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# Democracy in a New America: Some Reflections on a Title

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# "DEMOCRACY IN A NEW AMERICA": SOME REFLECTIONS ON A TITLE

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*Whatever the quality of the contributions to this Symposium, which is certainly very high, they nonetheless exemplify a certain tunnel vision—or propensity to be confined within conceptual boxes—that ill serves us as we try to determine the future of American democracy. In particular, we should become more comparative in our focus. Academics should also lessen the hold that the Supreme Court appears to have with regard to shaping the academic agenda. Finally, we must be far more willing than we have been to confront the possibility that the United States Constitution is itself significantly flawed, though we are discouraged from any such thoughts by the near impossibility of actually being able to change that document. We thus have a dangerous incentive to pretend that there is no danger attached to adhering to the constitutional status quo.*

I want to offer some very general comments on two central assumptions that not only appear to underlie our particular Symposium, but, more importantly, also serve as the foundation of almost all discussions on the general topic of the state of American democracy in the new millennium. Many such discussions, of course, have been provoked by the electoral fiasco of 2000 and the significant attention thus engendered on the adequacy of our democratic institutions. Perhaps inevitably, though, our discussions are structured by a variety of too often unexamined assumptions whose acceptance helps to constitute what we sometimes refer to as thinking "within the box." As interesting and provocative as all of the

* W. St. John Garwood and W. St. John Garwood Jr. Regents Chair in Law, University of Texas Law School; Professor of Government, University of Texas. Given the somewhat critical tone of what follows, I want to emphasize that I join the other participants in expressing my gratitude to the editors of the North Carolina Law Review for their efforts in organizing, and then carrying out, a splendid symposium. I am also grateful for their allowing me to deviate from my original charge, which was to comment on Professor Terry Smith's interesting paper on ways we imagine "equality," first when thinking about campaign finance and then with regard to the drawing of legislative districts, and instead to offer some observations on how we might organize our thinking about "Democracy in a New America."

contributions to this Symposium are, I believe they might have been even more so had they gone more "outside the box."

## THE NEED TO LOOK BEYOND OUR SHORES

The first assumption is handily illustrated by the title itself, which focuses on "a New America." To be sure, there is vital need for fearless examination of the state of American democracy; the question is how that examination can best be carried out? As a matter of fact, a world-wide discussion of the meaning of democracy has been taking place for at least the last fifteen years, not least because of the "transitions" that have taken place, most dramatically (but not exclusively) in Eastern Europe, South America, and South Africa from authoritarian (or worse) political systems to ones that aspire to achieving some recognition as "liberal democracies."[2] Why shouldn't any discussion of "Democracy in a New America" be informed by simultaneous discussions of "Democracy in a New South Africa" or "Democracy in a New Hungary" and so on? Is it really the case that Americans, concerned about the state of democracy in the United States, have nothing to learn from how these countries are grappling with such common enterprises as organizing elections and attempting to structure "representative" legislative or executive institutions? These questions, of course, are rhetorical, for the answers seem entirely obvious. To take the easiest example, we might well spend less time obsessing over the issue of gerrymandering—a central concern of this conference inasmuch as congressional districting in North Carolina appears now to be a permanent part of the Supreme Court's docket—if we followed the example (and wisdom) of the rest of the world, which, save for Great Britain, relies far less on single-member, territorially-based districting than does the United States.[3] Americans tend to be notoriously

2. *See, e.g.*, CONSTITUTIONALISM & DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3–84, 267–348 (Douglas Greenberg et al. eds., 1993); TRANSITIONS FROM AUTHORITARIAN RULE: COMPARATIVE PERSPECTIVES *passim* (Guillermo O'Donnell et al. eds., 1986); *see also* CONSTITUTIONS IN DEMOCRATIC POLITICS *passim* (Vernon Bogdanor ed., 1988).

