“No theoretical principle is a substitute for a close examination of the Constitution’s intricate clockwork.”

JOHN HARRISON — PAGE 8

“Asylum seekers present a spectrum of situations, with only subtle shadings distinguishing the risk levels they face. Adjudication must draw a line at some point.”

DAVID MARTIN — PAGE 22

“Despite the negative connotations of the label, democracy-as-consumption might offer a better normative theory for contemporary politics.”

DANIEL ORTIZ — PAGE 38
INTRODUCTION

This publication celebrates the scholarship of the University of Virginia School of Law. Each year, the Virginia Journal presents in-depth intellectual profiles of three scholars, plus a survey of recent publications by the entire faculty.


These choices reflect a wide variety of interests, perspectives, opinions, and methodologies, but a consistent dedication to excellence. Our goal is to maintain an intellectual community where the broadest range of opinion and debate flourish within a framework of common purpose. Every person honored by the Virginia Journal has contributed to that goal, not only by his or her published work, but also by constructive participation in our community of scholars.

This year's Virginia Journal presents three members of our faculty:

JOHN C. HARRISON is a tenacious advocate of text-based constitutionalism. His prolific scholarship focuses chiefly on structural questions, including the lawfulness of the Reconstruction amendments, the power of Congress to control precedent, and the origins and implications of judicial review. John's work is always historically informed and closely reasoned. The combination of imagination and rigor is rarely equaled in the legal academy.

DAVID A. MARTIN is one of the nation's leading thinkers and doers on immigration policy. He has served as General Counsel of the Immigration and Naturalization Service and has published widely on questions of citizenship, immigration, asylum, and refugee law. In this highly polarized field, David's scholarship stands out for the scrupulous care with which he compassionate claims of immigration advocates and the legitimate needs of immigration control are weighed and balanced. He combines practical experience and wide reading in history and theory to produce scholarship that is at once informative on questions of contemporary public policy and rich in deeper meaning.

DAN R. ORTIZ is one of the legal academy's most wide-ranging intellects. He has published scholarship on topics ranging from voting rights and political structure to feminism and constitutional theory. In all these fields, Dan is a boisterous champion of ideas and a hard-hitting critic of convention. He is also a teacher of contagious enthusiasm. Both in the classroom and in collaborations with colleagues, Dan brings to bear wide learning, a fertile intellect, and unsurpassed generosity.

John C. Jeffries, Jr
Dean
The Constitution Outside the Supreme Court

AFTER THE DISPUTED PRESIDENTIAL ELECTION OF 2000, commentary poured out from constitutional law scholars. John Harrison wrote about one aspect of the problem in a short article called Nobody For President, J. Law & Politics (forthcoming 2001). Like much of Harrison’s writing, it is informed by history, here the problem presidential elections of 1800 and 1876, and relies on a close reading of the Constitution. And like most of his work, but unlike the vast bulk of what has been written about the 2000 election, the article is not concerned with Supreme Court cases. Harrison wrote about Bush versus Gore without writing about Bush v. Gore.

Instead, he wrote about a question the Supreme Court never has faced and likely never will: whether Congress, when it meets in joint session to count electoral votes, has the constitutional authority to resolve disputes conclusively. In 2000 the apparent consensus among politicians, pundits, and scholars was that Congress has that power. The issue was not academic. At one point it seemed possible that the Florida Supreme Court would order the certification of a slate of Gore electors at the same time the Florida legislature selected Bush electors under a federal statute of doubtful applicability. That statute provides that when two sets of electoral votes have been received from a state, the set certified by the governor shall be counted unless both Houses of Congress
decide to the contrary. With Jeb Bush as governor of Florida and the Republicans in control of the House of Representatives on electoral count day, so talking heads pointed out, things looked bleak for Gore.

According to Nobody For President, however, the premise of the whole debate was flawed, because Congress is not the final judge of presidential elections. No one is, Harrison says. Central to his argument is the familiar lawyer's principle, excepio unius est exclusio alterius. Article I, Section 5 of the Constitution explicitly makes each house of Congress the judge of disputed elections to that house. But while the Eleventh Amendment provides that the electoral votes shall be counted by the vice president in the presence of the Senate and House of Representatives, it does not make that joint session—any other officer or institution—a final arbiter. This may be an error of constitutional design or a brilliant stroke that forces ad hoc political compromise when presidential elections go awry, but it is the import of the Constitution's text, structure, and history, says Harrison.

Most constitutional scholarship is about Supreme Court cases. Scholars criticize the Court's decisions, attempt to devise a theory to explain them, or develop legal arguments based on them as would practicing lawyers. Harrison's work, by and large, is not like that. His first major article, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1185 (1992), is about the Privileges or Immunities Clause of the Fourteenth Amendment. Although the amendment's authors thought the clause central to their work, the Supreme Court construed it so that it had negligible practical significance, thus there is almost no case law about it. Harrison argued that the Privileges or Immunities Clause, and not the Equal Protection Clause, was originally designed to be the Fourteenth Amendment's primary ban on race discrimination. That is a fairly radical claim, but it does not say any-

thing about existing precedent—except that it got off on the wrong foot.

In similar fashion, Harrison's recent article, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375 (2001), addresses an issue the Supreme Court studiously avoided when it arose and has said almost nothing about since: whether the coercive measures Congress used to obtain ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments were so extreme as to make those amendments invalid. Although the question has little practical significance today, it is back on law professors' agendas because constitutional theorist Bruce Ackerman of Yale has based his theory of American constitutional development on the thesis that the Reconstruction Amendments were illegally adopted, and thus represent a piece of extra-constitutional political change just as revolutionary as the adoption of the Constitution itself.

