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THE HAZARDS OF LEGAL FINE TUNING: CONFRONTING THE FREE WILL PROBLEM IN ELECTION LAW SCHOLARSHIP

*Michael A. Fitts**

I. INTRODUCTION

Few fields of legal scholarship have grown as rapidly over the past few years as the study of election law and the political process. While courts refrained from an extensive oversight of the electoral system through the 1950s, that abstention has abated over time, beginning with the redistricting cases, accelerating with the passage and implementation of the Voting Rights Act,¹ and continuing with the development of more searching standards of judicial review.² While the level of scrutiny has since ebbed and flowed, especially in the enforcement of the Voting Rights Act, the results of these inter-related developments are evident. Far more than was ever imaginable several decades ago, litigants are asking the judicial process to draw the permissible limits of political activity.

Legal scholarship has undergone an even greater evolution—a transformation that is the subject of this article. Armed with insights from the rapidly developing social sciences, academics have sought to clarify and push the judicial and regulatory envelope beyond existing doctrine, exploring in detail the political consequences of alternative regulatory programs. Suffice it to say that many articles on constitutional law and the electoral process in recent years begin with

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1. 42 U.S.C. § 1973 (1994).

2. For a good overview of this progression, see James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893 (1997).

an enunciation of a more general political theory that legal intervention should seek to implement.³

This article speculates broadly about two types of challenges raised by these generally positive judicial and scholarly developments. While others have noted many of these points in the context of particular types of electoral interventions, this article seeks to link them together in a general discussion of legal intervention into the political process. In so doing, I take seriously the kind invitation of Rick Hasen, our symposium organizer, to think creatively and—truth be told—provocatively about the study of election law. My central, and admittedly somewhat mischievous, thesis is that the burgeoning legal scholarship on election law, of which I am a supporter and admirer, has nevertheless illuminated two related difficulties. These potential complications, which are empirical as well as normative, result from our greater scholarly exploration of the implications of existing legal structure on electoral outcomes and our attempts to fine tune the legal apparatus to improve those outcomes.

First, in exploring alternative regulations, scholars face the danger of systematically overestimating the significance of the legal apparatus—dwarfing soft variables, as it were. Given the synoptic character of our real life political world, legal changes at the margin are unlikely over time to have the result that academics, focusing on a particular legal rule, predict. This familiar claim is related to, but more general than, the observation that public choice models can overstate the impact of the rules of the game. Given the necessary limitations of rule-bound *legal* intervention, our attempts to oversee and manage the electoral process, which invariably examine issues at the causal margin, run the risk of overstating the significance and precision of legal rules, as the political system invariably responds systematically.

Secondly, and more importantly, our ambition to better understand and control regulation of the electoral process raises a related normative problem. With our expanded focus, we may be subtly

3. In the past four years, we have also seen the arrival of the first two focused exclusively on the regulation of the electoral process. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (1998); DANIEL LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS* (1995).

undermining our willingness to accept the political process as an independent system charged with choosing the appropriate ends of government. The more we seek to understand and manage electoral rules in order to affect policy outcomes, the less we may reserve for resolution by the political process itself.

Why would this be problem? In part, this normative concern also reflects a judgment that our complicated political processes have more ways of adapting to changes than we at first think. But, more importantly, this uneasiness stems from a suspicion that no single and precise theory of democratic group rights can be articulated for our diverse society; indeed, the "genius of American politics"⁴ may well be our acceptance of a degree of moral ambiguity. In other words, we need to be humble about our factual as well as our normative powers. To the extent that this is true, as we seek to define with ever greater precision the appropriate inputs to democratic decision-making, we run the risk of losing the necessary equivocation surrounding the meaning of democratic rule.

These related complications are what I broadly term the "free will problem," a reference to the tension in criminal law between legal standards of moral responsibility and the increasing psychiatric and medical understanding of human action and motivation.⁵ According to criminal law scholars, courts are less likely to hold legally or morally "responsible" an individual whose actions are "explained" in terms of psychological causation and pathology.⁶ To draw the analogy to the political process: the more we understand how the rules of the game affect the substantive outcomes in politics, the more we may run the risk of losing a proper respect for the

4. DANIEL BOORSTIN, *THE GENIUS OF AMERICAN POLITICS* 1-2 (1953).

5. In the criminal law context, the expansion in knowledge of the internal mechanics of the human mind has tended to undermine concepts of free will and moral responsibility for human actors.

