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BOOK REVIEW

The Possibilities of Competitive Democracy

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LAW, PRAGMATISM, AND DEMOCRACY. By Richard A. Posner. Cambridge: Harvard University Press, 2003. Pp. 398. \$35.00.

THE STATE OF DEMOCRATIC THEORY. By Ian Shapiro. Princeton: Princeton University Press, 2003. Pp. 183. \$19.95.

Introduction

Modern democratic theories reflect a seeming division between the real and the ideal of political democracy.¹ Many descriptive or explanatory

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studies of democratic politics are profoundly influenced by Joseph A. Schumpeter's vision of "competitive democracy," which defines democracy as a governmental system that institutionalizes the competitive struggle for political power and leadership.² The public choice literature, though, seldom mentions Schumpeter's contribution, but echoes with his minimalist vision of democracy and endeavors to elucidate the logic of political competition on the basis of its strategic view of politics.³ On the other hand, theories of "deliberative democracy," an ideal that can be traced to ancient Greece and has commanded the normative discourse of democracy for at least the past fifteen years,⁴ view "civic self-governance" as the ultimate ideal of democracy. Deliberative democrats basically argue that public reasoning or

their helpful comments. Thanks also to Paula Maute for her editing assistance. All mistakes are mine.

- ¹ Ian Shapiro observes that "[n]ormative and explanatory theories of democracy grow out of literatures that proceed, for the most part, on separate tracks, largely uninformed by one another," IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 2 (2003).
- ² See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY*, 269 (1942, 1975). Schumpeter's influence can be found in the works of many students of electoral democracy, such as Robert A. Dahl, Samuel P. Huntington, Seymour Martin Lipset, Juan J. Linz, and G. Bingham Powell; see Larry Diamond, *Defining and Developing Democracy*, in *THE DEMOCRACY SOURCEBOOK* 29, 31-32 (Robert A. Dahl, Ian Shapiro, & Jose Antonio Cheibub eds., 2003).
- ³ William H. Riker, for instance, argues that the liberal veto (i.e., the rejection of incumbents) is all we can ask for in democracy; WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 244 (1982). For an overview of the public choice analyses of political competition, see generally DENNIS C. MUELLER, *PUBLIC CHOICE* III 230-302 (2003).
- ⁴ John S. Dryzek observes that the theory of democracy took a definite "deliberative turn" around 1990; JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* 1 (2000). For the normative discourse of deliberative democracy during recent years, see also *DELIBERATIVE DEMOCRACY* (John Elster ed., 1998); *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* (James Bohman and William Rehg eds., 1999) [hereinafter *DELIBERATIVE DEMOCRACY*]; *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* (Stephen Macedo, ed., 1999) [hereinafter *DELIBERATIVE POLITICS*].

public deliberation is the key to legitimate law-making.⁵ While there are significant differences within this camp, the banner of deliberative democracy has enlisted many important thinkers of our time, including John Rawls and Jürgen Habermas.

Admittedly, our thoughts about democracy are not confined to these two leading visions, nor are conceptions of competitive and deliberative democracy diametrically opposed to each other.⁶ The tug of war between realists and idealists, nonetheless, heightens the contrast between these two visions, for realists often denounce deliberative democracy as a utopian ideal, and idealists constantly accuse theories of competitive democracy of being normatively impoverished. Overcoming the disparity between the real and the ideal has thus become a goal of most serious democratic theorists. While deliberative democrats seek to demonstrate that they envision a "realistic utopia" in a Rawlsian sense,⁷ competitive democrats argue that even if democracy currently at work is minimal, it is still worth defending.⁸

In view of the height and breadth of the deliberative vision, it may well be an uphill campaign for competitive democrats to promote their minimalist vision in normative terms. Advocates of competitive democracy certainly can build their case on "realistic" assumptions of human nature; they can also

⁵ DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS ix (James Bohman & William Rehg eds., 1999).

⁶ Many deliberative democrats, for instance, identify the aggregative conceptions of democracy that take the citizens' preferences as given to be their main rivals; see, e.g., Jack Knight and James Johnson, *Aggregation and Deliberation: On the Possibility of Democratic Legitimacy*, 22-2 Political Theory 277 (1994); AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 13-21 (2004).

⁷ "Political philosophy is realistically utopian when it extends what are ordinarily thought of as the limits of practical political possibility;" JOHN RAWLS, THE LAW OF PEOPLES 6 (1999). For deliberative democrats' responses to the practical challenges, see, e.g., AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY (2004).

⁸ Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in DEMOCRACY'S VALUE 23, 43-50 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999).

propose and defend their own criteria of normative justification without subjecting themselves completely to the moral principles of deliberative democracy. But in the end, the normative strength of competitive democracy depends on whether it can provide critical insights and useful guidance to the making and working of democracy that other democratic visions do not offer. What are the morals connected to competitive democracy? Could a minimalist vision that may not cast democracy in its best moral light nevertheless be justified as the normative position we should take? Under what assumptions and under what conditions can the competitive vision claim to have advantages over other normative views of democracy?

Focusing on these questions, we turn now to Richard Posner's *Law, Pragmatism, and Democracy* (2003) and Ian Shapiro's *The State of Democratic Theory* (2003), as these two books are perhaps the two most important attempts in recent years to advance the vision of competitive democracy in the domain of normative discourse.⁹ By tracing the steps of these two leading competitive democrats, we aim to examine why they revive Schumpeter's vision and how they develop normative accounts of competitive democracy that can meet the challenges of other theories. A comparative reading of these two books can also reveal the differences within this movement and prompt us to review the potentials as well as the limitations of different theories of competitive democracy.

⁹ To be sure, Posner and Shapiro are very different in terms of background, ideology, and scholarship, and these two authors in their 2003 books have independent agenda. In *Law, Pragmatism, and Democracy*, Posner offers us a rather comprehensive account of his "pragmatic liberalism" on law and democracy; he terms his unique approach as "everyday pragmatism" and simply proposes "uses of common sense to solve problems." See generally RICHARD A. POSNER, *LAW, PRAGMATISM AND DEMOCRACY* ix, 52 (2003). Shapiro's *The State of Democratic Theory* is no less ambitious. He advances a domination-minimizing thesis of democracy through integrative analysis of normative and explanatory theories of democracy. See SHAPIRO, *supra* note 1, at 3.

Section I of this review analyzes the striking convergence between these two uncoordinated works. Both Posner and Shapiro criticize theories of deliberative democracy and public choice. To build a credible alternative, they restore Schumpeter's vision of competitive democracy and seek to transform it into a more attractive vision. The elitist sentiment of the Schumpeterian democracy abates, as "interest representation" becomes a mark of the newborn idea. Both authors also seek to ensure the competitiveness of political markets, and they propose similar measures to address political antitrust problems. In view of their theories of democracy, it is not surprising that both Posner and Shapiro caution against vanguardist judicial review and demand more room for democratic experimentation.

Equally significant, however, are the differences within their almost simultaneous advocacy for competitive democracy. While many of their arguments are complementary, the images of the competitive vision projected by these two books are far from identical. Not only do Posner and Shapiro have different policy preferences regarding the structure of the democratic process, they also embrace different ideals of competitive democracy and hold different ideological stances. Section II looks into the differences between them and explains why we should read their theories as *two* distinct versions of the competitive vision. Posner's theory is more conservative, closer to Schumpeter's ideas, and focuses more on the "contestability" of political competition. Shapiro's theory, by contrast, is more progressive, more distant from Schumpeter's intent, and places more stress on the "responsiveness" of political competition.

Together, Posner and Shapiro lead us to question the dominance of deliberative democracy in normative discourse. They also invite us to reevaluate the normative ideals of competitive democracy. Section III of this review reflects on the merits and challenges of viewing democracy from the competitive perspective. Although I am skeptical about the possibility and reasonableness of privileging any vision of democracy in the abstract, I

suggest that plausible arguments exist for practicing the competitive vision in the judicial context, if we believe in and expect judicial review to enhance rather than limit democracy. But its comparative advantage in the context of judicial review is limited, for this minimalist vision still has multiple and sometimes conflicting implications even for the task of judicial review of the law of democracy. The promise of ensuring competitive democracy through process-oriented judicial review, therefore, has yet to be realized.

This book review is a study of two democratic theories. But my concern is not purely with the two authors' theories. What is at stake is not just someone's scholarship, but the way we think of and *do* democracy. Although the discussion below is inevitably centered on American democracy, I hope to inspire reflections on the meanings and conditions of democracy in Taiwan as well. My beloved father, Justice (Ret.) Jyun-Hsiung Su, has devoted his entire career in academics, politics, and the judiciary to pursuing constitutional democracy in Taiwan. Perhaps a lively discussion of the ideals of democracy is a good way to celebrate his seventieth birthday.

I. The Convergence toward Competitive Democracy

Posner's *Law, Pragmatism, and Democracy* and Shapiro's *The State of Democratic Theory* mark the latest surge of a "neo-Schumpeterian" movement in normative theories of democracy. Just as Schumpeter presents his "alternative theory of democracy" as a response to the "classical doctrine of democracy" in his time,¹⁰ Posner and Shapiro revive Schumpeter's vision in response to the prevailing theories of deliberative democracy and public

¹⁰ The "classical doctrine of democracy," according to Schumpeter's definition, perceives democracy as "institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will;" SCHUMPETER, *supra* note 2, at 250.

choice. Certainly, their diagnoses of these two schools are not identical, nor do they support Schumpeter's vision for the same reason. But Posner and Shapiro both pay much attention to the empirical practices of democracy, and they discuss normative questions mainly in strategic or instrumental terms, rather than making judgments in a cognitive or epistemic sense.¹¹ Generally speaking, they revive Schumpeter's theory not only because it offers a more realistic account of democracy, but also because it is more conducive to certain ends of politics than other alternatives.