Harrison's article, the first detailed examination of the topic, concludes that the amendments were validly ratified despite severe irregularities in the process. He points to the familiar principle of international law according to which the actions of a de facto government legally bind the country in question, whatever doubts there may be about that government's de jure status. When Cromwell's forces executed King Charles I and instituted the Commonwealth, the crowned heads of Europe looked on in horror, but they treated the new government as if it had full legal authority. Harrison points out that this principle was well known to Americans at the time of the framing and afterwards, and has some manifestations in American domestic law. Because the southern state governments that ratified the Reconstruction Amendments were de facto in command, he maintains, they had the power to act in the Article V amendment process.

Harrison explains that his approach to constitutional law has both some systematic and some accidental origins. One serendipitous

Professor Antonin Scalia, who held that position under President Ford. The Office of Legal Counsel advises the Attorney General, the rest of the executive branch, and the President on a wide range of issues, including especially those having to do with separation of powers. How much does Harrison's approach to constitutional law reflect the OLC agenda?

"Lots. Pretty thoroughly, when I think about it. OLC specializes in structure, from headline stuff like war powers to micro-level stuff like the President's pocket veto. I went to the Office interested in those questions and came out fascinated by them. When the 2000 election put a bunch of those issues above the fold in every American newspaper, it was OLC heaven."
aspect is that Harrison came to law at a time of renewed interest in the original understanding of the Constitution. Indeed, as a student and then a law clerk for Robert Bork, and a staffer for Reagan's Attorney General Edwin Meese, he was close to the epicenter of that renewed interest. Harrison explains, "Whatever one makes of the normative claim that constitutional doctrine should be measured against the original understanding of the text, recovering that understanding is independently interesting."

Another partly accidental explanation, Harrison suggests, comes from another phase in his government experience. From 1989 to 1993, he worked in the Department of Justice's Office of Legal Counsel, which advises the President, the Attorney General, and the rest of the executive branch on sensitive legal issues, particularly constitutional issues. That office specializes in constitutional topics that rarely come to the courts. A leading example is the constitutional allocation of the war power between Congress and the President. The courts have been extremely reluctant to touch that issue, even though presidents have frequently waged war with limited authorization from Congress. But the Office of Legal Counsel must confront the issue and has developed its own body of legal doctrine on that all-important topic.

Beyond the biographical accidents, though, Harrison finds more fundamental reasons for his orientation away from constitutional case law. "One of the main attractions of being an academic is the opportunity to develop a more comprehensive understanding of whatever you're thinking about. If you're interested in the Constitution and constitutional law, having a more comprehensive view involves thinking about the constitutional system as a whole, and judicial doctrines are only part of the larger system. Americans now have a better feel for that than they did ten years ago, I suspect, because they've seen a presidential impeach-

ment. Crucial constitutional questions were debated in non-judicial fora. We were all reminded about the rest of the system."

"Interesting legal scholarship often tries to explain legal doctrines. But in a lot of constitutional law, explanations are either too easy or not intellectually exciting and often both. That's because a lot of constitutional law, especially the kind of constitutional law that gets written about the most, just reflects the individual attitudes of judges and especially Justices. Chief Justice Rehnquist thinks states should have a lot of autonomy relative to Congress, so he believes in state sovereign immunity. Justice Souter disagrees. So they voted differently in Seminole Tribe, and Rehnquist won because he had four more votes and Souter only had three. So Seminole Tribe is too easy to be worth explaining. On the other hand, why did the Court reject the argument for state autonomy in the U.S. Term Limits case? Because Justice Kennedy switched sides and voted with Justices who take a less expansive view of state autonomy. That may be hard to explain, but it's not interesting, at least for a law professor as opposed to a psychologist."

Does that mean Harrison thinks that there's nothing to be gained by trying to explain constitutional doctrine? "No, it means that I don't think there's much to be gained from trying to explain the parts that reflect the particular views of particular judges. But there are regularities in judge-made constitutional law that seem not to reflect individual attitudes because the judges don't disagree about them. Those regularities are worth explaining."

Of course, any principle held in common by Justices across the ideological spectrum might be so obvious as not to need explaining. Harrison, though, thinks that at least some of those shared assumptions are worth puzzling over. An article he's working on now tries to unravel one of those shared assumptions, an assumption so basic that it is easy

color

While his work reflects an interest in separation of powers, Harrison may be best known in the academy as an originalist and a textualist. Does that have an OLC connection? "Absolutely. Maybe there's something about the Office's work that makes originalism seem more plausible because the past seems so present. The unitary executive problem is a great example. OLC is constantly involved in struggles over the President's authority over executive agencies. That was thoroughly thrashed out in the First Congress in 1789. The arguments used in the 1980s could have been xeroxed from the debates in the 1780s; nothing was new."

"Same for the text. Often the Office will have to unravel some complex statute that the executive branch must administer and that's received no judicial gloss. That means text and legislative history, and legislative history comes from Congress, so OLC sometimes empties the salt shaker on it. That leaves text, which is more interesting anyway. Same with some parts of the Constitution, like the President's power to make temporary appointments while the Senate's in recess. There's a lot of practice on that one, but the text is still the starting point and does a lot of the work."

Most of the time, being lawyer for the Attorney General and the Counsel to the President means being in the back room. From time to time, though, the head of OLC appears on the public stage. On
to overlook. A familiar concept in constitutional law is "facial invalidity," meaning that a legal rule is wholly unconstitutional and may not be applied to any situation. In the past few years law professors have debated how widespread that phenomenon is, and whether constitutional limitations like the First Amendment usually or even always result in the facial invalidity of the laws to which they apply.