6. For a discussion of this issue, see DEBORAH W. DENNO, *BIOLOGY AND VIOLENCE: FROM BIRTH TO ADULTHOOD* 534, 536 (1990). This connection, I freely concede, is not logically required. See Stephen Morse, *Brain and Blame*, 84 *GEO. L.J.* 527, 531-37 (1996). See generally, MICHAEL MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* (1984) (proposing that psychiatry and the law share similar views of the human mind). See *infra* text accompanying notes 55-57.

complicated and interactive functioning of the political process itself, that is, its free will.

Section II of this article discusses the background of judicial intervention in the political process. Sections III and IV explore in detail the factual and normative conundra mentioned above. Finally, Section V describes two old approaches to politics—pluralism and political parties—that seemed to accommodate some of these tensions.

One final caveat. As I freely concede, the strains I discuss are not preordained. Nor are they usually even negative. I identify them not to redirect the goals of scholarship, but rather to suggest reasons why it should be circumspect, especially as we seek to fine tune any legal intervention. In this sense, readers should understand the argument principally as a plea for intellectual and professional humility.

II. BACKGROUND

A. *The Old Days*

There was a time when judicial doctrine, and to a lesser extent legal scholarship, viewed the political process as much more outside the legal terrain. A variety of traditional doctrines sustained this deference. The most important, of course, was the political question doctrine, which insulated a series of political decisions from judicial review. The assumption was that the political process had a constitutionally protected status that the courts were not to challenge. Analogous doctrines, such as abstention and standing, also served to insulate the political process from direct judicial second-guessing.

This judicial stance was related to, and in some sense an outgrowth of, the distinction drawn between the common law mode of decision-making and legislative and political processes. For many years, courts treated common law judicial processes as a morally “neutral” form of incremental policymaking, despite the absence of popular accountability.⁷ When courts left this presumptively

7. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 894-97 (1996); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 754, 769-71 (1993) [hereinafter Sunstein, *On Analogical Reasoning*]; Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L.

impartial domain, however, they were supposedly encroaching upon a qualitatively different moral system, over which they lacked comparative intellectual competence as well as normative legitimacy. Democratic theory, though not well developed, provided the substantive validity for this separate network. To this extent, judicial oversight of the political process was presumptively illegitimate, as well as potentially incoherent.⁸

The Legal Process school, identified principally with the work of Hart and Sacks,⁹ reflected a similar deference, though it incorporated a much more dynamic approach to legal structure and judicial/legislative interactions. Proponents understood that political processes were not distinct from law, and that the common law was not the only area in which strong judicial oversight was appropriate. At the same time, while adherents supported the expansion of legal intervention beyond the common law, they did not purport to develop a general theory of democracy.¹⁰

B. *The New Public Law*

The legal system has evolved significantly over the years. Among other changes, the decline of the abstention doctrine and the political question doctrine, as well as expanded standing rules, have led the courts to confront a variety of issues affecting politics that heretofore were beyond their reach. Three familiar areas illustrate the overall trend.

REV. 873, 885 (1987) [hereinafter Sunstein, *Lochner's Legacy*].

8. For a general description of early viewpoints of the legislative process within the legal community, see Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective Civic Virtue Reform of the Legislative Process*, 136 U. PA. L. REV. 1567, 1569-76 (1988).

9. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

10. See, e.g., WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 395-98 (1995) (describing the legal process perspective); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987) (explaining and critiquing legal process theory). See also BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 38-41 (1984) (reviewing the basic concepts and problems of legal process theory).

The first major change occurred when courts began to scrutinize the political process in the redistricting and gerrymandering cases. While the political question doctrine had originally insulated these topics from judicial second-guessing, in *Baker v. Carr*¹¹ and its progeny the courts began the complicated task of reviewing the drawing of district lines. Few other judicial decisions have placed the courts in the middle of as basic or fundamental a political question.¹²

The second area, the passage of the Voting Rights Act,¹³ continued the judicial oversight by redefining the relationship of the courts to the political process. Through both traditional and dynamic statutory construction of the Act, the courts sought to establish a standard for evaluating the appropriate participation and influence of African-Americans. These changes initially covered voter access rules, such as poll taxes and literacy tests, but ultimately included the restructuring of district representation, such as multimember districts. With the passage of the 1982 amendments,¹⁴ courts were faced with defining the permissible limits of racially polarized voting and vote dilution.¹⁵

The third major area of increased electoral debate has been in the campaign finance context. Here, most of the innovative thinking has occurred in legal scholarship, rather than in judicial doctrine. In *Buckley v. Valeo*,¹⁶ the Supreme Court limited legislative and judicial intervention through a general presumption that spending one's own political money constituted protected speech, thereby thwarting much legislative or judicial fine tuning of the proper limits of campaign activity.