The revival of Schumpeter's vision of competitive democracy marks just one major junction of Posner and Shapiro's theories. They are "neo-Schumpeterians" in the sense that they advance the normative concerns of competitive democracy beyond what traditional Schumpeterians would likely envision. We can find significant common themes in their works: both favor inclusive interest representation, emphasize antitrust concerns to enable political competition, and argue for a modest role for judicial review. Critics of competitive democracy often frown on its normative hollowness. In their 2003 books, Posner and Shapiro invite us to rethink this.

A. Why Not Deliberative Democracy?

Deliberative democracy, as suggested in the introduction, has become the gravitational center of the normative discourse of democracy. In recent years, this concept has attracted many followers as well as critics.¹² Its gravity is so strong that nowadays it is difficult to do democratic theory without positioning yourself in relation to the deliberative theorists. Posner

¹¹ For the distinction between strategic and cognitive views of politics, see David M. Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 Tex. L. Rev. 1437 (1993).

¹² For criticism of deliberative democracy, see, e.g., Lynn M. Sanders, *Against Deliberation*, 25-3 Political Theory 347 (1997); Stanley Fish, *Mutual Respect as a Device of Exclusion*, in DELIBERATIVE POLITICS, supra note 4, at 88; MICHAEL WALZER, POLITICS AND PASSION: TOWARD A MORE EGALITARIAN LIBERALISM 90-109 (2004).

and Shapiro are no exception; they begin their arguments for the competitive vision roughly by critiquing deliberative democracy.

Posner summarizes the basic idea of deliberative democracy as “political democracy conceived of as the pooling of different ideas and approaches and the selection of the best through debates and discussion.”¹³ Referring to it as “Concept 1 democracy,” Posner characterizes deliberative democracy as “civic-minded, [and] oriented to the public interest rather than to selfish private interests.”¹⁴ “It insists that voters be both informed and disinterested and that voting be based on the ideas and opinions that emerge from deliberation among these informed and disinterested citizens.”¹⁵ Shapiro offers a similar picture by contrasting the deliberative view with the aggregative view of democracy. According to Shapiro, both deliberative and aggregative theorists “share Rousseau’s assumption that democracy’s task is to express a general will that reflects the common good.”¹⁶ However, deliberative theorists hope to reach the common good “by transforming preferences rather than aggregating them.”¹⁷ From the perspective of deliberative democrats, “[t]he point of democratic participation [...] is more to manufacture the common good than to discover it.”¹⁸

In *Law, Pragmatism, and Democracy*, Posner singles out a number of deliberative democrats, including John Dewey, John Rawls, Jürgen Habermas, James Bohman, Joshua Cohen, Amy Gutmann and Dennis Thompson, James Fishkin, and Cass Sunstein.¹⁹ Although he recognizes the

¹³ POSNER, *supra* note 9, at 106-107.

¹⁴ *Id.*, at 131.

¹⁵ *Id.*

¹⁶ SHAPIRO, *supra* note 1, at 3.

¹⁷ *Id.*, at 21.

¹⁸ *Id.*, at 22.

¹⁹ POSNER, *supra* note 9, at 14.

divergences within the deliberative camp,²⁰ Posner molds these theorists' divergent theses into his "Concept 1 democracy" and directs his comments to this general concept. It may be too harsh to criticize Posner for attacking a straw man, but it is fair to say that his criticism is rather impressionistic. What he endeavors to unveil are the sentiments, tacit implications, and implicit tendencies of the deliberative theories. By contrast, Shapiro's criticism is more realistic in terms of style. His critique of deliberative democracy derives largely from close examinations of Amy Gutmann and Dennis Thompson's discussion of actual deliberative processes, and of Bruce Ackerman and James Fishkin's proposal for "deliberation day."²¹ But Shapiro is not merely concerned about the costs and benefits of deliberation in the actual world. He also invites us to reconsider the conception of the common good embraced by theorists of deliberative democracy.

For Posner and Shapiro, the effects of deliberation are at best indeterminate. As Shapiro notes, "[d]eliberation's benefits are not unequivocal. They depend on many contingencies of circumstance, and sometimes deliberation creates costs that outstrip its advantages."²² In view of the power relations and conflicts of interest in real politics, Shapiro reminds us that deliberation does not necessarily lead to agreement or promote accommodation; in certain circumstances, "[d]eliberation can bring differences to the surface, widening divisions rather than narrowing them."²³ As an appellate judge for more than twenty years, Posner also testifies to the limits of deliberation: "argument over fundamentals creates anger and is more likely to deepen and congeal disagreement than to overcome it."²⁴

²⁰ *Id.*, at 133-134. On different versions of the theory of deliberative democracy, see also GUTMANN & THOMPSON, *supra* note 6, at 21-29.

²¹ SHAPIRO, *supra* note 1, at 22-34. See also GUTMANN & THOMPSON, *supra* note 7; ACKERMAN & FISHKIN, *supra* note 7.

²² SHAPIRO, *supra* note 1, at 39.

²³ *Id.*, at 27.

²⁴ POSNER, *supra* note 9, at 139.

Many deliberative democrats fail to address these problems, Shapiro suggests, because the deliberation they envisage takes place in ideal settings.²⁵ Posner makes a similar criticism in accusing some Concept 1 theorists of modeling democracy on a faculty workshop.²⁶ Posner's faculty workshop analogy is misleading, if not a cheap shot, because deliberative democrats can easily distinguish the political process of deliberative democracy from an academic seminar that does not produce binding decisions.²⁷ But the general point stands: deliberation is not necessarily benign.

Both Posner and Shapiro link the difficulties of deliberation in the actual world to irreconcilable disagreement among people, which, ironically, is also the starting point of some pluralist theories of deliberative democracy.²⁸ Shapiro wonders whether fundamentalists are willing to subject themselves to the rational rules of deliberation.²⁹ Posner doubts whether deliberation over fundamental values is feasible since American society is quite religious, and religious belief often cuts short public debate.³⁰ Nonetheless, Shapiro does recognize that sometimes deliberation helps to limit domination. He even proposes to protect the right to deliberative participation when "voice" is a critical tool for the vulnerable.³¹ But Shapiro makes it clear that deliberation is best seen by government "as a consumption good; people should be free—but not forced—to engage in it."³² He argues that "[g]overnment can try to

²⁵ See SHAPIRO, *supra* note 1, at 33-34. Shapiro's examples are Habermas's "ideal speech situation" and Ackerman's "dialogic model of justice."

²⁶ See POSNER, *supra* note 9, at 135.

²⁷ See GUTMANN & THOMPSON, *supra* note 6, at 5.

²⁸ See GUTMANN & THOMPSON, *supra* note 7, at 18-26.

²⁹ See SHAPIRO, *supra* note 1, at 25-26.

³⁰ POSNER, *supra* note 9, at 137.

³¹ Drawing insight from Albert Hirschman's theory on "exit" and "voice," Shapiro suggests that "the right to deliberative participation should vary with the degree to which people are trapped;" SHAPIRO, *supra* note 1, at 43.

³² *Id.*

structure things so as to make deliberation more or less likely, but ultimately deliberation depends on individual commitment. By its terms, deliberation requires solicitous goodwill, creative ingenuity, and a desire to get to the best answer. These cannot be mandated."³³ In contrast, Posner appears to be much more suspicious of the function of deliberation, because he holds a rather dim view of human nature and calls "the deliberative capacity of the people" into question.³⁴ This line of argument enables Posner to read "intellectual elitism" into the vision of deliberative democracy,³⁵ but it also opens the door to the criticism that Posner may betray his own pragmatism by taking a certain view of human nature for granted.³⁶

Regardless of whether deliberative democracy is elitist, the basic point remains that deliberation is not a cure-all or unconditional good. This is a powerful critique because it presses us to reflect on what we should expect of political democracy. For Shapiro, this question touches upon the definition of "the common good" for democracy. Whether deliberation itself is the common good or is merely a process for forming a general will that reflects the common good, his criticism has made it clear that in neither case can the proposed common good be realized in the actual world.³⁷ Shapiro does not reject the idea of "common good" entirely as Schumpeter did,³⁸ but he suggests that we should seriously consider the feasibility of the common good defined by our democratic vision.³⁹ Posner expresses a similar concern by directing his criticism at the very ideal of self-government that deliberative democrats embrace: "Concept 1 is, in short, utopian. Its essential

³³ *Id.*, at 49.

³⁴ See POSNER, *supra* note 9, at 107, 133, 247-248.

³⁵ *Id.*, at 135-136.

³⁶ See Michael Sullivan and Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 Yale L.J. 687, 720-724 (2003)(book review).

³⁷ See SHAPIRO, *supra* note 1, at 21-30.

³⁸ Cf., SCHUMPETER, *supra* note 2, at 250-256.