"When I started thinking about that problem," Harrison said, "it occurred to me that it is an aspect of a basic feature of constitutional law, one of those pervasive principles on which the judges don't differ. It's true that some rules are invalid on their face. A classic example, from some famous cases about ten years ago, is a ban on flag burning. A statute that bans flag burning may not be applied, even if the flag was stolen. The flag burner could be punished for theft, but not for flag burning. That's one standard configuration. Other rules, though, are invalid in some instances but not all. Recently the Court held that the First Amendment gave the Boy Scouts an exemption from the New Jersey law that forbids discrimination on the basis of sexual orientation. But while the Boy Scouts get an exemption, most groups don't. Businesses don't. So some rules are partly constitutional and partly unconstitutional. Finally, just as some rules are invalid per se, some rules are valid per se. The central example of the latter is the law of private property. If you're arrested for trespassing, it's no defense that you were holding a political rally. Hold your rally on your own lawn, not your neighbor's. All this is well established, a matter of consensus among judges of very different views. They may disagree about which cases fall into which box, but they agree implicitly (no one notices it) that there are three boxes."

"Why is that? I'm trying to find out."

John Harrison is John Harrison's contribution to the long-running debate over that topic. He maintains that a close reading of the Constitution's text demonstrates that congressional power is extensive. In this excerpt from the last section of the article, Harrison addresses the objection that his interpretation is inconsistent with the substantive principles that the text is designed to reflect. The principles most often relied on by those who believe in more limited congressional power are "coextensiveness," the notion that the jurisdiction of the federal courts must match Congress' legislative jurisdiction and so must extend to every federal-question case, and judicial independence.

There is still more serious methodological difficulty with [this] argument. The difficulty is that structural principles such as coextensiveness, even if identified correctly, generally lack resolving power in deciding questions of detail. This is so because structural principles are not constitutional rules, or even the aggregate of constitutional rules. Rather, they are hypothesized guidelines for design. Consider

The Power of Congress to Limit the Jurisdiction of Federal Courts

one such occasion, Harrison was recruited to be the property master. "When I was in the Office during the first Bush administration, the Supreme Court invalidated a Texas statute that banned flag desecration. The Administration was supporting a constitutional amendment in response. At the Senate Judiciary Committee's hearing my boss, Bill Barr [later Attorney General] used me as his prop easel. The alternative to a constitutional amendment was a statute; in an attempt to make it constitutional, the statute's supporters made it very broad, so that it would forbid any physical destruction of a flag, whatever message was being conveyed. Bill wanted to make fun of that approach. So he had me holding up the plastic case containing the flag that went up San Juan Hill with the Rough Riders while he went on about how under such a silly law you couldn't make a movie of that, because you couldn't show the flag getting shot full of bullet holes."

During Harrison's tenure the Office was involved in supporting the Administration's efforts to have its Supreme Court nominees confirmed. "David Souter's a big friend of Warren Rudman, then a Senator from New Hampshire. Some of us were stationed in a tiny room in Rudman's offices that one OLC lawyer called the 'war closet.' We watched the hearings on TV. For some reason the room had a chalk board. At one point a senator asked a question that I thought was so stupid I threw a piece of chalk at
judicial independence itself. In one sense that phrase can be used simply
to label the fact that judges appointed pursuant to Article III may be
removed from office only by impeachment and conviction. In that sense,
though, to speak of judicial independence adds nothing. It is more inter-
esting to talk about judicial independence in the sense that refers to the
ability of the courts to operate without being subject to the control of the
other branches of government. That is a guideline for design.

Guidelines for design are more abstract and general than con-
crete constitutional provisions. The principle of judicial independence is
more abstract than the protected tenure that actually appears in the
Constitution. The result of this conceptual relationship is that guide-
lines for design... do not determine the content of the rules. Rather,
there usually will be various potential implementations that are all con-
sistent with the same principle. Different sets of rules will achieve the
goal of the principle in different ways and to different degrees. Judicial
independence, for example, is consistent with the Constitution as we
have it, with one in which a simple majority vote of the Senate is suffi-
cient for conviction upon impeachment, and with one in which a three-
fourths vote is required for conviction.... Nor is long tenure with dif-
cult removal the only way to ensure decisions by courts will be free from
executive or legislative influence. Juries also serve that end, but do so
through their brief tenure. The desideratum of independence does not
dictate the manner in which it is pursued any more than it dictates the
extent to which it is pursued.

Design principles underdetermine structural rules. Indeed, most
of the hard work in constitutional design comes not in identifying the
appropriate principles, but in deciding precisely how and to what extent
to implement them.... As the proceedings of the Federal Convention
prove... the crucial question usually is not whether, but how and
how much. One question the Convention had to address repeatedly was
whether to implement a principle by putting a rule about it into the doc-
ument or by giving Congress the power to make a decision.

Article I, Section 10 contains examples of both approaches. [For
example,] Section 10 forbids any State from entering into a treaty,
alliance, or confederation, while leaving to Congress the decision whether
States may enter into agreements or compacts with foreign powers.

In drawing the fine distinction between a treaty and a compact,
the Federal Convention was not simply applying the principle that rela-
tions between States and foreign countries are a federal concern. It was
also making nice judgments of policy on other grounds, drawing distinc-
tions beyond the resolving power of the general principle, and per-
haps recognizing that many principles have exceptions that cannot be
foreseen in advance.

