it is worth recalling that the Warren Court began the process of making democracy the focal point of American constitutional law.[5] But the Warren Court had little basis in text, history, or judicial precedent for developing a robust conception of democratic politics. Nor, for related reasons, did it develop much of a theoretical justification for explaining when an aggressive judicial role in constructing democracy would be justified. The limitations with which the Warren Court began haunted the subsequent development of its approach to these problems and, because of the importance of Warren Court precedents, continue to haunt the field. It is worth recalling these constraints on the Warren Court's first steps toward "democratizing" the Constitution. As Mark Rush has observed, "the controversies that inhere in electoral process case law really have everything to do with the conflicting strains of democractic theory and, in reality, little to do with the inconsistencies of jurisprudence."[6]

The Warren Court's need to create a vision of democracy *ex nihilo* from the constitutional order stems in part from the great silences of the Constitution regarding the structure of electoral politics—silences that often reflect America's peculiar federal structure in which so much regarding the ground rules of political competition

5. For a recent study of the Warren Court that locates democracy as the central idea driving Warren Court jurisprudence, see MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 74-111 (1998).

6. Mark Rush, *The Law of Democracy*, 5 LAW AND POL. BOOK REV. 239 (1998) (reviewing Samuel Issacharoff, Pamela S. Karlan & Richard Pildes, THE LAW OF DEMOCRACY (1998)).

was left to be settled at the state level. Neither the original Constitution nor the Fourteenth Amendment secured even the basic right to vote. The Constitution speaks quite generally about the terms of office for federal elected officials[7] and even more generally about qualifications for election.[8] But the Constitution is silent on virtually all the important issues regarding elections, from how ballots are to be cast, to the electoral system for all public offices save the President and Senate, to issues of how elections are to be run and financed, to the eligibility for voting, and so forth.

The Constitution's failure to offer specific guidance also reflects the pre-modern world of democratic practice and the long-since rejected assumptions of that world on which the Constitution rests—a point that the Supreme Court and many commentators often lose sight of when they seek to tease out a vision of democracy from the original Constitution itself.[9] For example, the Framers specifically intended the constitutional structure to preclude the rise of political parties, which were considered the quintessential form of "faction."[10]

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7. *See* U.S. CONST. art. I, § 2, cl. 1; art. I, § 3, cl. 2; art. II, § 1, cl. 1.

8. *See* U.S. CONST. art. I, § 2, cl. 2; art. I, § 3, cl. 3; art. II, § 1, cl. 5.

9. For example, in *Storer v. Brown*, 415 U.S. 724 (1974), the Court, resting on the rationale that states have a legitimate interest in seeking to avoid the splintering of the two major parties, upheld various California restrictions on ballot access for third parties and independent candidates. *See id.* at 728. In support, the Court offered originalist justifications: "California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government." *Id.* at 736 (citing THE FEDERALIST NO. 10 (James Madison)). *The Federalist No. 10* is a particularly ironic place to seek support for entrenchment of the two-party system, given that parties were the quintessential form of "faction" against which the constitutional design was constructed. *See* THE FEDERALIST NO. 10 (James Madison). The very point of Madison's argument was that political parties were anathema to healthy democratic politics. *See id.* For the modern Court to equate the avoidance of faction with the two-party system reveals not only the ideological seachange between the Framers' era and today's conceptions of democracy but also the continuing failure to recognize how little insight the original constitutional design provides into modern problems of democratic politics.

