
ESSAY

THE CASE FOR A DEMOCRATIC THEORY OF AMERICAN ELECTION LAW

DAVID SCHULTZ†

INTRODUCTION

If any area of constitutional adjudication requires philosophizing and a theory about politics, it is election law.¹ Current election law adjudication is theoretically and perhaps even empirically rudderless,² or it appeals to an implicit theory about American democracy that is incoherent and empirically deficient.

This Essay asserts the need for an American democratic theory of election law and begins to describe how such a theory might look.

I. THE ROLE OF ELECTION LAW IN POLITICS

Election laws are the rules of politics.³ They are like the rules in *Monopoly* that determine how the game is played. Or, as former Solicitor General and Watergate prosecutor Archibald Cox said, they are the “rules that determine[] the rules of the game.”⁴

Election laws are the rules of democracy. They describe who gets to vote and run for office, how ballots are counted, the rights of political parties, and who gets to speak or give money to influence campaigns and elections. Election law rules are outcome determinative and impact who will be the winners and losers in American democracy. Election laws are the transmission

† Professor of Political Science, Hamline University; Associate Adjunct Professor of Law, University of Minnesota Law School.

¹ See DAVID SCHULTZ, ELECTION LAW AND DEMOCRATIC THEORY 7-9 (2014) (discussing the Supreme Court’s failure to articulate a robust theory of election law).

² *Id.* at 13-14.

³ *Id.* at 46.

⁴ *Id.* at 46-47.

belt of American democracy, operating similarly to neutral principles which guide court decisions.⁵

But what is American democracy? Given that the Supreme Court, at least since *Baker v. Carr*, has entered the political “thicket” and ventured many important election law decisions,⁶ a curious feature of its jurisprudence is how theoretically deficient its decisions have been. There is a recurrent problem of ad hocism and legal formalism. The Court has either failed to appreciate the plethora of democratic values embedded within its decisions, or has rendered opinions lacking an empirical appreciation for how American democracy actually operates.

Buckley v. Valeo is perhaps the most significant Court decision on the role of money in politics, setting the precedent for the regulation of political contributions, expenditures, and the disclosure of both.⁷ The Court focused on the issue of how money is related to First Amendment free speech.⁸ The Court’s analysis failed to consider what role money should have in a broader theory of democracy regarding how elections, political institutions, and campaigns should operate. The opinion singularly concentrated on one issue—money and speech. Its analysis about the legitimacy of campaign-finance regulation was reduced to addressing one issue—abating quid pro quo corruption or its appearance⁹—while ignoring how the use of money needs to be examined within a broader concept of democratic politics. The Court further ignored the power of corporations,¹⁰ raising questions about the responsiveness of the political process.¹¹

In *Citizens United v. FEC*, the Court reduced the debate about the role of money in politics to focus on free speech and the right of any entity to spend money as a protected right.¹² The Court equated democracy to the First Amendment, and equated the First Amendment to the ability to spend money.¹³ In simplifying the meaning of corruption to quid pro quo, it ignored a historical context and tradition in America indebted to a Republican

⁵ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959) (remarking that even the Supreme Court has “defined standards for the exercise of its discretion”).

⁶ 369 U.S. 186, 330 (1962) (Harlan, J., dissenting).

⁷ 424 U.S. 1 (1976) (per curiam).

⁸ See *id.* at 23 (noting how restrictions on campaign expenditures implicated political expression and association interests).

⁹ *Id.* at 26-27.

¹⁰ See generally LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* (2015).

¹¹ See generally Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014) (demonstrating that political figures are more responsive to economic elites and organized interest groups than to average citizens).

¹² 558 U.S. 310 (2010).

¹³ See *infra* Part II.

tradition that saw corruption as something structural and feared the role that unequal divisions of property would have in politics.¹⁴

Further proof of the Court's atheoretical as well as empirically deficient approach is *McCutcheon v FEC*.¹⁵ In striking down aggregate contribution limits, the plurality suggested that questions about how much people or entities spend to influence elections may reveal unequal influence but not corruption.¹⁶ The opinion ignored questions about how money and speech should be balanced against other democratic values, and empirical political science research on the topic.

