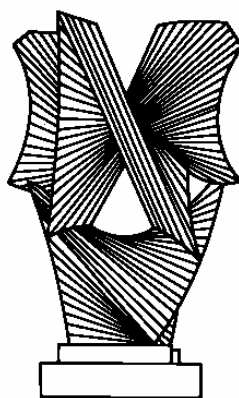


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## **The Business of Democracy Is Democracy**

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**The Business of Democracy is Democracy**

A Review of Richard Posner, *Law, Pragmatism and Democracy* (Harvard, 2004), and  
Tom Campbell and Adrienne Stone, eds, *Law and Democracy* (Ashgate, 2003)

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The Supreme Court's decision in *Bush v. Gore* reminded America of the paradoxical relationship between the democratic process and legal institutions. The Posner book and Campbell-Stone volume under review are valuable contributions to an expanding understanding of the tense yet mutually reinforcing interaction of law and democracy. Posner sketches a stark, minimally procedural definition of democracy within which the people do not actually rule, a definition that corresponds well with Posner's support of the Court's decision in *Bush v. Gore*, restated and revised in the book: since elections are simply procedures that peacefully sort out who among competing elites will assume power for limited terms, a judicial intervention ensuring the orderly resolution of contested elections need neither divine nor respect the popular will—if there is such a thing. The *Law and Democracy* collection, on the other hand, is replete with more substantive views of the relationship between popular government and the rule of law, including civic republican and deliberative perspectives that if read in tandem with Posner's

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book might serve to put some badly needed flesh on the latter's rather skeletal theoretical framework.

### **I. A Necessary, Empirical and Realistic Democratic Theory?**

Posner's theory of democracy is inspired by the work of Austrian economist, Joseph Schumpeter, who distilled the democratic process down to the election of political officials from among a group of competing elites by the general population. It is curious that Posner thinks Schumpeter's theory is in need of revival, that it has been "in recent years rather thoroughly neglected" (ix) and "not much elaborated by his followers" (15). Posner himself cites many authors working in a Schumpeterian vein, even if he neglects to say that most of them have attempted to confront the deficiencies and expand the horizons of Schumpeterianism: Russell Hardin, Bernard Manin, John Roemer, and most importantly Robert Dahl (180-181).<sup>2</sup> Perhaps Posner feels that minimalist democratic theory has fallen into desuetude because none of the scholars mentioned who study it do so with the ideological and patriotic intent that Posner thinks necessary today: "there is at present no influential body of academic thought that makes the case for American democracy as it is actually practiced" (2). Posner's recourse to Schumpeter is intended "to make the case for American democracy" (2). As we will see, however, Posner's understanding of the "is" of American democracy may be seriously flawed, and his effort to render that "is" into an "ought" may lack the cultural and normative substance necessary to make American democracy worthy of promotion, let alone celebration.

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2. More egregiously, Posner completely neglects the school of Schumpeter-inspired democratic theory founded by Adam Przeworski, and continued by his students, protégé's and himself today: e.g., Michael Wallerstein, Stathis Kalyvas, Jose Cheibub, Leonard Wantchekon, etc. This is especially curious since Przeworski produced his best work and trained many of these scholars while a colleague of Judge Posner's at the University of Chicago in the 1980s and well into the 1990s.

Posner insists that his “pragmatic” theory of democracy is fundamentally realistic and not “aspirational”; his goal is “to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans” (3). But one might argue that his own gestures to the conceptualizations of economics are just this. After all, “the empirical methods of economics” (4) are notoriously hypothetical and abstract. He rejects “abstractions common in law talk such as fairness, justice, autonomy, and equality” (79). But are “interest”, “efficiency”, “consumer”, “producer”, “reasonableness” etc. any more certain and determinate? Indeed, Posner imagines that he can surmount the problems inherent in the messy use of philosophical concepts that he traces back to Plato by adopting a rather Platonic move: he approximates the mind of god by supposing that he can conduct analysis with no “unexamined political preferences and aversions” (84).

Two debates reproduced in the Campbell-Stone collection demonstrate that it is no penchant for airy abstraction that compels legal theorists to invoke the “conceptualisms, generalities, pieties and slogans” that Posner derides. Cass Sunstein’s critique of Antonin Scalia’s “law as rules” doctrine demonstrates decisively that any appeal to old fashioned, hard-headed simplicity in adjudication must confront the inevitability of semantic indeterminacy, historical disputation and second-order conceptual justification. These are not therefore, as Posner suggests, always products of a judge’s arbitrarily imposed political agenda (although they sometimes may be), or the academic’s desire to make things complicated. Simple necessity may require recourse to complexity in the comprehension and application of legal rules. The debate between Samuel Freeman and Jeremy Waldron over entrenched rights and majority rule lays bare the fact that even when people agree on the necessity of both elements of liberal democracy, agreement over the proper balancing of the two is impossible without elaborate statements about

the meaning of democracy, rights, minorities (privileged or vulnerable), the legislative process, judicial interpretation, etc. Posner's appeal for more commonsense understanding of particular laws and more sensible assessment of the likely ramifications of judicial decisions is insufficient to resolve the indeterminacies of legal language or ambiguities in the relationship between rights and majority rule.

Posner states with full confidence that "our actual existing democracy" concerns "power and interests rather than truth" (106 & n. 25). But, sensing that he's over-reached in his claims to empirical certainty and conceptual simplicity, Posner often backtracks: "granted this book is not itself a work of empirical scholarship" (4); and further: "Pragmatic decisionmaking will inevitably be based to a disquieting extent on hunches and subjective preferences rather than on hard evidence" (126). Disquieting indeed, if we are to follow Posner's advice not to be taken in by ungrounded and speculative theory! This harsh realism gets Posner into some logical confusions as well. For instance, he argues forcefully for "a reformulation" of American law so that it better conforms to minimalist democracy (131); but if the politics and government of the United States already form a minimalist democracy, why does its legal system need to be brought in line? Either the US is already a Schumpeterian democracy as Posner asserts (130), or it is not, in which case the realism of his claims based on the American example falls apart.