Legal scholars, on the other hand, have not observed such jurisdictional boundaries. Given the potentially corrosive influence of money on elections and the absence of any textual constitutional

11. 369 U.S. 186 (1962).

12. For the next thirty years the courts were forced to decide the appropriate numerical size of districts, as well as the drawing of district lines to protect political parties and other potentially threatened groups. *See, e.g., Davis v. Bandemer*, 478 U.S. 109 (1986).

13. 42 U.S.C. § 1973 (1994).

14. Voting Rights Act of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973 (1994)).

15. *See id.*

16. 424 U.S. 1 (1976).

clarity, scholars have offered an eclectic group of strategies for filling in the constitutional lacunae and alleviating different types of political inequalities. These proposals have included stricter regulation of campaign contributions, volunteer activity, political speech, newspaper endorsements, and public organizing, as well as the creation of elaborate types of political voucher systems and federal subsidies.¹⁷ Indeed, since the concept of political equality is ultimately a normative one,¹⁸ some scholars have affirmatively argued for government subsidization of particularly "underrepresented" political philosophies, for fear that such positions will not be "adequately" included in any private debate.¹⁹

These developments have transformed the scholarly landscape. If academics once gave much greater respect to the political process, they now understand with ever greater precision the impact of our structural choices.²⁰ More importantly, with such understanding, there is a reasonable impulse to fine tune the extent and nature of electoral regulation. Two types of issues are worth highlighting: (1) causal complexity, and (2) normative complexity. Both relate to the synoptic and adaptive character of our real world political processes.

17. See, e.g., Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, in *READER IN AMERICAN POLITICS* (Walter Burnham ed., 1995); Ronald Dworkin, *The Curse of Money*, N.Y. REV. OF BOOKS 19-24 (1996); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1252 (1994); Richard Hasen, *Clipping Coupons for Democracy: An Egalitarian Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996); Daniel Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 355-60 (1989). For a general critique of campaign reform proposals, see Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996).

18. See PETER WESTEN, *SPEAKING OF EQUALITY* 6 (1990).

19. See OWEN FISS, *THE IRONY OF FREE SPEECH* 80 (1996); CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

20. Undoubtedly the most disturbing example is found in the voting rights area, where poll taxes, voting tests, and multimember districts all have pervasive effects on the racial makeup of the electorate and their representatives. See, e.g., CHANDLER DAVIDSON & BERNARD GROFMAN, *INTRODUCTION TO QUIET REVOLUTION IN THE SOUTH* (Chandler Davidson & Bernard Grofman eds., 1994). A political system rigged to disenfranchise minorities through such mechanisms has pervasive and perverse effects on our democratic ideal.

III. SCHOLARLY TENSIONS: CAUSAL COMPLEXITY

The first issue is sometimes mentioned, but bears repeating. It is the problem of assessing over time the political impact of changes in the legal rules. As we have explored legislative intervention in ever greater detail, we run the risk of overestimating our ability to predict what the political outcome of changing the legal structure will be.

At first, this fear may seem odd; one of the underlying *goals* of this line of scholarship has been to improve understanding of the nuanced impact of legal structure on the political process. Our earlier and somewhat unreflective deference to the political system lacked any real appreciation for the complex nature and meaning of popular will. Yet, as we undertake this management project, we run the risk of overstating the causal impact of legal intervention. Our exploration of changes in legal rules ordinarily focuses in one direction—how a particular policy affects the political system. In the process, we can tend to downplay the many ways in which the political process, in all its complexity and fluidity, can, in response to a change, distort and redirect the impact of a legal innovation.²¹

In most cases, the legal system views the first part of this causal loop as forward-looking interdisciplinary scholarship; for example, assessing what the impact of multimember or single-member districts will be on the election of African-Americans. The legal system often treats the second part—the systemic response of the political and legal environment over time—as beyond immediate legal analysis, since it works through other statutes or doctrines.

