

## FOREWORD

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Elections are what may be called the festival of democracy, in which it announces, celebrates, and enacts itself. Therefore, election law—the subject of this Issue—plays a central role in how democracy unfolds in this country.

The connection between elections and democracy is not quite one of identity: in a very small community, all those who count as members may participate directly in all significant decisions, and thereby have democracy without elections.<sup>1</sup> Conversely, as in the most notorious instance of the 1933 election that promoted Hitler to supreme and dictatorial authority in Germany, an election, though perhaps democratic in itself, may lead directly to and embody the choice of the complete abandonment of democracy.<sup>2</sup>

As to what democracy is, let us start with Lincoln's words, "government of the people, by the people, for the people."<sup>3</sup> This idea of democracy connects with, though is not quite identical with, the notion of democracy as self-government. The idea is nicely captured in the first provision of the French Declaration of the Rights of Man and of the Citizen, the authors of which were greatly influenced by the American Declaration of Independence and the Virginia Declaration of Rights<sup>4</sup>: "Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation,"<sup>5</sup> and later, in respect to taxation, "All the citizens have the right to decide, either personally or by their repre-

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1. See, e.g., Amy Crawford, *For the People, by the People*, SLATE (May 22, 2013), [http://www.slate.com/articles/news\\_and\\_politics/politics/2013/05/new\\_england\\_town\\_halls\\_these\\_experiments\\_in\\_direct\\_democracy\\_do\\_a\\_far\\_better.html](http://www.slate.com/articles/news_and_politics/politics/2013/05/new_england_town_halls_these_experiments_in_direct_democracy_do_a_far_better.html) [<http://perma.cc/CM3X-RGFU>] (describing experiment in direct democracy in Westborough, Massachusetts, where citizens come together in town meetings and act as their own legislature).

2. Cf. Tara McKelvey, *The Abandonment of Democracy Promotion*, 13 INT'L J. NOT-FOR-PROFIT L. 12, 14 (2011) (noting that "democratic elections sometimes produce undesirable results").

3. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), available at [http://avalon.law.yale.edu/19th\\_century/gettyb.asp](http://avalon.law.yale.edu/19th_century/gettyb.asp) [<http://perma.cc/EX2V-KPKP>].

4. See, e.g., ENCYCLOPEDIA OF THE AGE OF POLITICAL REVOLUTIONS AND NEW IDEOLOGIES: 1760–1815, at 190–91 (Gregory Fremont-Barnes ed., 2007).

5. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 6 (Fr. 1789).

sentatives, as to the necessity of the public contribution [and] to grant this freely.”<sup>6</sup>

That “all” means all is explicit in the Declaration of Independence’s proclamation as a “self-evident” “truth” that “all men are created equal.”<sup>7</sup> In his Senate campaign against Douglas in 1858, Lincoln issued this challenge:

I adhere to the Declaration of Independence. If Judge Douglas and his friends are not willing to stand by it, let them come up and amend it. Let them make it read that all men are created equal except negroes. Let us have it decided whether the Declaration of Independence, in this blessed year of 1858, shall be thus amended.<sup>8</sup>

It is, however, a commonplace that in a society of a certain size and complexity, the first option—direct, universal participatory democracy—is impracticable, and universal plebiscitary democracy is practicable only at special “constitutional” moments. For the rest, we are inevitably remitted to representative democracy, and elections are the occasions on which we choose those representatives. It is through these elections that we are governed by representatives, freely chosen by us all so that we are governed by ourselves—self-government. Everyone who exercises authority over us ultimately traces that authority to some act of our chosen representatives. That is why the Massachusetts Declaration of Rights in Articles 5 and 6—written in John Adams’s characteristically emphatic style—states:

All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by

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6. *Id.* at art. 14.

7. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

8. Abraham Lincoln, Address in Springfield (July 17, 1858), in *POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS* 79 (Burrows Bros. Co. ed., 1894).

blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.<sup>9</sup>

So there you have it: the connection between self-government, democracy, and elections, and the corollary that those elections must be elections by all, equally. Having reached that conclusion, why are we not at the end of our story? Why do we need, indeed how can there legitimately be, laws about elections—election law—in this democratic republic? This probing challenge to the body of laws that regulate elections often arises in the denunciation of a particular provision of some election law. Consider campaign finance regulation. There it has been argued that, by making rules about who can do and say what, when, with and to whom, and at what cost to their own (and their associates') pocketbooks, current legislators are making it harder for the people to challenge them at the polls, harder to replace them; campaign finance limitations are in truth nothing but incumbent-protection schemes devised by those very same incumbents. The factual basis for that claim should be examined, but for the moment we can generalize, taking this to the meta level: Since legislators are supposed to be chosen by the people, why should those same legislators be allowed to legislate—set the rules—by which we, the people, choose (and may try to replace) them?

