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Retracing Political Antitrust: A Genealogy and its Lessons

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Abstract

From a notion dismissed by Joseph Schumpeter, the idea of political antitrust has become a leading theme of the contemporary law of democracy. Yet the intellectual history of this transformation has been largely neglected. This article retraces the intellectual lineages, transformative innovations, and lost opportunities in the development of the political antitrust approach to the law of democracy. It situates this alternative approach at the transformative confluence of the Elysian tradition of process-oriented theories of judicial review on the one hand, and the Schumpeterian tradition of theories of competitive democracy on the other. As a progeny of the Elysian tradition, the political antitrust approach entails a more restrictive set of rules of judicial engagement than do the traditional Elysian, Carolene*-style theories while shifting the central concern of process-based judicial review from political representation to political competition. As a progeny of the Schumpeterian tradition, the political antitrust approach has deepened the fairness commitment of the competitive vision of democracy and called for political antitrust enforcement through judicial review. The genealogy of political antitrust casts doubt on the need of political antitrust legislation/codification, brings to the fore the ideological as well as institutional disagreements among the political antitrust theories, and suggests a realignment of the political antitrust approach with a political as opposed to an economic theory of competitive democracy.*

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I. INTRODUCTION

Two general concerns lie at the center of the young field of the law of democracy, a.k.a. election law.[1] The first concern is with the pathology of *excessive self-interested political regulation*, which jeopardizes the very fairness and even the meaningfulness of political competition.[2] The second is with the *judicial over-constitutionalization of democratic politics*, which

[1] These two concerns are vividly expressed in two most cited law review articles of the law of democracy in the past ten more years. *See* Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) [hereinafter Issacharoff & Pildes, *Politics as Markets*]; Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) [hereinafter Pildes, *Foreword*].

[2] *See infra* Part II. A.

interferes with the political trials and errors essential to democracy.[3] One way or another, any general theory of the law of democracy is bound to address these two concerns. But one theory has emerged as a leading alternative to the conventional rights-based election law jurisprudence. This theory has come under different names and has notable variations. But for reasons explained later, it is best identified as "*the political antitrust approach*" and understood as a general theory for the judicial oversight of political regulation that aims to protect the law of competitive democracy from both excessive political self-dealing and judicial overreaching.[4]

Should the (constitutional) courts adopt the political antitrust approach and act primarily as trustbusters of political markets? Students of the American law of democracy have debated this issue, over and over again, for more than a decade. Many embrace it.[5] Others reject it as an intellectual dead end.[6] Still others look for compromises and ways to move forward.[7] It is questionable, though, whether progress can be made without changing the terms of debate. Two problematic narratives have thus far dominated

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[3] *See infra* Part II. B.

[4] On the naming and definition of the political antitrust approach, see *infra* Part II and accompanying notes 32-37.

[5] This article identifies Samuel Issacharoff, Richard Pildes, Michael Klarman, Richard Posner, Ian Shapiro, Einer Elhauge, David Schleicher, Daniel Ortiz, Elizabeth Garrett, and Yasmin Dawood as leading supporters of the political antitrust approach; *see* the literature cited in notes 25-34.

[6] Prominent critics of the political antitrust approach include Bruce Cain, Daniel Lowenstein, Richard Hasen, and Nathaniel Persily. *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE 143-156 (2003) [hereinafter HASEN, THE SUPREME COURT AND ELECTION LAW]; Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589 (1999); 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) [hereinafter Lowenstein, *The Supreme Court Has No Theory of Politics*]; Daniel H. Lowenstein, *Competition and Competitiveness in American Elections*, 6 (3) ELECTION L.J. 278 (2007) (book review) [hereinafter Lowenstein, *Competition and Competitiveness in American Elections*]; Nathaniel Persily, *The Place of Competition in American Election Law*, *in* THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 171 (Michael P. McDonald & John Samples eds., 2006) [hereinafter THE MARKETPLACE OF DEMOCRACY] [hereinafter Persily, *The Place of Competition in American Election Law*].

[7] This article identifies Christopher Eisgruber, Daniel Farber, Heather Gerken, and Guy-Uriel Charles as representative mediators of this grand debate. *See* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 168-211 (2001); Daniel A. Farber, *Implementing Equality*, 3-2 ELECTION L.J. 371, 374-77 (2004) (book review); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 521-31 (2004) [hereinafter Gerken, *Lost in the Political Thicket*]; Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1124-30 (2005) (book review) [hereinafter Charles, *Judging the Law of Politics*]. There are also many commentators who criticize, but not outright reject, the political antitrust approach. *See, e.g.*, Dennis F. Thompson, JUST ELECTION: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 6-8 (2002); John Ferejohn, *It's Not Just Talk*, 85 VA. L. REV. 1725 (1999); Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697 (1999); Daryl J. Levinson, *Market Failures and Failures of Markets*, 85 VA. L. REV. 1745 (1999).

and framed the existing debate. One narrative focuses on the rights-versus-structure paradigm contestation in the newly independent field of the law of democracy; it casts the political antitrust approach as a leading exemplar of the structural paradigm.[8] The other focuses on the use or misuse of market or antitrust analogies; it views the development of the political antitrust approach as mainly about doctrinal transplantation from antitrust law to election law.[9] Both of these narratives are incomplete and somewhat misleading. In fact, we don't have to embrace or reject the political antitrust approach as a grand theory of the law of democracy. Nor is its fate necessarily tied to the success or failure of the various attempts to draw analogies between antitrust law and election law. To fully explore the efficacies and difficulties of the political antitrust approach, we need to re-frame the terms of debate by developing a new account of it.

This article attempts to develop a new account of the political antitrust approach on the basis of its largely overlooked intellectual history. The idea that political competition can and should be regulated in antitrust terms dates back well before the recent ascendance of political antitrust scholarship. Presenting the basic idea of political antitrust as a recurring theme rather than a novel invention, many advocates acknowledge the influence of the late constitutional scholar John Hart Ely, who in his 1980 book *Democracy and Distrust* advanced an approach to judicial review that bears an "antitrust" analogy. Judicial intervention is warranted, Ely famously argued, "only when [...] the political market is systemically malfunctioning."[10] Ely was not the first to view democratic politics from an antitrust perspective. In *Capitalism, Socialism and Democracy* first published in 1942, Joseph Schumpeter made such an analogy but quickly dismissed it from his "realistic" conception of competitive democracy.[11] Schumpeter set the realist and minimalist tone of competitive democracy, but his summary judgment against political antitrust was not sustained too long. By 1970, political scientist Andrew M. Scott called for the development of political antitrust law.[12] Nonetheless, it took another three decades for political antitrust to gain traction in the marketplace of ideas. When it finally entered the spotlight, much of its history—with the exception of the lineage from Ely—has been lost.

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[8] *See infra* Part III. A.

[9] *See infra* Part III. B.

[10] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 102-03 (1980).

[11] *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 271 (1942).

[12] *See* ANDREW M. SCOTT, COMPETITION IN AMERICAN POLITICS: AN ECONOMIC MODEL 122 (1970).

How was the idea of political antitrust transformed from a notion summarily dismissed by Joseph Schumpeter into a leading theme of the contemporary law of democracy? To answer this question, this article retraces the intellectual lineages, innovations, and lost opportunities in the development of the political antitrust approach. Though I am not pursuing a Nietzschen or a Foucaultian project, I use the term "genealogy" to create a critical distance from the prevailing narratives for the purpose of reconstructing the intellectual history of political antitrust.[13] The genealogy thus construed enables us to reframe the terms of debate over political antitrust as a judicial project of competitive democracy. It also sheds new light on how to address the two practical challenges that motivates the theoretical and normative debate in the first place.

My genealogical account of the political antitrust approach begins with a simple proposition: The development of the political antitrust approach—as defined in terms of its dual commitment to protecting competitive democracy from excessive self-dealing in political regulation and from judicial over-constitutionalization of democratic engineering—can be seen as a confluence of the Elysian tradition of process-oriented theories of judicial review and the Schumpeterian tradition of theories of competitive democracy.[14] Less obvious and often overlooked, however, are the transformative aspects of this theoretical development. As a progeny of the Elysian tradition, the political antitrust approach entails a set of rules of judicial engagement that is more restrictive than that of its predecessors. It has also shifted the central concern of process theories of judicial review from political representation to political competition.[15] As a progeny of the Schumpeterian tradition, the political antitrust approach has deepened the commitment to fairness of competitive democracy and called for political antitrust enforcement through judicial review. But so far the political antitrust theorists have paid insufficient attention to the uniqueness and complexity of political competition. Not coincidentally, they have relied heavily on intent/purpose-based inquiry and analogical reasoning to draw the normative baselines for political antitrust adjudication.[16]

This article draws three major lessons concerning the potentials and

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[13] On the meaning, methodologies, and problems of genealogy, *see, e.g.*, Michel Foucault, *Nietzsche, Genealogy, History*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 139 (D. F. Bouchard, ed., 1977); David Owen, *On Genealogy and Political Theory*, 33(1) POLITICAL THEORY 110 (2005); Jacqueline Stevens, *On the Morals of Genealogy*, 31(4) POLITICAL THEORY 558 (2003).

[14] *See infra* Part III. C.

[15] *See infra* Part IV.

[16] *See infra* Part V.

limitations of the political antitrust approach. First, to the extent that the political antitrust theorists continue to share Ely's aspiration for democracy-reinforcing judicial review, political antitrust legislation—a proposal inferred from the common criticism that the approach has insufficient textual basis—is not a necessary next step for this normative project.[17] Second, the scope and intensity of the political antitrust approach have been and always will be issues of contention. Apart from the inevitable ideological disagreements, there is an underappreciated tension between the Elysian aspiration to contain the reach of judicial review and the post-Schumpeterian aspiration to expand the minimalist construction of competitive democracy.[18] Third, instead of belaboring market or antitrust analogies, the genealogy invites us to explore the possibility of realigning the political antitrust approach with a political as opposed to an economic theory of competitive democracy. Such a realignment would re-open political antitrust reasoning to ethical-political considerations beyond a public choice calculus. It would also challenge political antitrust theorists to distinguish illegitimate collusion from indispensable cooperation in democratic politics—a critical task that has not received adequate attention in the current debate over political antitrust.[19]

The remainder of this article is organized as follows. Part II defines the political antitrust approach as geared to checking anticompetitive political self-deals and to managing the role of judicial review in the law of democracy. Part III reviews the two dominant narratives regarding the development of the political antitrust approach and outlines a genealogical narrative that retraces its development to the confluence of the Elysian tradition of process-oriented judicial review and the Schumpeterian tradition of competitive democracy. Parts IV and V examine the inheritance and transformation of the political antitrust approach as viewed respectively from its Elysian and Schumpeterian lineages. Part VI discusses the three lessons I draw from the proposed genealogy. Part VII concludes.

II. THE POLITICAL ANTITRUST APPROACH

What is the political antitrust approach to the constitutional adjudication of the law of democracy? A forceful trend in the law of democracy since

[17] *See infra* Part VI. A.
[18] *See infra* Part VI. B.
[19] *See infra* Part VI. C.

the late 1990s though it has been, its name and definition remain unsettled. By "the political antitrust approach," I refer to the recent theoretical efforts made mainly but not exclusively by authors like Samuel Issacharoff,[20] Richard Pildes,[21] Richard Posner,[22] Ian Shapiro,[23] Michael Klarman,[24] Einer Elhauge,[25] David Schleicher,[26] Daniel Ortiz,[27] Elizabeth Garrett,[28] and Yasmin Dawood.[29] To be sure, these authors have different understandings of political democracy, and they often give different suggestions as to what the courts should do in reviewing political regulation.[30] But significant convergences do exist among them.[31] To the

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[20] *See* Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 416 (2004) [hereinafter Issacharoff, *Collateral Damage*]; Issacharoff, Constitutional Courts and Democratic Hedging (March 2010), GEO. L.J. forthcoming, *available at* SSRN: http://ssrn.com/abstract=1580211; Issacharoff, *Democracy and Collective Decision Making*, 6 INT'L J. CON. L. (I•CON) 231 (2008); Issacharoff and Laura Miller, *Democracy and Electoral Processes* (March 2009), *in* RESEARCH HANDBOOK ON LAW AND PUBLIC CHOICE (Daniel A. Farber and Anne Joseph O'Connell, eds., forthcoming), *available at* SSRN: http://ssrn.com/abstract=1366503; Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007); Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) [hereinafter Issacharoff, *Gerrymandering and Political Cartels*]; Issacharoff & Pildes, *Politics as Markets*; Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J. L. & PUB. POL'Y 91 (2000); Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274 (2001); Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684 (2002) [hereinafter Issacharoff, *Why Elections*].

[21] *See* Issacharoff & Pildes, *Politics as Markets*; Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999) [hereinafter Pildes, *Theory of Political Competition*]; Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685 (2004) (book review) [hereinafter Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*]; Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253 (2006) [hereinafter Pildes, *Constitution and Political Competition*]; Pildes, *Foreword*, *supra* note 1; Pildes, *Political Parties and Constitutionalism* (February 2010), *in* RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW (Rosalind Dixon and Tom Ginsburg, eds., forthcoming), *available at* SSRN: http://ssrn.com/abstract=1550905.

[22] *See* RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 245-47 (2003).

[23] *See* IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 60-77 (2003).

[24] *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997) [hereinafter Klarman, *Majoritarian Judicial Review*].

[25] *See* Brief Amicus Curiae of Pennsylvania Voters Joann Erfer and Jeffrey B. Albert in Support of Appellants, Vieth v. Jubelirer, 541 U.S. 267 (2004) (No. 02-1580) (written by Einer Elhauge).

[26] *See* David Schleicher, *"Politics as Markets" Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163 (2006) [hereinafter Schleicher, *"Politics as Markets" Reconsidered*]; Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J. L. & POL. 419 (2007).

[27] *See* Daniel R. Ortiz, *Duopoly versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753 (2000); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217 (1999) [hereinafter Ortiz, *From Rights to Arrangements*].

[28] *See* Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95 (2002).

[29] *See* Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411 (2008).

[30] Take the sharp contrast between Richard Posner's and Ian Shapiro's theories for example. In *Law, Pragmatism, and Democracy* (2003), Posner advocates a theory of competitive democracy that is fairly conservative in the usual sense of the word. Posner's conservatism is reflected not only in his strong

extent that we can speak of the political antitrust approach in the singular, it is because an identifiable set of viewpoints has emerged and arguably forms the common denominator of these authors' respective theories.

The challenge is to characterize and make intelligible the common theme of these divergent theories. Richard Pildes identifies this group as "competitive theories of election law." "For these theories," Pildes argues, "the most salient features of democracy are the institutional frameworks that structure the electoral process; these theories also focus immediately on the organizations and groups, particularly political parties, that organize, structure, and drive the electoral process." [32] "The political markets approach" is another widely used label reflecting this sort of broad characterization.[33] Such naming captures the competitive electoral process as the locus of the institutional/structural concerns of these theories. It also leaves ample room to try out numerous ways of reasoning without privileging, say, analogical reasoning from antitrust law.[34] But such broad

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defense of the basic features of American democracy, but also in his adherence to many of Schumpeter's basic teachings, including, among other things, the acceptance as human nature of the division of labor between political elites and ordinary people and the confidence in monopolistic political competition. Not incidentally, Posner opposes proportional representation, raises doubt on campaign finance reform, and advises that antitrust-modeled judicial review focus on the "contestability" of political markets. *See* POSNER, *supra* note 22, *passim*. Ian Shapiro's THE STATE OF DEMOCRATIC THEORY (2003), in contrast, presents a progressive vision of competitive democracy. Shapiro revitalizes the conception of competitive democracy not because he agrees with Schumpeter's account of human nature, but because he thinks that the competitive vision offers a power-centered approach for managing power relations in the hope of minimizing domination in real politics. Pressing the logic of competitive democracy to challenge the status quo, Shapiro criticizes the collusive aspect of bipartisanship, recognizes the strengths of proportional representation, endorses campaign finance reform, and envisions political antitrust measures that focus not only on the "contestability," but also on the "responsiveness" of political markets. *See* SHAPIRO, *supra* note 23, *passim*.