10. According to the classic study of shifting concepts of political representation in the eighteenth century:

> [W]hen [Madison] discussed the problem of interests in the tenth number of *The Federalist*, he was occupied immediately with the problem of so dividing the government as to resist the formation of political parties. No doubt influenced by his great Irish fellow-Whig,

Yet political parties have long been the principal organizational form through which mass democracy can be mobilized and effectively pursued. No constitutional framework for enabling modern democratic self-government can neglect the role of political parties,[11] yet the Constitution is not only silent about parties but designed to preclude their emergence.[12] Similarly, the original Constitution reflected a particularly elite conception of democratic politics. According to the leading historian of the period, "Madison hoped that the new federal government might restore some aspect of monarchy that had been lost in the Revolution."[13] But this more aristocratic conception of democracy was already being displaced by the 1790s and was supplanted as early as the Jacksonian era. These developments led virtually all the Framers who lived that long to a pervasive

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> Burke, Madison anticipated the division of the country into conflicting and competing economic and professional interests, and maintained that the chief cause of conflict would be between those with and those without property. The political organisation of these interests he called factions, a disparaging name for parties—but he hoped that parties would merely come and go as their temporary objects dictated. By an irony which he cannot have either anticipated or enjoyed, Madison himself soon became one of the leading agents in the process by which interests were consolidated into parties . . . .

J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 530-31 (1966).

11. *See, e.g.*, E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 1 (1942) ("[P]olitical parties created democracy and . . . democracy is unthinkable save in terms of the parties."); Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, DÆDALUS, Summer 1980, at 25, 26 ("The only way collective responsibility has ever existed, and can exist given our institutions, is through the agency of the political party. . . .").

12. *See supra* notes 9-10 and accompanying text.

13. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 255 (1992). As Wood elaborates: "With 'the purest and noblest characters' of the society in power, Madison expected the new national government to play the same suprapolitical neutral role that the British king had been supposed to play in the empire." *Id.* Bernard Manin argues that the debate between Federalists and Anti-Federalists was, as the Anti-Federalists argued, essentially a debate over how aristocratic political leadership should be, or whether it should mirror the electorate. *See* BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 121 (1997) ("The Federalists, however, all agreed that representatives should not be like their constituents. Whether the difference was expressed in terms of wisdom, virtue, talents, or sheer wealth and property, they all expected and wished the elected to stand higher than those who elected them.").

but under-appreciated pessimism[14] precisely because democracy had fallen "into the hands of the young and ignorant and needy part of the community."[15] This transformation in the conception of democracy eventually culminated in certain structural changes, such as the Seventeenth Amendment's shift to direct senatorial elections,[16] and the various franchise-expanding amendments.

But these changes are layered onto a document and a set of institutional structures that reflect the pre-modern vision of democratic politics.[17] Even in the earliest conception of the role of voting, the

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14. *See* WOOD, *supra* note 13, at 365.

15. *Id.* at 366 (quoting Benjamin Rush, a signer of the Declaration of Independence). Wood quotes a similar view of George Washington, who in 1799 bemoaned that the rising spirit of party politics had displaced character as the touchstone for electability: "Members of one party or the other now could 'set up a broomstick' as candidate, call it 'a true son of Liberty' or a 'Democrat' or 'any other epithet that will suit their purpose,' and the broomstick would still 'command their votes in toto!'" *Id.* Wood summarizes that the Framers "found it difficult to accept the democratic fact that their fate now rested on the opinions and votes of small-souled and largely unreflective ordinary people." *Id.* at 367. He also observes that a "new generation of democratic Americans was no longer interested in the revolutionaries' dream of building a classical republic of elitist virtue out of the inherited materials of the Old World." *Id.* at 369. Similarly, J.R. Pole reports that in Virginia by the 1820s, "[t]he open electioneering of the candidates would certainly have struck anyone bred in the habits of the eighteenth century as a debasement of the dignity of the legislature and a corruption of the freedom and purity of elections." POLE, *supra* note 10, at 165.

16. Recently there has been a renewed outpouring of writing on the Seventeenth Amendment. For a critical history, see C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT (1995). For an exploration of the under-appreciated effects direct elections had on other features of institutional role and constitutional doctrine, see Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347 (1996).