We might conceive of this dynamic as the political counterpart of the Coase Theorem, which first showed how the significance of legal property assignments frequently turned on the ease with which actors could trade or renegotiate initial distributions in private economic markets.²² Based on an extensive analysis of transaction costs, scholars have come to appreciate how legal rules are often effective only to the extent that they cannot be renegotiated. What at first seemed an inviolate system of property rights turned into a

21. In other words, politics can produce a Heisenberg-type effect, where the legal rule changes the politics of the environment in which it is applied.

22. See generally Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

complicated scheme of renegotiation and trades, as those most interested in the right sought to reallocate its incidence.

In the election law context, there is an analogous concern that people may circumvent legal rules through an informal dynamic—in this case, a synoptic and reactive private political process. When the courts change the marginal rules of the game in one area, such as in redistricting, burdened political actors can easily respond by doing an end run around the rule or pursuing relief in an alternative legal context.²³ Adding to this complexity is the fact that changes may systematically galvanize affected actors, either positively, giving the intervention greater force,²⁴ or negatively, in a process Mark Roe has recently termed “backlash.”²⁵ The space to fully discuss these repercussions is not available here, but some familiar cases are illustrative.

The first example involves gerrymandering. While *Baker v. Carr*²⁶ and its progeny revealed gross inequities in the number of voters placed in legislative districts, the ultimate impact of the legal intervention became quite difficult to control, as the political process used its newfound legal obligation as a means to gerrymander on behalf of political parties and to protect incumbency. The attempt to equalize the “vote,” which had originally seemed *formally* straightforward, had quite unforeseen effects. The courts were thus faced with a complicated process of determining how to protect the substantive equality of the different group interests.²⁷ Given this

23. To draw the Coasian analogy, those most interested or burdened by the outcome may have the greatest incentive to respond.

24. See, e.g., MORTON HOROWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE: A CRITICAL ISSUE* (1998); RICHARD KLUGER, *SIMPLE JUSTICE* (1997). But see GERALD ROSENBERG, *THE HOLLOW HOPE* (1993) (questioning whether courts can produce change without popular mobilization and participation).

25. Legal scholars or courts focused on a particular legal rule, or applying a particular but necessarily simplified model from the social sciences, may miss this dynamic—a type of political theory of the second-best. For one attempt to assess this dynamic, see Mark J. Roe, *Backlash*, 98 COLUM. L. REV. 217 (1998).

26. 369 U.S. 186 (1962).

27. See Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 269-70 (1985); Daniel Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 2 (1985); Peter H. Schuck, *The Thickest Thicket: Partisan*

political reaction, as one commentator has observed, "a persistent awareness exists [to this day] that the infirmities at the core of the political process, which the reapportionment cases of the 1960s promised to cure, continue to be alive and resistant to the doctrinal interventions of the Supreme Court."²⁸

The racial redistricting cases²⁹ illustrate a similar type of dynamic. The first legal interventions triggered by the Voting Rights Act³⁰—scrutinizing poll taxes, literacy tests, and multimember districts—markedly increased the number of African-Americans who were able to vote and elected to office.³¹ The second line of cases enforcing the Voting Rights Act, on the other hand, sought to confront the difficult problems of racially polarized voting and vote dilution.³² As we have seen, the political system reacted here, as the pursuit of racial diversity seemed to have undermined the interests of the Democratic party in at least some cases, and thereby, possibly, the substantive policy interests of African-Americans. While the initial foray into the political process was relatively straightforward, the indirect impact of the latter innovation was far more complicated.³³

Finally, in the campaign regulation context, we find similar synoptic responses, even though *Buckley v. Valeo*³⁴ proved a major obstacle to serious legislative and judicial intervention. Despite the tortured holding of *Buckley*,³⁵ the development of Political Action

Gerrymandering and Judicial Regulation of Politics, 87 COLUM. L. REV. 1325, 1325-29 (1987).

28. Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1644 (1993).

29. See *supra* notes 11-15 and accompanying text.

30. 42 U.S.C. § 1973 (1994).