³⁹ See SHAPIRO, *supra* note 1, at 2-3.

utopianism is its conception of democracy as self-government, so that its implicit model is Athenian democracy, which is utterly unworkable under modern conditions.”⁴⁰

But what is wrong with embracing such an aspirational, idealistic, or even utopian vision of democracy? After all, the ideal of deliberative democracy can be viewed as “counterfactual, but not as divorced from experience;” it can also be regarded as “uncertainly defined or incompletely specified, but not as unthinkable or uninterpretable.”⁴¹ To persuade idealists that the vision of deliberative democracy is unsound (by suggesting that the ideal of deliberation may be out of touch) is simply not enough; we have to explain *why* holding such a view is normatively undesirable. Shapiro’s answer to this question is derived from his deep concerns for the unequal power relations in real politics. He asserts that “[d]eliberation theorists tend to confuse problems associated with the unequal power contexts in which deliberation occurs with a deliberative deficit, mistaking the doughnut for the hole.”⁴² In other words, an idealistic vision may misjudge the current state of democracy and fail to address the real problems due to its inattention to the power relations and conflicts of interest in the real world. Posner, in contrast, launches a strong assault on the “pessimistic” sentiment and “antidemocratic” tendency of the deliberative vision:

And so we have the culminating paradox that in practice and tendency, deliberative democracy often turns antidemocratic. The theorist of deliberative democracy prescribes conditions of knowledge, attention, and public-spiritedness that the people cannot or will not satisfy in their political life. And so he is tempted to give up on the people and embrace

⁴⁰ POSNER, *supra* note 9, at 164.

⁴¹ Frank I. Michelman, *How Can the People Ever Make the Laws? A Critique of Deliberative Democracy*, in DELIBERATIVE DEMOCRACY 145, 149-150.

⁴² SHAPIRO, *supra* note 1, at 10.

rule by experts, judicial or bureaucratic, whom he deems capable of deliberation—experts much like himself.⁴³

Posner seems to accuse deliberative democrats too much. If he is entitled to claim that he is a liberal rather than a democrat *tout court*,⁴⁴ so too can deliberative democrats confess that they are “really just a sect of rights-foundationalists *malgré nous*.”⁴⁵ Posner may not succeed in painting deliberative theorists as less sincere democrats, but he does have a point: there are tensions between democracy and liberty, and these tensions cannot be easily dissolved into the vision of deliberative democracy.⁴⁶ Posner’s harsh critique, therefore, would be better regarded if it were construed as a warning against the downside of utopian thinking;⁴⁷ it also encourages us to confront the tension between democracy and judicial review more candidly.

B. What’s Wrong with Public Choice?

Posner and Shapiro also criticize “public choice” theories that apply methods of economics to subjects of political science.⁴⁸ Most of the studies under this rubric aim at describing or explaining the function or outcomes of the political process. But they are not immune from normative scrutiny because they necessarily assume a certain conception of democracy and their findings often affect our normative judgments. By questioning the democratic

⁴³ POSNER, *supra* note 9, at 157.

⁴⁴ *See, id.*, at 155.

⁴⁵ Michelman, *supra* note 41, at 166-67.

⁴⁶ Michelman provides us a more philosophical explanation with his conceptual examination of the difficulties inherent in a strong normative version of epistemic-democracy theory such as that of Habermas’s; *id.*, at 159-165.

⁴⁷ *See, POSNER, supra* note 9, at 164.

⁴⁸ A finer distinction can be made between “social choice” theories that focus on the study of collective decision-making processes and “public choice” theories that are narrowly defined as studies of interest group politics. Many people use the term “public choice” in a loose sense to label all the relevant studies, and still others prefer to categorize these studies under the concept of “rational choice.”

conception of public choice theory, Posner and Shapiro in fact build a case against some libertarians and even some liberals whose distrust of democratic governance is often based on or reinforced by studies of public choice. This is a crucial step for Posner's and Shapiro's normative projects of competitive democracy, because they want to distinguish their theories from certain public choice theories that also endorse a minimalist conception of democracy similar to Schumpeter's.

According to Shapiro, modern social choice theorists still maintain an aggregative view of democracy, under which democracy is supposed to discover a social welfare function—a modern version of Rousseau's "general will"—by aggregating individual preferences.⁴⁹ But based on Kenneth Arrow's impossibility theorem, many social choice theorists argue that this project cannot be rendered coherent due to the problem of cyclic voting, which produces intransitive outcomes. They also worry that the democratic outcomes are either manipulated by the agenda setters or heavily contingent on the voting rule being used.⁵⁰ "In short, democracy might lead to tyranny of the majority, but it might also lead to tyranny of a strategically well placed minority or to tyranny of irrational arbitrariness."⁵¹ Posner's review, in contrast, focuses on George Stigler's theory that portrays a democratic government as one ruled by interest groups. He also reports that public-choice theory at large remains pessimistic about the policies made by democratic government.⁵² The findings in the public choice literature thus have inspired some scholars like William Riker and Barry Weingast to further

⁴⁹ SHAPIRO, *supra* note 1, at 11.

⁵⁰ *Id.*, at 11-12.

⁵¹ *Id.*, at 12.

⁵² POSNER, *supra* note 9, at 199.

argue for limiting democratic decision-making by constitutional mechanisms such as judicial review.⁵³

Shapiro has a reputation for criticizing public choice theories. He and coauthor Donald Green extensively criticize the methodological problems with public choice theories in their 1994 book, *Pathologies of Rational Choice Theory*.⁵⁴ In *The State of Democratic Theory*, Shapiro directs his criticisms to the normative implications of public choice theories. He basically agrees with Arrow on the impossibility of discovering a general will, but he refutes the Arrowian (mis-)implication that democracy or majority rule is particularly irrational.⁵⁵ Shapiro further suggests that the principle of transitivity might not be a reasonable standard for measuring the rationality of collective decisions.⁵⁶ He also argues that "the possibility of voting cycles is not especially troubling, and it may even be advantageous for the stability of democratic institutions."⁵⁷ But given that cycles are rare in reality,⁵⁸ does the possibility of voting cycles really help to sustain democracy by giving hope to the losers? Shapiro posits:

⁵³ See William Riker and Barry Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 Va. L. Rev. 373 (1988). It should be noted that the idea of using public choice theories to justify more intrusive judicial review, while popular during the 1980s, has been resoundingly refuted by Einer Elhauge's 1991 article and no longer carries the day. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale. L. J. 31 (1991). See also JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997).

⁵⁴ DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994).

⁵⁵ SHAPIRO, *supra* note 1, at 12-13. For a modern explanation and discussion of the Arrow's theorem and its applications, see DONALD G. SAARI, *DECISIONS AND ELECTIONS: EXPLAINING THE UNEXPECTED* (2001).

⁵⁶ SHAPIRO, *supra* note 1, at 14.

⁵⁷ *Id.*, at 15.

⁵⁸ For an extensive empirical study of democratic voting records, see GERRY MACKIE, *DEMOCRACY DEFENDED* (2003).

It may be that democracies turn out to enjoy the best of both worlds. The possibility of cycles gives those who lose in any given election an incentive to remain committed to the system in hopes of prevailing in the future, but the fact that cycles are actually rare means that government policies are not perpetually being reversed.⁵⁹

This proposition is not convincing. Of course, democracy can be changeable yet stable. But the possibility of change is mainly a function of time, of periodic elections in particular. Only on rare occasions can we attribute changes to cyclical voting, which is puzzling and unsolvable for public choice only when it is caused by the preference profile with *Condorcet n-tuple*.⁶⁰ Just as Riker exaggerates the danger of voting cycles, Shapiro probably overstates their benefits. The rarity of voting cycles in the real world can only render their conceptual benefits and threats equally trivial.

After defusing the threats to democracy's legitimacy posed in some public choice literature, Shapiro reexamines the traditional concerns about the tyranny of the majority upon which some public choice theorists build their arguments. He explores James Buchanan and Gordon Tullock's social contract fiction and their initial bias in favor of unanimity rule.⁶¹ He also questions whether judicial review is indispensable to the protection of individual rights and civil liberties.⁶² Shapiro is particularly skeptical about the theoretical consistency of the democracy-limiting view of judicial review

⁵⁹ SHAPIRO, *supra* note 1, at 15.

⁶⁰ Condorcet's paradox of voting is often illustrated with a list of three transitive rankings $A > B > C$, $B > C > A$, $C > A > B$. The *Condorcet n-tuple*, according to Saari's definition, is "a listing of n transitive rankings for n candidates where each alternative is in first, second, ... , last place precisely once;" SAARI, *supra* note 55, at 206. The *Condorcet n-tuple* profile is the only occasion where the aggregation of rational voters' preferences is cyclic and is contingent on agenda setting; for further explanation, see SAARI, *supra* note 55, *id.*, at 182-86.

⁶¹ SHAPIRO, *supra* note 1, at 17-19.