The principle of coextensiveness, if it is to be attributed to the
Constitution, is no different from the principle that state relations with
foreign sovereigns raise federal-level issues: it could be implemented
either with a constitutional requirement that the federal courts finally
resolve all questions of federal law, or with a power in Congress to pro-
vide that they shall do so. Which implementation is better depends on
additional considerations not contained in the principle itself.

To take what may be the most common phenomenon, the prin-
ciple must compete with others, such as the notion that the government
should not make the citizens' lives inconvenient. The latter guideline
underlies the reason most frequently given during the ratification
debates for allowing Congress to curtail federal jurisdiction: the incon-
venience, particularly for those of ordinary wealth, of protracted litiga-
tion. Especially if there were only a few federal courts, all of them appe-
late, it might not be worth the parties' money to have every case with a
dedicated and sophisticated people
are engaged in trying to figure out
what the law requires. The Office's
authority depends in part on its
credibility, which means that it
can't be completely result-oriented.
Once you've seen that happen, it's
very hard to go back to the easy
assumption that the rule of law is
just the rule of courts.

But doesn't OLC have substan-
teive biases, depending on the views
of its head and the Attorney
General, on the President's policies
and partisan identification, and
based on the executive branch's
distinctive interests? "Sure. No
doubt about it. But that's only part
of the story. Just as it's only part of
the story that federal courts decide
in part because of the personal
views of the judges and, frankly, the
political party of the President who
appointed the judges."

"You can play out the analogy.
The courts have a pretty strong
bias in favor of their own power.
Tell an American federal judge that
they do not always have the last
word about the law, and reactions
generally will range from anger to
incomprehension. And no doubt
for similar reasons, OLC has a bias...
federal question decided in federal court. This possibility suggests why the Constitution might implement the principle of coextensiveness in a way that gives Congress substantial discretion over the actual jurisdiction of the federal courts.

Principles interact and they compete with one another. . . . Virtually every principle, every desideratum, of constitutional design is subject to limitation on the basis of the master principle of constitutional design: power is dangerous. For this reason, Presidents and Article III judges have fixed terms, except that they are subject to impeachment, conviction, and removal. Similarly, Representatives and Senators are free from arrest during their session, but only to a limited extent. And the President appoints officers, with the advice and consent of the Senate. And so on and so on. From the standpoint of any principle, checks inserted because of the possibility of abuse will seem incongruous. Judicial independence is not furthered by the possibility of impeachment and removal, but through that process certain forms of judicial misconduct can be checked. The presence in the constitutional mix of a design principle therefore tells us almost nothing about the extent to which its implementation will be limited because of possible abuse of power.

The application of this fundamental meta-principle (a principle about the implementation of principles) to Congress’s power over jurisdiction is plain enough. That power is, among other things, a check on the judiciary. Whether such a limitation on judicial authority should be in the Constitution is a question of design on which commentators differ. Whether it is in the Constitution, however, cannot be answered by the observation (itself doubtful) that the Constitution reflects a design that federal jurisdiction extend as far as federal legislative power . . . [Arguments based on general design principles] are alluring in favor of the President’s power, especially when it comes to war and foreign affairs. In January 1991, on the evening the air phase of Operation Desert Storm began, a number of us were in Mike Luttig’s office (he was then head of OLC, now on the Fourth Circuit). The phone rang and someone said, ‘If it’s the President, tell him the answer is yes.’ Of course, when there’s a war on, that’s also what the courts tend to say.”

John Harrison

HARRISON BIBLIOGRAPHY


A Trailblazer in Immigration and Refugee Law

David Martin’s scholarly work combines his longstanding interests in human rights and the institutional prerequisites for good governance. He has taught and written about international law and constitutional law, with an emphasis on separation of powers. A particular focus is immigration and refugee law, where he is recognized as one of the nation’s foremost experts. Government service—most recently as General Counsel of the Immigration and Naturalization Service—has allowed him to test and apply the themes he develops in the classroom and in his writings.

After a period of private practice, Martin joined the State Department’s newly formed human rights bureau in 1978. That experience convinced him that human rights observance is closely linked with the structure of government at both the national and local levels. As many came to realize in the 1970s and 1980s, replacing a dictator as head of state does not suffice to guarantee the security of rights. The military may still commit abuses, the courts may still be corrupt or powerless, and well-intentioned decrees from the presidential palace may have no significant effect. Progress comes through using any footholds in the existing landscape to build institutions that promote accountability and stability. Martin concluded that small steps, like the creation of a disciplinary mechanism for the police, may be more important than sweeping initiatives that generate more attention.

“I became skeptical of human rights maximalism, and much more willing to look to trade-offs that promise to end abuses earlier and build a better foundation for future protections,” says Martin. He
believes, for example, that the use of truth commissions for societies in transition from dictatorship to democracy, including a carefully designed and limited amnesty for past abusers, will usually be more productive than a quest to prosecute past abusers. International criminal tribunals should also be designed to avoid discouraging humanitarian intervention by outside powers. Intervention has done far more in recent years to bring a swift end to human rights abuses than have international judicial initiatives, as important as those can be in targeted circumstances. Martin believes that these evaluations can (and should) coexist with a deep commitment to the ongoing cause of human rights. These themes figure prominently in Martin’s recent article on the international criminal court, Haste, Gaps, and Some Possible Cures for the ICC, 41 Va. J. Int’l L. 152 (2000).