What does the Constitution say about this? Surprisingly little. Starting at the beginning, the Preamble does say that “this Constitution” is “ordain[ed] and establish[ed]” by “we the people of the United States.”<sup>10</sup> Article I, section 2 says that the House of Representatives shall be composed of “Members chosen every second Year by the People of the several States.”<sup>11</sup> Who counts as the people of a state is in part up to the state, but the state cannot set those qualifications to be different from the qualifications of those who choose the members of the most numerous branch of that state’s legislature.<sup>12</sup> In other words, the States, in setting this crucial qualification, are mainly constrained by whatever limits they place on who may choose their own legislators. The Constitution does also set a mini-

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9. MASS. CONST. pt. I, arts. V–VI. I especially like this quotation in part because it is the only Founding document which I know of that describes a contrary proposition as “absurd.”

10. U.S. CONST. pmbi.

11. U.S. CONST. art. I, § 2.

12. *Id.*

minimum age (twenty-five) and requires the chosen representative be seven years a citizen of the United States and an inhabitant of that state.<sup>13</sup> The qualifications of Senators—after the Seventeenth Amendment—are the same except that the minimum age is thirty, and they must be nine years a United States citizen.<sup>14</sup> In this most crucial matter, therefore, the Constitution does not explicitly decree democracy but rather assumes what is and was certainly the case—that it is referring to states, all of which already had and would continue to have functioning elected legislatures. That is a matter of some importance, because here and at many other points the Constitution does not decree or establish but assumes the prior existence of governments, those of the States, all of which are assumed to have elected governments—executives and legislatures.

Whatever democracy we have is built, therefore, on the platform of existing democracies. The closest the Constitution comes to speaking of this prior existence is in Article IV, section 4 in which the Constitution “guarantee[s] to every state . . . a Republican form of government . . . .”<sup>15</sup> That the guarantee is to the state and not the people of the state gives this clause the flavor of a protection against violent imposition of some unelected government from within or without. And the mention of invasion and domestic violence confirms this premise.<sup>16</sup> The presupposition of the prior existence of democracy in the States was in a sense quite correct: in most instances the state governments were more explicitly, intensively, and enthusiastically democratic than the national government.<sup>17</sup> Election of judges was instituted as early as 1812 in Georgia.<sup>18</sup> And yet they imposed various restrictions on who shall choose their governments that today we judge as offensively undemocratic, a sentiment enacted in several amendments to the original doc-

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13. *Id.*

14. U.S. CONST. art. I, § 3.

15. U.S. CONST. art. IV, § 4. This Clause is considered in Professor Johnstone’s Article in this Issue.

16. *See id.* (“The United States shall guarantee to every State in this Union a Republican Form of Government and shall protect each of them against *Invasion*; and . . . against *domestic Violence*.”) (emphasis added).

17. *Cf.* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 69–70 (Gerald E. Bevan trans., 2003) (describing the essentially democratic nature of the States).

18. *See* JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 122 (2002).

ument: women were everywhere excluded as electors,<sup>19</sup> slaves were excluded in the slave states,<sup>20</sup> and free persons of African descent were excluded in some states.<sup>21</sup> In some states, property and other qualifications limited who could vote.<sup>22</sup> And even the democratic Framers took this as self-evident. These preexisting, underlying state systems of democratic elections were incorporated by reference by Article I, section 2<sup>23</sup> and the Seventeenth Amendment.<sup>24</sup> Article I, section 4 incorporated by reference state legislatures' rules for time, place, and manner of holding elections, but reserved to Congress the power to override them.<sup>25</sup> (What counts as time, place, and manner has been the subject of some controversy.<sup>26</sup>) Finally, the First Amendment's guarantee of freedom of speech, press, assembly, and petition<sup>27</sup> sets important constraints on the authority of legislatures—both federal, and, after the Civil War, state—to restrict the people in elections. The same can be said about the Fourteenth Amendment's guarantees of due process and equal protection<sup>28</sup> and the Fifteenth Amendment's guarantee that the right to vote shall not be abridged on account of race, color, or previous condition of servitude.<sup>29</sup> The Nineteenth Amendment adds sex,<sup>30</sup> the Twenty-Fourth Amendment adds the failure to pay a poll or other tax,<sup>31</sup> and the Twenty-Sixth Amendment adds age—for citizens eighteen or over.<sup>32</sup>

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19. See Steven Mintz, *Winning the Vote: A History of Voting Rights*, GILDER LEHRMAN INST. OF AM. HISTORY, <https://www.gilderlehrman.org/history-by-era/government-and-civics/essays/winning-vote-history-voting-rights> [http://perma.cc/AQ2F-FFBN].

20. *Id.*

21. *Id.*

22. *Id.*

23. See U.S. CONST. art. I, § 2.

24. See U.S. CONST. amend. XVII.

25. See U.S. CONST. art. I, § 4, cl. 1.

26. See, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673–74 (2015); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253–54 (2013).