[31] Take, again, Posner's and Shapiro's theories for example. Both Posner and Shapiro criticize the prevailing theories of deliberative democracy and public choice; they seek to reorient the normative discourse of democracy towards the direction pointed by Schumpeter's realist insight while trying to revamp competitive democracy into a more attractive normative vision. Above all, both Posner and Shapiro align their theories of judicial review with their theories of competitive democracy; they envision a limited, democracy-reinforcing role for judicial review in general, and antitrust-modeled judicial oversight of election law in particular. *See* POSNER, *supra* note 22, *passim*; SHAPIRO, *supra* note 23, *passim*.

[32] Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, *supra* note 21, at 686.

[33] *See, e.g.*, HASEN, THE SUPREME COURT AND ELECTION LAW, *supra* note 6, at 143 (discussing "political markets approach"); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 COLUM. L. REV. 708, 748-51 (2006) (discussing participatory and competitive theories of democracy); Issacharoff & Pildes, *Politics as Markets*, *supra* note 21 (proposing a "political markets approach"); Persily, *The Place of Competition in American Election Law*, *supra* note 6 (using interchangeably "political markets approach" and "political antitrust approach"); Pildes, *Theory of Political Competition*, *supra* note 21 (using mainly the term "the political competition approach").

[34] *See*, Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, *supra* note 21, at 694-95.

characterization says too much and too little. It says too much because these theories focus mainly on certain problems of election law and judicial review; they do not address all types of "political market failures" facing competitive democracy.[35] It says too little because these theories not only share common concerns about the competitive electoral processes, but they have also reached some significant substantive agreements in this regard. To capture their common theme, a label that is more specific than concepts like "competition" or "political markets" should be helpful.

We can uncover the thrust of these modern competitive theories of election law by inquiring into exactly what problems of constitutional democracy they diagnose and address.[36] All these competitive theories of election law, I argue, basically hold a dual commitment to (1) protecting the ordering of competitive political markets from the excesses of politicians' self-deals, and to (2) constraining, at the same time, the judicial constitutionalization of democratic institutional design. The term "political antitrust" is advisable, because "antitrust" has long been a leading metaphor for signaling both (1) the problem posed by self-interested political regulation and (2) the aspiration for democracy-reinforcing as opposed to democracy-limiting judicial review.[37] The political antitrust approach, to wit, is a systematic approach to the constitutional law of

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[35] Typical market failures include collective action problems, externalities, information asymmetries, and imperfect competition. On the political market failures in the context of election law, *see generally* Daryl J. Levinson, *supra* note 7. On the conceptions of "political markets" and the analyses of political market failures in democratic politics and governance, see BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES (2007); R. L. CURRY, JR. & L. L. WADE, A THEORY OF POLITICAL EXCHANGE: ECONOMIC REASONING IN POLITICAL ANALYSIS 73-96 (1968); MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS (1981); SCOTT, *supra* note 12; Donald Wittman, THE MYTH OF DEMOCRATIC FAILURE: WHY POLITICAL INSTITUTIONS ARE EFFICIENT (1995); Gary S. Becker, *A Theory of Competition among Pressure Groups for Political Influence*, 98(3) THE QUARTERLY JOURNAL OF ECONOMICS 371 (1983); W. Mark Crain, *On the Structure and Stability of Political Markets*, 85(4) JOURNAL OF POLITICAL ECONOMY 829 (1977); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE 3 (1971); Barry R. Weingast and William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96(1) JOURNAL OF POLITICAL ECONOMY 132 (1988).

[36] For a critical assessment of the theory-drivenness and method-drivenness in the study of politics, and a recommendation for problem-driven scholarship, *see* IAN SHAPIRO, THE FLIGHT FROM REALITY IN THE HUMAN SCIENCES 86-96, 178-203 (2005).

[37] The invocation of the antitrust metaphor here is intended to articulate the objectives of this theoretical trend, not to suggest that analogies to antitrust are the only mode of reasoning for this judicial project of competitive democracy. On the use of the term "political antitrust approach," *see also* Persily, *The Place of Competition in American Election Law*, *supra* note 6, at 180. On the significance of the antitrust metaphor for the competitive theories of election law, *see also* Nathaniel Persily and Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 778 n.51 (2000); Schleicher, *"Politics as Markets" Reconsidered*, *supra* note 26, at 166 n.13.

democracy that aims at protecting competitive democracy from both excessive self-interested political regulation and judicial over-constitutionalization of democratic institutional design.

A. Against Excessive Self-Interested Political Regulation

"The first instinct of power," Justice Scalia once remarked, "is the retention of power [...]."[38] In a crucial sense, the political antitrust approach aims at countering such an instinct of those who hold power to skew the rules of the game for their self-interests in power retention.[39] To the extent that all regulations of the democratic political processes are more or less self-interested, the approach targets on what may be termed the "excessive self-interested political regulation."[40] Controlling politicians' self-interestedness is a common concern in such fields as democratic theory, constitutional law, and election law.[41] Still, the political antitrust approach is marked in its close attention to election law manipulation in competitive democracy.[42]

In *Politics as Markets*, published in 1998, Samuel Issacharoff and Richard Pildes outline a representative case against self-interested political regulation from their politics-as-markets perspective:

> The key to our argument is to view appropriate democratic politics as akin in important respects to a robustly competitive market—a market whose vitality depends on

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[38] McConnell v. FEC, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part).

[39] *See also* Persily, *The Place of Competition in American Election Law*, *supra* note 6, at 172.

[40] On the strategic calculations of power elites in designing electoral system, see generally Carles Boix, *Setting the Rules of the Game: The Choice of Electoral Systems in Advanced Democracies*, 93(3) AM. POL. SCI. REV. 609 (1999). I use the term "political regulation" as synonymous with "the law of democracy" and "election law." On the concept of political regulation, *see also* Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105 (1999).

[41] *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); ROBERT A. DAHL AND CHARLES E. LINDBLOM, POLITICS, ECONOMICS, & WELFARE 273 (1992); THE FEDERALIST NOS. 10, 51 (James Madison), 60 (Alexander Hamilton); THOMPSON, *supra* note 7. On the consideration of self-interested political regulation in the election law theories other than the political antitrust theories under discussion here, *see also* HASEN, THE SUPREME COURT AND ELECTION LAW, *supra* note 6, at 94-99; Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601 (2007).

[42] Michael Klarman proposes that the problem of political entrenchment be assessed against the benchmark of majority rule; *see* Klarman, *Majoritarian Judicial Review*, *supra* note 24, at 498-501. In his dissent in *Vieth v. Jubelirer* (2004), Justice Breyer also suggests a majoritarian standard against partisan gerrymandering. Vieth v. Jubelirer, 541 U.S. 267, 355 (2004) (Breyer, J., dissenting). Competitive democracy, however, soon replaced majoritarian democracy as the major democratic vision upon which the political antitrust approach is built. Rather than a deliberate choice, though, this change appears to be incidental to the growing prevalence of market-related metaphors and analogies in the discussion about the law of democracy in the recent years.

> both clear rules of engagement and on the ritual cleansing born of competition. Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens. But politics shares with all markets a vulnerability to anticompetitive behavior. In political markets, anticompetitive entities alter the rules of engagement to protect established powers from the risk of successful challenge. This market analogy may be pushed one step further if we view elected officials and dominant parties as a managerial class, imperfectly accountable through periodic review to a diffuse body of equity holders known as the electorate.[43]

What Issacharoff and Pildes advance in the quoted passage is a specific justification for applying the vision of competitive democracy to the judicial task of monitoring and curtailing excessive self-interested political regulation. This justification incorporates three widely-shared propositions: Election is the very process through which modern representative democracies recruit, select, and discipline ruling political elites.[44] The effectiveness of electoral control of politicians is heavily dependent on the way political/electoral competition is structured.[45] Politicians want easy retention of their power and political careers. Knowing the game well, they are likely to use the opportunity of political regulation to restrict political competition, which in turn diminishes the effectiveness of electoral control.[46] By pressing the logic of these propositions, Issacharoff and Pildes make a plausible case that self-serving political regulation is usually

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[43] Issacharoff & Pildes, *Politics as Markets*, *supra* note 21, at 646.

[44] *See* DAHL & LINDBLOM, *supra* note 41, at 272-323. On the functions and significance of elections in modern democracy, *see also* Bernard Manin, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT (1997).

[45] *See, e.g.*, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); Sara Binzer Hobolt & Robert Klemmensen, *Government Responsiveness and Political Competition in Comparative Perspective*, 41(3) COMPARATIVE POLITICAL STUDIES 309 (2008); John Ferejohn, *Incumbent Performance and Electoral Control*, 50 PUBLIC CHOICE 5 (1986); Bernard Manin, Adam Przeworski, & Susan C. Stokes, *Election and Representation*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 29, 46-50 (Adam Przeworski, Susan C. Stokes, & Bernard Manin eds., 1999).

[46] *See, e.g.*, Roger D. Congleton, *Economic and Cultural Prerequisites for Democracy*, *in* RATIONAL FOUNDATIONS OF DEMOCRATIC POLITICS 44 (Albert Breton et al. eds., 2003) [hereinafter RATIONAL FOUNDATIONS]; Gianluigi Galeotti, *Voting Rules: A Constitutional Quandary*, *in* RATIONAL FOUNDATIONS 177; Issacharoff & Pildes, *Politics as Markets*, *supra* note 21, at 708-10; Pildes, *Foreword*, *supra* note 1, at 43-44.

anticompetitive and harmful to the proper functioning of democratic electoral process.

In addition to the commonly shared view that democracy requires "free and fair" elections, Issacharoff and Pildes invoke the distrust of power elites in building their case against anticompetitive self-dealing in political regulation. "Without a complete theory of optimal partisan political competition," these two leading political antitrust theorists argue, "the courts can do a far better job of recognizing grossly anticompetitive practices." [47] Pildes further elaborates: "Our theory is framed in the negative, not the positive; we seek to eliminate partisan-driven anticompetitive political practices, not to enshrine some ideal level of political competition." [48] In a similar fashion, Yasmin Dawood characterizes her "antidomination model" as one geared to minimizing democratic harms, not maximizing or optimizing democratic goods.[49] To paraphrase Einer Elhauge's process-based construction of antitrust law, one may argue that political antitrust stands for the limited proposition that those who stand to benefit politically from restraints of political competition cannot be trusted to determine how to structure political competition for the common good of democracy.[50]

Framing the approach in the negative makes practical sense. Few if any would consider self-serving election law manipulation morally unproblematic, and the more egregious the self-serving bias is in a law of democracy, the less controversial the judicial intervention is in holding it constitutionally impermissible.[51] Still, it is tempting for supporters and critics alike to characterize the political antitrust project as "pro-competition." Issacharoff, for example, takes competition "as the metric for analyzing the interplay between constitutional law and politics."[52] He also considers the competitiveness of the political process an "independent democratic good." [53] Not incidentally, it is often heard among political antitrust theorists that we should pursue a "more competitive" democratic

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[47] Issacharoff & Pildes, *Politics as Markets*, *supra* note 21, at 681.

[48] Pildes, *Theory of Political Competition*, *supra* note 21, at 1612.

[49] *See* Dawood, *supra* note 29, at 1423-26.

[50] *See* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 672 (1991). Although the process-based account that is equivalent to the apparent distinction between market and state (political process)—the distinction upon which Elhauge develops his thesis of antitrust law—may not be readily available in the realm of democratic politics, I take that a similar limitation on the objective of political antitrust is still conceivable.

[51] *See* Pildes, *Theory of Political Competition*, *supra* note 21, at 1612.

[52] Issacharoff, *Why Elections*, *supra* note 20, at 685.

[53] Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 20, at 622.

politics.[54] Critics of the approach might even love the "pro-competition" characterization more than supporters do, because they can criticize how myopic and oversimplified it is.[55] However, we should resist the positive framing of political antitrust as simplistic rhetoric. After all, political competition is not a linear property, but a multi-dimensional one with no apparent equilibrium among its different values.[56] In view of the normative disagreement and empirical uncertainty about the law of democracy, institutional considerations also counsel that a political antitrust court be attentive to the problem of anticompetitive political regulation while refraining from imposing its value preferences on democratic institutional design.[57] It remains to be examined whether and to what extent the power of a political antitrust court can be contained by framing its objective in the negative, but letting unelected judges decide how to structure competitive democracy as they see fit is not what the political antitrust theorists have meant to propose.

B. Against Judicial Over-Constitutionalization

As a theory of judicial review of political regulation, the political antitrust approach is also committed to managing the problem of judicial paternalism in this particular intersection of law and politics at a time when more and more issues of democratic institutional design have become issues of constitutional law.[58] Notwithstanding voluminous discussion about the "counter-majoritarian difficulty" of judicial review, one might wonder why judicial review poses a problem to the law of democracy. After all, there are a certain political rights whose protection is indispensable to democratic self-governance.[59] Few would expect that a

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[54] *See, e.g.*, SHAPIRO, *supra* note 23, at 149.

[55] *See, e.g.*, THOMPSON, *supra* note 7, at 6-8, 175-77; Cain, *supra* note 6, at 1600-03; Lowenstein, *Competition and Competitiveness in American Elections*, *supra* note 6; Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002).

[56] On the complexity and multi-dimensionality of political competition, *see infra* Part V. A.

[57] Many political antitrust theorists have much to say about the institutional design of competitive democracy, but they by and large observe the difference between doing political antitrust through judicial review and enhancing competitive democracy through institutional reform. *See, e.g.*, POSNER, *supra* note 22, *passim*; SHAPIRO, *supra* note 23, *passim*.

[58] There are numerous expressions of this commitment. Ian Shapiro, for instance, commends political antitrust for being a middle-ground approach to judicial review that aspires to be "democracy-reinforcing" as opposed to be "democracy-limiting;" *see* SHAPIRO, *supra* note 23, at 51, 73-77. Samuel Issacharoff maintains that political antitrust entails a "limiting principle for judicial intervention into politics;" *see* Issacharoff, *Why Elections*, *supra* note 20, at 694.

[59] While different conceptions of democracy imply different conceptions of "democratic rights," overlapping consensus apparently exists in the constitutional protection of the "political rights" or the

distorted democratic process somehow could overcome the problems of prejudice or vested self-interests on its own.[60] Besides, election law issues usually fly below the radar of public attention,[61] and they have relatively insignificant fiscal consequences or implications.[62] On these accounts, the constitutional law of democracy is arguably one of the least controversial domains for the exercise of judicial review in contemporary transnational constitutional cultures.[63] The prevalent confidence in or indifference to judicial review of election law may have contributed to the glaring but largely underappreciated development of what Richard Pildes terms "the constitutionalization of democratic politics," the transformation by which constitutional adjudication has exerted profound impact on the institutional arrangements as well as on-the-ground practices of democratic politics over the late twentieth century in the expanding world of constitutional democracies.[64]

With or without the controversial *Bush v. Gore* (2000),[65] there has been

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"rights of politics," which are usually conceived as including, above all, the right to vote, freedom of speech, freedom of association, and political equality.

[60] For the functional/institutional justification of this genre, see United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (Stone, J., concurring); ELY, *supra* note 10, at 73-104.

[61] For a discussion on the distinction between high- and low-salience issues in the U.S. Supreme Court's docket and its general implications to the justification of judicial review, see Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4 (2006).