In addition, Posner's impulse to elevate the Is to the Ought puts him in the ridiculous position of claiming that, on the one hand, there is virtually nothing wrong with or improvable about contemporary American politics, or, on the other, of leaving ungrounded and inappropriate the critical observations on reality that he, as an intelligent observer, must make. Statements like "elite democracy is the best pragmatic understanding of what American democracy should be and is" (17) undermine the force of his criticisms like the claim that "the funding of political

campaigns has blossomed into quasi-bribery” (111). Does Posner think that elections function well under such circumstances? He avers that American practice and minimalist theory respond to what people really want rather than what they would want under imagined better circumstances (165). But an analysis as assertive of the present and hostile to political theory as Posner’s permits no way of conceiving “better circumstances”. This is made plain by his cursory and trivializing discussion of campaign finance reform efforts (170-171).

## II. Inconsistent use of “Democracy”

Posner wavers between a narrow and expansive conception of democracy in his historical reflections. His most narrow moments compel him to neglect Medieval and Renaissance republics, and therefore to ignore their institutional arrangements and political lessons: “Between the end of Athenian democracy in the fourth century B.C. and the rise of the New England town-meeting government in seventeenth-century America, a period of 2000 years, democracy was not part of any serious political agenda” (10). Furthermore, he considers the American founding as a reflection of the “renewed stirrings of democracy in the postmedieval West after a hiatus of two millennia following the fall of Athenian democracy” (144); a revival of a form of government that had “dropped from the world’s political agenda for two millennia” (146). This is a bizarrely constrained interpretation of the history of popular government: many Italian and Central European republics were as or more democratic than America at any point in its history. Indeed, as the *Law and Democracy* contributions of Sunstein, Mortimer Sellers, Kathryn Abrams, and Philip Pettit make plain, the legacy of post-Athenian republicanism had a profound impact on the American Founding and Constitution, and continue to exert influence over legal thinking in the US today.

But Posner's historical narrative blackmails readers into accepting (his version of) American representative democracy by posing a false either/or between Athenian direct democracy, which is "unworkable" under modern circumstances (164), and the political system of the United States (16). Yet the Roman, Swiss, Northern Italian and German republics experimented with combinations of direct and representative practices, making any one of them a much better example of "a mixed republic" than the strictly electoral United States (110). Posner mentions the Roman Republic as a regime that "mingled democratic with oligarchic and dictatorial elements", but he most highly praises the Roman Empire of the Caesars as perhaps "the greatest political accomplishment in human history" (145, cf. 182). A traditional advocate of popular government would be very suspicious of the kind of "democracy" proposed by someone who would assess tyranny in such sanguine terms.

The inconsistent use of democracy plagues Posner's discussion of American history. In his elaboration of pragmatic jurisprudence and critique of alternatives he continually ridicules "original intent" interpreters of the US Constitution (11). This does not, however, prevent him from constantly invoking the Constitution as it was first composed to insist that the American system, like its "hard-headed framers," (14) was and remains Schumpeterianly elitist. But Posner ignores or unnecessarily denigrates the Jeffersonian, Jacksonian, Reconstructionist, Progressive, New Deal and Great Society waves of democratization that made the United States and its Constitution more inclusive and participatory than they initially were: "That the United States is a democracy, and that the dominant theme of our political history is the growth of democracy, are shibboleths" (109-110). He ridicules the significance of franchise enlargement during the "Jacksonian revolution" (110)—in fact, accusing it of having "obliterated" republican virtue and civic-mindedness in the US (148). And more recent reforms have supposedly

*diminished* democracy by elevating the federal government excessively over the states (111). But this is an empirical question, as is the natural riposte that the federal government was forced to expand so as to preserve and advance equality in the midst of a rapidly industrializing and post-slave-holding economy. Yet for Posner, despite democratic reforms (direct election of presidential electors and senators) the US has not “become more notably democratic” over time (150).

So the Framers were elitist and the republic remains happily so? Well, Posner maintains this narrow definition of democracy when exalting minimalist democracy over deliberative democracy, accentuating the anti-egalitarian and anti-democratic tendencies of the Founders (149). But then his conception of democracy becomes more expansive when he insists that it would be “anachronistic” to call the Founders “elitists”: they were actually “radicals” by the standards of their own time. But the imminent emergence of French republicanism, and the presence of more progressive political visions suppressed in the early American republic,<sup>3</sup> puts the lie to that line of reasoning. Posner’s claim that his pragmatic approach is informed by but not wedded to the past—that it is intelligently “historicist” (72)—turns out to mean that it is not particularly attuned to historical facts and trends.

Bad history undermines Posner’s attempt to downplay the status and necessity of deliberation in American democracy. He insists that his theory is more realistic than that of “deliberative democrats” because it “accepts people as they are”, that is, as not “public-spirited” or “well-informed” (14). Yet he accepts at various points Tocqueville’s demonstration that the American citizenry once had been both. So the elitism of American democracy is *not* the historical constant that Posner assumes it to be: apparently, people change, as do regimes. This

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3. See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1998).



always begs the question: do they improve or regress? Posner offers a rather weak answer: he writes that the American national character hasn't changed but, as we have seen, that its political democracy has diminished (147). American culture is "probably impervious to incremental adjustments in the system of political governance" (147). This would imply that the American people are still as spirited and informed as Tocqueville described them, and not as "ignorant and apathetic" (16) as Posner insists they are most of the time. In either case, wouldn't we want to revive a public-spirited, politically informed populace, or demand a reform of the political system as it is?