3. *See* CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 15–30, 41–52, 73–81 (Arend Lijphart & Bernard Grofman eds., 1984); AREND LIJPHART, ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES, 1945–1990 *passim* (1994); AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES *passim* (1999). There is an excellent short summary of types of electoral systems in SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD M. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 719–22 (1998) [hereinafter LAW OF DEMOCRACY].

parochial in their interests, and I am afraid that this is certainly true when one turns to the discussion of how best to structure the polity. We should work to overcome that parochialism by becoming more aware of alternatives to the way we do things here in the United States and, therefore, becoming, as well, better equipped to challenge the "conventional wisdom" that supports our practices.

Thus, my own candidate for the world's best electoral system, at least on formal grounds, is Germany's, which manages to enjoy the benefits undoubtedly connected with single-member, territorially-based districting while, at the same time, controlling for the equally undoubted problems that are attached to such systems.[4] The solution is relatively simple: only half the Bundestag, the lower House of the German legislature, are elected through single-member districts; the remaining half are assigned through a system of proportional representation, based on the nationwide vote, that includes a "correction factor" that compensates for a party that, say, achieved 48% of the popular vote but, because of inevitable "clumping" of support geographically, gained only 42% of the geographically-based seats. Enough seats are assigned at the second-stage so that the overall representation in the Bundestag will be 48%. It should be obvious that there is far less significance attached to the particular shape of each district than is the case in the United States. The whole point of gerrymandering, after all, is to gain more seats than one would get if proportional representation were the norm, and, concomitantly, to make sure that those who are the victims of the gerrymander are left with fewer seats than might otherwise be the case.

As my former colleague, Sam Issacharoff, once joined in putting it, in what remains one of the very best articles written in the aftermath of *Shaw v. Reno*,[5] we have established a system in the United States by which public officials are empowered to choose their voters, as against the promise, in a representative democracy, that it will in fact be the voters who choose their representatives.[6] We treat this pathology as built into our political system, capable of little, if any, reining in other than through the blunderbuss approach signified

4. *See* LAW OF DEMOCRACY, *supra* note 3, at 721–22.

5. 509 U.S. 650 (1993).

6. "In a democratic society, the purpose of voting is to allow the electors to select their governors. Once a decade, however, that process is inverted, and the governors and their political agents are permitted to select their electors." T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 MICH. L. REV. 588, 588 (1993).

by what almost everyone along the political spectrum regards as the Court's clumsy and unsatisfying attempts to limit "racial" (though not any other) gerrymandering. It is sadly illuminating that even Lani Guinier, who is acutely aware of the need to think "outside the box" about the way we organize political representation,[7] devotes none of her book, subtitled *Fundamental Fairness in Representative Democracy*, to consideration of what might be learned from looking beyond our shores.

One obviously need not agree with me about the glories of the German system, which, no doubt, would manifest some of its own deficiencies if subjected to close examination. But the point is that any really serious grappling with the issues raised by our symposium—and giving all due credit to the excellence of the presentations and ensuing discussion—requires a much greater willingness to look beyond our own borders than has traditionally been evident in the American legal academy.

The limits of the Symposium, organized by a devoted group of students whose energy impressed everyone who visited Chapel Hill, reflect, no doubt, the limits of the view of law taught them. I hasten to add that this is no criticism of the University of North Carolina, but, rather, of my own school, the University of Texas and, if truth be known, of basically all legal education as it is currently conducted. Although almost all schools offer some courses on "comparative law"—and Mark Tushnet and Vicki Jackson of the Georgetown Law School have recently published an excellent casebook, *Comparative Constitutional Law*[8]—such courses have not yet become truly significant parts of the curriculum. They remain "fringe" courses within the consciousness of most students and, equally, the students' professors. Consider the fact that almost no required first-year courses ever pay significant (if any) attention to the ways that similar issues are handled overseas.[9] Yet, as Rudyard Kipling once wrote,

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7. *See, e.g.*, LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 71–119 (1994). A listing of many basic works comparing electoral systems can be found in Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 634, 638 n.11 (2000).

8. VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (1999). It should be noted, though, that only two pages are devoted to consideration of "electoral systems." *See id.* at 713–14.

9. As both the teacher of such a course on constitutional law and the co-editor of the casebook that is used in the course, I can sadly testify that I and my co-editors are not exempt from my own critique. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (4th ed. 2000). As a matter of fact, our casebook includes very little material on the constitutional law of elections, in part because the field has become sufficiently complex that it is, we believe, basically impossible to teach in an

"[W]hat should they know of England who only England know,"[10] which Jack Balkin and I have elsewhere used as the basis for criticizing the insularities of American treatments of law.[11] One is sadly deficient in one's knowledge of American law, especially with regard to organizing the basic political process, if one knows only that body of law, precisely because it encourages us to continue denying in effect that there really are other ways to organize those processes.

Indeed, to make the point as strongly as possible: it would be very healthy for Americans to confront the fact that relatively few political systems throughout the world, whether "developed" democracies or countries "in transition" to such a status, have looked on our basic institutional structures and found them worthy of emulation.[12] To be sure, our insistence on the importance of written constitutions has been highly influential, as is almost certainly the case as well with regard to the importance of written guarantees of individual (and, in many countries, social) rights. But that influence is significantly diminished if one asks about basic structure, such as the degree of independence, or "separation," between legislature and executive or the methods of election by which rulers are chosen. With regard to such issues, the French, German, and Spanish constitutions collectively have been far more influential than our own.

## DOCTRINAL CAGES AND CONSTITUTIONAL POSSIBILITY

My second observation is linked with the first insofar as it, too, focuses on an assumption that serves to fetter our sense of constitutional possibility. That assumption is that discussions of constitutional possibility must invariably focus on the doctrines enunciated by the U.S. Supreme Court. This means, for example, that any discussion of, say, the use of race or ethnicity in drawing legislative boundary lines must necessarily be based on *Shaw v. Reno* and its progeny. As with the lack of comparative focus, I certainly

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"introductory" course. As noted earlier, Issacharoff et al. include helpful discussion of comparative materials toward the end of their casebook, though one does not know, of course, how often teachers using the casebook assign them and discuss them with their students. *See* LAW OF DEMOCRACY, *supra* note 3.

10. Kipling, *The English Flag*, *in* OXFORD DICTIONARY OF QUOTATIONS 298 (3d ed. 1979).

11. *See* Jack Balkin & Sanford Levinson, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1606 (1991); *see also* Jack Balkin & Sanford Levinson, *Constitutional Canons*, 111 HARV. L. REV. 963, 1005 n.134 (1998) (criticizing Justice Scalia's parochialism concerning the utility of comparative materials).

12. *See* Ackerman, *supra* note 7, at 637 n.10. Ironically, it appears that the country most imitative of the United States is Russia. *See id.*

understand this in the sense of being able to explain it. To make the easiest point, if our focus, either as legal academics, law students, or practicing lawyers is simply trying to figure out political and litigation strategies with regard to the spate of lawsuits that will undoubtedly follow in the wake of the new round of redrawing district lines, then one is well advised to pay attention to the views of the current majority of the Supreme Court.

But, of course, there are other questions that can profitably be asked besides predicting the response of the current Court to certain legislative outcomes, especially if one is a legal academic presumably charged to take a broader perspective than that of the actively litigating lawyer. Our fixation on the Supreme Court as the fount of constitutional learning serves to deprive us of the ability to say, forthrightly, "the Supreme Court is wrong in fundamental ways, and our emphasis should be on how most effectively to encourage the reversal of direction." In order to make such arguments, though, one must liberate oneself from the iron cage of doctrinal analysis and be willing to look to other approaches to the Constitution. As my colleague Philip Bobbitt has long argued, there are many "modalities" of constitutional analysis, and doctrine, with its reliance on precedents, is only one of them.[13]