[62] The size of the budgetary consequences is part of the conventional argument against judicial enforcement of social and economic rights; *see, e.g.*, Cass R. Sunstein, *Against Positive Rights*, *in* WESTERN RIGHTS?: POST-COMMUNIST APPLICATION 225 (András Sajó ed., 1996). *But cf.* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 233-37 (2008). In contrast, even in election law cases where public spending may be a factor—such as the voting equipment litigations in the United States after *Bush v. Gore*, and the German Constitutional Court's series decisions on public funding of party finance—the budgetary consequences may be too modest by comparison to entertain such a fiscal argument against judicial review.

[63] This is a descriptive argument about the present-day popular perception of constitutional democracy, and I do not mean to deny the historical contingency of this mindset. For a historical overview of the evolving constitutional law of democracy in the United States, see Mark A. Graber, *From Republic to Democracy: The Judiciary and the Political Process*, *in* THE JUDICIAL BRANCH 401 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

[64] Pildes, *Foreword*, *supra* note 1, at 31-34. This development is often viewed and explained as part of the global trend toward constitutionalization and judicialization of politics broadly conceived; *see, e.g.*, RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41 (2002).

[65] 531 U.S. 98 (2000). For various reasons, students of the law of democracy and students of the comparative constitutional law tend to view *Bush v. Gore* not as an outlier, but as an emblem of what judicial review has done to democratic politics in the United States and elsewhere; *see, e.g.*, RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345 (2001); Richard H. Pildes, *Constitutionalizing Democratic Politics*, *in* A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE,

a growing concern over the specter of *Lochner*—i.e., paternalistic judicial value-imposition—in the law of democracy. The institutional arrangements of democratic politics, after all, are by no means devoid of reasonable disagreement—the core condition under which the legitimacy of judicial review is being challenged.[66] In the face of reasonable disagreement, democratic experimentation is arguably preferable to Platonic judicial guardianship. An epistemic argument can be made that democratic political process is more likely than not to outperform constitutional adjudication in making the trade-offs, compromises, and judgments that are central to the task of democratic engineering.[67] Besides, we generally cherish and aspire to have the various socio-political experiences that define or enrich the meaning of our political life—passion, struggle, solidarity, persuasion, contestation, deliberation, negotiation, and cooperation.[68] The judicial constitutionalization of democratic politics raises the danger that the judges' political ideologies and/or cultural attitudes may mold the pertinent constitutional law of democracy at the peril of democratic self-governance.[69]

The big question is how to prevent this risk to democratic politics. In a key passage of *Politics as Markets*, Issacharoff and Pildes set forth a guideline for the role of political antitrust courts:

In cases involving the regulation of politics, we argue that courts should shift from the conventional first-order focus on rights and equality to a second-order focus on the background markets in partisan control. Rather

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THE SUPREME COURT, AND AMERICAN DEMOCRACY 155 (Ronald Dworkin ed., 2002).

[66] *See, e.g.*, HASEN, THE SUPREME COURT AND ELECTION LAW, *supra* note 6, at 1-13; SAMUEL ISSACHAROFF, PAMELA S. KARLAN, AND RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1-15 (rev. 2d ed. 2002) [hereinafter ISSACHAROFF, KARLAN, AND PILDES, THE LAW OF DEMOCRACY]; THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS (David K. Ryden ed., 2000); Pildes, *Foreword*, *supra* note 1, at 48. On reasonable disagreement and the case against (strong form) judicial review, *see* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); JEREMY WALDRON, LAW AND DISAGREEMENT (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

[67] For a recent philosophical construction of the epistemic case for democracy, see DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK (2008).

[68] For an emphatic defense of the political life of the community from philosophical and judicial intervention, see Michael Walzer, *Philosophy and Democracy*, *in* THINKING POLITICALLY: ESSAYS IN POLITICAL THEORY 1 (David Miller ed., 2007).

[69] Richard Pildes observes that the U.S. Supreme Court's election law jurisprudence reflects a generally shared cultural attitude toward democracy among the justices—an attitude that perceives democracy as a fragile system in need of judicial protection to maintain stability and order; *see* Pildes, *supra* note 65. On the influence of the justices' ideologies on judicial decision-making, see generally JEFFREY A. SEGAL AND HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

than seeking to control politics directly through the centralized enforcement of individual rights, we suggest courts would do better to examine the background structure of partisan competition. Where there is an appropriately robust market in partisan competition, there is less justification for judicial intervention. Where courts can discern that existing partisan forces have manipulated these background rules, courts should strike down those manipulations in order to ensure an appropriately competitive partisan environment.[70]

What Issacharoff and Pildes propose is arguably a complex of two distinct propositions. Based on the diagnosis that the conventional rights discourse is liable to the judicial over-constitutionalization of democratic institutional design, Issacharoff and Pildes first suggest that the focus of judicial review be shifted from individual rights and political equality toward the background structure of partisan competition. Call this *the structural thesis* of political antitrust. Immediately following their proposal for a paradigm shift, they also suggest that political antitrust be taken as a primary mediating principle for determining the level of judicial scrutiny. Call this *Carolene*-style proposition *the primacy thesis* of political antitrust. There is much to be said about the distinction, interaction, and respective efficacy of these two limiting strategies.[71] Suffice it to say here that political antitrust theorists have sought to manage the role of democracy-reinforcing judicial review by charting a new map of the constitutional law of democracy.[72] This game plan is different from, say, the various "exit strategies" proposed by Pamela Karlan,[73] and the recent call for the return of "the political question doctrine."[74]

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[70] Issacharoff & Pildes, *Politics as Markets*, *supra* note 21, at 648.

[71] *See* Yen-tu Su, Political Antitrust: Rethinking the Constitutional Law of Competitive Democracy 56-63 (2010) (unpublished S.J.D. dissertation, Harvard Law School) (On file with the Harvard University Library).

[72] Heather Gerken uses the map metaphor to describe the structural approach to the law of democracy; *see* Gerken, *Lost in the Political Thicket*, *supra* note 7, at 519.

[73] *See* Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch out of the Political Thicket*, 82 B.U. L. REV. 667 (2002).

[74] One common criticism of *Bush v. Gore* is that the Court should have invoked the political question doctrine and let the disputed presidential election run its course. *See, e.g.*, Steven G. Calabresi, *A Political Question*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 129 (Bruce Ackerman ed., 2002); Samuel Issacharoff, *Political Judgments*, *in* THE VOTE: BUSH, GORE & THE SUPREME COURT 55 (Cass R. Sunstein & Richard A. Epstein eds., 2001). For a critical assessment of the decline of the political question doctrine as reflected in the silence of *Bush v. Gore*, see Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002). Another push for the revival of the political question doctrine came from Justice Scalia's plurality opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), in which he argues that partisan gerrymandering claims should be nonjusticiable because of the absence of judicially manageable standards. For a view that the *Vieth* plurality is "signaling a retreat from the Court's

In view of the sharp criticisms some political antitrust theorists level at the U.S. Supreme Court's election law jurisprudence for its leniency on the suspicious political self-deals in certain occasions,[75] one might get the impression that the political antitrust approach is actually a strategy of "judicial reinforcement"—that it stands for "aggressive judicial oversight of the political sphere."[76] Such an impression often takes hold when the approach is compared to the various proposals of judicial abstention. However, we should resist the hasty inference that, simply because the adoption of the political antitrust approach might lead to the invalidation of certain practices deemed permissible under the current case law, the approach belies its commitment to containing the expansion of judicial power in the law of democracy. This inference would neglect the constitutionalizing effect of judicial validation.[77] It also would obscure the fact that not all instances of judicial invalidation are tantamount to judicial

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aggressive posture of years past," see Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899 (2006). For a recent call for judicial retreat from the law of democracy, see also Luis Fuentes-Rohwer and Laura Jane Durfee, *Leaving the Thicket at Last?*, 2009 MICH. ST. L. REV. 417 (2009).

[75] Many political antitrust theorists, for example, are critical of the Court's lenient jurisprudence on political gerrymandering as demonstrated, *inter alia*, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *see* Brief of Samuel Issacharoff, Burt Neuborne, and Richard H. Pildes as Amici Curiae in Support of Appellants, LULAC v. Perry, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, and 05-439); POSNER, *supra* note 22, at 244-45; Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 20; Klarman, *Majoritarian Judicial Review*, *supra* note 24, at 533-35; Pildes, *Foreword*, *supra* note 1, at 55-83. *Cf.* Elhauge, *supra* note 25. Ballot access is another issue area where the Court's several deferential decisions are under fire from some advocates of the political antitrust approach; *see, e.g.*, POSNER, *supra* note 22, at 239 (criticizing *Jenness v. Fortson*, 403 U.S. 431 (1971)); Issacharoff & Pildes, *Politics as Markets*, *supra* note 21, at 668-87 (criticizing *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)).

[76] Nathaniel Persily, *The Search for Comprehensive Descriptions and Prescriptions in Election Law*, 35 CONN. L. REV. 1509, 1516 (2003).

[77] On the legitimating effect of judicial validation; *see* CHARLES L. BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 52-53 (1960). The constitutionalization-through-validation thesis can be seen as a flip side of Black's legitimatization-through-validation thesis. By affirming the merits of an electoral regulation—say, the voter ID law in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), the Court's decision may, in effect, increase the difficulty of changing the disputed regulation through ordinary democratic politics. However, a more profound influence of the judicial constitutionalization of democratic politics seems to lie in judicial reasoning and has little to do with the acts of validation or invalidation. How the courts interpret the constitutional law and craft the relevant doctrines of judicial scrutiny may exert strong influence, for good or for bad, on our understanding and imagination of constitutional democracy. For instance, constitutional lawyers in the United States have long learned not to talk about the political equality rationale for campaign finance regulation, because, however popular the notion of "leveling the playing field" is in political theory and public discussion, the Court has adamantly dismissed it as "wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 48-9 (1976). Similarly, the Court's faith in the two-party system and its mistrust of proportional representation may have helped to entrench the single-member district electoral system in the United States.

value-imposition to the same degree.[78]

III. THREE STORIES OF POLITICAL ANTITRUST

Why has the political antitrust approach developed into such a prominent yet controversial theory in the United States since the late 1990s? What is this theoretical development all about for the growing field of the law of democracy? Two narratives stand out as leading answers. In the first narrative, the development of this theoretical project and the debate it has generated are seen as part of the rights-versus-structure paradigm contestation in the field of the law of democracy. In the second narrative, the project is viewed as an attempt to model the constitutional law of democracy after antitrust law. These two prevailing stories have exerted strong influences on our understanding of this theoretical development. They have also shaped the terms of debate over the merits and demerits of political antitrust.

These two prevailing narratives, however, shed insufficient light on the conceptual and intellectual transformation that precedes or underpins the recent ascendance of the political antitrust approach. They are partly incomplete and partly misleading. This article proposes a third story to uncover the largely neglected intellectual history of the idea. Call it "a genealogy of political antitrust." The political antitrust approach, under this view, can be retraced to the confluence of the Elysian process theory of judicial review and the Schumpeterian theory of competitive democracy. This genealogical narrative invites us to reconsider the path dependence and historical contingency of this theoretical development. It also empowers us to reframe the terms of debate to better appreciate the potentials and limitations of this alternative approach to the law of democracy.

A. Political Antitrust as a New Paradigm of Election Law

"It is leaving constitutional law's empire," so observes Pamela Karlan when commenting on the development of "the law of democracy" (a.k.a. "election law") towards becoming a field of study in its own right.[79] With a

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[78] In short, much is dependent upon the mode and substance of the underlying judicial reasoning—upon whether it resonates with the people and how much room it leaves for different political judgments.

[79] Pamela S. Karlan, *Constitutional Law, the Political Process, and the Bondage of Discipline*, 32 LOY. L.A. L. REV. 1185, 1187 (1999). On the emergence of American election law scholarship since the 1990s, see also *Symposium: Election Law as Its Own Field of Study*, 32 LOY. L.A. L. REV. 1095 (1999).

shift of context from the academic division of labor to the substance of law, the same can be said of the recent boom of the political antitrust theories. Whether or not the political antitrust approach has become a new orthodoxy of election law scholarship,[80] it has surely asserted itself as an insurgency against rights-based jurisprudence, upon which the judicial empire of constitutional law is built and extended to the "political thicket." Samuel Issacharoff and Richard Pildes, for instance, begin building their theory with sharp criticisms of the U.S. Supreme Court's rights-based election law jurisprudence. Their political antitrust theory is proposed as a structural alternative to the conventional rights-based regime. "Paradigm shift" or "regime change" is the rallying cry of this ongoing theoretical movement, so is it the main theme of the first story regarding the development of the political antitrust approach in the recent years. The story, in a nutshell, is about a movement—led by some political antitrust theorists—to leave the rights-based empire of constitutional law in order to cultivate and consolidate a new "identity" for the emerging field of the law of democracy.[81]

In the recent years, students of the law of democracy in the United States have fervently debated whether the Court should take such a structural turn. Much of the controversy, though, seems to revolve around the vagueness and indeterminacy of what counts as a "structural" approach to the constitutional law of democracy. Sometimes the structuralists call for a clean slate and propose that certain issues like redistricting be adjudicated under the long neglected Republican Form of Government Clause or the Elections Clause of the U.S. Constitution.[82] But most of the time the

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[80] Richard Hasen suggests that Issacharoff's and Pildes's political markets approach "is becoming the new election law orthodoxy." HASEN, THE SUPREME COURT AND ELECTION LAW, *supra* note 6, at 139.

[81] *See, e.g.*, Charles, *Judging the Law of Politics*, *supra* note 7, at 1114-20; Gerken, *Lost in the Political Thicket*, *supra* note 7, at 519-31; Ortiz, *From Rights to Arrangements*, *supra* note 27, at 1218; Persily, *The Place of Competition in American Election Law*, *supra* note 6, at 171-76. The debate over "election law exceptionalism" can also be understood as part of the quest for the identity of the law of democracy as a field of law. On the discussion of "election law exceptionalism," see Farber, *supra* note 7, at 382; Heather K. Gerken, *Election Law Exceptionalism? A Bird's Eye View of the Symposium*, 82 B. U. L. REV. 737 (2002); Nathaniel Persily, *supra* note 76; Frederick Schauer and Richard H. Pildes, *Election Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999). For an earlier discussion on the uniqueness of voting rights, *see also* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998); Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109 (1994); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201 (1996).

[82] For a proposal of adjudicating the redistricting cases under the Republican Form of Government Clause of the U.S. Constitution, see Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J. L. & PUB. POL'Y 103 (2000). For a suggestion that the

structuralists do not discard outright constitutional adjudication under the First and Fourteenth Amendments. Rather, they aim at remodeling the way political rights and political equality are conceptualized and interpreted—from an individualistic or formalistic conception of rights to a structural or functional one.[83] The line between the rights-based and the structural paradigms is further blurred by the fact that structural, institutional, or functional considerations are not entirely absent from the Court's existing rights jurisprudence, but may have been the story behind the scene.[84] When seen in this light, the proposed paradigm shift looks not much different from a plea for intellectual honesty and doctrinal consistency, the merit of which, though, is not beyond dispute.[85]

The indubitable entanglement of the rights-based and the structural paradigms suggests that the paradigmatic contestation does not have to be framed as an either-or debate, and many commentators have sought to synthesize these two schools of thought, or find other ways to transcend the

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Court invoke the Elections Clause of the U.S. Constitution to review the congressional redistricting plans, *see* Brief of Samuel Issacharoff, Burt Neuborne, and Richard H. Pildes as Amici Curiae in Support of Appellants, LULAC v. Perry, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, and 05-439); Pildes, *Constitution and Political Competition*, *supra* note 21.

