On Democracy: Fair Elections Are Freedom’s First Bulwark

Dan Ortiz brings a formidable array of intellectual interests and accomplishments to bear on the wide range of legal problems his scholarship confronts. A hint of the breadth of his interests was already apparent as an undergraduate at Yale, where he majored in mathematics, English, and an interdisciplinary program in History, Arts and Letters. He then studied Shakespeare at Oxford before turning to law. Ortiz’s career as a legal academic has been marked by a similarly expansive inquisitiveness. His teaching portfolio includes contemporary legal theory, constitutional law, election law, administrative law, civil procedure, cyberlaw, and occasionally even ERISA. His scholarship is equally broad, covering employment discrimination, family law, administrative law, political theory, and affirmative action, among others. His most frequent forays, however, have been into election law, making him one of the country’s foremost experts in that field. In a recent article, From Rights to Arrangements, 32 Loy. L.A. L. Rev. 1217 (1999), Ortiz noted some of the consequences of the development of election law as a separate field of study. Most notably, he argued, election law had come to be less single-mindedly focused on a set of rights and more interested in the institutional structure of campaigns and elections. This latter focus is essential, Ortiz observed, in order to make effective the rights of speech and political participation.
It was only natural, then, that Ortiz was selected as the legal coordinator of the Task Force on Legal and Constitutional Issues for the National Commission on Federal Election Reform chaired by former Presidents Carter and Ford. In that capacity, he edited and contributed to the Commission's recently-released background reports on legal issues, The Federal Regulation of Elections (2001) and What Counts as a Vote? (2001).

Ortiz's work for the Commission is emblematic of another consistent feature of his teaching and scholarship. He is equally at home in the worlds of theory and practice. While his writings have grappled with positive political theory, democratic theory, civic republicanism, law and economics, and feminism, they are also informed by his close contact with the world of practice. For several years, he chaired or co-chaired the Election Law Committee of the American Bar Association's Administrative Law Section and was a member of the Administrative Law Section's governing council. He is also currently serving as counsel in two major pieces of litigation.

Another thread that unites Ortiz's scholarship is a careful analysis of the assumptions underlying competing normative positions. Whether or not he takes a normative viewpoint on a topic, he attempts to uncover the unspoken premises that drive the potential stances. For example, an early article, The Myth of Intent in Equal Protection, 41 Stan. L. Rev. 1105 (1989), took a novel look at the Supreme Court's imposition of an intent requirement in equal protection cases. Most commentators had criticized the requirement as inappropriately applying a notion from criminal law to equal protection and as focusing constitutional concern narrowly on discriminatory purposes rather than more broadly on discriminatory outcomes. The requirement's defenders, on the other hand, justified it by saying that equal protection should protect against only bad purposes, not bad outcomes.

Ortiz, by contrast, looked carefully at the actual ways the Supreme Court had applied the doctrine and argued that it did not fit the description both sides had implicitly accepted. In fact, it represented, under a single head, a divergent set of context-specific doctrines. In the areas of employment and economic regulation, the Court was applying the doctrine somewhat as described and looking at purposes rather than at outcomes. Yet in jury selection, criminal, and voting cases, the Court employed the doctrine largely to police outcomes rather than purposes, focusing more on discriminatory impact than motivation. By carefully setting out the details of the Court's doctrinal application, Ortiz was able to see that the intent requirement represented several different requirements—some having nothing to do with traditional intent—that applied in different kinds of cases. He then explained the pattern by noting that the Court was, in effect, trying to separate cases that discriminate on the basis of race from those that discriminate on the basis of wealth—not a suspect classification, but one sufficiently correlated with race to justify a shift of the burden of proof. The explanation gave equal protection doctrine a deep coherence, but one very different from that of the Court and commentators.

Ortiz has employed a similar approach in his extensive writings on election law. The current debate over campaign finance regulation—a debate in which Ortiz has been very active in the pages of law reviews and in Washington—is usually pitched as an argument between equality and liberty. Those favoring campaign finance regulation usually argue that it is necessary to maintain equality among voters. If one side spends much more than the other, the outcome will at least partly reflect the candidates' relative economic power rather than the power of their ideas. Those opposing campaign finance regulation usually argue that it unconstitutionally burdens political speech, the most important kind of speech.