One reason that some give for emphasizing doctrine is that the Supreme Court is indeed, as it often describes itself, the "ultimate interpreter" of the Constitution,[14] so that whatever the Supreme Court says just *is* what the Constitution means. There is, as I have argued elsewhere,[15] no good reason to accept the Court's exaggerated, even megalomaniacal, sense of its own privileged status as constitutional interpreter.[16] Indeed, given that there is no reason to believe that members of the current Court, trained only in the techniques of legal analysis and quite devoid themselves of any meaningful experience in the electoral process itself, have any genuine insight into how best to structure the electoral system, it is

13. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991).

14. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 37–46 (1988) (delineating the difference between "protestant" and "catholic" approaches to institutional authority to interpret the Constitution).

15. *Id.* at 47–50.

16. This megalomania is well illustrated, of course, in *Bush v. Gore*, 121 S. Ct. 525, 532 (2000), but all too many other recent examples could be offered, including *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), and *U.S. v. Morrison*, 529 U.S. 598, 607 (2000), both of which stand for the proposition that the Court, and the Court alone, is authorized to decide what could count as a violation of the Fourteenth Amendment with regard to authorizing congressional action under Section 5 of the Fourteenth Amendment. The current Supreme Court is by far the most "papalist" in our history.

especially important to be skeptical of the adequacy of judicial doctrine to provide cogent answers to truly complex dilemmas.

It is, of course, unrealistic to believe that the Supreme Court will lose its special role as constitutional interpreter. But we can, perhaps, work to tame its excesses if we pay more attention to the Constitution as *we* believe it to be best interpreted and less attention to parsing every paragraph of judicial opinions that should be overruled as soon as possible. Even if the Court remains untamed, though, at least we can work to diminish its legitimacy and empower the general community, including our own students, to take issue with its analyses. This would, perhaps, help to empower those of us who strongly disagree with the Court's current directions to work actively to discourage the appointment or confirmation of successor judges who seem eager, or even likely, to continue implementing its handiwork. Successfully to defend such a strategy, however, requires a systematic critique of that handiwork, in effect its delegitimation by redescribing it as "politics" or "ideology" rather than simply "what the Constitution means (because the Supreme Court says so)."

## CONSTITUTIONAL CAGES AND IMAGINATIVE POSSIBILITY

It is not only the doctrinal structures imposed by the Supreme Court that limit our sense of imaginative possibility. The Constitution itself serves to stifle us, to place us into boxes that needlessly confine rather than necessarily serve to help implement the inspiring vision of a "more perfect Union" spelled out in the Preamble. Consider the fact, for example, that the recent election exposed certain fault lines imposed by the Constitution, particularly the Electoral College and the mechanism for breaking deadlocks in the Electoral College elaborated in the Twelfth Amendment.[17] One might believe that any discussion of "Democracy in a New America" would ask if the institutional structures created by the Framers in 1787 (and modified by the 1804 Amendment) adequately serve our present needs. If not, then presumably we might talk about the desirability of changing them.

It is possible, of course, that America will continue to muddle through future elections that occur within unchanged structures. If, after all, George W. Bush has been so easily accepted by most Americans as a legitimate occupant of the White House, in spite of the irregularities of the process by which he got there, then, one is

17. As to the Twelfth Amendment, see Sanford Levinson & Ernest Young, *Who's Afraid of the Twelfth Amendment?*, 28 FLA. ST. L. REV. (forthcoming 2001).

tempted to say, Americans will accept just about anything. As Bobby McFerrin might put it, then, the proper attitude is "Don't Worry, Be Happy." If that's really the case, though, then there is simply no rationale for having brought all of us to Chapel Hill to anguish about the meaning of "Democracy in a New America," because, it turns out, it will turn out to be almost exactly like "Democracy in Old America," and everybody will be accepting of that reality. (Or, what is more likely, and far more ominous, is that those who are dissatisfied will be increasingly marginalized and left out of the "official" political process.)