If Posner believes his assertion that the US electorate is as a rule "ignorant and apathetic" (16), as opposed to the Tocquevillian line that he seems to accept elsewhere, this position takes insufficient account of the social bases of American democracy: for instance, Robert Putnam's study of associations in post-war America shows the indirect benefits of group membership on participation and quality of government; and Theda Skocpol's work on 19<sup>th</sup> century associationalism draws a direct correlation between civic engagement and robust democratic politics.<sup>4</sup> Against the tide of empirical evidence, Posner asserts that John Dewey was wrong to think people could learn to be rational, civic-minded and involved. People do not influence policy "through debate and pooling of ideas" (109, cf. 131). Interest, which involves bargaining, not deliberation, is supposed to characterize American politics: "it would be unrealistic to expect good ideas and sensible policies to emerge from the intellectual disorder that is democratic politics by a process aptly termed deliberative" (107).

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4. See Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon and Schuster, 2001), and Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (Oklahoma City: University of Oklahoma Press, 2003). Posner cites the outdated and probably inaccurate Arthur Hadley to assert no correlation between participation and good government (111, n. 33).

But the eternal questions confront the economically inclined like Posner, who assume that preferences are givens: how do people come to know or better recognize their interests? Are preferences fixed and pre-deliberative or are they formed, shaped and altered through deliberation? As skeptical as both Tom Campbell and Michel Rosenfeld are in their contributions to the *Law and Democracy* volume about the possibility that Jürgen Habermas's discourse theory of law can bring antagonistic worldviews near consensus, both stress that public persuasion, preference change and opinion convergence have been underestimated in legal scholarship. Moreover, Habermas's essay on legal paradigms in the collection is quite strong on a point where Posner is especially weak: the relationship of preference change to historical transformation. Habermas shows that the mindset of market participants, both facilitated and presumed by nineteenth century "bourgeois formal law", changed in response to apprehension of and deliberation over the result of the unfettered workings of that economic paradigm: escalating social inequality. As a consequence of changed historical circumstances and discussion about those changes the citizens of advanced industrial countries in the twentieth century supported the emergence of the "welfare state paradigm" of law, the drawbacks of which are presently inspiring further consideration of the paradigm of law appropriate to contemporary circumstances (Habermas focuses on feminists). Unless people change their minds about their interests, both ideal and material, for which Posner gives no account, social learning and political change is impossible.

Besides the historical myopia evident in Posner's argument that American democracy is and should be elite or minimalist democracy, his case exhibits conceptual slippage as well: Posner pronounces with realist bravado that elites, "not the people", are "the rulers of the nation", but adds that minimalist democracy provides a "method of controlling" such elites (14,

cf. 110). This begs the question, what kind of *rulers* are *controlled*? If the people control them, then can't the people be said to share in rule? According to Posner, minimalist democracy provides "merely a check on the officials, elected or otherwise, who are the real rulers" (106).

What does it mean to be checked and yet be a "real" ruler? The people don't rule, but "they decide who shall rule" (109), which at regular intervals means they take part in rule.

Characteristically, Posner backtracks by conceding that "people's interests, preferences, and opinions influence government, certainly, through the electoral process and otherwise" (109); and he later speaks of "the degree to which the people rule" (153). The history and constitutional arrangements of the Medieval and early-Modern republics that Posner ignores would prompt us to ask why the exercise of a check can't be a form of self-government, and why the political check has to be strictly "electoral"?<sup>5</sup>

### III. Elites: Political *and* Economic?

The elites central to Posner's framework are almost exclusively political; he never asks whether they are simultaneously economic elites or perhaps the exclusive servants of economic elites rather than of the electorate that appoints them. At his most "pluralist" Posner would likely reject the concept of "economic elites"; however, at other moments he concedes their existence and minimalist democracy seems woefully inadequate at keeping them from seizing

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5. The discretion granted political elites by the framers of post-18th century electoral/representative constitutions and their success at realizing the "total exclusion of the people in their collective capacity from any share" in government (See Publius, *The Federalist Papers* (New York: Penguin, 1961) 387) has opened the way for manipulative combinations of these traits, wherein leaders pretend to speak for the people who never directly speak for themselves. Most innocuously, the prevalence of polling data permits politicians to use "public opinion" to claim that "the people" rule through them at any particular time, when the officials are actually pursuing their own agendas. More sinister versions of this phenomenon exist as well: see Carl Schmitt, *Legality and Legitimacy*, trans. Jeffrey Seitzer (Duke, 2004). Posner is quick to criticize Schmittian versions of "democracy (78, 162, 176, 264-65), but never fully distinguishes the acclamatory aspects of his own theory from Schmitt's and fails to acknowledge that Schmitt's theory is as much an "elitist" theory of democracy as it is a "Bonapartist" one: Schmitt's political intention in the waning days of Weimar was to facilitate rule by an aristocratic clique through the plebiscitary and emergency authority of President Hindenburg.

undue influence in a popular government. Posner asserts that political officials and candidates “are by no means ordinary men and women but instead belong to an elite of intelligence, cunning, connections, charisma, and other attributes that enable them to present themselves to the public plausibly as ‘the best’” (109). Conspicuously absent from the list, although it could be assumed under the category of “other attributes”, is the one characteristic above all others that made citizens electible in republics throughout history: wealth. It finally appears when he resumes this discussion later on: “Successful candidates are not random draws from the public at large. They are smarter, better educated, more ambitious, and wealthier than the average person.” And further: It is “hard to keep the rich and brainy from rising” (154).