17. The conflict between the aristocratic nature of pre-modern democracy and the more populist spirit of subsequent American politics is vividly exhibited in William Findley's attack on the first Bank of the United States in 1786, an event which Gordon Wood dramatically characterizes as "maybe the crucial moment" in "the history of American politics." WOOD, *supra* note 13, at 256. Findley, an ex-weaver from Western Pennsylvania and defender of paper-money interests and debtor-relief laws, was the kind of common and back-country legislator whom "gentry like Madison" considered too narrowly self-interested to be worthy legislators. *Id.* Findley argued not only that the elite political leaders were just as interested as anyone else in political outcomes, but that there was nothing wrong or suspect about the promotion of private in-

election process itself was directly tied to a distinct ideology of politics and society. For example, while voting for public officeholders was the quintessential attribute of representative government, the act of voting quickly changed its social meaning and significance from that which the Framers originally envisioned. Initially, the open ballot played the role of ratifying social and political hierarchies. As another leading historian notes, "leaders still assumed political office as their right and instructed the people as their duty."[18] Elections

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terests through politics—indeed, that the promotion of private interests was exactly what democratic politics was about. As Wood sees it, Findley's attack on the Bank in 1786 anticipated

> all of the modern democratic political developments of the *succeeding generation*: the increased electioneering and competitive politics, the open promotion of private interests in legislation, the emergence of parties, the extension of the actual and direct representation of particular groups in government, and the eventual weakening, if not the repudiation, of the classical republican ideal that legislators were supposed to be disinterested umpires standing above the play of private interests.

Id. at 257-58 (emphasis added). The point is that all these developments that characterize modern conceptions of democratic politics and that emerge in the culture and politics of the early 19th century are at odds in the most fundamental respects with the conception of democracy that underlay the original Constitution and Bill of Rights.

18. ROBERT H. WIEBE, SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY 29 (1995). See MARK A. KISHLANSKY, PARLIAMENTARY SELECTION: SOCIAL AND POLITICAL CHOICE IN EARLY MODERN ENGLAND (1986), for a similar view of the historical distinction between voting as an active choice among competing candidates and voting as "a ritual of acclamation, a public act that recognizes (and reconstitutes) the superior status of the candidate." DON HERZOG, HAPPY SLAVES 197-98 (1989). Kishlansky argues that the meaning and significance of voting shifted in England from "selection" or ratification to "election" roughly around 1640, and that this change was still not consolidated until considerably later. *See* KISHLANSKY, *supra*, at 225-30. For a similar view of the role of deference in English elections in the eighteenth century, see MANIN, *supra* note 13, at 95-96. Manin writes that:

> [before the English civil war, r]eturning a Member was a way of honoring the 'natural leader' of the local community. Elections were seldom contested. It was seen as an affront to the man or to the family of the man who customarily held the seat for another person to compete for that honor. Electoral contests were then feared, and avoided as much as possible. . . . This distinctive feature of British political culture later came to be termed 'deference.' The term was coined by Walter Bagehot in the late nineteenth century, but the phenomenon to which it referred had long been typical of English social and political

focused on personal qualities, not political issues. A striking example is the elections to the Virginia ratifying convention for the Constitution: Many districts elected their two leading men even though the candidates held opposite opinions on whether the Constitution should be embraced.[19] Nevertheless, by the early nineteenth century, the open ballot had come to symbolize a kind of political equality and independent choice of citizens, with genuine sovereign power, that had not been originally contemplated in the election-as-ratification conception.[20]

With respect to democratic politics, then, the American Constitution is a curious amalgam of textual silences, archaic social and political assumptions that subsequent developments quickly undermined, and a small number of narrowly targeted recent suffrage amendments that reflect modern conceptions of the electorate but fail to address conceptions of democratic politics more deeply. This was the constitutional material from which the Warren Court was required to draw to create a modern conception of democracy.

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life.

Id. On the role of deference in English elections in the nineteenth century, see DAVID CRESAP MOORE, THE POLITICS OF DEFERENCE: A STUDY OF THE MID-NINETEENTH CENTURY ENGLISH POLITICAL SYSTEM (1976).