To put it mildly, I am disturbed by the remarkable complacence that underlies such a view. One need not believe that the United States of America is at all as fragile in 2001 as the Union of Soviet Socialist Republics was in, say, 1989, but one *can* learn from the events of that earlier decade that amazing things can happen even in apparently stable political systems. There is a certain wisdom in the adage, "If it's not broken, don't fix it." But it's foolish to be almost mindlessly self-confident either that there is no danger of breaks occurring or, more to the point, that one should always wait until the accident happens to begin thinking about how to fix it. No lawyer would ever suggest to a client operating a dangerous activity to wait for a disaster rather than engage in some pre-emptive measures that would reduce the likelihood of the misfortune occurring in the first place.

Unfortunately, though, we don't regularly engage in conversations about what might be necessary to forestall foreseeable problems. The reason, I believe, is not simply a proclivity on the part of Americans, including legal academics, toward an often unwarranted optimism or, far more ominously, a fear that being labeled a critic of American verities will disqualify one from public office.[18] Rather, I think that a great deal of the explanation lies in Article V of the Constitution, which makes it next to impossible to

18. Thus Bruce Ackerman notes the importance of the "Lani Guinier Affair," Ackerman, *supra* note 7, 638 n.11, referring to the vicious attacks leveled on Professor Guinier following her nomination by President Clinton to head the Civil Rights Division of the Department of Justice. Just as important, I believe, was the way that the President, when withdrawing her nomination, appeared to give credence to the attacks by completely distancing himself from her views, which, he proclaimed, he had only recently read for the first time. One could readily discern from this dismaying episode that it was basically unpatriotic to suggest that American democracy might suffer from grievous flaws that merited correction. As Ackerman writes, this treatment of Guinier "has been an intellectual disaster that affects us all, regardless of our politics—marking the subject of electoral reform off-limits for those scholars who harbor the thought of public service." *Id.* This is true whether or not one agrees with Professor Guinier's specific views.

amend the Constitution and serves as the ultimate iron cage. The reason is the truly extraordinary majorities that those seeking to change the document are required to gain. It is far more "sensible" to talk about what might in fact be subject to change, whether doctrine (which could, presumably, be changed by judges themselves) or statutes (which could, presumably, be changed by passage of new legislation). To talk about constitutional change sounds "academic" in the most pejorative sense, little better than discussing how many angels indeed could dance on the head of a pin. Although this attitude might be readily understandable—who among us wants to be dismissed as an "academic airhead"?—it may not always serve our fellow citizens or our students.

It is possible, of course, that optimists are correct and that my own fears are absolutely meritless. I would have far more confidence in that conclusion, though, if I had a firmer sense that those who are most knowledgeable about the electoral system, including the participants in this excellent Symposium, had confronted the deepest, most radical, critiques of that system and demonstrated why we should continue to feel confident in disregarding them. All of us learned as children that one should not be too quick to cry "Wolf" or proclaim that the sky is falling. But the moral of the first story, after all, is that the wolf *did* finally attack the child, who was disbelieved because he had been precipitous before in his cries. Academics should be slow to arouse, and especially to alarm, the public, lest they (or we) indeed be dismissed as over-eager doomsayers or Chicken Littles. But we should be just as fearful about reinforcing a tendency toward parochial complacence that can be every bit as dangerous.

The last election was more than a fiasco. It should also be treated as the equivalent of an alarm going off that signals the presence of genuine dangers in the American system. Or, to switch the metaphor slightly, we should realize that the canary has died, and those of us left in the mine should make haste to understand what threatens us. It is, of course, altogether understandable why neither the present occupant of the White House nor the current majority of the Supreme Court has the slightest incentive to admit to the presence of, and therefore to confront, these dangers. This does not excuse the rest of us, and a good place to begin our analysis is to look outside our borders for any wisdom we might find there.