But for the vast majority of the book, Posner operates with a strictly *political* theory of class—minimalist democracy presupposes “two distinct classes”: representatives and voters (167). Underneath this is a sociology that supposes a myriad of pluralist socio-economic interests (171 n31), all relatively equal in power and resources. On this basis, Posner can believe that minimalist democracy, while dominated by a political elite, is resistant to control by other elites, be they “military, technical or ideological,” but he can’t entertain the notion that the political elites in a democracy may be the agents of an elite of wealth (168).<sup>6</sup> Posner defines democratic conflict in exclusively pluralist terms: “The problem of democracy, as of government generally, is to manage conflict among persons who, often arguing from incompatible premises, cannot overcome their differences by discussion” (112). He emphasizes problems of “worldviews and fundamental values” but how are these to be reconciled with his emphasis on “interests”?

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6. Commenting on a chapter in James Bryce’s *The American Commonwealth*, “Why the Best Men Do Not Go into Politics”, Barbara Tuchman writes: “With opportunity opening on every hand, government in America through the seventies and eighties functioned chiefly to make the country safe—and lucrative—for the capitalist. Government was a paid agent.” Barbara W. Tuchman, *The Proud Tower: A Portrait of the World Before the War: 1890-1914* (New York: The Macmillan Company, 1966) 136.

Posner claims not to begin “with moral or political theory but with the actual practice of democracy in its various instantiations from Athens in the fifth and fourth centuries B.C. to the United States in the twenty-first century A.D.” (143). Yet for the most perspicacious observers of this “practice” like Aristotle and Machiavelli, whom Posner constantly invokes as theoretical antecedents (167), the existence of rich and poor was among the first “facts.” Unlike Aristotle and Machiavelli, Posner does not understand the primary conflict in a republic or popular government to be class conflict. Inexplicably, Posner invokes Machiavelli’s supposed “equation of democracy and tyranny” (155), which takes on the perspective of defense of the wealthy few against the poor many (the demos) and the powerful one (a prince). But it is not Machiavelli that Posner cites in this instance, but rather his most oligarchically sympathetic interpreter, Harvey Mansfield. Since this is not the place for a complete elaboration, suffice it to say that the Florentine was less a partisan of “the few” than is either Posner or Mansfield.<sup>7</sup>

In fact, Machiavelli may hold the key to one of the puzzles that Posner poses concerning participatory and deliberative democracy: Posner asks rhetorically how one might initiate a “virtuous cycle” in which citizens strengthen their capacity for deliberation through participation and consequently enhance the value and effect of their participation (133, 146-47). This question has force against the jurists in the Campbell-Stone volume who draw on the “common good”, “civic virtue” legacy of republicanism, but who like Posner ignore the class-conflict facet of that tradition.<sup>8</sup> Machiavelli might have responded to this important question of sparking attention to and deliberation over the common good by suggesting that healthy republics encourage the expansion of that one aspect of citizen-participation that even Posnerian minimalist democracy

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7. See John P. McCormick, *Machiavellian Democracy: Controlling Elites With Ferocious Populism*, 95 *American Political Science Review* 297 (2001).

8. See John P. McCormick, *Machiavelli Against Republicanism: On the Cambridge School’s “Guicciardinian Moments”* 31 *Political Theory* 615 (2003).

requires: control and containment of elites. People need not be as well informed as officials, and they need not expound upon the common good in widely expansive terms; they need only recognize that their liberty and the perpetuation of the political system that assures it depend on a more careful surveillance and mistrust of political *and* economic elites. Both Posner and the neo-republicans in the *Law and Democracy* collection overlook this necessity.

Posner asserts that “an increase in democracy would probably have to be purchased with a reduction in liberty”, which he associates with commerce and the “protection of property rights” in the next phrase (133). But *more* democracy, through better, that is extra-electoral, control of elites, may be required to hold back political and economic elites. Machiavelli and pre-Modern republicans thought this required a mixing of lot and election in the selection of officials and the exclusion of wealthy citizens from certain assemblies and magistracies—techniques *never* mentioned in the Campbell-Stone contributions on republicanism. Rejecting such political practices, the modern democrats that Posner cites—Mill, Dewey, Habermas, Dahl—advocate the redistribution of wealth within a purely electoral system to counter the power of the wealthy in a popular government. Posner is completely ignorant of the traditional *political* means of controlling economic and political elites, such as selection of officials by lot, and rather bemused by the *socio-economic* ones advocated by these four modern democrats that he respects. In fact, he expresses discomfort with or avoids altogether the fact that each of them identified themselves as *socialists* at various points in their careers (e.g., 102, 133, 162, 180, 181 n. 61).<sup>9</sup> Put simply, Posner’s adherence to a notion of liberty tied almost exclusively to property

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9. There are other self-serving or inexplicable forays into the history of political thought in Posner’s book: when arguing that the founders were radicals in their time but would likely be politically conservative minimalists today (149), Posner focuses on Madison but ignores the fact that Madison himself became more radical in his post-Publius career (141)! He suggests that Madison’s great mistake was being too fearful of democracy, understood in terms of a wide suffrage (150); but Posner neglects to discuss the important fact that Madison attempted to correct that mistake by co-founding the Democratic-Republican party to counter the elitist, plutocratic policies of the

rights warps his conception of power dynamics within a popular regime. Faithfully following the classical, pro-aristocratic republican narrative, Posner regards popular majorities as the main threat to liberty, which is why liberal principles like Rights and institutions like the Senate and the Supreme Court have been established against majorities in the US (110, 181). But Posner, like Pettit, who endorses such anti-majoritarian institutions for purportedly more progressive purposes, never mentions the threat posed by *privileged* minorities against the majority, especially those who from time to time have used those two institutions: Southern slave-holders against the rest of country in the Senate, and the wealthy against workers in the Supreme Court.