⁶² *Id.*, at 20-21.

endorsed by liberal constitutionalists; after all, "[t]here is every reason to believe [courts] would be at least as vulnerable to cycles as legislatures, and possibly even more susceptible to manipulation."⁶³

Posner also laments that the public choice theorists, just like theorists of deliberative democracy, "tend to assign too large a governance role to judges, overlooking the extent to which they share the infirmities of the other participants in the political process."⁶⁴ Focusing on Stigler's interest-group theory, he posits two other critiques. First, Posner suggests that we take a less cynical view of the role of interest groups, for they have certain redeeming values such as generating information and attenuating to the danger of simple majoritarianism.⁶⁵ "In any event, the social costs imposed by interest groups are not a cost of democracy; they are a cost of government [...]"⁶⁶ Secondly, he criticizes Stigler's theory for ignoring or underestimating the roles of politicians and voters when focusing too much on interest groups; as a result, interest group theories fail to distinguish democracies from dictatorships and cannot address problems regarding the structure of a democratic government.⁶⁷ Above all, Posner is uncomfortable with the underlying sentiment of public choice theory, even though he is sympathetic to the deregulation and privatization movements prompted by some public choice theorists: "[t]he danger of public-choice theory, as of deliberative democracy, is overstatement, contributing to the generally hostile attitude of the academy toward contemporary American democracy."⁶⁸

⁶³ *Id.*, at 13. For an example of using public choice theories to analyze the decisions made by the U.S. Supreme Court, see MAXWELL L. STEARNS, *CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING* (2002).

⁶⁴ POSNER, *supra* note 9, at 387.

⁶⁵ *Id.*, at 171, 199-200.

⁶⁶ *Id.*, at 171.

⁶⁷ *Id.*, at 198, 200.

⁶⁸ *Id.*, at 199-200.

C. Reclaiming the Vision of Competitive Democracy

After rejecting the predominant theories of deliberative democracy and public choice, both Posner and Shapiro revisit Schumpeter's theory and argue for the revival of his core thesis, which emphasizes the role of political competition in democracy. In *Capitalism, Socialism and Democracy*, Schumpeter offers a rather minimal conception of political democracy: "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."⁶⁹ Under this vision, political democracy is "a method rather than an ideal of political culture;"⁷⁰ it aims at determining political leadership according to rules of electoral competition, as opposed to discovering or manufacturing the will of the people.⁷¹ Karl Popper expresses a similar view when he defends democracy as the only system allowing citizens to change governments without bloodshed.⁷² For Schumpeterian and Popperian democrats, democracy is not about self-government; "[d]emocracy is government subject to electoral checks."⁷³

Viewing competition for leadership as the central concern of democracy, Schumpeter's work inspired Anthony Downs and many other scholars to develop economic theories of democracy.⁷⁴ The market analogy—the parallel between political and economic competition—has since become a hallmark of the competitive vision. It basically suggests that democratic

⁶⁹ SCHUMPETER, *supra* note 2, at 269.

⁷⁰ POSNER, *supra* note 9, at 178.

⁷¹ See SCHUMPETER, *supra* note 2, at 271-272.

⁷² KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 124 (1962).

⁷³ POSNER, *supra* note 9, at 164.

⁷⁴ See, e.g., ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); MUELLER, *supra* note 3, at 230-302; JOHN E ROEMER, *POLITICAL COMPETITION: THEORY AND APPLICATIONS* (2001).

competition can be viewed as a market, in which voters are like consumers and parties or politicians like sellers. Posner and Shapiro recognize the dissimilarities between politics and economic markets.⁷⁵ They use the market analogy, nonetheless, to highlight the importance of politicians' profit motive for the function of competitive democracy: "[o]nce parties are modeled on firms trying to maximize votes as analogues of profits, then leaders can be seen as disciplined by the demands of competition;"⁷⁶ if politicians do not care about votes, there is simply no democratic and peaceful way to assure that government is responsive and responsible to the people.⁷⁷

Under the label of "Concept 2 democracy," Posner offers a lengthy account of why Schumpeter's vision of competitive democracy is "realistic" and why it offers a more accurate description of American democracy. "Having no preconceived, idealized model of democracy to which to compare the practice of American or any other existing democracy, the Concept 2 democrat is inclined to take for granted the features of democratic practice lamented by Concept 1 democrats."⁷⁸ After laying out this general proposition, Posner describes how comfortable Concept 1 democrats feel about representative democracy, interest group politics, winner-take-all elections, voter apathy, and even pragmatic judicial activism—to name just a few. Moreover, he attributes the realism of competitive democracy to Schumpeter's "realistic" attitude toward human nature. In terms of human nature, Posner not only refers to the self-interestedness of politicians and voters, he also indicates a "natural" division of labor between elites and the crowd:

⁷⁵ See POSNER, *supra* note 9, at 188-196; SHAPIRO, *supra* note 1, at 57-58.

⁷⁶ SHAPIRO, *supra* note 1, at 57-58.

⁷⁷ POSNER, *supra* note 9, at 195.

⁷⁸ *Id.*, at 162.

[S]ociety 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. ... 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.⁷⁹

In other words, Posner considers Schumpeter's thesis on "human nature in politics" an asset rather than a debt; he embraces the very spirit of Schumpeter's "elite democracy," even though he thinks the term is misleading.⁸⁰ We can sense a sharp contrast when we turn to Shapiro, who does not mention Schumpeter's elitist view on human nature at all! For Shapiro, Schumpeter's legacy is nothing but a power-centered approach with a double claim: "(1) that structured competition for power is preferable both to Hobbesian anarchy and to the power monopoly that Hobbes saw as the logical response to it, and (2) that the choices among anarchy, monopoly, and competition are the only meaningful possibilities."⁸¹ Shapiro also praises Schumpeter's theory for being a realistic account of democracy. But he probably would argue that the strength of Schumpeter's realism derives mainly from Schumpeter's attention to the power relations in real politics, not from his "realistic" account of human nature. In this regard, we have two different perspectives of the Schumpeterian legacy: according to Posner, Schumpeterian democracy is construed both as "competitive democracy" and

⁷⁹ *Id.*, at 183-184.

⁸⁰ Posner argues that "deliberative democracy is actually more elitist than elite democracy is;" *id.*, at 14, 220.

⁸¹ SHAPIRO, *supra* note 1, at 55.

"elite democracy," and these two senses are inseparable; Shapiro's silence on the elitist aspect of Schumpeter's vision, on the other hand, seems to suggest a limited inheritance from the Schumpeterian legacy.

Whether the legacy is broadly or narrowly construed, competitive democrats must answer a critical question: Why should we revitalize the vision of competitive democracy and place it at the center of our normative discourse? With his narrow construction of the Schumpeterian legacy, Shapiro's answer is clear and straightforward: Schumpeter's power-centered approach should be supplemented rather than rejected because it provides us with the best available means of managing power relations, means that are often ignored by the conventional liberal and republican theories.⁸² Posner's answer, in contrast, is slightly hazy. He seeks to justify the vision of Schumpeterian democracy as *the* pragmatic theory of democracy, at least in terms of his "everyday pragmatism." But he also provides some substantive arguments to support his idea of "pragmatic democracy," including its ability to defend the status quo of American democracy from radical reform,⁸³ and its commitment to protecting citizens' private life.⁸⁴ A close examination will reveal that Posner's arguments are largely built on political conservatism. Because Posner's and Shapiro's answers are so different, I will revisit this question when analyzing the divergence of these two neo-Schumpeterians.

D. Enriching the Normative Vision

Posner and Shapiro do not simply argue for the revival of Schumpeter's democratic vision; they also seek to transform it into a more attractive vision in a normative sense. After all, Schumpeter speaks very little about the

⁸² SHAPIRO, *supra* note 1, at 51.

⁸³ See POSNER, *supra* note 9, at 181-182.

⁸⁴ See, *i.d.*, at 172-174.

normative conditions of competitive democracy,⁸⁵ and his democratic theory was, to some extent, shaped by his deep antipathy toward the historical process of democratization.⁸⁶ By comparing Schumpeter's, Posner's, and Shapiro's theories, we can identify the following four significant developments in the normative dimension of competitive democracy.

Firstly, we can discern a difference in the role of popular participation. In saying that "democracy is the rule of the politician,"⁸⁷ Schumpeter merely assigns a very limited role to voters. For instance, he argued that "[t]he voters outside of parliament must respect the division of labor between themselves and the politicians they elect. They must not withdraw confidence too easily between elections and they must understand that, once they have elected an individual, political action is his business and not theirs."⁸⁸ But, Posner and Shapiro envision a larger role for voters. Even though Posner shares Schumpeter's vision of an elite democracy, he indicates that "direct democracy, in moderation, does have a role in maintaining political competition, if only as a safety valve, though at best it is merely a band-aid solution to the problem of collusion between the major parties."⁸⁹ Shapiro does not address issues of direct democracy, but he suggests that political antitrust measures may be adopted through ballot initiatives.⁹⁰

⁸⁵ Schumpeter did mention that "effective competition for leadership requires a large measure of tolerance for difference of opinion....[I]t must be possible for every would-be leader who is not lawfully excluded to present his case without producing disorder." SCHUMPETER, *supra* note 2, at 295.

⁸⁶ The early Schumpeter was a monarchist who resented the development of democratization, and the late Schumpeter even had pro-Nazi sympathies. See JOHN MEDEARIS, JOSEPH SCHUMPETER'S TWO THEORIES OF DEMOCRACY 36-37, 68-76 (2001).

⁸⁷ SCHUMPETER, *supra* note 2, at 285.

⁸⁸ *Id.*, at 295.

⁸⁹ POSNER, *supra* note 9, at 244.

⁹⁰ SHAPIRO, *supra* note 1, at 61.