[83] Among others, Richard Pildes has long advocated the structural/institutional/functional conception of rights; *see* Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); Pildes, *Formalism and Functionalism in the Constitutional Law of Politics*, 35 CONN. L. REV. 1525 (2003); Pildes, *Two Conceptions of Rights in Cases Involving Political "Rights"*, 34 HOUS. L. REV. 323 (1997); Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998). Guy-Uriel Charles attributes the structural conception of political rights to "the initial exposition of the structural approach" and criticizes that the subsequent development of the structuralism has unnecessarily essentialized election law claims and produced very little insight; *see* Charles, *Judging the Law of Politics*, *supra* note 7, 1114-1120, 1131-40. However, I fail to see any clear indication that Pildes and his fellow structuralists have recanted their support for the structural approach to political rights.

[84] Pamela Karlan argues that the U.S. Supreme Court has developed "structural equal protection" in its *Shaw* line of cases regarding racial gerrymandering as well as in its *Bush v. Gore* decision; *see* Karlan, *supra* note 65. For an in-depth analysis of the structural dimension of the vote-dilution claims, see Heather K. Gerken, *Understanding the Right to An Undiluted Vote*, 114 HARV. L. REV. 1663 (2001). Similarly, Christopher Elmendorf argues that the Court's jurisprudence in electoral mechanics cases is structural rather than individualistic notwithstanding the rights/burden rhetoric in the Court's reasoning. *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PENN. L. REV. 313 (2007). For discussions about the structural considerations in the constitutional law in general, *see, e.g.*, AMAR, *supra* note 41; CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969, 1985); Laurence H. Tribe, *Sanez Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999).

[85] Part of the rights-structure debate centers on whether the Court should embrace and adhere to a particular theory of democratic politics on a certain level of generality, given that such a theory is necessary for the pursuit of doctrinal coherence and consistency. For different views on this issue, see Gerken, *supra* note 65, at 414-23; Lowenstein, *The Supreme Court Has No Theory of Politics*, *supra* note 6; Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459 (2004).

rights-structure debate.[86] But at least one fundamental disagreement persists. Heeding Justice Felix Frankfurter's teaching that courts are simply unfit for the task of redressing "a wrong suffered by [the state] as a polity,"[87] many commentators on the rights camp have strong reservations against the structural theories of the law of democracy. These critics stress the courts' limited competence, and they worry that a structural approach would only aggravate the danger of judicial encroachment on democratic institutional engineering.[88] The structuralists, on the other hand, emphasize the functional justification for structure-oriented judicial review and the necessity for the courts to engage in structural analysis in adjudicating election law claims. With proper design, they contend that a structural approach can serve to limit the reach and intrusiveness of judicial review of political regulation.[89] In view of this fundamental disagreement, the rights-versus-structure debate might not be easily dismissed as immaterial.[90]

Understanding how the political antitrust approach is positioned vis-à-vis the conventional rights-based election law jurisprudence is certainly a key to understanding its recent surge along with the controversies it generates. On the one hand, the campaign for the approach has capitalized much on the discontent with the performance of the existing rights-based jurisprudence. Were it not for the doctrinal inconsistency, sterile reasoning, and many other problems resulting from the courts' use of individual rights doctrines in adjudicating issues of election law that are of structural significance, there might not have been much interest in the quest for political antitrust working as an alternative judicial approach.[91] On the

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[86] For different theoretical efforts to synthesize or transcend the rights-structure debate, see, e.g, EISGRUBER, *supra* note 7, at 170-75, 179-86; Farber, *supra* note 7, at 374-77; Gerken, *Lost in the Political Thicket*, *supra* note 7, at 521-31; Charles, *Judging the Law of Politics*, *supra* note 7, at 1124-30.

[87] Colegrove v. Green, 328 U.S. 549, 552 (1946).

[88] *See* HASEN, THE SUPREME COURT AND ELECTION LAW, *supra* note 6, at 138-56.

[89] *See, e.g.*, Gerken, *Lost in the Political Thicket*, *supra* note 7, at 529-31; Pildes, *Foreword*, *supra* note 1, at 42-47. The qualification on the propriety of design is critical because the fact that an approach can be categorized as a structural one does not necessarily mean that it offers adequate and effective safeguard against unwarranted judicial intervention in democratic politics. In fact, many structuralists are no less critical of the several structural approaches already found in the praxis of comparative constitutional law of democracy. What distinguishes the structural theorists from their antagonists is not their unconditional support for judicial approaches that are geared to regulate the legal structure of democratic political processes, but their readiness to look for means other than the techniques provided by the conventional rights-based jurisprudence to cabin the courts' structural inquiry when adjudicating issues of the law of democracy.

[90] *But see* Charles, *Judging the Law of Politics*, *supra* note 7, at 1131.

[91] The shift to a structural approach is not the only option being considered. The call for judicial minimalism, above all, represents an incremental reformist response to the problems inherent in the

other hand, advocates of the political antitrust approach still have to answer questions about all sorts of doctrinal issues, such as justiciability, standing, standards of judicial scrutiny, and the design of remedies. These issues and their solutions have long been framed on the assumption that protecting individual rights is the core mission of judicial review, and one cannot but wonder whether and how we can constrain the judicial power without resorting to the tools provided by the rights-based regime. [92] Not surprisingly, the rights-structure dimension is where some major battles over political antitrust take place.[93]

Cast as a leading exemplar of the structural paradigm, the political antitrust approach is often considered a grand theory or an overarching theme that places structural issues of political competition—as opposed to individual rights or other values of democracy—at the center of judicial oversight of political regulation. The talk of "paradigms" highlights the differences resulting from different theoretical/doctrinal frameworks. It also casts doubts on the efficacy of muddling through, and breeds hope for fundamental changes.[94] However, in considering that the American law of democracy has long been trapped in what Heather Gerken calls a "doctrinal interregnum,"[95] the hope is at best a long shot. Guy-Uriel Charles might have mistaken the paradigm contestation with an "essentialist" dispute,[96] but his and others' urge to turn the page is quite understandable in the aftermath of an exhausting debate. And once we step aside from the paradigm narrative, we may find that the political antitrust approach is more diverse, more complicated, and also more readily operable under the

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rights-based jurisprudence. On the general tenets of judicial minimalism, *see, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). For a proposal of judicial minimalism in election law, *see* HASEN, THE SUPREME COURT AND ELECTION LAW, *supra* note 6. For a critical assessment of judicial minimalist approach in voting cases, *see* Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N. C. L. REV. 1411, 1427-43 (2002).

[92] *See* Gerken, *Lost in the Political Thicket*, *supra* note 7, at 520-21.

[93] For criticisms of the political antitrust approach from the standpoint of the rights-based jurisprudence, see, e.g., HASEN, THE SUPREME COURT AND ELECTION LAW, *supra* note 6, at 2-10, 143-56; Farber, *supra* note 7, at 374-77; Persily, *The Place of Competition in American Election Law*, *supra* note 6, at 176-93; Charles, *Judging the Law of Politics*, *supra* note 7, at 1120-40.

[94] On the problems of incremental change in the U.S. Supreme Court's election law jurisprudence, *see* Gerken, *supra* note 91. For an assessment of the potentials and risks of shifting to a structural approach, see also Gerken, *Lost in the Political Thicket*, *supra* note 7, at 519-31.

[95] *See* Gerken, *Lost in the Political Thicket*, *supra* note 7; Heather K. Gerken, *Rashomon and the Roberts Court*, 68 OHIO ST. L.J. 1213 (2007); *see also* Fuentes-Rohwer and Durfee, *supra* note 74. On the uncertain state of the Roberts Court's election law jurisprudence, see also Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743 (2007).

[96] *See* Charles, *Judging the Law of Politics*, *supra* note 7, at 1131.

existing circumstances than we used to think.[97]

B. Political Antitrust as an Analogical Construction

To the extent that the structural approaches to the law of democracy can be organized around different structural themes of democracy,[98] one may wonder, why do the political antitrust theorists place emphasis on the structural concerns over political competition as opposed to something else? Whereas the aforementioned paradigm narrative is silent on this question, the second mainstream narrative attributes the idea of political antitrust to the very use of analogies. Issacharoff and Pildes first analogize their politics-as-markets theory to the lockups theory in the law of corporate governance. Just as self-serving corporate lockups done by incumbent management deserve heightened judicial skepticism, they argue, so do self-serving lockups in the political arena.[99] The lockups analogy cogently articulates the normative concerns about entrenchment and self-dealing in the election law, but its influence pales in comparison to that of the markets/antitrust metaphors, which have since resurged in the discourse of American law of democracy roughly about the same time.[100] Since the harm caused by political lockups is measured and explained mainly in terms of their adverse effects on political competition, and since the basic justification for judicial intervention is to restore the proper function of political markets as the major mechanism for disciplining self-interested politicians, it makes much intuitive sense for political antitrust theorists to draw analogies from antitrust law.[101] Prominent examples include

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[97] On the variegated possibilities of the political antitrust approach, see Su, *supra* note 71.

[98] For a pluralistic understanding of the structural paradigm, see Gerken, *supra* note 91, at 1442 n.125. For a pluralistic view of the constitutional law of democracy, see also Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretative Approach of* Baker v. Carr, 80 N. C. L. REV. 1103 (2002).

[99] *See* Issacharoff & Pildes, *Politics as Markets*, *supra* note 21, at 648-49.

[100] In fact, several constitutional law scholars have pioneered the use of markets/antitrust analogies in discussing issues of the law of political processes in the United States in 1980s and early 1990s. *See, e.g.*, ELY, *supra* note 10, at 102-3; DAVID A. SCHULZ, PROPERTY, POWER, AND AMERICAN DEMOCRACY 188-95 (1992); David Cole, *First Amendment Antitrust: The End of* Laissez-Faire *in Campaign Finance*, 9 YALE L. & POL'Y REV. 236 (1991); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1337-48 (1987). Such uses of market/antitrust analogies in constitutional or political analyses can be found outside the United States, too. For instance, some European scholars have come to defend certain practices of direct democracy as efforts to break "politicians' cartels." *See, e.g.*, Bruno S. Frey and Iris Bohnet, *Democracy by Competition: Referenda and Federalism in Switzerland*, 23-2 PUBLIUS: THE J. OF FEDERALISM 71, 72-4 (1993); Michael Wohlgemuth, *Entry Barriers in Politics, or: Why Politics, Like Natural Monopoly, Is Not Organized as an Ongoing Market-Process*, 12 REV. OF AUSTRIAN ECON. 175, 192 (1999).

[101] *See, e.g.*, POSNER, *supra* note 22, at 245-47; SHAPIRO, *supra* note 23, at 60-61; Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 20, at 618-21; Kevin Mitchell, *Antitrust Analysis: A*

Issacharoff's proposal to craft a prophylactic rule against bipartisan gerrymandering in light of the *per se* illegality of horizontal market division agreement in antitrust law;[102] Einer Elhauge's proposal to model the judicial standards for judging partisan gerrymandering after the monopolization doctrine;[103] and David Schleicher's inference from natural duopoly regulation to defend the U.S. Supreme Court's approach to primary ballot access laws.[104] The antitrust analogies are so instrumental to the development of so many political antitrust doctrines under consideration that it is tempting to view the whole project as one of analogical transplantation from antitrust law to election law.[105]

This analogy-centered narrative has strong influence on how we think of the political antitrust approach. Under its influence, much of the ongoing debate has centered on the use, misuse, or abuse of antitrust analogies in the law of democracy. It would be a mistake, however, to view analogical transplantation as the only game in town. However useful analogical reasoning is in crafting antitrust doctrines for the regulation of political markets, it is still a means, not an end in itself. In considering the uniqueness and complexities of political competition as will be discussed in more detail in Part V and Part VI of this article, it is even questionable whether the existing theories have focused too much on the analogies between product markets and political processes, and between antitrust law and election law, while neglecting other venues for developing the political antitrust approach.[106] Besides, this popular story is ahistorical. It says nothing about how the idea has transformed from a notion summarily dismissed by Joseph Schumpeter into a leading theme of the contemporary law of democracy. To know this, we must attend to its intellectual history, which, in turn, has critical implications for the future of political antitrust.

Roadmap for Election Reform under the First Amendment, 10 COMMLAW CONSPECTUS 157 (2001); Persily, *The Place of Competition in American Election Law*, *supra* note 6, at 175-76.

[102] *See* Issacharoff, *Gerrymandering and Political Cartels*, *supra* note 20, at 598-601

[103] *See* Elhauge, *supra* note 25, at 15-27

[104] *See* Schleicher, *"Politics as Markets" Reconsidered*, *supra* note 26, at 197-219.

[105] Political antitrust theorists, however, do not monopolize the use of the markets/antitrust metaphors. Rather, terms like "competition," "antitrust," "political markets," "monopoly," "duopoly," "oligopoly," "barriers to entry," "collusion," "cartels," and so on, have become common vocabulary in the contemporary literature of the law of democracy. These terms, for instance, are commonly present in the literature on ballot access laws; *see, e.g.* JAMIN B. RASKIN, OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE 91-116 (2003); Mark R. Brown, *Popularizing Ballot Access: The Front Door to Election Reform*, 58 OHIO ST. L.J. 1281 (1997); Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181 (2001); Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167 (1991).

[106] *See infra* Part VI. C.

C. A Genealogy of Political Antitrust: An Introduction

From a historical-genealogical perspective, we can find that the approach bears strong affinity to two theoretical traditions—the Elysian tradition of process theory of judicial review on the one hand, and the Schumpeterian tradition of competitive theory of democracy on the other. The political antitrust approach, in other words, can be understood as evolving from a confluence of these two theoretical traditions. The alternative narrative proposed here offers a genealogical explanation as to why political antitrust theorists have come to embrace the competitive vision of democracy—as opposed to the other competing visions of democracy.[107] It also explains why judicial review—as opposed to other institutional possibilities—has been chosen as the central mechanism for implementing the political antitrust principles.[108] The collaboration of these two theoretical traditions in developing the political antitrust approach makes teleological sense, too. Whereas competitive democracy acquires an effective political antitrust mechanism from judicial review, the proposed structural approach to judicial review, in return, may be constrained by the relative minimalism of competitive democracy.[109]

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[107] When commenting on the choice between deliberative and competitive theories of democracy as framed by Richard Posner, Richard Pildes argues that "[t]he best justification for this framing is that it forces attention to issues of institutional design and material questions concerning mobilizing power in the electoral context that deliberative theories often leave out." Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, *supra* note 21, at 693. But Pildes also acknowledges exceptions and the institutional turn in the theoretical tradition of deliberative democracy. *See id.* at 693-94. Without delving into the contestation of democratic theories, suffice it to say here that the emphasis on structural concerns of democratic institutional design does not leave the competitive vision of democracy as the only, or unquestionably the best choice for election law structuralists.

[108] Aside from antitrust-modeled judicial review of the law of democracy, several political antitrust measures have been proposed in the literature. Direct democracy, above all, has long been considered a promising way to institute pro-competitive electoral reform that may run against legislators' self-interests; *see, e.g.*, POSNER, *supra* note 22, at 243-44; SHAPIRO, *supra* note 23, at 61; Frey and Bohnet, *supra* note 100, at 72-4; Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1110-21 (2005); Elizabeth Garrett, *Who Chooses the Rules?*, 4 ELECTION L.J. 139, 140 (2005) (book review); Issacharoff, *Collateral Damage*, *supra* note 20, at 416; Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667 (2006); Wohlgemuth, *supra* note 100, at 192. Some other proposals are also worth mentioning here. For instance, economist-turned-politician James Miller suggests a number of reforms to boost political competition, including, among other things, tasking the U.S. Attorney General to "test the constitutionality of all state election laws that are suspected if granting one type of candidate or party preference or advantage over another." *See* JAMES C. MILLER III, MONOPOLY POLITICS 138-47 (1999). Political theorist Ian Shapiro also makes several creative suggestions about political antitrust measures, such as "limiting the 'market share' of any party's votes [seats]." *See* SHAPIRO, *supra* note 23, at 61-63, 112. These and other institutional possibilities of political antitrust require further investigation that is beyond the scope of this article.