Martin had the rare experience of seeing his scholarship make an immediate impact on an important policy issue shortly after joining the Virginia faculty. One of his first articles analyzed the legislative veto, a device that allowed one or both houses of Congress to disapprove administrative action without the President’s review and possible veto. Proponents saw the legislative veto as a streamlined mechanism for Congress to establish better accountability for the “fourth branch” in the modern administrative state.

But Martin drew a different conclusion: that the accountability achieved through this device was illusory and would have the perverse effect of discouraging agencies from tackling politically sensitive policy choices. Arguing that the legislative veto allowed Congress to indulge in “the luxury of being negative,” Martin provided a functional critique of the device in action, coupled with constitutional analysis, based on separation-of-powers cases and scholarship, and urged the Supreme Court to hold it unconstitutional. The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253 (1982). The Court promptly did so in the 1983 case of INS v. Chadha, making prominent reference to Martin’s work in the process. The majority opinion noted that the “political wisdom” of the legislative veto “has been vigorously debated and it is instructive to compare the views of the protagonists.” It then cited only two works, Martin’s critique and an opposing article by former Senator Jacob Javits.

Most of Martin’s scholarly work, however, has focused on immigration law. His first encounter with the field came early in his time at the State Department, during immigration crises involving Southeast Asian “boat people,” the Mariel boatlift, which brought 125,000 asylum seekers from Cuba in spring 1980, and a steady flow of asylum claimants from Haiti. Martin worked on the initial responses to Mariel, but left the State Department to join the Virginia faculty that summer, where he retained a strong interest in refugee admissions and political asylum. “Mariel had made asylum a hot topic, but almost no one in the law schools then specialized in these areas of the law. I was rather startled to find myself, a rookie law professor, as one of the few U.S. experts on refugee law.” A major refugee conference at the University of Michigan provided Martin an opportunity to explain the Refugee Act of 1980 in some detail, pointing out that “the taming of the asylum process remains [its] major unfinished business.” The Refugee Act of 1980: Its Past and Future, in Transnational Legal Problems of Refugees, 1982 Mich. Y.B. Int’l L. Stud. 91.

During that year, Martin also gave the keynote address at Columbia’s Wolfgang Friedmann Conference on International Law, which was then focusing on refugee questions. He used the occasion to argue that the UN treaty that protects refugees should not be stretched to cover the full range of valid humanitarian concerns. He argued that one could still denounce and struggle to end human rights abuses without concluding that all citizens of the relevant state would have valid refugee claims. Legal Solutions to Refugee Crises: Tragic Choices, Proceedings of the 1981 Wolfgang Friedmann Conference on International Law, Columbia University. He later expanded on the theoretical underpinnings for refugee protection in his article The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource, in Refugee Policy: Canada and the United States 30 (H. Adelman ed. 1991).

Martin's writings reflect a distinctive perspective on refugee issues. Like his Virginia colleagues Paul Stephan and Curtis Bradley, Martin attempts to add the rigor of careful institutional analysis to an insular area of international law. Much of the literature on refugees takes an uncritical approach that urges wider refugee protections without acknowledging tradeoffs. Martin's work, by contrast, recognizes the risk that some migrants will manipulate the asylum protection system and underscores the requirement for sustained political support, which can be lost if the public believes that asylum substantially undercuts immigration control.

Early in Martin's academic career, he gained another opportunity for hands-on experience with asylum law. He won a highly competitive German Marshall Fund Research Fellowship in 1984-85, as well as funding from the Ford Foundation, to spend a year in Europe examining the political asylum adjudication systems in a half-dozen European countries. This field work proved so valuable that Martin followed it up with similar interviews and observations of asylum proceedings in the United States and Canada after his sabbatical year.

Martin took advantage of this research in putting together the Sokol Colloquium, a biennial international law conference at Virginia, in 1986. Devoted to refugee issues that year, the conference brought leading figures — scholars, practitioners, and government officials — from both sides of the Atlantic to Charlottesville. The resulting volume, which Martin edited, was published as *The New Asylum Seekers: Refugee Law in the 1980s* (1988). Martin is particularly proud of his introductory essay, which gained wide attention in the refugee field. It explained why the refugee flows to wealthier countries during the 1980s were qualitatively different from earlier cross-border flows in the developing world. After analyzing the possible policy responses, the essay predicted that Western countries would impose greater barriers to entry unless they could make progress in assuring speedy but fair procedures and enforcing negative decisions. The succeeding decade saw modest progress on procedures, but, as Martin anticipated, a major expansion of barriers.

Martin continued to argue for improved asylum procedures that could be expeditious enough to deter abuses, but fair enough to assure full protection for the truly endangered. He was able to perform the final stages of his field research under the auspices of the Administrative Conference of the United States and ultimately published a study with suggestions for reform of the U.S. procedures, suggestions that were formally adopted by the Conference and sent on to the agencies involved. An abbreviated version of the report was also published as *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247 (1990), perhaps Martin's most influential single work.