The only class analysis that Posner seems willing to perform in support of his minimalist theory of democracy is against deliberative democrats whom he exposes as limousine liberals (142, 155). The “academic elite”, especially academic lawyers (158) it seems, “are at one in their hostility to populism” (156). They prefer rule by deliberating experts to rule by people who they believe can’t really deliberate (157). But to whom does this charge really apply? Not to the most important deliberative democrat of all, Habermas. Posner concedes as much (159), the chapter of Habermas’s *Between Facts and Norms* excerpted in the *Law and Democracy* volume makes it plain, and Rosenfeld’s essay on Habermas in that collection articulately and exhaustively confirms it. In this vein, Posner may demonstrate that Sunstein focuses on deliberation in elite dominated policy-making circles, but he doesn’t demonstrate that Sunstein rules out deliberation among the general populace.<sup>10</sup> Moreover, Posner assumes that deliberative or transformative critics will always take judicial (or bureaucratic—164) recourse in attempts to improve democracy “by handing more power to an elite of unelected, life-tenured judges” (161).

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Federalists. Moreover, Posner identifies Rousseau as an “inventor” of the kind of deliberative, transformative democracy that irks the Judge (151), when the *Social Contract* is avowedly anti-deliberative, and declares explicitly that elective aristocracy is the best form of government.

10. See Cass R. Sunstein, *Republic.com* (Princeton: Princeton University Press, 2002).

His blanket claim that “academic lawyers have been too casual in their analysis of democracy” (18) simply doesn’t hold water when he acknowledges so many exceptions—Balkin, Ackerman, Sunstein, Rubenfeld—and the *Law and Democracy* volume offers so many counter-examples—Campbell, Michelman, Rosenfeld, Sunstein, Waldron, and so on.<sup>11</sup>

#### IV. Elections as Political Markets

What’s the problem with elections alluded to above? Why is Posner’s theory questionably democratic when it is so firmly founded on elections? There’s a clue in Posner’s comparison of elections to markets: minimalist democracy is “a kind of market” because it “tends to align the behavior of politicians and officials with the people’s interests as the people perceive them” (166). But exactly like markets, electoral systems create and proliferate inequalities. Elections tend to favor wealthy candidates or their proxies, and so an unfettered electoral system risks biasing the government policies that they make against the interest of the general populace. The resource advantage enjoyed by the wealthy when directed at channels of public information often camouflages this fact through manipulation and obfuscation. These are some of the reasons why scholars, even those working within minimalist and empiricist frameworks, conclude that political officials are largely unaccountable and unresponsive to the general populace and overly responsive to wealthy constituents in unqualified electoral

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11. See also Frank I. Michelman, *Brennan and Democracy* (Princeton: Princeton University Press, 1999) (reconstructing the theory of democracy latent in Justice Brennan’s opinions). Samuel Issacharoff and Richard Pildes have used the theory of competitive democracy as a standard for criticizing the US Supreme Court’s constitutionalization of the electoral process. By scrutinizing election law solely through the frame of individual rights, they argue, the Supreme Court has missed the structural political dimension of elections, in which what counts is institutional design and the massing of power by groups, and has thus suppressed innovation by states aimed at dislodging entrenched political elites through electoral devices calculated to enhance political competition. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stanford L. Rev.* 643 (1998). Consideration of democracy at the local level in the United States is also alive and well. See, e.g., Clayton P. Gillette, *Direct Democracy and Debt*, 13 *Journal of Contemporary Legal Issues* 365, 366 n. 1 (2004).



systems.<sup>12</sup> Posner asserts that electoral politics keeps “representatives on a tether, though a long one” (167). But evidence suggests that such a tether may be frayed and entirely *too* long.

There are other indications of the inegalitarian and undemocratic ramifications of elections in the book. Posner dismisses the fascist orientation and fascist sympathy of Schumpeter and other elite-minded “democrats” like Mosca and Pareto on the ground that “motives do not discredit analysis” (180). But they may influence analysis and determine results. As Posner admits, Schumpeter’s theory was intended to stem the tide of democratic socialism (note: *not* Bolshevism or Communism but social democracy). Historically, this is not out of step with the analyses and motives of ex-Nazis in post-war Germany. Just as Hans Freyer and Ernst Forsthoff turned to free market economics to preserve social hierarchy and combat creeping socialism (because the fascist state had proved a failure at doing so before and during the war),<sup>13</sup> Schumpeter turned to the political market of elections in the hopes of preserving hierarchy and stemming what he feared were irresistible egalitarian trends. This strategy emphasizes the anti-egalitarian thrust of purely electoral systems, reinforces Aristotle’s analysis that they are an inherently aristocratic and hierarchy-preserving device, and explains why populist republicans advocated the use of lottery or a mixture of lot and elections so that politics would not be dominated by the rich. Genuine populists would have predicted that a regime where popular participation is confined to elections alone would be inherently aristocratic and

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12. See Douglas A. Arnold, *Can Inattentive Citizens Control Their Elected Representatives*, in Lawrence C. Dodd and Bruce I. Oppenheimer, eds., *Congress Reconsidered* (Washington, D.C.: CQ Press, 1993); Jane Mansbridge, *Rethinking Representation*, 97 *American Political Science Review* 515 (2003); Adam Przeworski, Susan C. Stokes, and Bernard Manin, eds., *Democracy, Accountability, and Representation* (Cambridge: Cambridge University Press, 1999); Larry Bartels, “Economic Inequality and Political Representation” (Presented at the American Political Science Association Annual Meeting, Boston, August 29-September 1, 2002); and Susan C. Stokes, *Mandates and Democracy: Neoliberalism by Surprise in Latin America* (Cambridge: Cambridge University Press, 2001).

13. See Jerry Z. Muller, *The Other God That Failed: Hans Freyer and the Deradicalization of German Conservatism* (Princeton: Princeton University Press, 1988); and Peter C. Caldwell, *Ernst Forsthoff and the Legacy of Radical Conservative State Theory in the Federal Republic of Germany*, 15 *History of Political Thought* 615 (1994).

not democratic at all, whether Posner recognizes this or perhaps approves of it. Elections, by themselves, are more elite-enabling than elite-controlling.