[109] To put it differently, I suspect that the appeal of competitive democracy in the context of judicial review might have more to do with its minimalism than with its institutionalism.

Rather than simply stating the obvious, the proposed genealogy seeks to bring to the fore two sets of significant yet underappreciated features in the development of the political antitrust approach. First, while inheriting the basic design of the Elysian theory of judicial review, the political antitrust approach entails a set of rules of judicial engagement that is more restrictive than that of its predecessors. It has also shifted the central concern of process theories of judicial review from political representation to political competition. Part IV details the transformation of the political antitrust approach as viewed from the theoretical tradition of process-oriented judicial review. Second, while embracing competitive democracy as the underlying conception of democracy, the political antitrust approach entails a deeper commitment to political fairness than other theories within the Schumpeterian tradition. In the face of the challenge posed by the uniqueness and complexity of competitive democracy, the political antitrust theorists have relied heavily on intent/purpose-based inquiry and analogical reasoning in developing judicial doctrines of political antitrust. Part V traces the development of the political antitrust approach as viewed from the theoretical tradition of competitive democracy.

In short, the genealogy this article proposes concerns not just about the evident intellectual lineages, but also about the underappreciated transformations and lost opportunities in the development of the political antitrust approach. By unveiling the path dependence and historical contingency of this theoretical development, this genealogy complements the two prevailing narratives and empowers us to rethink the project of political antitrust.

IV. THE ELYSIAN TRADITION AND POLITICAL ANTITRUST

The antitrust metaphor only appears once in John Hart Ely's *Democracy and Distrust*. In one of the most-cited passages of this most-cited treatise in American constitutional law, Ely succinctly states, "[t]he approach to constitutional adjudication recommended here is akin to what might be called an 'antitrust' as opposed to a 'regulatory' orientation to economic affairs—rather than dictate substantive results [the Court] intervenes only when the 'market,' in our case the political market, is systemically malfunctioning." [110] Ely does not delve into why and to what extent democratic political process is analogous to a market. Nor does he explore what doctrinal lessons constitutional law can learn from antitrust law. By

[110] ELY, *supra* note 10, at 102-3.

the broadly construed antitrust analogy, Ely only means to suggest a less intrusive role of judicial review in determining the substance of constitutional law. But when it comes to the history of the idea of political antitrust, Ely has been widely hailed as the most influential forerunner of the later political antitrust theories. "Ely was on to something," Richard Posner reservedly admits.[111] In light of the conventional recognition of Ely's significant influence on the field of election law in general and on the political antitrust approach in particular, that "something" Ely was on to is arguably more substantial than his choice of metaphor.[112]

Indeed, it doesn't take much effort to recognize the deep resemblance of modern political antitrust theories to Ely's process-based, representation-reinforcing theory of judicial review. The political antitrust approach shares with Ely's theory a democracy-reinforcing—as opposed to democracy-limiting—vision of judicial review. According to this vision, a central task of judicial review of political regulation is to "clear the channels of political change."[113] In addition, the two strategies political antitrust theorists employ to manage the role of judicial review—the structural thesis and the primacy thesis of political antitrust as alluded in Part II. B—are drawn heavily from Ely's playbook. They can be fairly termed as Elysian strategies. Still, there are notable differences—as indicated in Part III. C—between the political antitrust approach and its Elysian predecessors, and the differences bear emphasis because they mark the subsequent development of the process theory tradition beyond what we have learned from Ely's *Democracy and Distrust*.

A. Old Wine in New Bottle?

What is at issue is not so much whether these and other changes have occurred within the vaguely defined tradition of *political process theory* of judicial review since the publication of *Democracy and Distrust*, but how much significance should be attached to such changes.[114] Crediting Ely for his insight, many political antitrust theorists nonetheless endeavor to

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[111] POSNER, *supra* note 22, at 246.

[112] On the lasting influence of Ely's theory of judicial review on the field of election law, see also Luke P. McLoughlin, *The Elysian Foundations of Election Law*, 82 TEMPLE L. REV. 89 (2009).

[113] ELY, *supra* note 10, at 105.

[114] For the tenets of political process theory of judicial review and its development in American constitutional thought before and after *Democracy and Distrust*, see, e.g., Michael C. Dorf and Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923 (2001); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721 (1991); Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

differentiate theirs from his achievement. They do so not only to highlight their own contributions, but also to avoid or overcome the failures Ely's theory is said to suffer.[115] Critics of the political antitrust approach, on the other hand, seem to see more continuation than change in the process theory tradition. Viewing the political antitrust approach as essentially a partial application of Ely's theory to the constitutional law of democracy, critics like Richard Hasen apply the conventional objections against Ely's theory to this repackaged process theory.[116] For these commentators, the expression of political antitrust may be new, but the take-home message stays the same as what we already learned from Ely.

The déjà vu impression many people have of the political antitrust approach is a testament to the influence of Ely's theory. Though Ely does not use the now fashionable antitrust jargon to denote the pertinent political market failure, he certainly recognizes the problem of excessive self-interested political regulation. "The [political] process is undeserving of trust," Ely famously argues, when "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."[117] Ely leaves an even deeper imprint on the way we think of the political antitrust approach as a theory of judicial review. By assigning the task of "unblocking stoppages in the democratic process" to judicial review on account of the courts' expertise on process and the judges' status as comparative outsiders to partisan politics,[118] Ely not only points out a way to police the excesses of self-interested political regulation, but also presents a "coherentist," process-oriented solution to the counter-majoritarian difficulty of judicial review.[119] It is not a coincidence that, as Ely's students, political antitrust theorists also envision a similar role of constitutional court as political trustbuster, while holding a similar goal of constraining the power of judicial review through such modeling.

A process theory of judicial review is indeed a key component of the political antitrust approach, but only on a rather abstract level can we say that it remains the same as what Ely proposes. An old-wine-in-new-bottle

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[115] For representative criticisms of Ely's theory, see, e.g., Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981).

[116] *See, e.g.*, HASEN, THE SUPREME COURT AND ELECTION LAW, *supra* note 6, at 4-6.

[117] ELY, *supra* note 10, at 103.

[118] *Id.* at 88.

[119] On the coherentist characteristic of Ely's theory, see Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 YALE L.J. 1237 (2005). For a similar but more critical reading of Ely's quest for the "ultimate interpretivism," see JAMES C. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 19-36 (2006).

view of political antitrust is problematic, because it simply assumes away the significance of the subsequent changes political antitrust theorists have made to the process theory tradition. As a result, such view implies a rather static understanding of what it means to be a process theory of judicial review. Upon a closer look at the development of this theoretical tradition, one can argue for a contrasting new-wine-in-old-bottle view—that modern political antitrust approach has brought new meaning to the process theory tradition. Though it is less of a change and more of a clarification, the fact should not be overlooked that the new generation of process theorists recognize the substantive value judgments involved in determining the procedural or second-order issues of democracy. They may still believe in a distinction between result-oriented and process-oriented reasoning, but they certainly harbor no illusion that a process-oriented approach is somehow value-neutral or value-free.[120] It is debatable whether or not Ely's theory takes a flight from substance, as Laurence Tribe and many other critics claimed it did.[121] But to insist that process theorists after Ely continue to flee from substantive political theory would be, to say the least, quite puzzling.

B. Rewriting the Footnote Four

Conventional wisdom seems to hold that the differences between the political antitrust approach and Ely's theory are merely semantic, because the practical outputs of these two approaches are more or less the same. Is this an analytically robust account? Consider *Lucas v. The Forty-Fourth General Assembly of Colorado,* in which the U.S. Supreme Court struck down a voter-approved apportionment plan in Colorado as inconsistent with the Fourteenth Amendment.[122] In *Democracy and Distrust*, Ely tersely defends Chief Justice Warren's majority opinion in *Lucas* as required by the then newly-minted "one-person, one-vote" principle.[123] By sharp contrast, the Court's rule-bound intervention in *Lucas* has been seriously questioned in the field of the law of democracy. At the center of this growing criticism is a process-based assessment that reapportionment process in Colorado by then had been live and working—at least in comparison to the other states where vested interests had blocked the

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[120] *See, e.g.*, SHAPIRO, *supra* note 23, at 65-66; Klarman, *supra* note 114, at 782-88.

[121] For a recent review of the recurring criticism that Ely's theory "flees substance for process," see FLEMING, *supra* note 119, at 24-36.

[122] 377 U.S. 713 (1964).

[123] *See* ELY, *supra* note 10, at 124-25, 239 n.60.

necessary reform.[124] *Lucas* thus presents a dilemma for those who want to maintain the conventional view that the process theory tradition has stayed by and large constant. Either Ely misunderstands the challenge of *Lucas* and misapplies his own theory, or the later process theorists of election law fail to appreciate the need and long-term payoff of applying—with no exception to cases like *Lucas*—the judicially manageable "one-person, one-vote" standard. However, instead of debating which of these two views is more faithful to the process theory tradition, we should put the conventional wisdom under closer scrutiny. *Lucas* may be one of the few instances where the later process theorists of election law have parted their ways with Ely. But it is arguable that the changing views on *Lucas* reflect one of the generational changes in the post-Elysian process theory tradition—i.e., the narrowing of the case for judicial intervention in the context of the law of democracy.

To be specific, it does not matter much that Ely's short defense of *Lucas* is beside the mark,[125] because it is arguable that *Lucas* is not much of a problematic decision when viewed from the classic political process theory Ely represents. Given the *general distrust* the *Carolene Products* Footnote Four and its Elysian re-formulation cast on the political process of political regulation,[126] the benefit of having a judicially manageable standard may have weighed enough to justify the *Lucas* decision as an integral part of the Warren Court's "reapportionment revolution."[127] The calculus may have changed, however, by the time the later process theorists shifted their concern from constitutional law in general to the constitutional law of democracy in particular, which has much expanded in the United States since *Baker v. Carr*. In the face of changing circumstances, the later process theorists of election law seem no longer to view the political process of political regulation as generally or presumptively distrustful.

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[124] *See, e.g.*, ISSACHAROFF, KARLAN, AND PILDES, THE LAW OF DEMOCRACY, *supra* note 66, at 10-15.

[125] In defending *Lucas*, Ely notes: "The reasons for judicial intervention are just as compelling when, say, 65 percent of the voters vote themselves 80 percent of the effective legislative power as when the representatives of the 40 percent of the voters secure for themselves 55 percent of the effective power." ELY, *supra* note 10, at 239 n.60. This argument misses the fact that in *Lucas* the majority voters actually voted to give a bit more representation to the minority voters in smaller counties; *see* ISSACHAROFF, KARLAN, AND PILDES, THE LAW OF DEMOCRACY, *supra* note 66, at 14.

[126] By the "general distrust of political process," I mean to suggest a feature of the traditional process theories that is similar to what Adrian Vermeule diagnoses as the problems of stylized and asymmetrical institutionalism in these theories. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 17-18, 239-42 (2006).

[127] The consideration of judicial administrability looms large in Ely's justification for the "one-person, one-vote" standard; *see* ELY, *supra* note 10, at 121-25.

Rather, it appears that they would give more credit to the functioning reapportionment process and the resulting political compromise in Colorado—even though it fell short of meeting the principle of "one-person, one-vote."

It still make sense to speak of process theory as one intellectual tradition, but if the shifting views on *Lucas* have any general implication, it is that the process theory tradition is not invariable, but has experienced at least one change of no small consequence. The transformation occurred, namely, in the perception or sentiment that process theorists hold toward political process and toward judicial review. Whereas the traditional process theorists of constitutional law tended to tilt toward judicial review in their functional-institutional calculation when political rights were at stake, the present process theorists of election law, in general, seem to be more discreet in calling for judicial intervention in political regulation. In other words, even though the basic formula—that judicial review is supposed to clear the channels of political change—is the same, the "rules of judicial engagement" under the process theory tradition have been tightened up over time in the context of the law of democracy.

A dose of the history of American constitutional law of democracy in the last century can help understand this theoretical transformation. The *Carolene Products* Footnote Four was written at a time when the U.S. Supreme Court just began to reverse its *Lochner*-era jurisprudence and had done little to protect political rights and civil liberties. As a prototype of the process theory, it merely alluded to two possibilities of non-deferential judicial review.[128] In the years between *Carolene Products* and *Baker v. Carr*, the American constitutional law of democracy had been characterized mainly by judicial reluctance to enter the political thickets.[129] The Warren Court certainly gave new significance to the Footnote Four.[130] But by the time the Warren Court stepped into recent history, the big question of the day was arguably whether the liberal legacies of the Warren Court would survive the conservative re-turn of the Court. It was at this

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[128] The second and third paragraphs of the *Carolene Products* Footnote are usually considered as representing two different strands of process theory; *see* 304 U.S. 152 n.4.

[129] Justice Frankfurter's opinion in *Colegrove v. Green*, 328 U.S. 549 (1946) (asserting that "Courts ought not to enter [the] political thicket") can be seen as reflective of the Court's general attitude toward issues of election law during this period. The "White Primary Cases" are notable exceptions to this generalization, however.

[130] It was not until the 1960s that the modern perception of the meaning and significance of *Carolene Products* Footnote began to take shape. For an overview of the changing status of the *Carolene Products* Footnote in the history of American constitutional law, see Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163 (2004).

historical juncture that Ely published his *Democracy and Distrust*, which was known, among other things, for offering a functional justification of the major achievements of the Warren Court.

In view of the history behind the classic political process theory Ely represents, it is little wonder that when it comes to the law of democracy, the accent was placed upon judicial empowerment as opposed to judicial limitation. By envisioning a role for judicial review that is arguably compatible with democratic self-governance, the classic process theory helped to liberate the development of American constitutional law of democracy from the once predominant theme of Frankfurterian judicial self-restraint. However, the landscape of American constitutional law of democracy has changed significantly since *Baker v. Carr* to the extent that the Frankfurterian concern of judicial overreaching has been revived with a vengeance.[131] The question facing the later process theorists of election law is no longer whether judicial intervention could ever be justified, but how to differentiate justified from unjustified exercises of judicial review. To take on this challenge, the process theorists of the law of democracy would have to be more sensitive to the reasonable disagreement on issues of democratic institutional design, and be more sanguine about the prospect of political self-revision, than were the previous process theorists of constitutional law. This explains why the present-day process theorists of election law would have second thoughts about *Lucas*.

C. From Representation to Competition

What counts as a political process malfunctioning that warrants judicial intervention? From the *Carolene Products* Footnote Four to Ely's *Democracy and Distrust*, the traditional political process theory is known for offering two distinctive rationales for heightened judicial oversight. To use Pamela Karlan's terminology, the first one can be characterized as the "anti-entrenchment rationale", and the second one the "anti-discrimination rationale."[132] The anti-discrimination rationale—the idea that the courts should "facilitate the representation of minorities" who are disadvantaged in the ordinary interest group politics due to prejudice or animosity against them—is of particular significance to the classic process theory of judicial review.[133] As Daniel Ortiz suggests, this strand of process theory "performs

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[131] Heather Gerken terms the Court's current dilemma in adjudicating the law of democracy claims "Frankfurter's revenge." *See* Gerken, *Lost in the Political Thicket*, *supra* note 7, at 529, 531.

[132] *See* Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winder*, 114 YALE L.J. 1329, 1332-33 (2005).

[133] "Facilitating the representation of minorities" can be understood as a positive expression of the

the bulk of the work," and is what makes the process theory an interesting and controversial project.[134] By contrast, political antitrust theorists of modern times either are silent on the continuing relevance of the anti-discrimination strand, or express reservation to this particular task assignment of the judiciary. To the extent that the political antitrust approach can be seen as a continuation of the process theory tradition, the scope of the continuation appears to be limited mainly to the anti-entrenchment rationale.