Secondly, whereas Schumpeter attaches little significance to the extent of suffrage, Posner argues that the normative vision of competitive democracy requires universal suffrage for the sake of assuring adequate representation of all interests.⁹¹ "The essence of Concept 2 democracy understood in normative terms is that the interests (preferences, values, opinions) of the population, whatever they may happen to be, be represented in government."⁹² This is a critical advance in normative terms because it assures that with universal interest representation competitive democracy can be egalitarian as well. Shapiro also emphasizes the "principle of affected interest" and argues that the right to participate in democratic decision-making "should turn on whether someone's interests are likely to be affected by the result."⁹³ He even encourages us to reconsider rights of democratic participation beyond the conceptual boundary of citizenship.⁹⁴

Thirdly, both Posner and Shapiro stress antitrust concerns of political competition by drawing normative implications from the market analogy. Hence they expand our view on the competitiveness of the democratic political process, a critical issue about which Schumpeter says little.⁹⁵ Viewing political competition as the lifeblood of democracy, Shapiro warns that bipartisan agreement may in fact amount to anticompetitive collusion in restraint of democracy.⁹⁶ Although his thought experiment of applying the

⁹¹ POSNER, *supra* note 9, at 165.

⁹² *Id.*

⁹³ SHAPIRO, *supra* note 1, at 52-53.

⁹⁴ Shapiro asserts, "[a]nother advantage of the power-centered approach is that it offers a tractable perspective on long-standing conundrums about the relations between democracy and citizenship;" *id.*, at 52.

⁹⁵ Schumpeter argued that his definition of democracy "does not exclude the cases that are strikingly analogous to the economic phenomena we label 'unfair' or 'fraudulent' competition or restraint of competition. And we cannot exclude them because if we did we should be left with a completely unrealistic ideal." SCHUMPETER, *supra* note 2, at 271. But Schumpeter did consider the openness of political competition an important condition of competitive democracy; *see* SCHUMPETER, *supra* note 2, at 295.

⁹⁶ *See* SHAPIRO, *supra* note 1, at 60.

Sherman Act to political parties is less than successful,⁹⁷ he encourages us to develop political antitrust theories aimed at enhancing the competitiveness of the political system.⁹⁸ Shapiro also encourages the courts to assume the task of assuring genuine political competition.⁹⁹ Posner is one step ahead; not only does he propose the use of antitrust reasoning to guide judicial decision-making with respect to the law of democracy, he also develops a basic model for the political antitrust approach based on Schumpeterian antitrust thinking.¹⁰⁰ The basic mission of political antitrust doctrines, according to Posner, is to remove unreasonable barriers of entry into the political arena so as to assure that “would-be challengers of the current monopolist have a fair shot at entry.”¹⁰¹

Posner and Shapiro are not pioneers of political antitrust jurisprudence. Following the call of John Hart Ely in *Democracy and Distrust*, first published in 1980, at least two generations of scholars in constitutional law and law of democracy have been pushing for the development of this new paradigm concerning the role of judicial review with respect to issues of democracy’s basic structures.¹⁰² In fact, Posner’s comments on the concrete

⁹⁷ See, *id.*, at 61.

⁹⁸ See, *id.*, at 149.

⁹⁹ See, *id.*, at 75.

¹⁰⁰ See POSNER, *supra* note 9, at 245-247.

¹⁰¹ *Id.*, at 246.

¹⁰² For the arguments in favor of political antitrust jurisprudence, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101-04 (1980); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491 (1997); Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643 (1998); Richard H. Pildes, *The Theory of Political Competition*, 85 Va. L. Rev. 1605 (1999); Daniel R. Ortiz, *From Rights to Arrangements*, 32 Loy. L.A. L. Rev. 1217 (1999); Daniel R. Ortiz, *Duopoly versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 Colum. L. Rev. 753 (2000); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593 (2002); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28 (2004) [hereinafter Pildes, *Foreword*]. For criticism of the antitrust model, see Bruce E. Cain, *Garrett’s Temptation*, 85 Va. L. Rev.

issues or cases of law of democracy are heavily influenced by the forerunners of this theoretical movement.¹⁰³ Posner and Shapiro do not surpass Samuel Issacharoff, Richard Pildes, and other advocates in working out the judicially manageable standards from the perspective of political antitrust jurisprudence, but they prompt the participants of this theoretical campaign to reexamine how the “rights v. structure” debate in the law of democracy is related to normative discourse between deliberative and competitive democrats.¹⁰⁴

The last but probably the most significant development in the normative dimension of competitive democracy is Posner’s and Shapiro’s attempt to align theories of judicial review with normative visions of democracy. Their advocacy for political antitrust jurisprudence, for instance, exemplifies how they define the role of judicial review in light of the vision of competitive democracy. In general, Shapiro suggests that courts should play “a reactive,

1589 (1999); Pamela S. Karlan, *Politics by Other Means*, 85 Va. L. Rev. 1697 (1999); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 Colum. L. Rev. 775 (2000); Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 245 (David K. Ryden ed. 2000); Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymandering*, 116 Harv. L. Rev. 649 (2002); DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 6-8 (2002); RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE, 143-156 (2003).

¹⁰³ See Richard H. Pildes, *Competitive, Deliberative, and Rights-oriented Democracy*, 3 Election L.J. 685, 689 (2004) (book review).

¹⁰⁴ Richard Pildes, in his review of Posner’s *Law, Pragmatism, and Democracy*, questions the reasons for framing the debates on visions of democracy as conflicts between deliberative and competitive theories. Pildes suggests that these two visions are not incompatible, but he also reiterates why the exercise of judicial review should rest on or focus on competitive democracy. See, *id.*, at 686-88, 689-91, 693. Pildes’s review actually points out another possible route for the normative project of competitive democracy; see *infra* Section III. B.

escape-value, role in limiting the perverse consequences of democratic procedures when they produce results that foster domination.”¹⁰⁵ “More than process, less than substance” is the motto of his “middle-ground” view on judicial review.¹⁰⁶ Posner also envisions a limited role for judicial review. Although he strongly supports pragmatic adjudication, Posner suggests that “Concept 2 democrats, being more comfortable with our actual existing democracy than either its left-wing or right-wing critics, can be expected to be less [judicial] activist than either wing.”¹⁰⁷

Posner considers it an “oddity that judges and constitutional-law professors have failed to articulate a coherent conception of democracy even though the relation between law and democracy is fundamental to the proper role of judges in a democratic society.”¹⁰⁸ This is a powerful statement, though it might look a bit odd that such a statement should come from someone who has been quite skeptical about the development of constitutional theory.¹⁰⁹ By connecting their theories of democracy to their theories of judicial review, Posner and Shapiro not only answer the need to articulate the judicial conception of democracy, but also assign a more important role to the institutional calculus in the discourse of democracy’s visions.

II. One Concept, Two Theories

The convergence between Posner and Shapiro’s simultaneous advocacy for competitive democracy is surely a striking phenomenon, but their divergence is equally significant. Posner and Shapiro disagree on many issues

¹⁰⁵ SHAPIRO, *supra* note 1, at 7.

¹⁰⁶ *Id.*, at 66.

¹⁰⁷ POSNER, *supra* note 9, at 211-212.

¹⁰⁸ *Id.*, at 131.

¹⁰⁹ See Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U.L. Rev. 1 (1998).

regarding the architecture of competitive democracy. They express different attitudes toward party systems and electoral engineering. They take different positions on campaign finance reform. Even their political antitrust policies reveal distinct concerns. These policy differences are not incidental; they result from their different constructions of and justifications for competitive democracy. In short, Posner and Shapiro disagree with each other because they actually embrace different normative ideals of competitive democracy.

The divergence between Posner and Shapiro suggests that competitive democracy is no longer (or never was) an ideologically homogenous vision. Whereas Schumpeter's democratic theory is unequivocally conservative, the competitive vision now has two competing versions with different ideological propensities. Posner's version is conservative in essence; he is faithful to the core values of traditional Schumpeterianism. Shapiro's version is comparatively progressive; he presses the logic of competitive democracy to challenge the status quo. In this regard, considerable value conflicts still exist within this minimalist vision of democracy.

A. Different Policy Preferences

Both Posner and Shapiro speak of competitive democracy, but their theories reflect two different images of this democratic vision. In the previous section, I suggested that they construe the legacy of Schumpeter's theory in different ways, and that they defend competitive democracy for different reasons. But do these differences really matter? To ascertain the magnitude of their divergence, a brief review of their policy positions on issues regarding the architecture of competitive democracy can give us some clues.

We can start by examining their attitudes toward the party system, which constitutes the basic structure of political competition in a modern democracy. Posner is quite comfortable with the two-party system shaped by the winner-take-all electoral system in the United States. However, his

argument in favor of this system is somewhat speculative: "A two-party system tends to make people more moderate, more centrist,"¹¹⁰ because it curbs ideological extremes by letting swing voters hold the balance of power.¹¹¹ "This is the positive side of the tendency of Concept 2 democracy to lower the temperature of political debate. It cools but it does not freeze."¹¹² Posner believes that a multi-party system is still compatible with Schumpeter's vision, but in his eyes, a multi-party democracy is inferior because it lacks the cooling effect he so cherishes.¹¹³ In view of the arguable bi-polarization of electoral politics in the United States, one may wonder whether the swing voters still hold the balance of power.¹¹⁴ In the absence of an objective measurement of political temperature in different party systems, one may also doubt whether Posner's cooling-effect argument meets the requirements of his own pragmatism.