In light of this history, and when society is described as follows (in a paragraph where Posner's views merge seamlessly with those of Schumpeter and the fascist, elite theorists of democracy), the question arises: are elections sufficiently robust to enable voters to restrain a ferociously predatory elite?

The outstanding fact about human beings is their inequality. In particular there is in every society a class of (mostly) men who are far above average in ambition, courage, energy, toughness, ambition, personal magnetism, and intelligence (or cunning). In other words, society is composed of wolves and sheep. The wolves are the natural leaders. They rise to the top in every society. The challenge to politics is to provide routes to the top that deflect the wolves from resorting to violence, usurpation, conquest, and oppression to obtain their place in the sun. In our society dangerous sports and high-stakes business dealings are among the routes by which these natural leaders can achieve the success, distinction, and power they crave without danger to the public weal. Politics is another route, maybe the most important, since the natural leaders who have political talents and aspirations are the ones that pose the greatest potential danger to civilized society. Schumpeter's theory of democracy is realistic in its recognition that these people exist, that they will be the rulers whatever the structure of government, and that democratic politics, by giving these natural leaders a competitive arena in which to strive for political power and attain it in a chastened, socially unthreatening, in fact socially responsible, form, performs an indispensable social function unacknowledged in the conventional pieties of democratic discourse. (183-184)

Posner wants to “orient reform toward improvements” of realistic, minimalist democracy (163), but it’s not clear that his theory allows for genuine upgrade. The theory is too crotchety, cranky and resistant to innovation, dismissive of theory, and exhibits a decidedly unpragmatic institutional imagination. For instance, when addressing low voter turnout in the US, Posner suggests that the act of not voting may indicate a preference for the status quo rather than disaffection with things as they are (168-169). But the spirit of his book would rule out the following reform that might respect someone’s desire not to cast a vote for any particular candidate or policy, yet nevertheless would insure that there aren’t any informal structural barriers that deter some citizens from voting: what if the state sponsored a day off for elections, and required citizens to appear at the polls, but *also* provided voters an abstention option on the ballot so as to allow them to register their dissatisfaction or indifference? Similarly with Posner’s criticism of proportional representation (PR): he claims that the existence of too many parties polarizes issues and the electorate in a way that threatens the stability of regimes (174). But PR with an adequate percentage threshold solves this problem and makes for a more representative politics. Posner asks if his theory is too complacent and Panglossian (164). With no room for such reform efforts in his theory, and given pronouncements that American democracy deserves “supportive” rather than “critical” evaluations (182-183), the Judge proves himself to be complacent indeed.

## **V. Posner’s Anti-Idealism and the Idealism of American Democracy**

A major source of Posner’s complacency is his relentlessly anti-idealist cast of mind. He wants to banish ideal motives from his commercial republic so that citizens might focus their energies solely on the task of creating the means for realizing their private projects, of

accumulating wealth. Only those resources that are necessary for the purpose of protecting the capacity to create wealth should be directed towards the public realm. All other resources should remain in private hands to be turned to private purposes. For Posner, the difficulty with the practice of deliberative democracy (as opposed to the limousine liberalism of deliberative theory) is precisely that it encourages discussion of ends other than wealth creation, such as redistribution and idealist adventures, and that it leads inevitably to divisive and destructive conflicts over public ends—threats to the wealth-maximizing enterprise. It is not that Posner thinks the pursuit of wealth to be the only worthwhile end (he is, after all, a civil servant); rather he assumes that we're not very good at deliberating over public ends, that we are, after all, Darwin's creatures (4) whose greatest talent is survival, not flourishing. So the lack of deliberation in American democracy is one of its greatest strengths. When all is said and done, we don't want to be like Europe in the twentieth century, riven by lethal ideological warfare and consumed with economic redistribution, both of which discourage the accumulation of wealth.

Posner believes that Americans don't deliberate because he assumes that deliberation must be practiced in the language of philosophers. That's certainly the language of many *theorists* of deliberative democracy, but it is not the language of democratic discourse that they would expect or recommend among the populace. Deliberation need not be discussion per se; it need not take place in language, but may be conducted more effectively through symbols or action. American democracy has sustained this kind of deliberation in the vast and lengthy struggle over the abolition of slavery and all the consequences of slavery for over 200 years, drawing upon the voices and reaching far into the consciousness of ordinary and ordinarily less than articulate citizens. Men like Franklin Roosevelt, whom intellectuals admire, and Ronald Reagan, whom they despise, raised profound issues of the republic in vivid ways that all people,

simple and exalted, grasped and considered. Deliberation need not resemble a faculty workshop (even faculty workshops don't), as Posner mistakenly supposes (109, 135-136). Perhaps talk radio, internet chat rooms, and 24-hour news channels have not entirely replaced the small-town deliberative institutions that Tocqueville observed and urbanism atrophied. But they need not in order for deliberation to flourish.<sup>14</sup>

Moreover, deliberation isn't defective, as Posner avers, simply because it fails to mobilize 100% of the citizenry. Full participation is a requirement only in regimes that are nominally democratic, such as the former Soviet Union and Saddam's Iraq. Those regimes insure that 100% of citizens vote, *and* pitch in with leagues and clubs and movements. Democracy no more needs everyone to participate in democratic activity in order to govern than a symphony orchestra needs everyone in its audience to compose music in order to entertain. Self-government, contrary to Posner's belief, does not abolish the division of labor. Some people will always have a greater aptitude and taste for politics than others. Democracy does not require that everyone participate in the same way and at every moment, but that everyone be able to participate each in their own way as, in their judgment, events require.