31. See James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 351 (Chandler Davidson & Bernard Grofman eds., 1994).

32. See *supra* notes 11-15 and accompanying text.

33. In effect, political actors responded to the new legal rule—a type of political renegotiation, as it were—leading to unanticipated results. See Issacharoff, *supra* note 28, at 1645 (concluding that, even in the race context, "the promised control of partisan manipulation of the political process has not occurred").

34. 424 U.S. 1 (1976).

35. The Court held constitutional the individual contribution limits, the disclosure and reporting provisions, and the public financing scheme of the Fed-

Committees ("PACs"), which proliferated under the distinction between contribution and expenditure, has provided their own type of political override.³⁶

Moreover, the voluminous scholarship criticizing the opinion in *Buckley* illuminates some of the same scholarly concerns. As noted above, the proposals for legal intervention have contemplated the use of vouchers, federal subsidization of parties, federal subsidization of challengers, general limitations on certain types of political activity, as well as subsidization of particular viewpoints.³⁷ While virtually every proposal has thoughtful arguments to be made on its behalf, taken as a group, they represent what two of the most prominent authors in the election law area, Samuel Issacharoff and Pamela Karlan, recently described as a "cottage industry."³⁸

What is going on? Issacharoff and Karlan claim that critics often seek to "enforce" what can only be described as "some immaculate vision of politics."³⁹ Unfortunately, as they point out: "[R]aising and spending political money takes place inside of institutional structures, such as the two party system, territorial districting, restrictive ballot access laws, and a variety of incumbency protection practices . . . that powerfully affect how that money is raised, by whom it gets raised, and where it goes."⁴⁰ In this milieu, the free flow of money is the equivalent of a "hydraulic system"; people can at least partially circumvent most changes in the rules through the movement of cash or other things of value. Echoing some of these same sentiments, a recent study of PACs and special interest groups suggested that any attempt to limit PAC contributions might actually *increase* congressional incentives to engage in wasteful "pork barrel" spending.⁴¹ Issacharoff and Karlan suggest that interventions in the

eral Election Campaign Act of 1971, but held "constitutionally infirm" the limitations on expenditures provisions. *See id.* at 143.

36. *See, e.g.,* LARRY SABATO, *PAC POWER* (1985); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797 (1990).

37. *See supra* note 17 and accompanying text.

38. Samuel Issacharoff & Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. (forthcoming 1999).

39. *See id.*; *see also* Smith, *supra* note 17, at 1049 (arguing that reform proposals are based on faulty assumptions).

40. Issacharoff & Karlan, *supra* note 38.

41. *See* ROBERT M. STEIN & KENNETH N. BICKERS, *PERPETUATING THE*

campaign finance context be simple and straightforward in order to maximize chances for long term success.⁴²

Of course, this is not to imply that we should not intervene, only that, when we do, we should be appropriately circumspect. Due to the synoptic character of politics, predictions are far more precarious than one initially expects. As the Coase Theorem showed in the case of private economic markets, we may systematically underestimate the ability and willingness of private actors—in this instance, in the political process—to redirect legal intervention.

IV. SCHOLARLY TENSIONS: NORMATIVE COMPLEXITY

This leads to the second and more fundamental point. In addition to the need to be circumspect about the impact of legal intervention, we also need to be cautious about our ability to resolve the normative conflicts implicit in any fine tuning of that intervention.⁴³

Based on current scholarship, we understand, far more than in the past, the nuanced impact of special interest groups, of lobbying, of public opinion, of judicial review, of campaign contributions and expenditures, and of informal contacts, on the performance of government. Moreover, we appreciate how the structure of government affects outcomes: rules on the raising of money, on who may vote, on campaign advertising, on redistricting, and on campaign fund-raising. Armed with these insights, it is too easy to assume that we can and must resolve all the normative conflicts implicit in these choices.⁴⁴

PORK BARREL—POLICY SUBSYSTEMS AND AMERICAN DEMOCRACY 149 (1995). The authors claim that: “[I]n the absence of other reforms that curtail the actions of subsystems, campaign finance reform may lead to the type of universalizing behavior that produces inefficient and profligate federal spending.” *Id.*

42. See Issacharoff & Karlan, *supra* note 38.

43. Much like a jury, whose decisions the public accepts in part because the legal system does not scrutinize its precise internal workings, see Albert W. Altschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 154 (1989), political systems subjected to greater causal understanding are subject to more public and scholarly second-guessing.