The causes and consequences of this difference have not been fully examined in the literature. Michael Klarman agrees with the common criticism of Ely's theory that Ely fails to present a "non-substantive theory of prejudice" required for the objective identification of the circumstances where judicial intervention is appropriate.[135] Klarman's main objection to the prejudice prong (i.e. the anti-discrimination strand) of the process theory, however, is on the ground of necessity. He seeks to demonstrate that "political process theory shorn of its prejudice prong remains a fully coherent, as well as normatively attractive, theory of constitutional adjudication."[136] Richard Posner also takes issue with the anti-discrimination strand of the process theory. Differentiating two concepts of democracy, Posner criticizes Ely for veering into the all-too-lofty "Concept 1 democracy" by recognizing the problem of discrimination as a particular type of political process malfunctioning.[137] The inescapable ambiguity notwithstanding, political antitrust theorists seem to be not that enthusiastic about the project of representation-reinforcing as Ely was. Such reluctance—along with the corresponding increase in the specification of the anti-entrenchment rationale in market or antitrust terms—can be viewed as part of the transformation that renders the political antitrust approach a more restrictive license for judicial intervention than the classic process theory.

To the extent that "facilitating the representation of minorities" can be said to be more controversial than "clearing the channels of political

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anti-discrimination strand of process theory. *See* ELY, *supra* note 10, at 135-79.

[134] Ortiz, *supra* note 114, at 729-30. For discussions focusing on this strand of process theory originated from the third paragraph of the *Carolene Products* Footnote Four, see, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE. L.J. 1279 (2005); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685 (1991).

[135] *See* Klarman, *supra* note 114, at 782-88.

[136] *Id.* at 784.

[137] *See* POSNER, *supra* note 22, at 233.

change," it is not because a non-substantive theory is inconceivable in the former but not so in the latter, but because there is arguably much less overlapping consensus between liberals and conservatives for the former than for the latter. The judicial protection of minorities being discriminated against—whether they are "discrete and insular" or "anonymous and diffuse"[138]—requires that judges have certain "empathy" toward their plight. Ideology clearly exerts profound influence on how a judge would approach such a task. And the ideological divide in this respect is so wide that few would expect conservative jurists to embrace the cause of representation-reinforcing championed by constitutional theorists on the liberal side of the aisle.[139] Significant ideological disagreement exists in the anti-entrenchment strand of the process theory tradition as well, but at least the basic anti-entrenchment rationale seems to resonate with liberals and conservatives alike.

Given the rightward drift of the U.S. federal courts in the past three decades, it is not surprising that some liberals have become disillusioned or less sanguine about the prospect of representation-reinforcing judicial review. Instead of asking for the mercy of the courts, they would rather turn to other means to fulfill their liberal aspirations and prefer that courts stay on the sidelines.[140] Conservatives certainly would welcome the decline of what is commonly perceived as a liberal project of judicial review. The puzzle, though, is why conservative process theorists do not reshape the anti-discrimination rationale in the conservative mold, as did the Court in the *Shaw* line of cases regarding the constitutionality of race-conscious redistricting.[141] In addition to the resurgence of judicial conservatism, the growing skepticism towards public choice justification for judicial intervention may have contributed to the making of such a "partial disarmament agreement" between conservative and liberal political antitrust theorists.[142] Up to the 1980s, public choice—especially the studies of interest group politics—had been widely considered a powerful justification for more intensive judicial review of the outputs of the

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[138] *See* Ackerman, *supra* note 134, at 724, 745.

[139] The debate of color-consciousness versus color-blindness is illustrative in this regard.

[140] The rise of popular constitutionalism in the last decade is indicative of such liberal disillusionment; *see* KRAMER, *supra* note 66; TUSHNET, *supra* note 66. *Cf.* Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. REV. 373 (2007).

[141] *See* Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995). *But see* Easley v. Cromartie, 532 U.S. 234 (2001).

[142] The "partial disarmament agreement" is meant to refer to the agreement to contest the meaning and applications of the political antitrust approach as an anti-entrenchment but not an anti-discrimination mode of judicial review.

political processes.[143] However, Einer Elhauge and several other commentators in the 1990s forcefully put to rest such an over-simplistic use of public choice by demonstrating, among other things, that judicial process is not immune to the problems plaguing interest group politics, and that public choice analysis does not make the inevitable normative judgment any less contestable.[144] Since the anti-discrimination rationale entails normative and empirical assumptions that are no longer tenable, political antitrust theorists of modern times have turned away from it in justifying judicial intervention in the law of democracy.

The political antitrust approach, in this regard, departs from the classic process theory tradition in terms of how democratic political process is conceived. Whereas the classic process theory puts emphasis on political representation and participation in the give-and-take of pluralist interest-group politics, the political antitrust approach turns its gaze to political competition. To the extent that political fairness is a common concern across generations of process theorists, its meaning may have shifted from "fair representation" to "fair competition." Still, one may quarrel with the significance of the conceptual transformation suggested here. Just as Ely is comfortable enough to invoke the antitrust metaphor to illuminate his representation-reinforcing approach, so are some theorists who seek to enlarge our imagination of what is reachable through a political antitrust theory—even to the possibility of including the bulk of the work traditionally associated with the anti-discrimination strand of the process theory. Michael Klarman, for instance, proposes an anti-entrenchment approach that addresses not only the problem of "legislative entrenchment" but also the problem of "cross-temporal entrenchment."[145] Ian Shapiro's anti-domination theory and Michael Kang's theory of "democratic contestation" also pave the way for a more capacious political antitrust approach by broadening our normative imagination of competitive democracy beyond the conventional concerns of electoral competition among political elites.[146]

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[143] *See, e.g.*, William Riker & Barry Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

[144] *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); MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (2002).

[145] *See* Klarman, *Majoritarian Judicial Review*, *supra* note 24, at 502-09.

[146] *See* SHAPIRO, *supra* note 23, at 51-55; Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734 (2008). On the less minimalist construction of competitive democracy as reflected in the development of the political antitrust approach, see also *infra* Part V. B.

However close and compatible a competition-centered process theory is to a representation-centered one, the possibility should not be dismissed that the shifting of emphasis may lead some political antitrust theorists to view certain issues of the law of democracy differently than the classic process theorists did. Ironically, it is many of those who criticize the political antitrust approach that bet on this possibility. Many criticize that, by focusing on the competition aspect of democracy, political antitrust theorists run the risk of ignoring other important democratic concerns including, above all, ideals of representation.[147] Specifically, the criticism is leveled against the projected political antitrust stance against gerrymandering—a controversial practice that implicates both minority representation and political competition in the United States. By denouncing partisan gerrymandering as a matter of constitutional law and commending the creation of "competitive districts" as a matter of redistricting policy, the political antitrust approach is said to jeopardize the practice of race-conscious redistricting, which, under the current case law, has to take refuge in the mix of all sorts of political considerations.[148]

I disagree with this criticism. To the extent that political antitrust theorists' objections to partisan gerrymandering are directed first and foremost at its *partisan process* as opposed to its *outcome* fairness,[149] it is absurd to argue that the approach would seek to purge the redistricting process from all kinds of political considerations, or that its goal is to pursue—single-mindedly—the maximization of competitive districts at the expense of other legitimate redistricting concerns. Nor is it evident that political antitrust reasoning would necessarily lead its supporters to march after Ely in celebrating the Court's *Shaw* jurisprudence on the strict scrutiny of race-conscious redistricting as a means to curb partisan gerrymandering.[150] Instead, many political antitrust theorists probably would side with Pamela Karlan and find the Court's *Shaw* jurisprudence

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[147] *See, e.g.*, Justin Buchler, *Competition, Representation and Redistricting: The Case against Competitive Congressional Districts*, 17(4) J. OF THEORETICAL POL. 431 (2005); Persily, *supra* note 55, at 668-69.

[148] *See, e.g.*, Persily, *The Place of Competition in American Election Law*, *supra* note 6, at 182-83. On the tension between the concerns of competition and representation in the drawing of majority-minority districts, see also Ellen D. Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1163, 1165-66 (2007).

[149] *See* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643 (1993).

[150] *See* John Hart Ely, *Confounded by* Cromartie*: Are Racial Stereotypes Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders*, 56 U. MIAMI L. REV. 489 (2002); John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607 (1998); John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997).

and Ely's proposal problematic.[151] Political antitrust theorists may have de-emphasized the anti-discrimination rationale *for* judicial intervention, but it does not follow that they thereby would take an entrenchment-only view of gerrymandering to the denial of the entanglement of race and politics in the context of redistricting. In view of the shifting emphasis from the anti-discrimination (representation) to the anti-entrenchment (competition) rationale for process-oriented judicial review, one may even argue that the *Shaw* jurisprudence—being fundamentally a product of conservative re-construction of the anti-discrimination rationale—is alien to the political antitrust approach grounded chiefly on the anti-entrenchment rationale.[152]

V. THE SCHUMPETERIAN TRADITION AND POLITICAL ANTITRUST

The story of the idea of competitive democracy, as usually told, begins with Joseph Schumpeter. In *Capitalism, Socialism and Democracy*, first published in 1942, Schumpeter popularizes the idea that democracy in reality is not about "civic self-governance" as argued by the classic democratic theorists, but about "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."[153] This insight is not original with Schumpeter, as one can trace the idea of "competitive elitism" back to Max Weber, who, according to David Held, "accepts competition between rival groups of leaders as the only way history could be kept open to human will and the struggle of values."[154] Early pioneers of this theoretical tradition also include Karl Popper. By defending democracy as the only system allowing citizens to change governments without bloodshed, Popper contributes with a minimalist conception of electoral democracy.[155] In the 1940s and 1950s, the campaign for the "responsible party government" led by political scientist E. E. Schattschneider opened yet another chapter of the competitive democratic

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[151] *See* Karlan, *supra* note 132. For an overview of the literature on the Court's *Shaw* jurisprudence, see also ISSACHAROFF, KARLAN, AND PILDES, THE LAW OF DEMOCRACY, *supra* note 66, at 906-07.

[152] *See, e.g.*, Klarman, *Majoritarian Judicial Review*, *supra* note 24, at 526-28. Political antitrust theorists could nonetheless support the Court's *Shaw* jurisprudence on a different ground—such as the need to address the expressive harm in the context of racial redistricting; *see* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993); Richard H. Pildes, *Race, Sexuality, and Religion: Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997).

[153] SCHUMPETER, *supra* note 11, at 269.

[154] DAVID HELD, MODELS OF DEMOCRACY 140 (3d ed., 2006).

[155] *See* KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 124 (1945, 1963).

theories by identifying political competition as taking place mainly within and between political parties.[156] Still, in the modern-day discussion about competitive democracy, most credit goes to Schumpeter. Competitive democracy is commonly referred to as the Schumpeterian view of democracy. Strictly speaking, Schumpeter proposes only one specific rationale for competitive democracy focusing on the *electoral accountability* of governing elites. It is rather Anthony Downs who gives birth to another prevailing rationale for competitive democracy—that political competition, under certain conditions, serves as a critical means to insure *democratic responsiveness*.[157]

Early advocates of the political antitrust approach did not identify themselves as competitive democrats.[158] But following Richard Posner and Ian Shapiro, most proponents and commentators have come to conceptualize the approach as founded on a certain conception of competitive democracy.[159] There are several competing conceptions of democracy, and in the realm of normative democratic theory, competitive democracy is usually considered a minority view.[160] As a general view of democracy, the competitive vision is often criticized for want of normative aspirations. At worst, it may be held liable for fostering a political culture of consumerism that deflates what it means to be a citizen in a democratic polity.[161] But in so far as the political antitrust approach is concerned, competitive democracy appears to be an appealing conception for the following four reasons:

First, the competitive vision provides a straightforward justification for the political antitrust approach to re-focus judicial attention on the

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[156] *See* E. E. SCHATTSCHNEIDER, PARTY GOVERNMENT (1942); Committee on Political Parties, American Political Science Association, *Toward a More Responsible Two-Party System*, 44 AM. POL. SCI. REV. 3, Supp. (1950).

[157] *See* DOWNS, *supra* note 45. On the differences between the Schumpeterian model and the Downsian model of competitive democracy, *see generally* David Miller, *The Competitive Model of Democracy*, *in* DEMOCRATIC THEORY AND PRACTICE 133 (Graeme Duncan ed., 1983).

[158] *See, e.g.*, Issacharoff & Pildes, *Politics as Markets*, *supra* note 21; Klarman, *Majoritarian Judicial Review*, *supra* note 24; Pildes, *Theory of Political Competition*, *supra* note 21.

[159] *See* POSNER, *supra* note 22; SHAPIRO, *supra* note 23; Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, *supra* note 21.

[160] The idea of competitive democracy is far more influential in public choice and in the political scientific studies of democracy and democratization. For an overview of the political scientific tradition of competitive democracy, see Larry Diamond, *Defining and Developing Democracy*, *in* THE DEMOCRACY SOURCEBOOK 29, 31-32 (Robert A. Dahl, Ian Shapiro, & Jose Antonio Cheibub eds., 2003).

[161] For criticisms of the competitive vision of democracy, see, e.g., BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 93-114 (1984, 2003); FREDERICK M. BARNARD, DEMOCRATIC LEGITIMACY: PLURAL VALUES AND POLITICAL POWER 98-115 (2001); THOMPSON, *supra* note 7, at 7-8, 176.

institutional conditions of political competition. It also paves the way for the typical (though not definitive) style of political antitrust reasoning—i.e., the framing and analysis of election law issues in market/antitrust terms. The other democratic conceptions do not necessarily disregard the instrumental values of political competition, but they tend to downplay its significance in our democratic political life. With the exception of "aggregative democracy," the other democratic conceptions also disfavor the market/antitrust metaphors. For many, democratic process should be modeled after the public forum, not the marketplace.[162]

Second, as a power-centered view, the competitive vision enables a political antitrust court to understand and manage the power relations within the law of democracy without injecting itself too much into the high politics of democratic engineering.[163] A reason-centered democratic vision, by contrast, may be less sensitive to the causes and consequences of power politics.[164] It is also questionable whether, under a reason-centered democratic vision such as deliberative democracy, the courts can resist the temptation to substitute the quarrels in the politics-as-usual with their composed deliberation.[165]

Third, while emphasizing the functional significance of political competition as the lifeblood of modern representative democracy, the competitive vision is not a unitary, programmatic platform that would dictate in detail how democratic political process should be structured. Instead, what underlies the political antitrust approach can be a set of widely shared, incompletely theorized propositions of competitive democracy as discussed in Part II. A.[166] The generality of the competitive vision, along with the negative orientation of the political antitrust approach, thus promises to provide a common ground for people across the

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[162] *See generally* Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 3 (James Bohman and William Rehg eds., 1999).

[163] *See* SHAPIRO, *supra* note 23, at 51-58.

[164] *See id.* at 10; Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, *supra* note 21, at 693-94.

[165] On the intellectual elitism of deliberative democracy, see POSNER, *supra* note 22, at 135-36, 141-42, 155-57; Russell Hardin, *Deliberation: Method, Not Theory*, *in* DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 103, 112 (Stephen Macedo ed., 1999). It should be noted, however, that there are competing conceptions of deliberative democracy as well as competing theories of judicial review therein, and many deliberative democrats also oppose judicial paternalism. *See, e.g.*, CHRISTOPHER F. ZURN, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW (2007).

[166] *See supra* text accompanying notes 44-46. On the idea of "incompletely theorized arguments," see CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35-61 (1996).

political/ideological spectrum.[167]

Fourth, competitive democracy can be seen as a middle-of-the-road compound in the sense that it can be positioned somewhere in-between the aggregative view and the deliberative view of democratic politics.[168] On the one hand, while sharing the market metaphor with the social choice view of democracy, the competitive vision does not conceive of democratic common good as simply the aggregation of given voter preferences. On the other hand, while siding with deliberative and participatory democrats in viewing democratic political life as a transformative experience, competitive democrats harbor no aspirations for virtuous politics. The competitive vision thus presents an opportunity to bridge and transcend the two opposing views of democratic politics that dominate contemporary political theory.