If, as Posner believes, American law and politics are and ought to be about creating means without any communal discussion or consideration of ends (the only communal end is the creation of means), then we should expect wealth to play a more dominant role in democracy, more so than in political systems that subscribe to a doctrine of ends. Without a doctrine of ends there can be no counterweight to wealth, no elite drawing its strength from that doctrine and tempering the political effects of wealth. To the degree that American democracy is more

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14. As Posner confesses (169: "Later in this chapter I shall present some evidence that voters are not *so* ignorant that they cannot play the role that Concept 2 [elite democracy] assigns them.")

closely bound to wealth than are the democracies of, say, Western Europe, Posner's empirical judgment about American democracy, that the business of America is business, is correct.<sup>15</sup>

But it is not entirely correct. For if it were, we should expect the eternal and central problem of politics—the struggle between the wealthy few and the less wealthy many—to be far sharper in the United States than in political systems subscribing to a doctrine of ends other than the storing up of means. And it is not. We may attribute the dearth of sustained and malign class conflict in the United States to many causes: the historic pre-eminence in American politics of conflicts about race, the role of the frontier in releasing the pressures of class and reducing class consciousness, the prevalence of intergenerational mobility. These are all important causes.

Yet a distinctively American ideal has also played a profound integrative role in American democracy: every citizen of the United States other than aboriginal Americans and the descendents of slaves comes from a family that sought America as a refuge from tyranny or was attracted to it as a shining city upon the hill. (Proof of the strength of this ideal lies in the exclusion of aboriginal Americans and the descendents of slaves from “the nation of immigrants”.)<sup>16</sup> Posner's political vision—protection and cultivation of the production of wealth—is a thwarted, diminished version of this ideal. Surely the ideal includes Posner's vision. But the “land of opportunity” narrative refers to the cultivation of talents as well as to the production of wealth, and talents can be devoted to purposes that are not necessarily wealth maximizing. For example, Americans put a huge chunk of gross domestic product to charitable uses, only a portion of which burnishes the nation's bottom line. Foundations may, of course, indirectly contribute to the production of wealth by supporting basic research or education; but

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15. See Kevin Phillips, *Wealth and Democracy: A Political History of the American Rich* (New York: Random House, 2002).

16. See Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997).

they may as well devote their funds to the care of the mentally disabled or other “unproductive” ends. Wealth may be understood economically, as Posner understands it, but it may also be understood as a command of power amongst other ways of commanding power (Hobbes). Were Posner to assert that Americans are devoted to enlarging their powers in every way that it is possible to enlarge one’s powers, he would be closer to the American ideal. Then he would have to refer to sources of power other than wealth, such as knowledge and religious conviction. All these are in the American ideal, and Posner has none of it.

Posner mentions a political conundrum, intractable from the economic perspective. Why do people vote (189-192)? It makes no sense. The chance that a single vote will sway an election is close to zero. So voting is a waste of time. Posner wonders about this conundrum, and suggests that voting may be an atavism from an age in which humans clustered in caves and one voice made a difference (206). Perhaps. More likely citizens who vote do so for entirely non-utilitarian, idealistic reasons. They ask themselves the Kantian question: If I make not voting into a rule of universal legislation, what will happen? Then no one will vote, and we will not have a democracy. So not voting contradicts the premise of my life in a democracy. They also vote for expressive reasons; they find it intrinsically satisfying to cast a vote for a candidate in whom they believe. They may also vote because they consider it their duty to vote, even as rational calculation counsels against it.

## **VI. Idealism and Pragmatic Adjudication**

Posner argues that judges in the United States are and ought to be pragmatic. By this he means that the judge considers the worth of a decision not according to its antecedents, as legal formalists counsel, but according to its consequences. By what standard is the pragmatic judge

to assess those consequences? Posner's response to this question is characteristic, and curious. First he suggests that the pragmatic judge, looking to consequences, makes and ought to make decisions that produce the "best consequences for the parties and those similarly circumstanced" (12). Not fair or just or correct, but "best". But this answer is obviously unsatisfactory from Posner's perspective. By what standard do we know what's "best"? Is it the decision that maximizes society-wide utility if applied as a universal rule to all similar decisions? Posner wants to avoid this line of reasoning, because if he followed it, he would be embracing a version of legal naturalism, which he rejects. Is it the decision that instantiates a set of substantive values? He won't take up this line either, because he wishes to exclude from both law and politics inevitably divisive and wealth-destroying debates over substantive values. He thus disclaims saying anything about which consequences are "best", leaving each judge, "each with his own idea of the community's needs and interests" to "weigh the consequences differently" (71). Posner is thus in the awkward spot of counseling judges to make decisions with the "best consequences", but refusing to tell them what "best" is. All he salvages from this philosophic and jurisprudential wreck is an argument for a diverse judiciary (71, 118-121).

Unable to ground a theory of pragmatic adjudication upon an empty concept of "the best," Posner then switches the foundation of his account (65). Now the pragmatic judge makes and is supposed to make a "reasonable" decision (13, 64). The word "reasonable" is telling. The "reasonable" is not the "best." It's not even some version of the best, even if it better suits his pragmatic undertaking. But he never even tries to tell us what "reasonable" is,<sup>17</sup> and disclaims any heavy philosophic lifting in trying (65). But heavy philosophic lifting is exactly what's

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17. Except that it's just the standard of reasonableness used so frequently in law (65), which is notoriously empty of meaning. Posner reasonably defines "reasonableness" in law as a fact-based discretionary decision (74-75).



required. Of course, this is what John Rawls attempts in *Political Liberalism*, which rates only cursory mention in Posner's book (135 n.11).

The "reasonable" first commits one to a substantive frame of values associated with political liberalism.<sup>18</sup> But these values, taxing as they are, occupy only a small space within the public sphere. Political liberalism expects and assumes that the vast bulk of political decisions must be derived from values extrinsic to liberalism. But liberalism also requires that these extrinsic values be part of the public sphere. Hence, citizens must be capable of "public reason", that is to say, of engaging (presenting and recognizing) arguments based on their own and alien values.<sup>19</sup> The "reasonable", from this perspective, is just any position that can and has been put to the arduous work of the public sphere. Moving into the Habermasian territory covered by the philosopher himself and Rosenfeld in *Law and Democracy*, the "reasonable" is any position that is a product of democratic deliberation. The "reasonable" is impossible without the deliberatively democratic process, the very process Posner denigrates and fears. Without referring to some version of the political construction of the reasonable (not necessarily Rawls's), Posner's notion is and must remain utterly empty.