The INS decided to reform the asylum system in 1993, at a time when it was overwhelmed with claims, deeply mired in backlogs, and subject to bitter congressional criticism. Martin was chosen as the lead consultant for the reform effort, which ultimately led to significant system redesign. Those changes succeeded in reducing applications by two-thirds by deterring weak or manipulative claims, provided the resources to reach prompt decisions, and generally demonstrated that the INS could both regain control of the asylum process and provide more effective protection to those with meritorious claims. Martin's role also helped lead to his selection as INS General Counsel in 1995. The administrative reforms to the asylum process have been credited with forestalling Congressional action to cut back on the availability of asylum in connection with the 1996 revisions to the immigration laws. The story is told, with a full account of Martin's role both as consultant and later as INS General Counsel, in Philip Schrag's book, *A Well-Founded Fear: The Congressional Battle to Save Political Asylum in America* (2000). Martin too has written about the regulatory changes, with wider reflections on lessons learned about governmental processes, in *Making Asylum Policy: The 1994 Reforms*, 70 Wash. L. Rev. 725 (1995).
Martin also appreciates the chance he has had to help bring immigration law more into the scholarly mainstream. "Immigration is central to the history of America," he observes, "and immigration practice is an under-appreciated source for many of the doctrines and procedures of U.S. administrative law — and indeed of constitutional law." Since returning to Virginia in 1998, Martin has turned much of his attention to issues of citizenship law and policy. His recent article, New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace, 14 Geo. Immig. L. J. 1 (1999), argues that states should accept dual nationality far more readily than traditional rules suggest. But, taking issue with some of the strongest enthusiasts for dual nationality, it goes on to suggest a few modest limitations in order to preserve a sense of national identity in a more globalized world. With Professor Kay Hallbrunner of the University of Konstanz, Germany, he now directs a German Marshall Fund project on dual nationality, and he has participated as a principal rapporteur in a Carnegie Endowment study on a wider range of citizenship issues.

Martin believes that the media frenzy surrounding the Elian Gonzalez case may help draw attention to the daily reality of the administration of immigration laws that affect millions of people. He remains at the forefront of those scholars and policymakers trying to make that reality both humane and effective.

Although Americans (along with most of the Western world) are virtually united in a commitment to protect refugees, they are far from united in a common conception of "refugee." Everyday parlance tends to treat anyone fleeing life-threatening conditions as a refugee, whether the source of the threat be natural disaster, foreign invasion, civil unrest, or deliberate persecution. The legal framework of course employs a narrower concept than this journalistic usage, and the 1951 Convention definition might be expected to provide the basis for a unified common understanding, built around the phrase "well-founded fear of persecution." But this phrase too can also take on a variety of shapes, from highly expansive to narrowly cabbed, often depending, it seems, on whether the speaker wishes to include or exclude a particular group of claimants.

Compounding [the problem of agreed interpretation] are the images we (both citizens and government officials) bring to judgments about asylum policy. [Under the case law, the] legal standard looks, in most cases, toward a finely calibrated individualized judgment of the risk of persecution the applicant would face in the homeland. The judgment must be based, to some extent, on general information about human rights conditions in the home country. But the primary reliance in a legal career that almost accidentally wound up focusing on how to assist those displaced by war and persecution. "I guess you could say that the refugee problem found me. A friend called me at my law firm in 1978 and told me about a chance to join the State Department's new human rights bureau, in a newly created post as special assistant to the head of the bureau. I had been excited by President Carter's efforts to champion the cause of human rights — a big change from this country's foreign policy in the Nixon years — and I jumped at this unexpected opportunity. But I went to the Department totally focused on diplomacy, on ways to use this country's considerable clout to lean on governments that tortured or suppressed dissent or detained prisoners without trial. It turned out that I was able to contribute on that score, but events had a different focus in mind."
will fall, most of the time, on information specific to that individual.

Public debate on asylum policy, however, proceeds in cruder terms. Partisans are often ready to make sweeping judgments, by nationality, about the merit of large groups of asylum seekers.

a. The essential problem. This kind of stereotyping or oversimplification is unfortunately commonplace—and to a significant extent inevitable—in public debate and policy decisions. In a classic work, Walter Lippmann explored comprehensively the influence on policy of these “pictures in our heads.”¹ In explaining how easily policymakers can err by relying on their own misconceptions about foreign lands, he wrote:

[T]he real environment is altogether too big, too complex, and too fleeting for direct acquaintance. We are not equipped to deal with so much subtlety, so much variety, so many permutations and combinations. And although we have to act in that environment, we have to reconstruct it on a simpler model before we can manage with it. To traverse the world men must have maps of the world. Their persistent difficulty is to secure maps on which their own need, or someone else's need, has not sketched the coast of Bohemia.

The “coast of Bohemia” problem bedevils both public debate and adjudication in the asylum field. But perhaps the image for our purposes should be shifted from the littoral to the physiographical. Few nations enjoy a political geography characterized by a reliably fertile plain of steady human rights observance. Outcroppings of abuses appear, sometimes intermittent hills, sometimes whole mountain ranges of severe persecution. The partisans in refugee debates—as well as adjudicators and judges under the current system—are too often inclined, in looking at nations to which they are favorably disposed, to mistake mountains for hills—or plains. The same people, in looking at nations to which they are hostile or for whose exiles they have (understandably) developed sympathy, often picture mountains where they should see hills, and then rush to the conclusion that that nation's exiles are refugees. Whatever the actual geography, it is also easy to forget that many people in those distant nations continue to inhabit the valleys even when the mountains loom large and forbidding.

b. Boxes vs. spectrums. A related and persistent misunderstanding compounds the difficulties in achieving a sensible and widely supported asylum policy, and it also occasionally complicates adjudication. Much of the debate proceeds as though there are two sharply different categories of persons who find their way into the asylum adjudication system in this country: refugees, on the one hand, and economic migrants (or simply “illegal aliens”) on the other. A recent book on U.S. refugee policy (in other respects quite thorough and insightful) reflects this attitude:

Refugees are neither immigrants nor illegal migrants, although, like immigrants, they have forsaken their homelands for new countries and, like illegal migrants, they may enter those new countries without permission. But a refugee is, in the end, unlike either. Both the immigrant and the illegal migrant are drawn to a country. The refugee is not driven; he seeks not to better his life but to rebuild it, to regain some part of what he has lost.²

Even if this sharply dichotomous view might, at one time, have captured the realities of refugee flows, it does not offer a helpful way to approach today's asylum caseload. Today's dilemma is both tragic and surprisingly difficult precisely because, among current asylum applicants, refugees are so much like illegal migrants. Only an indistinct and difficult line separates those who should succeed on their asylum applications from those who should not. That is, most of those applying in the United States today were both drawn and driven, and they chose to come in response to a complex mix of political and economic considerations. Asylum seekers are not so different from the rest of us. We have a hard time deciding, particularly when we make difficult, life-altering decisions, and when we finally do choose a course of action, we act from a mix of motives.