However close the connection is between the political antitrust approach and the theoretical tradition of competitive democracy, the latter is not a sufficient condition for the former. Under the lasting influence of Schumpeter, realism and minimalism have been the dominant themes of competitive democratic theories.[169] The Schumpeterian or Neo-Schumpeterian theories of democracy are not devoid of normative connotations, to be sure. But, with few exceptions, most of them do not commit beyond universal suffrage, basic political freedoms, free and fair elections, and a minimum requirement of electoral integrity—the criteria that are commonly used to separate electoral democracies from regimes of electoral authoritarianism.[170] Schumpeter specifically declines to infer any political antitrust requirements from the market analogy to democratic politics.[171] His reservation has since shaped the mainstream competitive democrats' ambivalence towards the fairness concern of political competition. Before the ascendance of political antitrust theories beginning in the late 1990s, some theorists had sought to reopen the possibility of

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[167] *See also supra* discussion in Part IV. C.

[168] *See* Elster, *supra* note 162, at 4.

[169] *See, e.g.*, POSNER, *supra* note 22; SHAPIRO, *supra* note 23. On the defense of minimalist conception of democracy, see also ADAM PRZEWORSKI, DEMOCRACY AND THE LIMITS OF SELF-GOVERNMENT (2010); James Allan, *Thin Beats Fat Yet Again—Conceptions of Democracy*, 25 LAW AND PHILOSOPHY 533 (2006); Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, *in* DEMOCRACY'S VALUE 23 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999).

[170] On the distinctions between electoral democracy and electoral authoritarian regimes, see ELECTORAL AUTHORITARIANISM: THE DYNAMICS OF UNFREE COMPETITION (Andreas Schedler ed., 2006); Larry Diamond, *Thinking about Hybrid Regimes*, 13(2) J. OF DEMOCRACY 21 (2002); Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13(2) J. OF DEMOCRACY 51 (2002); Andreas Schedler, *The Menu of Manipulation*, 13(2) J. OF DEMOCRACY 36 (2002).

[171] SCHUMPETER, *supra* note 11, at 271.

developing the political antitrust principles for political markets.[172] Their efforts, however, went largely unnoticed even by the subsequent political antitrust theorists. In this regard, the political antitrust theorists, while professing fidelity to the Schumpeterian tradition, have actually revamped the normative vision of competitive democracy. They have done so, however, without directly engaging with the complexity of political competition as exposed by contemporary political theories of competitive democracy.

A. The Complexity of Competitive Democracy

The gap between political antitrust theories and the other contemporary theories of competitive democracy has a professional dimension. Most of the political antitrust pioneers are constitutional lawyers, whereas political scientists and political theorists of competitive democracy tend to be less enthusiastic about this normative project. Political scientists/theorists do not hesitate to use market/antitrust terms to analyze, describe, or explain the state of political competition. For instance, the various "barriers to entry" in political markets have long been discussed in public choice literature.[173] The "cartel party model" for political parties and party systems is another example.[174] However, few public choice theorists and political scientists are eager to enter the normative realm, and most political antitrust lawyers have not paid much heed to such analyses.[175] In the face of the interdisciplinary gap, one wonders, are there some intricacies of competitive democratic politics that public choice theorists and political scientists know but political antitrust lawyers don't?

Consider first the diversity and multiplicity of political markets. Even when viewed solely through a market lens, political democracy is better conceived of, not as a single political market, but as a constellation of many inter-related political markets.[176] In terms of who the participants are

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[172] *See* CURRY, JR. & L. L. WADE, *supra* note 35, at 120; SCOTT, *supra* note 12, at 122.

[173] *See, e.g.*, Gideon Doron and Moshe Maor, *Barriers to Entry into a Political System: A Theoretical Framework and Empirical Application from the Israeli Experience*, 3(2) J. OF THEORETICAL POL. 175 (1991); Randell G. Holcombe, *Barriers to Entry and Political Competition*, 3(2) J. OF THEORETICAL POL. 231 (1991); Gordon Tullock, *Entry Barriers in Politics*, 55(1/2) AMERICAN ECONOMIC REVIEW 458 (1965); Alan E. Wiseman, *A Theory of Partisan Support and Entry Deterrence in Electoral Competition*, 18(2) J. OF THEORETICAL POL. 123 (2006); Wohlgemuth, *supra* note 100.

[174] *See, e.g.*, Klaus Detterbeck, *Cartel Parties in Western Europe?*, 11(2) PARTY POL. 173 (2005); Richard S. Katz and Peter Mair, *Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party*, 1(1) PARTY POLITICS 5 (1995); Ruud Koole, *Cadre, Catch-All or Cartel? A Comment on the Notion of the Cartel Party*, 2(4) PARTY POL. 507 (1996).

[175] *Cf.* Issacharoff & Miller, *supra* note 20.

[176] Many formal theorists have sought to model political competition and democratic decision-

and what is exchanged for what, at least the following four types of political markets are implicated in discussions of competitive democracy: *Legislative markets* are the central stages of democratic governance and interest group politics;[177] *electoral markets* are the processes in which offices or policies are determined through competition for people's votes;[178] privately funded elections create *markets for campaign finance* that are distinct from the relevant electoral markets in their functions and geographical locations;[179] the omnipresent *marketplace of ideas*, of course, is also integral to the working of competitive democracy.[180] Each type of political market has been subject of extensive studies, but we still have much to learn about how they relate and interact to one another. To what extent can a free market in ideas and information compensate the restrictions on electoral markets? Is monopolistic or collusive conduct in legislative markets objectionable only when concerning regulations of the political markets? Or are grand coalitions and bipartisan legislation in fundamental tension with the idea of competitive democracy? We have to answer these and many other difficult questions once we seek to expand the normative commitment of competitive democracy beyond its traditional minimalist construction.

To the extent that the political antitrust approach can focus primarily on electoral markets, its advocates still have to confront what may be called "the problem of many (electoral) markets." Part of the problem stems from the multi-stage structure of the electoral processes in modern representative democracies. A typical distinction is made between *inter-party competition* in a general election and *intra-party competition* in a primary election or party nomination. The former indicates a general electoral market in which

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making process in its entirety by focusing on competition of political parties; *see, e.g.*, JOHN E. ROEMER, POLITICAL COMPETITION: THEORY AND APPLICATIONS (2001). General models, however, have much less explanatory power than domain-specific ones. On the "universalism," "partial universalism," "segmented universalism," and "the family-of-theories view" of rational choice models, *see also* DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 23-30, 192-94 (1994).

[177] For competitive theories of democracy centering on legislative markets, see, e.g., HAYES, *supra* note 35; WITTMAN, *supra* note 35, at 65-121; Becker, *supra* note 35; Stigler, *supra* note 35. *But cf.* Barry R. Weingast and William J. Marshall, *supra* note 35.

[178] For an example of how electoral markets are construed and analyzed in comparative politics and electoral studies, see POLITICAL PARTIES AND ELECTORAL CHANGE: PARTY RESPONSES TO ELECTORAL MARKETS (Peter Mair, Wolfgang C. Müller, and Fritz Plasser eds., 2004).

[179] On the different geographic logic of electoral campaign and fundraising, see James G. Gimpel & Frances E. Lee, *The Geography of Electioneering: Campaigning for Votes and Campaigning for Money*, *in* THE MARKETPLACE OF DEMOCRACY 125.

[180] For a critical review of the "marketplace of ideas" metaphor, see Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1 (2005).

swing voters often have the final say, whereas the later is often associated with a more specific definition of electoral markets that highlights the "product differentiation" in party politics.[181] Following Albert Hirschman, many people conceptualize inter-party and intra-party competition as options of "exit" and "voice" respectively.[182] It is far from clear, though, whether an institutional equilibrium can be found between the two—given that the balance between inter-party and intra-party competition is ultimately a matter of political judgment on whose interests—swing voters' or loyal partisans'—weigh more.[183]

Political geography often factors in the definition of the relevant electoral market as well, because many electoral processes are structured in a way that incorporates competition at different levels or different sectors of a polity. Under the Electoral College system, for example, the outcome of competition in a number of battleground states is far more consequential than the national popular vote tally in determining who will be the next President of the United States. The U.S. House elections over the past two decades provide another example of how competition dynamics nationwide can differ dramatically from that at the district level.[184] The political antitrust approach to congressional partisan gerrymandering has been mired in controversy, in part because people cannot agree on which electoral market—i.e., district-level competition, state-wide (congressional-delegation-level) competition, or Congress-wide competition—should be the focus of the political antitrust inquiry when it comes to ascertaining the effects of congressional redistricting.[185] Political judgment is imperative for the resolution of this disagreement, especially

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[181] For partisan voters, intra-party competition is often the only electoral market where meaningful alternative products (candidates) are available for choice. This is more so when political parties diverge sharply in voter perception, and when partisan affiliation is developed and reinforced through political socialization.

[182] ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

[183] Two recent working papers criticize the mainstream political antitrust scholarship for paying insufficient attention to intra-party competition; *see* Addisu S. Demissie, *Accountability Through Intraparty Competition* (August 19, 2008), *available at* SSRN: http://ssrn.com/abstract=1237725; Jonathan J. Thessin, *Renewing Intraparty Democracy: Assessing Competition, Deliberation, and Associational Rights of Political Parties* (2007), *available at* http://works.bepress.com/jonathan_thessin/2. This criticism, however, seems to assume the comparability of inter-party and intra-party competition and leaves unaddressed the fundamental judgment call.

[184] The partisan struggle over the control of the House of Representatives has been quite intense since 1994, despite that the same period has also witnessed the decline of competition at the district level. *See, e.g.*, Gary C. Jacobson, *Competition in U.S. Congressional Elections*, *in* THE MARKETPLACE OF DEMOCRACY 27.

[185] *See* Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409 (2005).

since district-level, state-level, and national electoral markets are incommensurable, as each is premised on a distinctive view of political representation, and an inverse relationship can often be observed between competition at district level and competition at state or national level.

Even assuming agreement on the definition of the relevant electoral market, electoral competition in and of itself is filled with complexity. As a complicated function of a myriad of institutional and non-institutional factors, the quality of electoral competition differs from country to country.[186] The qualitative characteristics of electoral competition, in turn, say much about how a given electoral democracy conducts its business. For instance, what kind of party system a democracy has, and what type of policy it would adopt, in a crude sense and to a significant extent, are contingent on whether the pertinent electoral competition is *centripetal* or *centrifugal*.[187] Whether the electoral competition is *candidate-centered* or *issue-oriented* also matters.[188] Still, many people conceive of electoral competitiveness as a holistic democratic value that is distinct from other democratic values such as representativeness and governability, and they tend to characterize and compare different states of electoral competition in quantitative terms. Common measures of electoral competition include the margins of victory in an election contest, the rates of contested or uncontested races, the rates of seat/partisan turnover, the incumbent reelection rates, and the numbers of effective political parties.[189] Even though disagreements abound on when to use which measure for what purpose, many consider electoral competition such a matter of degree that one type of electoral markets can be said to be more, or less, competitive than another.

Competitive democrats and their critics generally agree on two things: First, electoral competition is not an end in itself, but a means to other ends, such as accountability (as emphasized by Joseph Schumpeter) and

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[186] *See generally* AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES (1999); G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS (2000).

[187] *See generally* GARY W. COX, MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS (1997); Gary W. Cox, *Centripetal and Centrifugal Incentives in Electoral Systems*, 34 (4) AMERICAN JOURNAL OF POLITICAL SCIENCE 903 (1990).

[188] *See generally* BRUCE CAIN, JOHN FEREJOHN, & MORRIS FIORINA, THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE (1987); PIPPA NORRIS, ELECTORAL ENGINEERING: VOTING RULES AND POLITICAL BEHAVIOR 230-46 (2004).

[189] For a brief overview of the common measures of electoral competition, *see* Persily, *The Place of Competition in American Election Law*, *supra* note 6, at 172-74. On the number of political parties and its implications to political/electoral competition, *see, e.g.*, Gianluigi Galeotti, *The Number of Parties and Political Competition*, *in* THE COMPETITIVE STATE 113 (Albert Breton et al. eds., 1991).

responsiveness (as underscored by Anthony Downs). Second, the instrumental value of electoral competition is finite, and the maximization of electoral competition—however it is measured—would often do more harm than good to democracy.[190] Given these two near truisms, it is tempting to set the goal as to find "the optimal level of competition."[191] However, the more we understand electoral competition as a multi-dimensional phenomenon, the less confidence we have in its optimization.

Building on the premise that electoral competition is legitimized through its contribution not only to political accountability but also to democratic responsiveness, Stefano Bartolini develops an analytical framework that divides electoral competition into four dimensions: *Electoral contestability* is the possibility for different groups and their political elites to take part in free and fair elections; it indicates the supply-side openness of electoral market. *Electoral availability* is the extent to which the electorate is susceptible to change in party platforms; it indicates the demand-side openness of electoral market. *Electoral decidability* refers to party differentials both in reality and in perception; it is a necessary condition for the meaningfulness of voting choice. *Electoral vulnerability* concerns how secure or vulnerable the incumbents are; it serves as an index to the effectiveness of electoral sanction and/or to the decisiveness of elections with respect to government formation and policy outcome.[192] "The level of actual competition in any given setting," according to Bartolini, "is a moving point in a four-dimensional space where no equilibrium can be found, as the maximization of one dimension comes at the expense of the others."[193]

Bartolini's analytical framework is not without problems. For example, his definition of electoral contestability seems to conflate "*competition for the market*" (market contestability) with "*competition within the market*"

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[190] For example, chaos often ensues when an election is too close to call. Cycling/intransivity becomes a real concern when an electoral field is too crowded. Too frequent regime/seat turnover also has its tolls on the quality of governance. For a discussion on the costs of competitive elections, see THOMAS L. BRUNELL, REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE *BAD* FOR AMERICA (2008). For a social choice criticism of the common normative assumption about the desirability of competitive elections, see also Justin Buchler, *The Social Sub-Optimality of Competitive Elections*, 133 PUBLIC CHOICE 439 (2007).

[191] *See, e.g.*, THOMPSON, *supra* note 7, at 8.

[192] *See* Stefano Bartolini, *Collusion, Competition and Democracy (Part I)*, 11(4) J. OF THEORETICAL POL. 435 (1999) [hereinafter Bartolini, *Part I*]; Bartolini, *Collusion, Competition and Democracy (Part II)*, 12(1) J. OF THEORETICAL POL. 33 (2000) [hereinafter Bartolini, *Part II*].

[193] Stefano Bartolini, *Electoral and Party Competition: Analytical Dimensions and Empirical Problems*, *in* POLITICAL PARTIES: OLD CONCEPTS AND NEW CHALLENGES 84, 108 (Richard Gunther et al. eds., 2002).

(market competitiveness).[194] No less question begging is his interpretation of electoral availability, decidability, and vulnerability as necessary conditions for "responsiveness" alone, for one can make a strong case that these conditions are related to the concern of "accountability" as well.[195] That said, Bartolini's framework enables us to better articulate the intricacies embedded in the design and workings of electoral competition.[196] His central theses—that (1) electoral competition is multi-dimensional, and that (2) the various dimensions of electoral competition co-exist in tension—present a powerful explanation of why the quest for the optimal level of electoral competition is elusive, if not impossible.

B. The Less Minimalist Construction and the Judicial Turn

Political antitrust theorists are not the first to speak of competitive democracy in normative terms. Proponents of the "responsible party government," for instance, have long argued for structuring competitive democracy in certain ways.[197] But the political antitrust approach presents a different normative-theoretical intervention than the previous normative theories in the Schumpeterian tradition. In short, the development of the political antitrust approach has pressed for a less minimalist construction of competitive democracy while undertaking a turn from institutional engineering to constitutional adjudication. These two transformations are interrelated, with the constitutional law being the venue through which political antitrust theorists deepen the normative commitment competitive democrats usually make to political fairness.