The Court's election law ad hocism rendered decisions that have failed to appreciate how American democracy should or does operate. An American democratic theory of election law guides important questions such as who gets to participate, who runs for office, or how votes are counted. It recognizes that a democracy is not about how one individual acts but is instead a political society where many individuals are involved. Such a democratic theory must identify important values and then articulate the affected tradeoffs.

Too much of current election law scholarship, adjudication, and court decisions come from a point of abstract reasoning, lacking a context, and are devoid of a theory to guide answers.¹⁷ Much of the discussion in election law is no more than ad hoc partisanship. What is needed is a theory of democracy to guide election law.

II. THE SUPREME COURT'S IMPLICIT DEMOCRATIC THEORY

While the Supreme Court has no explicit democratic theory guiding its decisions, there is an implicit one that guides a (conservative) majority of the Supreme Court, if not perhaps others. Timothy Kuhner refers to it as "neoliberal jurisprudence,"¹⁸ but free market democracy might be a better label. Commenting on the holding in *Citizens United*, Kuhner declares, "A close reading of *Citizens* reveals that the five conservative Justices of the Roberts Court have redefined democracy on the basis of this free market

¹⁴ See, e.g., J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 507-17 (1975) (describing early Americans' social and religious disdain for corruption); ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED* 37-38 (2014) (discussing the framers' fear that corruption could infect the political process).

¹⁵ 134 S. Ct. 1434 (2014) (plurality opinion).

¹⁶ *Id.* at 1450-51.

¹⁷ See generally RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (2016) (offering a plan for how to regulate money in politics but without providing any theoretical or foundational arguments to support the recommendations).

¹⁸ Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: the Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y & L. 395, 397 (2011).

approach to constitutional values.”¹⁹ This neoliberal or market view of democracy commenced in *Buckley* where the “opinion converts the currency of the economic sphere—money—into the currency of the political sphere—speech.”²⁰ The Court came to view all forms of speech as requiring the expenditure of money.²¹ In effect, “speech occurs within a marketplace and that marketplace must remain as free as possible, limited only by the need to prevent *quid pro quo* corruption.”²²

Zephyr Teachout makes a similar claim, arguing that the Court has adopted a consumer theory of democracy.²³ Justice Kennedy’s vision in *Citizens United* is that of a consumer democracy, where associational life happens through corporations, and democracy is a form of commercial or consumer exchange.²⁴ It reduces politics to economics, but a special type of free market fundamentalism that never really existed in the United States.²⁵ It is an Ayn Rand-style libertarian view of capitalism, viewing market exchanges as the only means of preserving freedom. Money is a legitimate and fungible placeholder for allocating political power or authority.

This theory reduces democracy to First Amendment free speech, free speech to economics, and then to money and its expenditure as the only way to ensure individual freedom. This reading of John Locke by Samples renders Locke and the constitutional framers proto-capitalists, possessive individualists,²⁶ and libertarians, none of which they were.

This perspective ignores that democracy is different from capitalism, that democracies value more than just freedom, and that to permit the use of money for political purposes overlooks the social context of politics—raising and spending unlimited sums of money for political purposes is not a democratic practice available to all. It is what one or a few wealthy individuals can do, not a method to make a democracy work for all the people.

¹⁹ *Id.* at 398.

²⁰ *Id.* at 415.

²¹ *Id.* at 416.

²² *Id.* at 409.

²³ TEACHOUT, *supra* note 14, at 234-35.

²⁴ *Id.*

²⁵ Cf. FRANK BOURGIN, *THE GREAT CHALLENGE: THE MYTH OF LAISSEZ-FAIRE IN THE EARLY REPUBLIC* 25 (1989) (“[D]uring the early era of our national government the governmental policies leaned in an affirmative direction: positive and active rather than negative and passive . . .”).

²⁶ See generally RICHARD ASHCRAFT, *REVOLUTIONARY POLITICS & LOCKE’S TWO TREATISES OF GOVERNMENT* (1986) (describing and criticizing this reading of Locke); C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962) (describing the same); JAMES TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* (1980) (describing the same).