19. *See* POLE, *supra* note 10, at 151. Referring to an electoral practice of the colonial period that he argues continued after the Revolution, Pole concludes that "[i]ssues seldom entered elections, and even when they did it was often agreed that the natural leaders were the best men to entrust with the decisions." *Id.*

20. *See* WIEBE, *supra* note 18, at 29-30. Building on the view of democratic politics and political representation that he sees reflected in William Findley's speech from 1786, *see* WOOD, *supra* note 13, at 256, Wood argues that within one generation following the Constitution's formation, the original views on these practices had changed dramatically:

> In the generation following the formation of the Constitution, the Anti-Federalist conception of actual or interest representation in government—the William Findley conception of representation—came to dominate the realities, if not the rhetoric, of American political life.
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> . . . Elected officials were to bring the partial, local interests of the society, and sometimes even their own interests, right into the workings of government. Partisanship and parties became legitimate activities in politics. And all adult white males, regardless of their property holdings or their independence, were to have the right to vote. By 1825 every state but Rhode Island, Virginia, and Louisiana had achieved universal white manhood suffrage."

Id. at 294.

Certain Warren Court decisions had breathtaking and transforming effects on American democracy. These decisions are broad in scope, particularly in light of their limited historical and textual foundations, especially from the perspective of subsequent Supreme Courts. Within only two years of *Baker v. Carr*,[21] where the Court held cases involving "political rights" justiciable, the Warren Court proceeded to require the foundational restructuring of virtually every state legislature in the country.[22] But even as it made such decisions, the Warren Court failed to elaborate a functional, coherent conception of democratic governance. The critical decisions, ranging from *Harper v. Virginia Board of Elections*[23] to *Kramer v. Union Free School District*,[24] provided no understanding of either the aims of participation or the standards by which to evaluate its success. The Court could identify "full and effective" participation as a goal, but the decisions did little to elucidate this idea.[25] Nor could the majority opinions meet the repeated Harlan dissents, which challenged the Court to identify the functional basis of its new concern for democratic participation.[26]

The Warren Court opinions turned to the individual rights-compelling state interest standard to break the restraints of the political question doctrine that had long kept the issues of democratic design outside of the constitutional law arena. But in doing so, the Warren Court locked into place conceptual tools that soon proved insufficient for the next generation of cases. Despite the jurisprudential limitations of the early cases, the Warren Court never shied away from recognizing the broader social and political context within which it was developing the doctrines of democratic oversight. To the Warren Court, even when not explicitly written into the text of decisions, theoretical issues about the electoral domain were inseparable from the central debates of the day, most notably the full incorporation into political citizenship of long-disenfranchised black

21. 369 U.S. 186 (1962).

22. *See* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 738-39 (1964); Reynolds v. Sims, 377 U.S. 533, 586-87 (1964).

23. 383 U.S. 663 (1966).

24. 395 U.S. 621 (1969).

25. *See Reynolds*, 377 U.S. at 565.

26. *See Harper*, 383 U.S. at 680 (Harlan, J., dissenting); *Reynolds*, 377 U.S. at 589 (Harlan, J., dissenting); *Baker*, 369 U.S. at 330 (Harlan, J., dissenting).

voters. Many of us who entered this field in the 1980s and 1990s did so through the statutory and constitutional dimensions of minority representation.

In retrospect, the individual rights approach of the early voting rights cases focused the Court's attention on the structural obstacles to the realization of *majority* preferences in American democracy as it was then constructed. Structural barriers such as grotesque malapportionment or the exclusion of significant numbers of voters through discriminatory mechanisms such as the poll tax allowed entrenched minorities to maintain a lock-up on political power. The various constitutional arguments put forward, from the equipopulation rule of *Baker* and *Reynolds v. Sims*[27] to the right of individual access to the ballot box,[28] all struck at the most visible barriers to the realization of majoritarian control in the political process. In this context, increasing the majoritarianism of democracy—which meant diminishing the stranglehold rural voters held over urban ones—also enhanced the political voice of cultural minorities, such as black voters who were increasingly concentrated in urban areas. There was no conflict in the early cases between majoritarianism and protection of those minority interests long subordinated in American law and politics. Hence, these decisions were conspicuously silent on how minority interests might be protected once the rudimentary demands of majoritarianism were met.[29]

The problem of minority representation emerged as the central issue in American democracy in what has been termed the "second generation" of voting rights claims.[30] It soon became clear that this protection required more than just formal access to the electoral

27. 377 U.S. 533.