It was one they could personally help fix.

One group that heard a call to do something was the University of Virginia's Miller Center for Public Affairs, sponsor of several national commissions that have looked at such problems as the separation of powers, the selection of federal judges, presidential disability and administrative transitions. In partnership with The Century Foundation, a New York-based research foundation that analyzes economic, political and social issues, the Miller Center promptly formed a new commission to recommend reforms of the electoral system. The National Commission on Federal Election Reform united

SHOULDN'T WE HAVE FIGURED OUT HOW TO RUN AN ELECTION BY NOW?

Election night 2000 wasn't half over before every political science professor knew that the Florida vote count was academic pay dirt, and by the time the U.S. Supreme Court decided Bush v. Gore America's law professors knew they too had plenty of fare to chew on. But for some, like Dan Ortiz, the problem was more than scholarly.
Ortiz’s innovation is to see that this debate springs largely from two deeper ones—a debate over how people actually make political decisions (a descriptive issue) and how they should make them (a normative one). In *The Democratic Paradox of Campaign Finance Reform*, 50 Stan. L. Rev. 893 (1998), he points out that those favoring campaign reform must believe that many voters make political decisions in a sloppy way. If all voters inform themselves of the issues and carefully think through their choices, restricting political advertising would be indefensible. The voters themselves would simply sort through it, using any information they find helpful and discarding the rest. Mass advertising, in this view, could only help political decisionmaking. It poses no danger of unfairly influencing voter choice.

Those opposing reform, on the other hand, must believe either (i) that voters do make decisions in this careful way or (ii) that democracy does not care about how they make political decisions. Under this first view, unbalanced advertising would make no difference to voters’ political decisions. If it affects their choices, it does so in a good way by giving them more information, some of which is relevant to their decisionmaking. This second view is more interesting. Under it, the First Amendment protects all ways of making political decisions equally. If a person chooses candidates on the basis of their looks, that is fine. If she wants to vote for the side that advertises more heavily, that is fine too. Democracy, in this view, is agnostic as to how people should make political choices. To anyone who believes this, any campaign finance regulation will be anathema.

Ortiz is an insightful critic of political and constitutional theory. For example, in *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 Va. L. Rev. 721 (1991), he discussed John Hart Ely’s view that the Supreme Court usually does, and should, use judicial review only to correct failures in the democratic process. Ely’s “process theory” stands in apparent contrast to other theories of judicial review, such as originalism, that take an explicitly substantive approach in which courts should strike down laws when Congress “gets it wrong” in some defined way.

Ortiz argues, however, that the distinction breaks down under close analysis. The quintessential process failure is discrimination on the basis of race or sex. Yet both the Court and Ely apply a substantive test to determine which groups get the benefit of heightened Due Process scrutiny. In effect, only when Congress encourages or facilitates the “wrong” kinds of social interactions—wrong by some inevitably substantive standard—does the Court step in. Ortiz further demonstrated that any form of process-based review will be subject to the same failing.

More recently, Ortiz turned his attention to the increasingly prevalent use of communitarian theory in public law scholarship (*Categorical Community*, 51 Stan. L. Rev. 769 (1999)). Communitarians argue that classical liberalism is unsatisfactory because of its relentless focus on the individual and suggest in its place a consideration of groups as fundamental political building blocks. Ortiz notes, however, that legal scholars use communitarianism in a way that repeats the error they claim to find in liberalism. That is, they treat groups—African-Americans, women, homosexuals—as atomistic entities. Ortiz contends, in much the same way that communitarians criticize individualism, that these “categorical communities” are actually extremely complex and variegated.