III. A DEMOCRATIC THEORY OF ELECTION LAW

Robert Dahl lists five criteria or values for a democracy.²⁷ They are voting equality, effective participation, enlightened understanding, control of the agenda, and inclusion. Dahl's criteria are similar to what other democratic theorists have ascribed to a democracy.²⁸

Dahl's values are not the sum of those essential to defining those which are requisites for a democracy. One might argue that concepts such as federalism and rule of law are also important.²⁹ Democracies may require substantive and not merely formal equality to assure a meaningful voice and input.³⁰ For many, pluralist diversity in values and allegiances are important to the protection of freedom.³¹ Others assert democracy needs a robust civil society to serve as a buffer on the economy and the polity,³² or democratization of the economy.³³ Dahl joins political scientists such as Gabriel Almond and Sidney Verba in contending that a specific political culture is needed if a democracy is to exist.³⁴ This political culture may encapsulate all of the values listed above or perhaps it is a culture distinct from these values—one that sustains or respects the above values. The point is that there may be other values needed to make democracy work.

There are two other points to consider when discussing the values of a democracy. One is that the values do not exist in isolation, but are perhaps in a tension with one another.³⁵ Second, the values are given meaning by institutions that support them. Values such as effective participation and control of the agenda, for example, may come into conflict. Giving 317 million-plus Americans control of the agenda or a meaningful voice may be

27 ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 222 (1989).

28 See generally JAMES ROLAND PENNOCK, *DEMOCRATIC POLITICAL THEORY* (1979) (giving a general discussion of democratic theories and criteria used to evaluate regimes); GIOVANNI SARTORI, *THE THEORY OF DEMOCRACY REVISITED* (1987) (describing the same).

29 See David Schultz, *Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post 9-11 World*, 38 *GOLDEN GATE L. REV.* 195, 197-200 (2008) (citing DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 17, 34 (2006)).

30 See generally Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 *N.C. L. REV.* 1103 (2002) (proposing principles for judicial supervision of the democratic process).

31 SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 61-62 (1960).

32 See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993).

33 See generally ROBERT A. DAHL, *A PREFACE TO ECONOMIC DEMOCRACY* (1985).

34 DAHL, *supra* note 27, at 262-64; see also GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 5 (1963) (explaining the impact that cultural components have on whether democratic participation will work); ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* 138-65 (1982) (discussing the inherent problems in relying on civic virtue).

35 PENNOCK, *supra* note 28, at 16-17.

impractical, necessitating representatives. Tradeoffs may be required for different participants or activities. In *Burson v. Freeman*, the Supreme Court had to confront clashing First Amendment rights—the right to vote versus the right of free expression.³⁶ The decision concerned a law that prohibited campaigning within 100 feet of a voting place, instituted to prevent voter intimidation at the polls.³⁷ The Court upheld the law, noting that there was a tradeoff that had to be affected between contending expressive rights.³⁸

Alongside of the goals of a democratic system, we must ultimately ask what types of institutions can best be fashioned or implemented to secure them. For Dahl, each of the five criteria depends on specific institutions.³⁹ To achieve voting equality, a democracy needs free elections and a free press, election officials, and political parties among other things. These institutions are needed to give meaning to values. But we also need criteria to measure how effectively these institutions operate. It is not simply enough to have parties or elections. Holding elections while jailing the opposition hardly promotes democratic values. Holding an election with only one legally recognized party or with a censored press also undermines the election. Declaring that everyone has a voice or voting equality may be meaningless if the votes are rigged and ballot boxes stuffed, if money determines the outcome of an election, or if lobbying activity preempts any meaningful ballot choice. Institutions must be effective as noted, and efficacy must be evaluated according to criteria that measure how well they secure the values articulated for a democracy to exist.

IV. AN AMERICAN DEMOCRATIC THEORY OF ELECTION LAW

Dahl provides a general theory of democracy. What is needed is a specific theory for the United States. An American democratic theory would include the development of values and institutions noted above, but with more details on the unique values applicable to the United States. There are two, if not three, theories of democracy operating within the American political legal structure.