28. *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

29. *See* Lani Guinier & Pamela S. Karlan, *The Majoritiarian Difficulty: One Person, One Vote*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 207, 209-10 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1718 (1993).

30. For a description of the generations of minority voting rights claims, see Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992).

machinery.[31] In cases challenging the exclusionary results of at-large or multi-member districted elections, the courts confronted a different order of concerns about democratic participation. As long as majorities consistently voted—in other words, "bloc voted"—along easily recognized lines, most notably race, there could be effective exclusion of minorities from representation even without formal exclusionary devices such as poll taxes, literacy tests, grandfather clauses, restrictive voter registration practices, and the like.[32] But the absence of overt prohibitions on participation itself—as opposed to the functional diminution in the *value* of political participation—defied the attempt to shoehorn the inquiry into a narrow individual right of participation. Rather, the minority vote dilution cases led the courts into the complex fields of effective representation,[33] fair distribution of governmental resources, and finally, equitable allocation of governmental power.[34] By the time of the cascading series of post-*Shaw v. Reno*[35] racial redistricting cases,[36] governmental classifications of political structures along the lines of race had emerged as the focus of judicial concern—a concern firmly distanced from any connection to the actual mechanics of the electoral process.

The insights drawn from the struggles over minority representation show that, while elections are ultimately about parties and vote tallies, democracy is actually the unstable relationship between governing majorities and vulnerable minorities. "Election law" suggests

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31. The leading cases in defining the challenge to at-large elections run from *White v. Regester*, 412 U.S. 755 (1973), to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), to *Thornburg v. Gingles*, 478 U.S. 30 (1986).

32. *See generally*, Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1365-76 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994) (summarizing data on persistence of bloc voting practices and their effect on minority electoral prospects)).

33. In fact, even the early Warren Court decisions recognized the broader ambition to define a right of "full and *effective* representation." Reynolds v. Sims, 377 U.S. 533, 565-67 (1964). More basically, they recognized a principle of "political fairness." Gaffney v. Cummings, 412 U.S. 735, 736 (1973).

34. *See* Presley v. Etowah County, 502 U.S. 491 (1992); Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985).

35. 509 U.S. 630 (1993).

36. *See* Abrams v. Johnson, 521 U.S. 74 (1997); Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995).

a temporal focus organized around the singular moment of formal voting. But for an emerging field seeking to build on the Warren Court's initial, critical engagement with the deep structural features of democratic institutions, the central question is how deep into existing practices a robust, functional, historically-aware understanding of democracy will penetrate. "Elections" can look legitimate with full access and fairly counted ballots. But what ideas about social life and political representation should inform the antecedent and far more decisive questions of whether elections are conducted through cumulative voting, proportional representation, or the longstanding but hardly examined American tradition of single-member, winner-take-all elections in geographic districts? Or whether within democratic bodies, decisions should be reached with minority vetoes, with consociational requirements of concurrent majorities, or with simple majority rule?

Ultimately our concern is with the structural aspects of constitutional law, not the regulatory arcana of elections. Approaching the law of democracy from this vantage point makes the field not a derivative and limited domain but a body of ideas that reflect the meaning and assumptions of constitutional law itself. Moreover, expanding the focus from elections to democratic self-governance enables us to begin forging connections between election law and the next frontiers of self-government. These connections implicate private corporate governance, union democracy, workplace participation, and the uncertain status of other intermediate institutions through which citizen involvement in all forms of politics can be made meaningful and effective.