Between the time Martin accepted the job and the time his security clearance came through, the Indochinese refugee problem had exploded onto the front pages. He arrived in the office during the same week that huge boats began appearing in the South China Sea, bearing as many as 3,000 Vietnamese refugees. Nearby countries resisted landing, and the United States was deeply involved in efforts to secure protection. Before long, 60,000 refugees per month were leaving Vietnam, and the world community was scrambling to cope.

'The State Department had a tiny refugee office to coordinate the diplomatic and material response to the crisis. I had no idea when I took my human rights job that the refugee office was located — at that time — in the human rights bureau. Filling a brand new position, I of course arrived with no set duties and no backlogged projects. I was imme-
[In judging an asylum claim under definitions derived from the UN Convention, we do not need to find that the applicant] was only driven, nor assess what his primary motivation was, nor the immediately precipitating event. The best way to understand asylum adjudication is to focus on the degree of risk he would face when he returns. If the risk of persecution is sufficiently substantial, his fear is well-founded, even if it was his need for funds to feed his children that sent him on the particular boat trip at the particular time. That he stayed home until economic considerations tipped the balance in his decision may be relevant—but only for the light it casts on the separate question concerning the degree of risk he truly faces. His refugee claim is not forever tainted because he thought about jobs in Miami or the need for money to feed his family.

If all asylum applicants did fit neatly into one of two boxes—refugee or economic migrant—the adjudicative task would certainly be simplified. The job would simply be to unmask the impostors, those economic migrants who are base enough to pose as something they are not. Unfortunately some people with authority over asylum decisions in Western countries sometimes speak of adjudications as though they did present such a morality play. They hasten to label as abusive, frivolous, or lawless those claims that simply fall short of the necessary showing.

But the world is not that simple. Asylum adjudication, it must be recognized, is at best a crude and incomplete way to respond to the complex realities that the world presents. Our legal structure, for ultimately sound reasons, demands a simple yes or no answer to the asylum claim. But the dichotomous character of the results should not obscure the complexity onto which that yes-or-no grid is forced. Asylum seekers present a spectrum of situations, with only subtle shadings distinguishing the risk levels they face. Adjudication must draw a line at some point on that spectrum. And it must do so with care, so that it protects those whose risks exceed the threshold, even if they happen to have joined a migration stream made up principally of those less severely threatened, who therefore lack, in this technical sense, a well-founded fear of persecution.

David Martin

Martin Bibliography

Books:
Immigration and Citizenship: Process and Policy (with Thomas Alexander Aleinikoff and (3d

On the government’s response to this new crisis, Martin joined the Virginia faculty that summer. “When I began my teaching career, I expected to emphasize constitutional law, in both my teaching and scholarship, but it turned out
that a lot of law schools were interested just then in holding conferences on refugee issues — for understandable reasons.”

Because of his extensive experience in government and his role with the new legislation, he received several invitations to speak. “I still thought I might do a couple of conference papers and then leave the refugee issue behind, but the more I worked on these questions, the richer and more challenging they appeared, implicating constitutional law, administrative law, international law, moral philosophy, and a big dose of practical politics. They still hold a fascination for me, and I’m still writing on refugees and immigration.”

While Martin was back in Washington in the mid-1990s, serving as General Counsel of the Immigration and Naturalization Service, the IRC opened up a new regional office in Charlottesville, one of 20 IRC offices throughout
the nation that resettle in local communities families chosen by the U.S. refugee program. "Charlottesville is a concerned and supportive community with low unemployment," Martin said. "It turned out to be an inspired choice for a resettlement office. Immigrants can generally find work within just a few days or weeks." Most who have come to Charlottesville are from the Balkans—Bosnia, Croatia and Kosovo—but IRC has also resettled here several from Sudan, Afghanistan, Iran,

Congo and Burma. University students, including many from the School of Law, have become a major source for assistance to these refugee families.

Besides his duties on the IRC's national board, Martin has been working with the Charlottesville office since his return from the INS.
In a way, it has brought him full circle to the process of helping people, family by family, resettle in his hometown. 


David Martin
DAN ORTIZ

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, cybe law, 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.

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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.

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
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
truth, 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 Governing Through Intermediaries, 85 Va. L. Rev. 1627 (1999) (with Samuel Issacharoff of Columbia Law School). Ortiz hopes to work out this new approach to the area through a series of articles and perhaps a book.