Ortiz has many projects in his future. One is to approach election law from a new direction. We have traditionally viewed democracy, he says, as political agents serving principals—the voters. We have viewed democratic outcomes as legitimate because we believe they reflect the choices of our agents, whose views represent our own. In

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former presidents Gerald R. Ford and Jimmy Carter as well as former Counselor to the President Lloyd N. Cutler and former House Majority Leader Robert H. Michel as co-chairs of a serious bipartisan effort to prevent another Florida debacle. They also needed a good lawyer and they could probably enlist whomever they picked. But Miller Center Executive Director Philip Zelikow knew he needn’t look far. He called across the University Grounds for Dan Ortiz and Ortiz saw his duty.

The job was to coordinate preparation of the report to the commission on the legal constraints on their policy choices and then advise the commission through its deliberative process. Among those Ortiz called on to help him were Trevor Potter, General Counsel of Arizona Senator John McCain’s presidential campaign and former chair of the Federal Election Commission, and Pamela Karlan of Stanford University, a leading academic on election issues (both have been on the Virginia law faculty).

Ortiz’s team started in February 2001 and the commission expeditiously presented its report, *To Ensure Pride and Confidence In the Electoral Process*, in August. For half that period Ortiz worked at least 20 hours per week, editing the entire legal report and co-authoring the
True, however, most voters are insufficiently engaged to be thought of
as principals. Rather, they function as consumers of political products
produced by others, most notably political parties. Under this new view of
democracy as consumption, many electoral rules and mechanisms
must be rethought. Ortiz set the stage for this rethinking in "Courting
Isolation" (Columbia Law School). Ortiz hopes to work out this new
appoach to the area through a series of articles and perhaps a book.

Traditionally, political parties have been conceptualized as
vehicles for carrying out the aims of those whom democracy sees as
principals. Voters serve democracy, in this view, because
they help carry our the aims of those whom democracy sees as
principals. The truth, however, is that political parties do much more than
that. They help voters that voters might otherwise not acquire, help voters evaluate
information, and serve to discipline political representatives. They tell party candidates
opportunities for advancement, make decisions about which one to
push or how to raise funds for their races, and help present them
on the market. They, in short, produce product - both policy and
course, the ubiquitous political consultants. They tell party candidates

Two-Party System

How the Major Parties Harms the Autonomy Versus

Duopoly

Wayne Grove

Two-Party System

Major Parties
party also organizes important get-out-the-vote efforts to ensure support for all its candidates at the election. The rise of soft money, in fact, has greatly enhanced the parties' power over their candidates and partly reversed the much-noted move towards candidate-centered elections of recent decades. Increasingly, the parties look less like faithful handmaidsens to the voters than corporations competing for the voters' business. In politics, they, not the voters, are the ones who produce a product; they, not the voters, develop and manage candidates and their associated policy positions. Or at the very least the parties do enough of this to dispel any characterization of them as "mere" agents.

This movement is probably inevitable. The collective action problems that lead to rational voter ignorance and weak participation force us to seek institutional arrangements to do the work of democracy instead. Those arrangements, however, go past agency. Indeed, the assumptions of insufficient individual interest in politics that drive the agency defense of political parties largely unwind that defense in the end. The more we allocate political work away from ourselves to others, the less we look like political principals. At some point, agency tips towards production; agents towards producers; and the traditional principals towards consumers. And our model of democracy as highly intermediated agency gives way to democracy-as-consumption.

But is there any justification for democracy-as-consumption apart from inevitability? Can the move from individuals actively managing politics to driving it as consumers through the invisible hand of choice on the market be justified in terms of democratic theory? Perhaps. First, this move may allow us to better see what our political institutions are doing. Right now many, including political parties, do not fit the descriptions we have of them. If we see many political organizations as agent-intermediaries, much of what they do seems inexplicable, if not dangerous. We should never, for example, in this view give the model, in fact, has an interesting dynamic quality. To those

really understand their problems — such as the blind not being able to vote in secret — and how those problems affected their view of the political process. Many people with disabilities feel marginalized in this great national civic event. For most of us, voting really represents being part of the political community, not just getting our preferences counted. We make voting secret partly in order to make its sacred role in democracy more distinct.