27. See U.S. CONST. amend. I.

28. See U.S. CONST. amend. XIV.

29. See U.S. CONST. amend. XV.

30. See U.S. CONST. amend. XIX.

31. See U.S. CONST. amend. XXIV.

32. See U.S. CONST. amend. XXVI.

These constitutional provisions impose important constraints on the authority of government to regulate elections, but a great deal of authority still exists. So the challenge raised with respect to campaign finance regulation—and now generalized—remains to be answered: If government is *by* the people, what justifies *any* regulation *by the government* of the people when they choose the government? If we follow the implication (I might say *the innuendo*) of that challenge, we arrive at the conclusion that the people's choice of their government must be completely unconstrained by that government, which, after all, is wholly dependent on them and which they are choosing. And that conclusion, of course, to use John Adams's word, would be absurd. What would it even mean for an election not to be governed by law? Such an approach would raise important questions about voting, organizing elections, lobbying, fundraising, and much more:

Who would get to vote? Children? Why not? Are certain classes of people disqualified—for example, ex-convicts or people presently in prison? Some of these qualifications seem self-evident, others are controversial, but they all imply a theory of democracy. Who gets to go on the ballot, and how? How many candidates can get on the ballot? What counts as winning—first-past-the-post, or must there be an absolute majority, leading to run-off elections?

If people are choosing members of a representative body—not just the single leader—how are the votes distributed? Are there single-member or multi-member districts? How are those districts to be drawn? By gerrymandering? All these matters the Constitution leaves open and thus open to rules later to be made—but by whom? Who else but the legislatures themselves?

Then there are the questions about organizing the actual election: Should the balloting be on one day, or stretched out over a longer or shorter time? How should the candidates finance their campaigns—should there be private or public financing? If public financing, who gets how much, and for what? If private, are there any limits? If there are limits, how much on whom, and for what? And once we have elected a legislature, what access should citizens have to it? Should contact

with legislators be regulated? This is the regulation of lobbying, and it is related to fundraising.<sup>33</sup>

Each of these questions has received multiple answers across this country, over time, and among developed democracies.<sup>34</sup> Some of them are implicated in sharply contested court battles just now.<sup>35</sup> But there is a general point: The idea of a democracy and democratic elections is a vague and insubstantial notion—a kind of fog of possibility—which must be brought into focus by a myriad of concrete, specific choices and institutions. It is like a hazy, unfocused cloud of indeterminate colors and indefinite shapes. The choices that must be made are like the twist of the lens that brings the vague cloud into focus, with images resolving into sharper forms. But the metaphor is faulty in one respect: this vague, out-of-focus image can be brought into many possible sharper images. And however you choose to bring one issue into focus—such as the definition of possible voters, or the establishment of who and how many candidates there are to be—changes the way in which all the other open questions must be brought into focus. If you arrange the voters one way, the possible forms of legislature (though not necessarily fixed) will present a narrower range of possibilities that must themselves be brought into focus. And these will rearrange other choices and perhaps require adjusting previously chosen electoral shapes.

In this respect, it is like constitutional interpretation generally. In the twenties and thirties of the last century, we had a newly focused conception of freedom of speech.<sup>36</sup> When that

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33. See Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELECTION L.J. 160 (2014).

34. See, e.g., *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

35. See, e.g., Robert Barnes, *N.C. case represents pivotal point of voting debate*, WASH. POST (July 30, 2015), [https://www.washingtonpost.com/politics/courts\\_law/outcome-of-trial-on-nc-election-law-changes-will-have-national-effect/2015/07/30/00645094-35f4-11e5-b673-1df005a0fb28\\_story.html](https://www.washingtonpost.com/politics/courts_law/outcome-of-trial-on-nc-election-law-changes-will-have-national-effect/2015/07/30/00645094-35f4-11e5-b673-1df005a0fb28_story.html) [<https://perma.cc/3JZG-BNGV>]; Erik Eckholm, *Texas ID Law Called Breach of Voting Rights Act*, N.Y. TIMES (Aug. 5, 2015), <http://www.nytimes.com/2015/08/06/us/appellate-panel-says-texas-id-law-broke-us-voting-rights-act.html> [<http://perma.cc/483L-8SUV>]; Adam Liptak, *Supreme Court Agrees to Settle Meaning of 'One Person One Vote'*, N.Y. TIMES (May 26, 2015), <http://www.nytimes.com/2015/05/27/us/supreme-court-to-weigh-meaning-of-one-person-one-vote.html> [<http://perma.cc/DH6H-XXNT>].

36. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (setting forth clear-and-present-danger test).

concept was enlarged to include motion pictures<sup>37</sup> and then sexually explicit material,<sup>38</sup> the concept—though enlarged in one sense—required further refinements. Similarly, with the inclusion of speech that would previously have been unprotected as either defamatory or merely commercial, the earlier, simpler, clear-and-present-danger test would not do, because it did not fit. And so it goes in respect to election law and the concept of democracy as well. We are engaged, in Neurath's metaphor, in rebuilding our vessel of democracy while we are at sea.<sup>39</sup> Both of these themes—democracy and democratic elections—are important and especially relevant now. The Articles that follow explore these twin themes and their relation to each other as we begin yet another national election cycle.

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37. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

38. See *Jacobellis v. Ohio*, 378 U.S. 184, 191–92 (1964).

39. See Otto Neurath, *Protocol Sentences*, in *LOGICAL POSITIVISM* 199, 201 (A.J. Ayer ed., 1978).