Traditionally, political parties have been conceptualized as the voters' agents. Parties serve democracy, in this view, because they help carry out the aims of those whom democracy sees as principals. The truth, however, is that political parties do much more than this simple agency model admits. They certainly provide information to voters that voters might otherwise not acquire, help voters evaluate that information, and serve to discipline political representatives. But the political parties do much more. They recruit candidates, provide them opportunities for advancement, make decisions about which ones to push and how hard, raise funds for their races, and help present them on the market. They, in short, produce product—both policy and character—and market it to voters. Modern mass democracy allocates much of the work of politics away from the individual voter to cadres of professionals—pollsters, fund-raisers, lawyers, policy advisors, and, of course, the ubiquitous political consultants. They tell party candidates how to present themselves, how taking certain positions on particular issues will pay off, and how to manage their campaigns effectively. The

Managing other people is not something academics have a lot of experience with. Getting the report out on time made me very happy. In fact, I surprised myself that I could pull it off.”

But meanwhile there was the matter of the pertinent legal constraints themselves. Ortiz was especially alert to the First Amendment, which prevents the government from interfering with how the press reports and predicts races. “There is great interest on the West Coast about how predicting affects voting on the West Coast,” he noted. A second large issue concerned appropriate voter identification requirements and voter’s privacy rights.

But perhaps most intriguing to him were the special problems confronting disabled voters. “How are voting places to be made accessible?” he said. “Can the blind be helped or are their votes less than absolutely secret?”

“I had never thought so deeply about the needs of the disabled before. It was mind-opening to
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 handmaidens 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 political parties rights as against their collective members, yet the courts sometimes do. To make the traditional description fit, we must willfully blind ourselves to the huge amount of work we fail to do that political parties pick up.

Second, and more importantly, despite the negative connotations of the label, democracy-as-consumption might offer a better normative theory for contemporary politics. If collective action problems make ignorance and nonparticipation rational, perhaps we should design institutional structures to place the major part of politics outside the individual, to lodge it some place where it might get done. Although the traditional agency picture is flattering, to the extent it relies on voters to do much actual work it might be dangerous. That work might just not get done. An individual’s vote just makes too little difference to justify the costs of actually acquiring political information—let alone voting itself. Some people vote, to be sure, but they do so largely because political participation holds some special consumption value for them as political “hobbyists” or because our weak social norms still do some work.

If for quite understandable reasons, then, we cannot rise to the demands of traditional democratic theory, we should consider designing our political institutions around this brute fact. In a world where it makes little sense for most people to do much political work, we should not pretend that we do much but instead construct institutions that allow us to do as much work as we will and then grant that work the best political effect possible. Democracy-as-consumption may represent such a system. Recognizing that most individuals understandably have little reason to deeply participate in politics, it grants much power and independence to political parties, who have a great incentive—victory and the spoils it brings—to do the actual work.

The model, in fact, has an interesting dynamic quality. To those who 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.

“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. 

ORTIZ BIBLIOGRAPHY

BOOK:

ARTICLES:

“Governing through Intermediaries” (with Samuel Issacharoff), 85 W. L. Rev. 1627 (1999).


disagree 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."
KENNETH S. ABRAHAM

*Insurance Law and Regulation: Cases and Materials* (Foundation Press, 3d ed. 2000).

*A Concise Restatement of Torts* (American Law Institute, 2000).


RICHARD D. BALNAVE


LILLIAN RIEMER BEVIER


VINCENT BLASI


RICHARD J. BONNIE


CURTIS A. BRADLEY


JONATHAN Z. CANNON


GEORGE M. COHEN


ANNE M. COUGHLIN


BARRY CUSHMAN


MICHAEL P. DOOLEY


KIM FORDE-MAZRUI


JOHN C. HARRISON


JOHN C. JEFFRIES, JR.


ALEX M. JOHNSON, JR.

*A Technical Guide to Academic Assistance Programs*, Lead Editor (Law School Admission Council, 2000).

EDMUND W. KITCH

*Selected Statutes and International Agreements on Unfair Competition, Trademarks, Copyrights and Patents* (with P. Goldstein and H. Perlman) (Foundation Press, 2000).


“The Intellectual Foundations of ‘Law and Economics,’” 33 *J. Legal Ed.* 184 (1983); translated into Spanish as *Los Fundamentos Intelectuales Del*...

MICHAELE J. KLARMAN

JODY S. KRAUS

DOUGLAS L. LESLIE

DARYL J. LEVINSON

CLARISA LONG

PETER W. LOW

M. ELIZABETH MAGILL

JULIA D. MAHONEY

PAUL G. MAHONEY

DAVID A. MARTIN

RICHARD A. MERRILL
“Organizing Federal Food Safety Regulation” (with J. Fransen), 31 Seton
“Scientific Authority: The Breast-Implant Litigation and Beyond” (with L. Walker), 86 Va. L. Rev. 801 (2000).

JOHN NORTON MOORE


CALEB E. NELSON


JEFFREY O’CONNELL

“Moynihan’s Legacy” (review, with R. Bland), 142 The Public Interest 95 (2000).

ROBERT M. O’NEIL


DANIEL R. ORTIZ

GEORGE A. RUTHERGLEN


JAMES E. RYAN


CHRIS SANCHIRICO


"Environmental Self-Auditing: Setting the Proper Incentives for Discovering and Correcting Environmental Harm" (with A. Pfaff), 16 J.L. Econ. & Org. 189 (2000).


ELIZABETH S. SCOTT


ROBERT E. SCOTT


KENT SINCLAIR


PAUL B. STEPHAN, III


WALTER J. WADLINGTON


LAURENS WALKER


"Scientific Authority: The Breast Implant Litigation and Beyond" (with J. Monahan), 86 Va. L. Rev. 801 (2000).
STEVEN D. WALT


Review of Sebok, Legal Positivism in American Jurisprudence, 20 Phil. in Rev. 79 (2000).

AMY L. WAX


G. EDWARD WHITE