44. As discussed above, however, the political process exhibits a quite complicated systemic and interactive quality, where changes in legal structure and inputs can cause underlying changes in values and preferences, as well as incite simple “backlash,” within the public at large. See Roe, *supra* note 25, at

One example of this dynamic can be found in the scholarly response to the redistricting cases. While the first cases simply looked at impediments to the right and ability to vote, the second wave confronted the difficult question of what constituted an equally effective vote for minority groups and other losers in the political process.⁴⁵ The resulting scholarship has sought to confront some of the most basic questions on the meaning of democracy: should our system give groups "an equally effective vote," a right to "take turns at setting the substance of government policy," a right to "equal access to political influence," or simply a right not to have their collective will "frustrated"?⁴⁶ Equality of the vote cannot be a "mere euphemism for political defeat at the polls,"⁴⁷ but what is it? Unfortunately, to the extent inputs and outputs are conflated, there is often no practical difference between an analysis of voting rights and the quality of the substantive decisions of government.

Some of the scholarship criticizing *Buckley v. Valeo*⁴⁸ has confronted similar questions. Once one concedes the obvious existence of huge "inequalities" in political influence, the question arises as to what type of influence is appropriate. Needless to say, the concept of equality is an inherently normative one.⁴⁹ This discussion has often turned into a debate over what are the appropriate inputs as well as outputs of government. As Issacharoff and Karlan have warned, the danger is that proposals will simply seek to enforce the author's "immaculate vision of politics."⁵⁰

While such issues cannot be avoided, the ultimate question is whether, in a society as normatively diverse as ours, we can resolve all these conflicts through legal rules. As Stephen Holmes has

1-2. This goal is not a recapitulation of the civic virtue and "real world" critique of public choice analyses, but rather a recognition that the political process will respond to intervention in self-interested, ideological, as well as problem solving, ways that transform the context in which the original intervention was made.

45. See *supra* notes 11-15 and accompanying text.

46. See *Davis v. Bandemer*, 478 U.S. 109, 137 (1986); *Reynolds v. Sims*, 377 U.S. 533, 565-76 (1964). See also LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 104 (1994).

47. *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

48. 424 U.S. 1 (1976).

49. See *supra* note 18 and accompanying text.

50. Issacharoff & Karlan, *supra* note 38.

observed, "in a liberal social order, . . . the basic normative framework . . . must be able to command the loyalty of individuals and groups with widely differing self-understandings and conceptions of personal fulfillment." As a result, "[t]heorists of justice can achieve [their principal aims] only if they steer clear of irresolvable metaphysical disputes."⁵¹

Admittedly, an underlying theory or political philosophy is always necessary to justify *any* decision about the form of the electoral process. The real question is how much comprehensiveness and detail must that theory possess and serve to implement. As we have observed in the extensive debates over Arrow's Theorem, Civic Republicanism, economic efficiency, and natural rights philosophy, scholars' attempts to articulate a universally accepted vision of democracy have met little success. In a society as socially and politically diverse as ours, we are unlikely to achieve a consistent and comprehensive theory of democracy, that is, a single and accepted system for aggregating individual rights into a collective democratic will.

To the extent this is true, some type of political black box, a pragmatic and evolving political process, is ultimately necessary.⁵² Justice Frankfurter implicitly recognized this conundrum in his famous—and criticized—admonition that the legal process should not be in the business of choosing "among competing theories of political philosophy."⁵³ While critics have rightfully pointed out that the electoral structures we choose necessarily involve an implicit choice as between political philosophies, defenders of Frankfurter can make the opposite claim; politics cannot *simply* be a choice between right

51. STEPHEN HOLMES, PASSIONS AND CONSTRAINTS 203-04 (1995). See also JOHN RAWLS, POLITICAL LIBERALISM (1993); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996) [hereinafter SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT] (suggesting that how people reason is a function of the particular social role in which they find themselves); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 17 (1987) (calling for the "remov[al] from the political agenda [of] the most divisive issues, pervasive uncertainty and serious contention about which must undermine the bases of social cooperation").

52. See Michael Fitts, *Back to the Future: The Enduring Tensions Revealed in the Supreme Court's Treatment of Political Parties*, in THE SUPREME COURT AND THE POLITICAL PROCESS (David Hope ed., forthcoming 2000).