The first several of the report's 13 policy recommendations he considers particularly important. "Number one, each state should adopt a system of statewide voter registration, perhaps linked to driver's license information," he said. "Number two, every state should permit provisional voting by someone who claims to be a qualified voter in that state. Provisional ballots would be counted after a voter's eligibility has been confirmed. The Commission was also unanimous about restoring felons' voting rights."

"The Commission's report is going to help," Ortiz asserted, noting that it will be the subject of congressional hearings this fall. "It was a genuinely independent investigation and the commissioners themselves are very highly respected."

Though generally unanimous the commissioners did ultimately
individuals who take the greatest interest in politics—party activists and other politically engaged individuals—the model grants more power than it does to others. Indeed, with respect to party activists, the party does look more like agent than producer. Since party activists are the ones who trek to party conventions and party committee meetings and regularly vote in party primaries, they are the ones who disproportionately set the party's agenda—along with party bosses and party candidates—and pick its candidates. They help make the conscious production decisions for the rest of us.

Democracy-as-consumption allocates work away from those individuals who quite reasonably do not want to do it to institutions that do. It does, however, ultimately allow those individuals to guide politics through their role as consumers of the goods these institutions produce. Every vote represents a consumption decision among various bundles of political goods and the aggregate of those decisions guides the markets. The invisible hand thus rewards those producers who provide the particular bundles of goods the voters want and keen competition among producers should ensure that they actually serve the market rather than themselves. A party that refuses, after all, to provide the goods voters want will fail in the face of competition from others.

To many, including myself, this view stands depressingly agnostic as to how people should make political decisions. Like most economic models, democracy-as-consumption respects consumer preferences as given. Whether someone votes on the basis of ideology, policy, naked self-interest, advertising effect, or candidate looks matters not. Democracy-as-consumption aims to give voters what they want no matter why they want it. Yet, this may be the best we can do. The unavoidable collective action problems of politics may make this the most sensible vision of democracy obtainable. We may be able to soften some of its more worrisome features through campaign finance regulation, but

we would be rightly suspicious of any inquiries into why voters hold certain preferences and would presumptively reject any efforts to exclude some from voting because of those reasons. This form of democratic agnosticism, however, is not new. It actually underlies much current political practice. Most of the existing constitutional rules of campaign finance, for example, reflect it. The only difference is that democracy-as-consumption makes agnosticism more pressing because it makes it more transparent.

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agree on a few things. "There was great discussion, pretty much following ideological lines, about whether the proposals should be mandatory or only apply if the states accepted federal dollars. I think in the end there will be a federal subsidy to states for election administration, but how much and with what strings attached is not clear. At a minimum, each state should have to describe objective standards of what counts as a vote." Of all the proposals, the most resistance has come to the suggestion that Veterans Day be declared a national holiday for holding elections, he said. "Some veterans feel it distracts people from remembering the day's original purpose."

Yes, things that we think ought to be straightforward, like voting, aren't. "There's an amazing diversity of ways of doing things and of needs, and everything is more complicated than you think. For instance, many have proposed going to optical scan forms but Los Angeles needs ballots in 10 or 11 languages. That would make them incredibly expensive to print and draw money from other uses. So punch cards do have virtues. One way to improve them would be to have machines that verify the votes. A voter could insert a completed ballot in a machine and find out if the ballot accurate reflects the intended vote. If a mistake
shows up, the ballot could be destroyed and a new one filled out.

"You could say I learned a lot about the ways of academics and the real world," Ortiz reflected.

"Academics tend to be less interested in details, but the county registrars were keenly sensitive to them."

Long active in campaign finance reform, Ortiz's next project is to help prepare a new edition of *Campaign Finance Reform: A Sourcebook*, to be published by the Brookings Institution. This time his involvement is more scholarly.

"Most people involved in these subjects really enjoy the mechanics of politics and schmoozing with politicians. But to me that's not the attraction. I like thinking about the underlying values and how well our system implements them. I like to think about politics structurally. My interest is more in studying than in living it."