Shapiro's position on the ideal party system is rather ambiguous. Though he appears to prefer the competitive model to the "consensus model" that works mainly in the context of multi-party democracies, he emphasizes the value of opposition politics and firmly opposes duopolistic collusion.¹¹⁵ Shapiro is dissatisfied with monopoly, duopoly, and oligopoly; he also suggests that reforms aiming at increasing the number of parties be instituted to facilitate more competition.¹¹⁶ But he does not tell us how many effective parties are needed to sustain meaningful political competition. To the extent

¹¹⁰ POSNER, *supra* note 9, at 176.

¹¹¹ *Id.*, at 175.

¹¹² *Id.*, at 176.

¹¹³ *Id.*, at 175.

¹¹⁴ On the polarizing trend of American electoral politics, *see, e.g.*, STANLEY B. GREENBERG, *THE TWO AMERICAS: OUR CURRENT POLITICAL DEADLOCK AND HOW TO BREAK IT* (2004); *but see* MORRIS P. FIORINA ET AL., *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2005).

¹¹⁵ SHAPIRO, *supra* note 1, at 63-64.

¹¹⁶ *Id.*, at 60.

that Posner also recognizes the danger of collusion and the social benefits of having third parties,¹¹⁷ their divergence does not loom large in this comparison.

A larger difference can be found in their attitudes toward proportional representation (PR) and electoral engineering. Just like Schumpeter, Posner believes that PR is not compatible with competitive democracy. "Concept 2 democracy is about picking leaders rather than about picking policies."¹¹⁸ Hence a restatement of Schumpeter's objection: "If acceptance of leadership is the true function of the electorate's vote, the case for proportional representation collapses because its premises are no longer binding."¹¹⁹ In addition, Posner objects to PR on the ground that it may bring ideological conflict to the fore and heighten the political temperature;¹²⁰ this claim, however, appears to be speculative as well. By contrast, Shapiro does not consider PR a system alien to competitive democracy.¹²¹ He also notes the findings of comparative politics in that the policy output of PR tends to be "closer to the preferences of the median voter than [is] competitive alternation in power."¹²² Although recognizing that PR is unlikely to be a feasible option in the United States, Shapiro appears to be more willing than Posner to consider other types of electoral reform geared to increasing the responsiveness of the government to the median voter.¹²³

¹¹⁷ See POSNER, *supra* note 9, at 237-239.

¹¹⁸ *Id.*, at 177.

¹¹⁹ *Id.*; SCHUMPETER, *supra* note 2, at 273.

¹²⁰ See POSNER, *supra* note 9, at 174-175.

¹²¹ Shapiro argues that "trying to ensure that the parties competing with one another are more representative of the electorate is a challenge that can in principle be taken up within the Schumpeterian framework." SHAPIRO, *supra* note 1, at 63.

¹²² *Id.*

¹²³ *Id.*, at 112.

Posner and Shapiro also differ on campaign finance reform. Shapiro accuses *Buckley v. Valeo*¹²⁴ of wrongly equating money with speech and thus limiting the possibilities of regulating money politics.¹²⁵ Shapiro particularly deplores the distorting effects of campaign contributions on political competition in the post-*Buckley* world:

Competition is the engine that provides politicians the reason to be responsive to voters, but for it to work well, they must have the incentive to compete over policies rather than personalities. Competition over policies is likely to diminish if they are in fact responding to contributors on policy matters. If both parties are bound to offer the same message, what remains to attack but the messenger?¹²⁶

Shapiro thus strongly supports campaign finance reform proposals aimed at limiting the influence of money. In the wake of the Enron scandal, he suggests that the government should limit “contributions to more than one candidate in the same contest, or members of both parties on the same legislative committee.”¹²⁷ He also endorses Ian Ayres and Bruce Ackerman’s reform initiative, which combines a system of “secret donation booths” that renders campaign contributions anonymous and a system of “patriot dollars” that seeks to empower the populace and level the field of political donations.¹²⁸

Posner is much more skeptical about campaign finance reform. He fears that limitations on corporations’ political spending may increase political

¹²⁴ 424 U.S. 1 (1976).

¹²⁵ SHAPIRO, *supra* note 1, at 73.

¹²⁶ *Id.*, at 74.

¹²⁷ *Id.*, at 108.

¹²⁸ *Id.*, at 108-109. On the Ayres-Ackerman proposal, see BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002).

extremism;¹²⁹ he also suspects that limitations on campaign spending may be geared to protecting incumbents from would-be challengers.¹³⁰ Above all, he suggests that campaign finance reform may “magnify the influence of journalists, celebrities, and media moguls,” and he fears that political competition would thus be reduced due to the “widely believed” media bias in favor of liberals.¹³¹ Posner weighs these bad or questionable consequences against only one benefit of reform concerning the career attractiveness of politics.¹³² He does not offer his conclusion, but his skepticism is beyond doubt.

In addition to drawing different blueprints for institutional design, Posner and Shapiro also suggest different political antitrust regimes. For his part, Posner lays out two models of political antitrust doctrines. The first draws analogies from “a static economic model.”¹³³ By assuring that a number of parties compete, “each representing the interests of some segment of the population,” the model suggests that voter welfare can be maximized through compromise among the parties.¹³⁴ The second is derived from Schumpeter’s dynamic theory of economic welfare. It assumes that voter welfare can be maximized over time as a result of a dynamic succession of monopolies.¹³⁵ Considering that “monopoly profits serve the socially valuable function of creating incentives to risky, socially beneficial innovation,” Posner chooses the second model to form his political antitrust doctrines. Accordingly, what is important under his political antitrust jurisprudence is not the number of parties, but the “contestability” of political markets. His political antitrust doctrines accept the existence of monopolistic,

¹²⁹ See POSNER, *supra* note 9, at 170.

¹³⁰ See *id.*, at 240.

¹³¹ See *id.*, at 170.

¹³² See *id.*, at 170-171.

¹³³ *Id.*, at 246.

¹³⁴ *Id.*

¹³⁵ *Id.*

duopolistic, or oligopolistic parties so long as they do not entrench themselves against new entry.¹³⁶

Shapiro also emphasizes the importance of maintaining the openness and contestability in political markets. He strongly opposes the arrangements of bipartisan regulation or bipartisan enforcement in the field of law of democracy. He criticizes such institutions as the Federal Election Commission and bipartisan debate commissions for tending to foster duopolistic collusion and may undermine political competition by sustaining high entry barriers to third parties.¹³⁷ But contestability is not the only concern of his political antitrust theory. Additionally, he conceives of competition mainly as a mechanism to constrain the corrupting effect of power and to assure the responsiveness of the political system.¹³⁸ As a result, Shapiro is more critical than Posner of power monopolies. He even suggests that antitrust measures be geared to "limiting the 'market share' of any party's votes."¹³⁹ Shapiro, however, does not explain how this goal can be justifiably achieved.

B. Different Normative Ideals

How should we explain Posner and Shapiro's divergence in these policy positions? Certainly their opinions rest on different factual assumptions or predictions, but on the whole it appears that their divergence is based on their different values. In other words, Posner and Shapiro disagree because they embrace different normative ideals of competitive democracy. To confirm this impression, we must revisit the ways they construe and justify the normative vision of competitive democracy.

¹³⁶ *Id.*, at 247.

¹³⁷ See SHAPIRO, *supra* note 1, at 62.

¹³⁸ *Id.*, at 58, 75.

¹³⁹ *Id.*, at 112.

Shapiro's construction and justification of competitive democracy are closely connected to his anti-domination thesis of democracy. In this anti-domination thesis, Shapiro asserts that democracy should be conceived of as a means of managing power relations in real politics so as to minimize domination, by which he means "the illegitimate exercise of power."¹⁴⁰ Taking his cue from Machiavelli instead of Rousseau, Shapiro defines the common good in a democracy as "that which those with an interest in avoiding domination share."¹⁴¹ He then argues that political competition is the best available mechanism to realize this domination-minimizing ideal, for competition not only can impose "disciplinary constraint on the corrupting effects of power" through the institutionalization of opposition politics, but it also can prompt politicians "to be responsive to more voters than are their competitors."¹⁴² Shapiro recognizes that deliberation in certain circumstances can serve to minimize domination, but he argues that people should be free, not compelled, to engage in deliberation.¹⁴³ In sum, he believes that "structured competition for power is a better way to limit political domination than is deliberation or liberal constitutionalism. In a world in which power is ubiquitous, structured competition beats the going alternatives."¹⁴⁴

Posner also measures the value of competitive democracy by extrinsic criterion, but his normative yardstick is often concealed behind the veil of his everyday pragmatism.¹⁴⁵ In general, Posner suggests that if one holds the "pragmatic mood" of ordinary people, then one should embrace his Concept 2 democracy. The problem with this approach, however, is that his account of

¹⁴⁰ *Id.*, at 3-4.

¹⁴¹ *Id.*, at 3, 35.

¹⁴² *Id.*, at 58, 75.

¹⁴³ See *supra* text accompanying notes 31-33.

¹⁴⁴ *Id.*, at 148.