53. *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

and wrong political philosophies. More to the point, courts and academics seeking to resolve the structure of our electoral system should not assume that all choices are capable of normative legal resolution. Some important subset of decisions needs to be left to the political process itself.

Such moral ambiguity may well be “the genius of American democracy”;⁵⁴ it creates the normative slack in which we accommodate our alternative substantive visions of American society and its politics. Of course, no one has suggested that we have already reached the point at which this moral conflict undermines democratic legitimacy; the point is simply that we should recognize the value in scholarly circumspection.

This organic quality of politics underscores the analogy between this issue and the free will debate in criminal law. Over the years, finding a causal factor for human behavior has often served to absolve individuals of moral or criminal responsibility. The more we understand what social or biological factors “explain” the behavior, the less likely we are to hold the individual responsible.⁵⁵ Society is less likely to “blame” a criminal who suffers from a disadvantaged upbringing or psychiatrically identifiable syndromes. Yet, as critics have pointed out, the fact that some underlying social or psychological fact can *partially* explain a human decision does not mean that moral responsibility cannot attach to other factors, such as human choice. The forces of the human mind comprise an infinity of “but-for” causes.⁵⁶ This web of influences constitutes moral agency, the human will. Drawing the analogy to the political context, the attempt to simplify and ultimately reduce politics into theories of segregable inputs downplays the work of politics itself—at least politics in its polycentric and pragmatic form.⁵⁷

54. BOORSTIN, *supra* note 4.

55. See DENNO, *supra* note 6, at 536.

56. See Morse, *supra* note 6.

57. See, e.g., Rogers Smith, *If Politics Matters*, 6 *STUD. IN AM. POL. DEV.* 1 (1992). In this sense, the whole may be greater than the sum of its parts.

V. MORE DEFERENTIAL APPROACHES TO POLITICS

Two older theoretical approaches capture at least part of this synoptic intuition: (1) pluralism and (2) political parties.⁵⁸

A. Pluralism

Traditional pluralists understood the complexity of real world political interactions and the normative appeal of a theoretical system that accommodated them over time. In the famous words of Charles Lindblom, "No person, committee, or research team, even with all the resources of modern electronic computation, can complete the analysis of a complex problem. Too many interacting values are at stake, too many possible alternatives, too many consequences to be traced through an uncertain future."⁵⁹ For Lindblom, the "intelligence of democracy" is the "partisan mutual adjustments" of complex political interaction. Such processes "achieve a coordination superior to an attempt at central coordination, which is often so complex as to lie beyond any coordinator's competence."⁶⁰

The normative theory underlining Lindblom's descriptive analysis is quite pragmatic. The complex process of "mutual adjustment" is supposed to ensure that interested actors will debate and pressure for their preferred outcomes. In this sense, the evolution of interests and ideas held by the public should help resolve the rough structure and substance of political decisions. The end result should be a mutually attractive accommodation.

Interestingly, law and economics scholars have offered a parallel justification for some types of interest group politics. They argue that interest groups often organize and have impact roughly commensurate to their underlying commitment to and investment in issues.⁶¹ While critics have rightfully questioned the robustness and

58. Most law-related attempts to understand politics generalize from very narrow and modeled normative frameworks, whether they be individual rights, civic virtue, economic efficiency, equality or simply "good" social policy. While each of these analytic and normative slices captures part of the dynamic of politics, each misses its synoptic evolutionary character, as reflected in some of the older literatures.

59. Charles Lindblom, *Still Muddling, Not Yet Through*, 39 PUB. ADVOC. REV. 517, 518, 523 (1979).

60. *Id.* at 523.

61. See, e.g., DONALD A. WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE:*

potential biases of the actual practice,⁶² the assumption is that a pragmatic form of interactive social decision-making will arise.

Indeed, legal scholars have advanced an analogous defense of common law decision-making, the most original form of judicial reasoning. Common law processes lack the abstractness and normative clarity achieved by most philosophical theories. At the same time, by grounding decisions in a "rough empiricism" and "test[ing] . . . in a variety of [real world] circumstances," they do offer a rough and pragmatic form of local justice.⁶³ Proponents argue that "[t]he core idea [] of [the] common law" reflects a sensible recognition of "the limits of human reason, and [a] distrust of abstract argument."⁶⁴

B. Political Parties

The traditional justification offered for strong political parties captures a second type of pragmatic political approach. As I have argued elsewhere, the theory of strong parties serves to help resolve one of the central dilemmas of constitutional law—defining majority will—without continued need for explicit judicial line-drawing. Through their competition for public support, a type of political invisible hand, parties serve to transform a legal system focused on individual voters and individual rights into a collective

WHY POLITICAL INSTITUTIONS ARE EFFICIENT (1995); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

62. For the classic criticism, which itself has been subject to much debate, see MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* (1982).