A. *Madisonian Democracy*

The first is Madisonian democracy, named after James Madison, the primary architect of the Constitution and the Bill of Rights. The Federalist Papers, specifically numbers 10 and 51, detail three competing goals that a political society needs to address. First, there is the imperative to preserve a

³⁶ 504 U.S. 191 (1992) (plurality opinion).

³⁷ *Id.* at 193-94.

³⁸ *Id.* at 211.

³⁹ DAHL, *supra* note 27, at 222.

republican form of government.⁴⁰ This is a government premised at least in part upon majority rule. The second goal is the protection of individual liberty.⁴¹ The third is to limit the threat of factions to both republican government and individual liberty.⁴² The issue then is how to preserve individual liberty and republican government from the threats of majority factions. This is the core problem of politics that Madison, the *Federalist Papers*, and the Constitution's framers sought to address. The problem, as Alexis de Tocqueville would later ask, is how the American republic can address the tyranny of the majority⁴³: How to balance majority rule with minority rights? Or as Robert Dahl described it, the goal of Madisonian democracy is to check factional concentrations of power.⁴⁴

The Madisonian solution can be broken down into two phases. The first, as articulated in the Constitution, involved a political solution of using an extended political sphere or civil society, representation, checks and balances, separation of powers, bicameralism, and federalism as complex means to control factions, if not otherwise to make it difficult for them to form. Madisonian democracy believed in a substantive notion of the public good.⁴⁵ And, it feared how there were both individual and institutional forces that could corrupt the political process, including drawing upon the Harringtonian-republican notion that "unequal distribution of property" was a chief source of that corruption.⁴⁶

The second phase is represented by the Bill of Rights, where the courts enforce certain rights that would be withdrawn from the political process and thereby preserved from being challenged by factions. As Justice Robert Jackson declared, majorities should not be able to vote on the right to free speech.⁴⁷

Madisonian democracy is not a theory that either implicitly or explicitly sanctions the use of money as a medium of political exchange, but it also does not endorse the use of money as some critics of campaign-finance reform

40 THE FEDERALIST NO. 10 (James Madison).

41 THE FEDERALIST NO. 51 (James Madison).

42 THE FEDERALIST NO. 10 (James Madison).

43 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 250-53 (1838).

44 See DAHL, *supra* note 33, at 3-34 (discussing how democracy alone does not protect against majoritarian tyranny).

45 See generally SHEILA KENNEDY & DAVID SCHULTZ, *AMERICAN PUBLIC SERVICE: CONSTITUTIONAL AND ETHICAL FOUNDATIONS* (2011).

46 THE FEDERALIST NO. 10 (James Madison).

47 See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

advocate.⁴⁸ Nor does it embody a specific economic theory.⁴⁹ Contrary to John Samples, who acknowledges that his reading of the constitutional framing is libertarian—and therefore ignores the Republican values the Federalists and Anti-Federalists had, including their fear of wealth and how it corrupts—and who argues that the framers “did not reflect much on the relation of money to politics,”⁵⁰ there is no conceptual or historical support to their claims that Madisonian democracy wanted or intended money to be a primary fungible tool for allocating political power or influence. Madisonian democracy instead believes in the public good and in the idea that one needs to address structural corruption and the power of groups (special interests) that might distort democratic decisionmaking.

Madisonian democracy is not a perfect theory. It failed to see the power that small groups may improperly exercise in America by believing that elections would check them.⁵¹ It also endorsed a political system that did not allow women, African-Americans, and the poor to vote. It needed to be updated many times for the idea of “We the people” to take on meaning.

B. *Pluralism*

A second theory of American politics is that of pluralism. It shares many assumptions with Madisonian democracy, but decisively deviates in a couple of major ways. First, it views groups in more favorable light than Madison did with factions.⁵² It sees interest groups as important vehicles of representation and as intermediate associations that restrain government power. Second, for pluralists, the essence of democracy is group competition and bargaining among groups and government officials.⁵³

Government decisions are the result of the contest and bargaining game among organized interests using many access points to advocate their members’ interests in the policy process.⁵⁴ In many ways, the government is almost like a blank slate, with the policies written onto it by different groups.