Posner's failure to do the heavy lifting of examining the reasonable has systemic consequences within his own theory of pragmatic adjudication. At the same time that he proposes that pragmatic adjudication be reasonable (and as a consequence of his inability to say what consequences are "best"), he calls for a diverse judiciary. A diverse judiciary is necessary because judges who adjudicate pragmatically disclaim fidelity to a constitutional text or legislation or any democratically sanctioned rule. Pragmatic judges consider consequences, not antecedents. This puts them in the class of the ordinary political rulers of Posner's pragmatic

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18. Cf. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) 224.

19. *Id.*

democracy (46). However, unlike elected officials they do not even pretend to represent the interests of the voters. So a diverse judiciary would help ameliorate the absence of representation. Without scrutinizing Posner's idea too closely, it's clear that Posner will be calling on his diverse judiciary to be pragmatic, just as he says judges now are. In other words, he will be calling on the diverse judges to make reasonable decisions. But if the judiciary is truly diverse in a meaningful way, then we should expect judges to have clashing versions of the reasonable. Then the violent and disruptive disputation over ends, which Posner tries to exclude from the front door of his polity, would enter it through the back. Without something like Rawls's political construction or Habermas's discourse theory of constitutional democracy, this disputation simply can't be managed peacefully. The point is that the reasonable is the product of a certain kind of political culture and a kind of political process, both of which Posner wants to wish away.

Posner's inability to uncover the moral and political preconditions of the reasonable follows from the beginning of his argument. The first and fundamental step he takes in *Law, Pragmatism, and Democracy* is to disavow any of the epistemological and political positions that classical American pragmatists thought compelled by a devotion to consequences. In particular, Posner regards Dewey's left-liberal political position as an accident, not at all essential to his pragmatism (45-46). Posner wants to throw epistemology and politics over the side, keeping on board only the "everyday pragmatism" of the "practical and business-like" folkloric American who is "disdainful of abstract theory and intellectual pretension, contemptuous of moralizers and utopian dreamers" (49-50). But exactly who does he think the Framers were? Only a "utopian dreamer" would have thought republican self-government of a domain as vast as the thirteen colonies to be possible (Montesquieu was assuring them it was not). Only a truly "abstract

theorist”, that is to say, one rooted in reality,<sup>20</sup> could participate in the debates in Philadelphia or write *The Federalist* (or *Anti-Federalist*) *Papers*. Only a “moralizer” would have plunged the nation into a brutal and catastrophic civil war over the issue of slavery. The institutional imagination and experimental spirit that are at the root of all pragmatism may not require Dewey’s exact politics—or Rorty’s or Habermas’s—but they do require *a* politics, which is missing from Posner’s account.

The politics that pragmatism requires need not be the cosmopolitan politics of the pure theorist. It can be rooted in a specific institutional, doctrinal and cultural tradition. Stephen Breyer, a justice of the US Supreme Court, has embraced just such a tradition-specific pragmatism both in his theoretical writings and in his work on the Court. In his Madison Lecture at the New York University School of Law, Breyer avowed that his “discussion will illustrate an approach to constitutional interpretation that places considerable weight upon consequences—consequences valued in terms of basic constitutional purposes. It disavows a contrary constitutional approach, a more ‘legalistic’ approach that places too much weight upon language, history, tradition, and precedent alone, while understating the importance of consequences.”<sup>21</sup>

Breyer finds these “basic constitutional purposes” in the text and tradition of the US Constitution. He says that “the Constitution, considered as a whole, can be described abstractly as including: (1) democratic self-government; (2) dispersion of power (avoiding concentration of too much power in too few hands); (3) individual dignity (through protection of individual liberties); (4) equality before the law (through equal protection of the law); and (5) the rule of law itself.”<sup>22</sup> Note that Breyer’s account of constitutional purposes depends upon an “abstract” account of the Constitution; he does not simply read off the constitutional purposes from the text.

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<sup>20</sup> See, for example, Plato’s *Laws*.

<sup>21</sup> Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, at 246-247 (2002).

<sup>22</sup> 77 N.Y.U.L. Rev. at 247.

Though “[t]he Constitution embodies these general objectives in particular provisions[,] . . . a general constitutional objective . . . plays a constitutional role beyond the interpretation of an individual provision that refers to it directly. That is because constitutional courts must consider the relation of one phrase to another. They must consider the document as a whole.”<sup>23</sup> Breyer’s understanding of his work as a judge on a constitutional court is that it entails the effort of constructing a political theory of the Constitution as a whole. It is not simply his own political theory, unguided by constitutional tradition. Nor is it just the theory of the tradition, unmediated by his own theoretical reflections on that tradition. It is rather the product of a discursive political engagement between judge and tradition, between theory and text. Breyer’s pragmatism is thus intrinsically connected to the politics of a particular constitutional tradition, a politics that allows him, unlike Posner, to say what is best.<sup>24</sup>

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<sup>23</sup> 77 N.Y.U.L. Rev. at 247.

<sup>24</sup> For a similar effort in a very different constitutional and pragmatic tradition, see Robert Alexy, *A Theory of Constitutional Rights* (New York: Oxford University Press 2002). See also Mattias Kumm, *Constitutional rights as principles: On the structure and domain of constitutional justice. A review essay on A Theory of Constitutional Rights by Robert Alexy*, 2 *International Journal of Constitutional Law* 574 (2004).

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