¹⁴⁵ Pildes observes that since "pragmatic" is always a term of praise for Posner, "he attaches it to any position he likes." Pildes, *supra* note 103, at 695.

human nature and institutional design is premised mainly on subjective speculations, not on results of “pragmatic inquiry” in a meaningful sense.¹⁴⁶ Regardless of his overblown rhetoric, Posner does convey a critical idea: “A revival of [Schumpeter’s] theory is overdue, if only because without it there are no wholehearted academic defenders of the most successful political system since the Roman Empire!”¹⁴⁷ For Posner, the vision of competitive democracy is normatively desirable exactly because it serves to preserve the status quo of American democracy from radical reforms. Posner provides several arguments for the merits of competitive democracy, but his favorite point is its recognition that “a considerable virtue of modern representative democracy is its enabling people to delegate most political responsibility to specialists in politics, leaving the rest of us free to pursue our private interests.”¹⁴⁸ In other words, competitive democracy is appealing to Posner because it sustains the marginalization of politics in our daily life.¹⁴⁹

C. Two Versions of Competitive Democracy

It should be clear by now that Posner represents the conservative stream whereas Shapiro represents the progressive stream of the latest theoretical movement for competitive democracy. Posner’s conservatism is reflected in his faithful adherence to classical Schumpeterianism, in his efforts to maintain the status quo of American democracy, and in his strong commitment to the “private first, public second” ideology. Shapiro, in contrast, explores the progressive potentials of the competitive vision. He tailors traditional Schumpeterianism to his domination-minimizing ideal; he is also eager to pursue creative reforms to enhance the functions of political

¹⁴⁶ Pildes criticizes: “Declarations of what ‘pragmatists’ do or do not believe, which abound in the book, become a way of stating positions without offering much analysis to justify those positions.” *Id.* See also Sullivan and Solove, *supra* note 36, at 719.

¹⁴⁷ POSNER, *supra* note 9, at 181-182.

¹⁴⁸ *Id.*, at 386.

¹⁴⁹ See *id.*, at 144, 172.

markets. These two versions of competitive democracy share certain common values, but they collide with each other when the former seeks to preserve the existing order and the latter aims to fight against the domination embedded in the status quo. Posner and Shapiro's disagreements on campaign finance reform and electoral engineering demonstrate that the conflicts between these two versions are real, not hypothetical.

The conflicts within the competitive vision may be a positive development for modern competitive democrats, because they suggest that the idea of competitive democracy is inclusive or flexible enough to garner support from conservatives and liberals alike. But the divergence between Posner and Shapiro also signifies a significant challenge to the implementation of competitive democracy because, contrary to the wishes of some minimalists, the consensus of competitive democracy is probably too thin to generate much unitary and unequivocal guidance for the tasks of institutional design and judicial review. Given the current state of competitive democracy theories, it is not surprising that the U.S. Supreme Court utterly failed to agree on how to address the problem of partisan gerrymandering in *Vieth v. Jubelirer*.¹⁵⁰

The contrast between Posner and Shapiro's theories informs us that competitive democracy is no longer an ideologically homogenous vision, but a vision with two or more possibilities. The disagreement between them highlights that there will always be reasonable disagreement about what competitive democracy means and should require. In the face of persistent moral disagreement, pluralist deliberative democrats like Amy Gutmann and Dennis Thompson counsel us to economize on our disagreements and keep working together to find common ground in an ongoing deliberative process.¹⁵¹ But I doubt that this is what Posner and Shapiro would like to do.

¹⁵⁰ 541 U.S. 267 (2004).

¹⁵¹ See GUTMANN & THOMPSON, *supra* note 6, at 6-7.

Both Posner and Shapiro aspire to set the agenda of competitive democracy's normative project, and both believe in competition. They probably will keep sharpening their respective theories, and let the politics of ideas determine the outcome of this contestation.

III. The Normative Case for Competitive Democracy: A Reappraisal

Posner and Shapiro each advance a fairly comprehensive theory of competitive democracy, though my previous analysis indicates that some of their arguments are problematic or not entirely persuasive. If Posner really takes pragmatism seriously, he probably needs to reexamine his arguments more carefully in light of the empirical studies of democracy. For instance, American democracy's current institutional arrangements, from electoral system to campaign finance regulation, do not necessarily contribute to "moderate politics" as Posner expects them to. As Posner's provocative rhetoric often overshadows his pragmatic reasoning, his book is fun to read but not quite convincing. Shapiro's domination-minimizing justification of competitive democracy is inspiring, but sometimes it is just not clear where he would draw the normative baseline. Since the indivisible nature of political authority predetermines the oligarchic tendencies of political competition,¹⁵² Shapiro probably has to specify with more precision when or to what extent imperfect competition in the political markets becomes unbearable.

Despite the shortcomings in their theoretical constructions, Posner and Shapiro have successfully reintroduced competitive democracy to our discourse of democratic ideals. But they seem to have a higher goal in mind.

¹⁵² See Stefano Bartolini, *Electoral and Party Competition: Analytical Dimensions and Empirical Problems*, in *POLITICAL PARTIES: OLD CONCEPTS AND NEW CHALLENGES* 84, 92 (Richard Gunther et al. eds., 2002).

For Posner and Shapiro, competitive democracy is not just one of many perspectives; instead, they seem to suggest that it should take precedence over other democratic visions. However, a definitive "competitive turn" in our normative discourse seems not in sight. The vision of competitive democracy surely has significant merits; it gives us an insightful framework for managing power relations and structuring the processes of political democracy. But even if competition is the default mode of democratic coordination, its values cannot always trump other democratic concerns.

Proponents of competitive democracy may have a stronger normative case in the context of judicial review, where the functional and institutional considerations of judicial review may reinforce the justification of competitive democracy as the vision in practice. However, the long-awaited potential of enhancing competitive democracy through judicial review has yet to be realized. Part of the reason is that the current competitive vision cannot readily and unequivocally be translated into the doctrines of political antitrust jurisprudence. Whether we can clarify and manage the normative indeterminacy of the competitive vision is the key to realizing this potential.

A. First among Equals?

Democracy can be framed in numerous ways. Adam Przeworski notes, "[a]lmost all normatively desirable aspects of political, and sometimes even of social and economic, life are credited as intrinsic to democracy: representation, accountability, equality, participation, justice, dignity, rationality, security, freedom, ... , the list goes on."¹⁵³ Democracy is so complicated and so value-laden that no single vision can provide a holistic view of it; all we have are but partial perspectives.¹⁵⁴ Recognizing the conceptual limitations built into every democratic vision prompts us to look into the assumptions and value preferences of each vision; it also leads us to

¹⁵³ Przeworski, *supra* note 8, at 24.

¹⁵⁴ See Pildes, *supra* note 103, at 690.

reflect on the assumptions and value judgments we make in embracing or rejecting a particular vision of democracy.

The vision of competitive democracy under Posner's and Shapiro's reconstructions has certain merits if measured in its own terms. It reminds us of the importance of electoral accountability, responsiveness, and competitiveness; it empowers us to confront the power relations in real life; with its greater realism, it provides "a stronger framework for appraisal of practical improvements in our democratic system."¹⁵⁵ Even its minimalist character may have a certain normative significance because the chance that such a thin conception of democracy, one that is widely accepted, may be much greater than that of a thick democratic vision. All these virtues can be appreciated when viewed from an instrumental or strategic conception of politics. This view of politics does not assume that voter preferences are given, nor does it necessarily deny the existence of the common good or public interests. I speculate that it would insist, however, that voters and politicians' self-interestedness simply cannot be assumed away, and that we had better approach issues about the means and ends of politics in a more practical manner. It is with this understanding of politics that Posner and Shapiro highlight the significance of political competition and launch their criticisms of deliberative democracy. Based on his everyday pragmatism and his observation of the convergence between competitive and deliberative democracy at the practical level, Posner even concludes: "Perhaps, apart from the radical left, we are all Schumpeterians now."¹⁵⁶

There are other ways of seeing politics, however. Whereas competitive democracy can be viewed as a "power-centered" vision,¹⁵⁷ deliberative democracy reflects, in a crude sense, "reason-centered" views of politics.¹⁵⁸

¹⁵⁵ POSNER, *supra* note 9, at 248.

¹⁵⁶ *Id.*, at 188.

¹⁵⁷ SHAPIRO, *supra* note 1, at 51.

¹⁵⁸ *Cf.* Estlund, *supra* note 11, at 1442-44.

Under the deliberative conceptions of politics, public reasons,¹⁵⁹ cognitive reasons,¹⁶⁰ or reasons that are "mutually acceptable and generally accessible"¹⁶¹ are basically what *justify* the political-legal order. Different deliberative democrats emphasize different political ideals, such as civic self-governance, participatory politics, and even political truth in epistemological terms. But essential to all deliberative democratic theories is, as Richard Pildes points out, "that the legitimacy of democratic outcomes depends on the kinds of reasons that are offered to justify collective choices."¹⁶² From the standpoint of these reason-centered views of political legitimacy, competitive democracy is normatively inadequate and can only be a subordinate vision at best. It is normatively inadequate because it can only cast democratic politics in a rather dim light; it is subordinate because deliberative democracy could demand that the structure, process, and activities of competitive democracy be assessed by deliberative principles at some time.¹⁶³ Competitive democrats certainly would not concede; they could argue that their vision is not devoid of "reason," and they just don't think deliberative principles are the only criteria of normative justification.