63. Strauss, *supra* note 7, at 892. See also Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 926 (1996); SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT*, *supra* note 51, at 62-100; Sunstein, *On Analogical Reasoning*, *supra* note 7, at 746. But see Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 72-76 (1996) (arguing that analogical reasoning in law does not exist).

64. Strauss, *supra* note 7, at 894. To this extent, the common law approach may reflect a belief in bounded rationality. See HERBERT A. SIMON, *MODELS OF MAN* 198-99 (1957). Pursuing a parallel line of argument, Dan Lowenstein has examined the conservative argument in favor of allowing the state political process to resolve conflicts over racial redistricting. His assumption is that, at the current state of the debate, traditional political resolution of this vexing racial issue may achieve a better and fairer result over the long run. See Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998).

decision-making process.⁶⁵ In the classic words of E.E. Schattschneider, "political parties created democracy and . . . modern democracy is unthinkable save in terms of . . . [political] parties."⁶⁶ Thus, while the legal system indirectly creates and protects parties through legal regulation, the informal competition between parties for support serves to help define the meaning of majority will.⁶⁷

This is not the place to defend any particular theory of parties or pluralism. Certainly, parties do not magically create an optimal political "market," just as the private invisible hand of the economic market does not magically produce efficiency.⁶⁸ There is extensive scholarship on the problems with, and the need to reform, political parties, including determining their appropriate number and form.⁶⁹

At the same time, the *theory* of political parties is important analytically. The competition between parties serves to implement a popular mandate without necessarily involving the courts in resolving the meaning of the democratic vote at every juncture.⁷⁰ It is not surprising, therefore, that very few legal academics, except for the usual suspects, spend any time analyzing the performance of parties. Even though democracy is "unthinkable" in their absence, the value

65. The structure of our party system also enables such resolution to be updated more easily as our political culture evolves. See Fitts, *supra* note 52.

66. E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 1 (1942).

67. Unlike legal intervention in other contexts, however, parties perform most of these roles without direct judicial or governmental oversight. Schattschneider implied this in his classic statement that "democracy is not to be found within the parties, but between them." See *id.* at 60.

68. For the classic description of the problems with monopolistic parties, see V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (1949).

69. See, e.g., Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and the Republicans from Political Competition*, 1997 SUP. CT. REV. 331. Of course, just as our property rights system serves to regulate the private market, a host of legal rules serve to condition how "private political parties" operate, thereby forcing the legal system to confront *indirectly* many of the difficult issues it may seek to avoid. See Fitts, *supra* note 52.

70. For one example of scholarship looking to ensure that parties are robust and focused, but which purports not to decide the outcomes of that competition, see generally Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

of political parties to the democratic debate may be a peculiarly extra-legal one.

VI. CONCLUSION

Most of the points advanced in this article ultimately reduce to a simple proposition—the need for intellectual and professional humility. In light of the complex history of electoral regulation, our ability to predict the impact of legal changes is less than we originally expected. We also are unlikely to achieve a normatively precise theory of democracy that will instruct and resolve all of the heated normative debates over the regulation of the electoral process. Admittedly, these observations are quite general. But my pursuit of this level of abstraction is quite intentional. By keeping the discussion on a fairly high level, I have sought to avoid a debate on the ultimate merits of *particular* interventions, and instead focused on the issues systemically.⁷¹

No particular political agenda lies behind this effort. Intervention into the political process can take many forms and further the interests of a wide variety of different constituencies, liberal as well as conservative.⁷² I agree with almost all of the legal interventions discussed in this article, even in their redirected form. Obviously, the question is not whether we should continue studying and regulating the electoral process, but how. Whatever the purposes of future intervention recommended by scholars, we need to be appropriately circumspect in our prediction of its ultimate outcome.

71. For the record, despite these caveats, I agree with most of the interventions discussed in the paper.

72. For an interesting discussion of this issue, see LOWENSTEIN, *supra* note 3.