48 See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1067-68 (1996) (challenging campaign-finance reform assumptions including whether “money buys elections”); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 50 (1997) (“[I]t is too late to argue that a gift of money, at least when made to a political candidate, is not a form of protected symbolic speech.”).

49 See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.”).

50 JOHN SAMPLES, *THE FALLACY OF CAMPAIGN FINANCE REFORM* 32 (2006).

51 SCHULTZ, *supra* note 1, at 70-73.

52 *Id.* at 73.

53 *Id.* at 73-74.

54 See DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 507 (1951) (discussing the contest between political parties and federal versus state governments).

What keeps any one group from possessing too much power is the competition from other groups similarly seeking access. Overlapping group membership also serves as a stabilizing force by overcoming class stratification and the singular-minded preoccupation an individual may have with pursuing only one interest.⁵⁵ The public interest, unlike for Madison, is procedural and not substantive. What is agreed to in a bargaining game is what is considered in the public interest.⁵⁶

Pluralism has been subjected to significant criticism, among the most potent is that it ignores the powerful differences in power among different interest groups and how that affects their ability to bargain.⁵⁷ As Schattschneider declared, there is an upper class bias in the American political system that distorts decisions in their favor.⁵⁸ There is merit to this argument. But the strength of pluralism is again to reinforce Madisonian concerns about the need to check power, perhaps even recognizing that there are some forces that do corrupt the political process.

C. *Progressivism*

A third theory of American democracy is found in the Progressive Era reforms of the early twentieth century. This theory also drew upon Madisonian notions of corruption, especially by special interests and wealth, and it sought reforms to address them. One aspect of the Progressive reforms was the use of initiative and referendum to bypass corrupt legislatures.⁵⁹ Others have attributed civil service reform, addressing spoils and political patronage, and even voting reform all as aspects of Progressive Era reforms that continue to today.⁶⁰ They are the essence of what some see as part of campaign-finance reform. All this may be true, but at the core of this theory is a shared concern about the need to check excessive power, the fear of corruption by wealth, and the need to develop mechanisms to secure both of these objectives.

⁵⁵ *Id.* at 520.

⁵⁶ SCHULTZ, *supra* note 1, at 79-80.

⁵⁷ *Id.*

⁵⁸ E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 31-32 (1960).

⁵⁹ See, e.g., Jonathan Bourne, *Functions of the Initiative, Referendum and Recall* (arguing that the adoption of referenda processes is consistent with founding principles), in *THE INITIATIVE, REFERENDUM, AND RECALL* 3, 16 (Emory R. Johnson ed., 1912); George W. Guthrie, *The Initiative, Referendum and Recall* (discussing why citizens need more direct protections to check the actions of legislatures), in *supra* at 17, 17-19.

⁶⁰ BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY* 159-62 (2015).

CONCLUSION

Ultimately it may not be possible to fully reconcile Madisonian, pluralist, and Progressive theories of American democracy. While the three share many similarities, they also distinguish themselves in critical ways. They equally share concerns with limiting power and perhaps even addressing corruption. None of them explicitly endorses the legitimacy of using large concentrations of wealth as a means of leveraging political influence. These three conceptions of American democracy may not fully speak to the entire range of issues that election law must confront. Other values may need to supplement them as they are drawn from American history and evolving senses of what democracy does or should mean.

Yet the core argument in this Essay is that there are three major reasons why a democratic theory of election law is needed. First, a theory provides context for adjudication—it determines the values that should be considered. Second, a theory guides adjudication, much in the same way that neutral principles prevent ad hocism. Third, a theory demonstrates that democracy cannot be reduced to free speech, and free speech cannot be reduced to the right to expend unlimited amounts of money. Instead, a theory indicates that a democracy is composed of many competing values and helps define tradeoffs among those values, ensuring that the overall political system is democratic while protecting the equal rights of all to participate, and not just of a few individuals.

Preferred Citation: David Schultz, *The Case for a Democratic Theory of American Election Law*, 164 U. PA. L. REV. ONLINE 259 (2016), <http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-259.pdf>.