Is it possible to argue that one vision of democracy is, all in all, superior to another vision? I doubt this. Visions of democracy are often identified as "second-order theories" in the sense that they propose different democratic mechanisms to deal with the claims of conflicting first-order theories of justice, such as utilitarianism, libertarianism, liberal egalitarianism, communitarianism, and so forth.¹⁶⁴ But since different democratic visions are founded on different conceptions of politics, which in turn are profoundly

¹⁵⁹ See John Rawls, *The Idea of Public Reason*, in DELIBERATIVE DEMOCRACY 93.

¹⁶⁰ See Estlund, *supra* note 11, at 1444.

¹⁶¹ GUTMANN & THOMPSON, *supra* note 6, at 7.

¹⁶² Pildes, *supra* note 103, at 685.

¹⁶³ Cf. GUTMANN & THOMPSON, *supra* note 6, at 56.

¹⁶⁴ *Id.*, at 13.

shaped by the eternal tension between realism and idealism, comparing and ranking these second-order theories on a general level can be as difficult as choosing among those first-order theories—if such philosophical inquiry remains possible.

Posner and Shapiro should be commended for challenging the predominance of deliberative democracy in the fields of law and philosophy; their efforts in pushing the normative discourse in the direction of realism or pragmatism also deserve our recognition. But their realist or pragmatic arguments simply cannot convert deliberative democrats into competitive democrats; a universal claim of competitive democracy's supremacy may also obscure the fact that it has distinct consequences or varied attractiveness in different contexts. For instance, competitive democracy is probably not an appealing cause for grassroots activists whose main objective is to mobilize public participation. On a different subject Richard Rorty writes: "I gradually decided that the whole idea of holding reality and justice in a single vision had been a mistake—that a pursuit of such a vision had been precisely what led Plato astray."¹⁶⁵ I cannot help but think a similar mistake might occur when we privilege the vision of either competitive or deliberative democracy on a general level. Posner and Shapiro indeed have some good reasons to defend and recommend competitive democracy, but they should resist the temptation of creating a new hegemony from a partial perspective of politics.

B. The Unrealized Promise

Competitive democracy cannot monopolize our normative imagination of democratic politics, but it can still be an influential vision. To say the least, it is informative for our choices and judgments for many issues such as institutional design and electoral politics. In certain contexts and with certain normative objectives in mind, we can even plausibly argue that competitive

¹⁶⁵ RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* 12 (1999).

democracy should be the only vision *in action*. Posner, Shapiro, and many competitive theorists of the law of democracy, for instance, consider competitive democracy the best candidate for *the* judicial conception of democracy. They have good arguments, I think, though the advantages of competitive democracy in the context of judicial review (of the law of democracy in particular) are inevitably premised on a specific institutional view regarding the courts' role in democracy, which is inversely affected by the visions of democracy under discussion.

The relationship between democracy and judicial review is the central concern of constitutional theories; however this paper's scope precludes a detailed discussion of such a complex issue. My reflection here focuses on the advantages and limitations of adopting the vision of competitive democracy to achieve a presumed expectation of reinforcing democracy—as opposed to limiting democracy—via *Carolene-style* judicial review. The *Carolene-style* rationale dates back to Justice Stone's footnote four in *United States v. Carolene Products*,¹⁶⁶ John Hart Ely's influential thesis, *Democracy and Distrust*,¹⁶⁷ is also structured by similar reasoning.¹⁶⁷ This approach basically suggests that by carefully qualifying judicial deference and judicial intervention in light of certain functional considerations, the exercise of judicial review can serve to reinforce the functioning of democracy.

Richard Pildes, a leading competitive theorist in the law of democracy, gives us a twofold explanation of why the courts ought to focus on ensuring competition when reviewing the law of democracy:

[O]n the one hand, if the power to design the framework of democratic competition remains in the hands of existing officeholders, they will likely use that power to entrench themselves or their viewpoints in power. There is special justification, then, for courts to secure the goal of effective

¹⁶⁶ 304 U.S. 144, 152 n.4 (1938).

¹⁶⁷ See ELY, *supra* note 102, at 75-77, 101-104.

competition. And on the other hand, where threats to competition are not present, courts left free to impose their view of "rights" on politics run the risk of Lochnerizing the democratic system by making it more difficult for legislators or voters to experiment with changes to democratic processes to respond to ever-shifting disaffections with democracy.¹⁶⁸

Pildes's argument is clearly presented in the form of *Carolene*-style reasoning. What Pildes, Posner, Shapiro, and other contemporary competitive theorists do is similar to pouring new wine into this old bottle. Pildes's argument is centered on the law of democracy, but from it, we can infer a more generalized rationale that can also be read into Posner's and Shapiro's works as well.¹⁶⁹ Roughly, the rationale is this: competitive democracy should be the democratic vision underlying the *Carolene*-style, democracy-reinforcing approach of judicial review because the competitive vision not only can justify the exercise of judicial review (with real concerns for entrenchment or domination), but it can also, possibly, limit judicial intervention into democratic politics with its minimalist conception of democracy. Ely's theory is often criticized for lacking a coherent vision of democracy.¹⁷⁰ Now competitive democrats believe that they have an answer to this problem.

If we are sympathetic to the quest for reconciling the tension between democracy and judicial review with *Carolene*-style reasoning, then competitive democracy seems to be a promising choice for the task of judicial review. In the judicial context, if the competitive vision can outperform its competitors such as deliberative democracy and rights-based democracy, it is because this vision (with its thin, realistic, yet optimistic account of democracy), in conjunction with the functional considerations of

¹⁶⁸ Pildes, *supra* note 103, at 688.

¹⁶⁹ Cf. POSNER, *supra* note 9, at 211-212; SHAPIRO, *supra* note 1, at 64-66, 73-76.

¹⁷⁰ See, e.g., POSNER, *supra* note 9, at 233.

judicial review (as identified by *Carolene*-style reasoning) is perhaps more likely to avoid the danger of judicial paternalism.

This conjecture, however, faces at least two challenges. The first one concerns the reach of the competitive vision in the judicial context. Posner and Shapiro basically treat the political antitrust jurisprudence on the law of democracy as an *example* of how the competitive vision defines the role of judicial review. Pildes also intimates that the competitive theory he advances in the law of democracy may have some implications for constitutional law in general.¹⁷¹ But one might argue that the dominance of the competitive vision in the law of democracy is at best an *exception*, that we should have some leeway to embrace other conceptions of democracy for guiding adjudication in other areas of constitutional law. This challenge is understandable, as the implications of the competitive vision for other constitutional issues remain largely unspecified. However, I don't think we should stretch the arguments for "election law exceptionalism" to limit the reach of the competitive vision,¹⁷² because the fact that we may need different doctrinal frameworks in different areas of law does not mean that the courts should be allowed to jump between different conceptions of democracy. In the absence of a coherent judicial conception of democracy, it is just unimaginable for the courts to play a consistent role in enhancing democracy.

The second challenge is the normative indeterminacy of the competitive vision. As my previous analysis suggests, this minimalist vision still has considerable value conflicts. The competitive vision, therefore, often fails to provide clear guidance for the task of judicial review. In this regard, the advantage of competitive democracy in the judicial context is probably less

¹⁷¹ See Pildes, *Foreword*, at 41, 154.

¹⁷² On the discussion about "election law exceptionalism," see, e.g., Frederick Schauer and Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 Tex. L. Rev. 1803 (1999); Heather K. Gerken, *Election Law Exceptionalism? A Bird's Eye View of the Symposium*, 82 B.U.L. Rev. 737 (2002).

significant than its advocates assume. Pildes also recognizes this problem. He suggests that "it would be worthwhile to seek a more fully developed theory of political competition, as well as an understanding of the other values that ought to supplement any competitive theory, to be able to adequately inform institutional design choices and judicial oversight of democracy."¹⁷³ I agree with Pildes. To further explore the normative potential of competitive democracy, we must take on the challenge of advancing theories of competitive democracy beyond Posner and Shapiro's achievements.

Conclusion

This book review examines the latest theoretical campaign for competitive democracy led by Posner in *Law, Pragmatism, and Democracy* and Shapiro in *The State of Democratic Theory*. Together, Posner and Shapiro challenge the prevailing theories of deliberative democracy and public choice; they elevate the normative ideals of competitive democracy beyond the revival of Schumpeter's legacy. Posner and Shapiro also converge in demanding inclusive interest representation, emphasizing antitrust concerns of political competition, and arguing for a modest role of judicial review. But their differences are equally significant. These two authors construe the Schumpeterian tradition in different ways and base their normative arguments for competitive democracy on different political ideals. These differences lead them to take different policy positions on issues concerning the structure of competitive democracy. Thanks to Posner and Shapiro, we now have two competing versions of competitive democracy with different ideological propensities: Posner's theory is conservative in essence, and Shapiro's is progressive in spirit. This is a significant development because it enlarges our

¹⁷³ Pildes, *supra* note 103, at 695.

imagination of competitive democracy while posing new challenges to fulfilling the promise of this minimalist democratic vision.

Posner and Shapiro successfully demonstrate the normative possibilities of competitive democracy by pushing the discourse of democracy's ideals in the directions of realism and pragmatism. But competitive democracy is not superior to other democratic visions *per se*; its normative significance is inevitably built on certain assumptions and value judgments. Competitive democracy is arguably conducive to achieving democracy-reinforcing judicial review, though this putative advantage is limited by the normative indeterminacy of this minimalist vision. To realize the potential of enhancing competitive democracy through judicial review, a more searching debate about the real and the ideal of competitive democracy must ensue.