From Joseph Schumpeter to Adam Przeworski, the mainstream theorists of competitive democracy are realists and minimalists in the sense that they not only embrace a democratic vision that is arguably less idealistic than its competitors, but they also tend to confine the normative requirements of democracy to a number of norms that are used to differentiate democratic regimes from non-democratic ones. There are different sets of coding rules for the classification or measurement of competitive democracy. Some are

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[194] On the distinction between contestability and competitiveness in the literature of industrial organization, see Harold Demsetz, *Why Regulate Utilities?*, 11 J. L. & ECON. 55 (1968).

[195] On the concept and conceptions of democratic accountability, see generally DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION (Adam Przeworski, Susan C. Stokes, and Bernard Manin eds., 1999).

[196] Kaare Strøm also develops a similar analytical framework of electoral competition. *See* Kaare Strøm, *Democracy as Political Competition*, 35(4/5) AMERICAN BEHAVIORAL SCIENTIST 375 (1992).

[197] For a review of the influences of the "responsible party government" theory, see RESPONSIBLE PARTISANSHIP?: THE EVOLUTION OF AMERICAN POLITICAL PARTIES SINCE 1950 (John C. Green & Paul S. Herrnson eds., 2002).

narrower but clearer while others are more comprehensive but less objective.[198] In any event, the normative principles as articulated by political antitrust theorists have not been made to any short list of norms that define what it takes to be a competitive democracy. Many political antitrust theorists do seek to justify the constitutional political antitrust enterprise in terms of its functional necessity. But few would go so far as to argue that the very survival of competitive democracy is at stake. Many political antitrust theorists also often speak of the egregiousness or outrageousness of the problem they seek to address. On a closer examination, however, one may find that they target not only the rare phenomena of what may be termed "the first-degree lockups," but also anticompetitive regulation commonly found in a consolidated democracy, and that even the definition of the first-degree lockups does not necessarily link to the minimum conditions of competitive democracy.[199] In this regard, the political antitrust approach registers a deeper commitment to political fairness than the Schumpeterian tradition used to require.[200] To the extent that the negatively framed political antitrust approach entails a positive vision of competitive democracy, it is not one defined in minimalist terms, but what may be characterized as "a reasonably well-ordered competitive democracy."

By shifting the focus of normative discourse from institutional engineering to constitutional adjudication, political antitrust lawyers also lead their fellow competitive democrats to reconsider the roles of judicial review in pursuing or sustaining a reasonably well-ordered competitive democracy.[201] Viewing democratic rules as ultimately endogenous and self-enforcing, many mainstream competitive democratic theorists perceive of constitutionalism and its judicial implementation as neither sufficient nor necessary for the survival of democracy.[202] Powerful as it may be a positive

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[198] *Compare* ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950-1990 18-28 (2000) *with* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 221 (1989). For a review of the four major approaches to measuring democracy in the literature of comparative studies of democracy, see PIPPA NORRIS, DRIVING DEMOCRACY: DO POWER-SHARING INSTITUTIONS WORK? 54-69 (2008).

[199] For a classification and review of the different magnitudes of anticompetitive political regulation that may fall within the purview of the political antitrust approach, see Su, *supra* note 71, at 138-77.

[200] For a recent study of comparative politics that also highlights the significance of political fairness to democracy, see Steven Levitsky and Lucan A. Way, *Why Democracy Needs a Level Playing Field*, 21(1) J. OF DEMOCRACY 57 (2010).

[201] For an instance of how modern political antitrust scholarship influences the discussion of competitive democracy in the field of political theory, see Keena Lipsitz, *Democratic Theory and Political Campaigns*, 12(2) THE JOURNAL OF POLITICAL PHILOSOPHY 163 (2004).

[202] *See, e.g.*, Adam Przeworski, *Why Do Political Parties Obey Results of Elections?*, *in*

conception of democracy and the rule of law, this dominant view nonetheless runs the risks of (1) brushing aside the nuanced roles judicial constitutionalism plays in many contemporary constitutional democracies, and (2) fostering the misconception that self-policing is the only mechanism for safeguarding democracy. The political antitrust approach, by contrast, enlists judicial review to protect democratic self-regulation from politicians' excessive self-dealing, and it empowers the constitutional courts to construe and implement the political antitrust principles in the name of constitutional law. The development of the approach, therefore, marks an evident judicial turn of the Schumpeterian tradition.

The institutional dimension of political antitrust has critical implications for its normative vision. To begin with, the approach is framed in the negative. Rather than advising what we should do to optimize competitive democracy, the approach says more about what we should not do to the detriment of competitive democracy. What lies behind such a problem-driven, negatively framed approach to the judicial oversight of political regulation is, more likely than not, an incomplete and incompletely theorized vision of competitive democracy. Issacharoff and Pildes themselves are first to admit that they do not have a full-blown theory of what it takes to have a reasonably well-ordered competitive democracy.[203] They consider such theory helpful but not necessary, and their arguments in this regard resonate with the separate teachings of Judith Shklar and Amartya Sen—that we can talk about injustice without having in advance an ideal theory of justice.[204] That political antitrust serves as a practical theory of judicial review also casts doubt on the necessity for it to have, at the outset, a fully developed theory of competitive democracy. The absence of such theory is not particularly problematic—at least for the time being—if we take the view that the constitutional enterprise of political antitrust—or, for the matter, the constitutional law of democracy—may well be developed bottom up and over time, rather than top down and all at once.[205] Moreover, the identity of political antitrust as a judicial theory has

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DEMOCRACY AND THE RULE OF LAW 114, 138-39 (José Maria Maravall and Adam Przeworski eds., 2003). For a representative model of democratic survival as a self-enforcing equilibrium, see Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91-2 AM. POL. SCI. REV. 245 (1997).

[203] *See, e.g.*, Issacharoff & Pildes, *Politics as Markets*, *supra* note 21, at 681; Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, *supra* note 21, at 695; Pildes, *Theory of Political Competition*, *supra* note 21, at 1612.

[204] *See* AMARTYA SEN, THE IDEA OF JUSTICE (2009); JUDITH N. SHKLAR, THE FACES OF INJUSTICE (1990).

[205] For a recent explication of how American constitutional law has evolved over time, see DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

profound influence on how its advocates approach the baseline-drawing challenge. Rather than engaging in "high" theoretical discourse over the political fairness requirements for a reasonably well-ordered competitive democracy, the political antitrust theorists rely heavily on two common strategies of constitutional lawyering—intent/purpose-based inquiry and analogical reasoning—in crafting specific judicial doctrines for political antitrust adjudication. The use of these two strategies is understandable, considering that the primary targeted audiences are constitutional judges, rather than political theorists.

Under the construction of political antitrust as a measure against excessive self-interested political regulation, intent/purpose-based inquiry appears to be a logical choice for its implementation in constitutional adjudication. [206] This form of judicial scrutiny offers a path for constitutional lawyers and judges to skirt around the complexity of competitive democracy by focusing on the moral wrong of excessive self-interestedness that skews election laws. By taking political antitrust reasoning as a kind of ethical-political analysis, it also helps political antitrust theorists to seek support outside the camp of competitive democrats. [207] However, the objectivity and judicial manageability of intent/purpose tests remain issues of controversy, and significant disagreements exist as to what judges ought to do to ascertain and assess legislative intent.[208] It is debatable whether *Vieth v. Jubelirer* (2004) is a failure of judicial will or a failure of judicial standards.[209] But the fact is revealing that, while all Justices in *Vieth* either agreed or assumed that an egregious partisan gerrymander is a constitutional pathology, only Justice Stevens came to endorse the use of intent-based inquiry in adjudicating partisan gerrymandering claims.[210]

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[206] *See* Dawood, *supra* note 29, at 1471-72; Issacharoff & Pildes, *Politics as Markets*, *supra* note 21, at 681; Pildes, *Foreword*, *supra* note 1, at 76. *But cf.* Cox, *supra* note 185, at 437 (viewing the "illegitimate purpose account" of the harm of partisan gerrymandering as "atypical" to the political antitrust approach).

[207] Many critics of the political antitrust approach are not hesitant to challenge the significance of the threat from election law manipulation, and they contend that the proposed political antitrust intervention may be a cure worse than the disease; *see, e.g.*, Lowenstein, *Competition and Competitiveness in American Elections*, *supra* note 6; Persily, *supra* note 55. The upshot of these counterarguments, however, is that the agency problem in political regulation is a necessary evil or a lesser evil, not that the political antitrust concern thereof is entirely baseless.

[208] For arguments against the use of intent-based tests in election law, see Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843 (2006).

[209] *See Vieth*, 541 U.S. 267, 341 (Stevens, J., dissenting).

[210] *Compare Vieth*, 541 U.S. at 284-86 (Scalia, J., plurality opinion) (rejecting the "predominant intent" test), *with Vieth*, 541 U.S. at 335-37 (Stevens, J., dissenting) (proposing the use of intent test in judging partisan gerrymandering).

Analogical reasoning plays a prominent role in the development of political antitrust doctrines, too, though it has not carried the approach too far, either. While drawing different lessons from the enterprise of antitrust law,[211] all of those who seek to model the constitutional law of competitive democracy after the antitrust law of market economy have one estimation in common: In view of the similarities in the function and textual structure between constitutional law and antitrust law, if an antitrust court has developed a certain doctrine to adjudicate a particular type of anticompetitive conduct in a given product market, a constitutional court may use a similar doctrinal technique to address an analogous anticompetitive problem in an analogous political market.[212] There are indeed similarities, but differences as well, between political and economic competition.[213] For the strategy of imitating antitrust law to succeed, its advocates would have to establish that as far as the project of political antitrust is concerned, the similarities outweigh the differences. This is by no means an easy task, especially since many people believe that incompatibility should be the presumption—that politics and economics should be viewed as two distinctive spheres of justice, with each having its own unique standards for the legitimate exercise of power.[214] It doesn't mean that any analogical attempt should thus be summarily dismissed, but to overcome the widely shared presumption of incompatibility, the proponents of the antitrust analogies would have to be more attentive to the complexity of competitive democracy than they currently do.

VI. THREE LESSONS OF THE GENEALOGY

From the late 1990s on, students of the law of democracy in the United States have debated extensively over the merits and demerits of the political antitrust approach. This generational debate has its share of misunderstandings and fallacies. For instance, it is misleading to frame the approach as a pro-competition measure or as a mere restatement of the

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[211] *See supra* text accompanying notes 101-04.

[212] The resemblance of the antitrust law to the constitutional law is a common theme in the antitrust jurisprudence. *See, e.g.*, United States v. Topco Associates, 405 U.S. 596, 610 (1972); Appalachian Coals v. United States, 299 U.S. 344, 360 (1933). *Cf.* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263 (1986).

[213] There is a vast literature on the similarities and differences between political and economic competition. For an extensive analysis of the fundamental differences between the two, see Bartolini, *supra* note 192, *Part I* and *Part II*.

[214] *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENCE OF PLURALISM AND EQUALITY (1983). Justice Souter expresses such concern in his dissenting opinion in *Vieth*. *See* Vieth v. Jubelirer, 541 U.S. 267, 351 n.5 (Souter, J., dissenting).

Elysian theory. The various arguments (on both sides of the debate) that are premised on a linear, uni-dimensional conception of political competition cannot withstand close examination, either. Still, the political antitrust approach remains an unfinished project and is by no means beyond criticism. It is simply too early to determine whether the approach is a success or a failure.[215] To break the impasse of the existing debate, however, we need to reexamine and reframe the terms of debate. We can do so on the basis of the proposed genealogy.

With respect to the potentials, limitations, and next steps of the political antitrust approach, this paper draws three major lessons from its genealogy. Each lesson points to a critical feature or a salient issue of political antitrust in its present stage of development, which in turn forms the basis for assessing a corresponding proposal for advancing the approach in certain direction. Subjective and incomplete as these lessons may be, the genealogy promises to shed light on the future of this theoretical development.

A. Political Antitrust Legislation?

Many commentators acknowledge that excessive self-interested political regulation poses considerable threat to the fairness of the democratic political process, but they are much less convinced that constitutional adjudication is the best solution to this problem. "[C]onstitutional law," as Nathaniel Persily argues, "proves to be both a blunt and a coarse instrument for addressing excesses of partisan greed or self-interest [...]."[216] This criticism entails a textualist concern that nowhere does the U.S. Constitution specify the political antitrust principles for the legal structure of political competition. Without explicit textual authorization and guidance, critics like Luis Fuentes-Rohwer worry that decisions under the political antitrust approach are reminiscent of the problematic *Bush v. Gore*.[217] The ambiguity of the legal basis of political antitrust prompts some commentators to question the fitness of the antitrust analogies. Such analogies cannot hold, it is often argued, unless there is a counterpart of the antitrust statutes in the context of democratic politics.[218]

Assuming that shaky legal basis is indeed a problem, the solution is

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[215] *See, e.g.*, Ferejohn, *supra* note 7; Gerken, *Lost in the Political Thicket*, *supra* note 7; Karlan, *supra* note 7.

[216] Persily, *The Place of Competition in American Election Law*, *supra* note 6, at 172.

[217] *See* Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 545 (2003).

[218] *See, e.g., id.* at 544-45.

straightforward: Insofar as the American political antitrust enterprise is concerned, let the Congress enact a statute (or a set of statutes) codifying the political antitrust principles either in general or in specific.[219] With the hypothesized statutory regime in place, there would be no dispute about the legality of political antitrust. In addition, the legislation could design a brand-new enforcement mechanism that could easily outperform the existing judicial process, which, after all, is designed mainly for the protection of individual rights. Conceivably, the courts would still play a critical role under such statutory regime, but the bulk of political antitrust issues would then become matters of statutory interpretation.[220] To launch a serious intellectual movement for political antitrust legislation, however, political antitrust theorists first would have to change the course of their thinking—from theory of judicial review to theory of legislation.

So far no political antitrust theorist has seriously contemplated such a change, and their apathy is understandable. To begin with, the necessity of the suggested legislative undertaking is far from evident. Constitutional law may well be "both a blunt and a coarse instrument" for managing the institutional arrangements of democratic political process. But since the core task of political antitrust is to combat the excessive anticompetitive political self-dealing in form of political regulation, not to perfect the legal structure of competitive democracy, one may reasonably argue that constitutional law is well capable of handling this task—with or without the help of judicially manageable standards.[221] The lack of explicit constitutional textual hook is not a fatal defect, either, because one may contend that the relevant constitutional provisions are spacious enough to support the construction of political antitrust principles, which are nothing but judicial doctrines for the judicial implementation of the Constitution.[222] The misfit between the political antitrust approach and the existing rights-

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[219] Here I deliberately skip the obvious option of constitutionalizing the political antitrust principles by amending the U.S. Constitution due to its relative improbability.

[220] Shifting issues of political antitrust from constitutional adjudication to statutory interpretation would open up the possibility of congressional overrides. For a cautionary note on the limited effect of congressional overrides on statutory interpretation, see Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. (2009).

[221] Drawing upon the insights of judicial minimalism, Richard Hasen advocates the use of judicially unmanageable standards in deciding certain type of election law cases; *see* HASEN, THE SUPREME COURT AND ELECTION LAW, *supra* note 6, at 47-72. Although I do not want to enter the debate about the merits and demerits of judicial minimalism in the field of law of democracy, I see no reason why the political antitrust approach should be categorically excluded from the application of the idea of judicial unmanageability.

[222] On the meaning of constitutional implementation and the role of judicial doctrines, see generally RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

oriented judicial process is indeed troublesome. This problem, however, is a common difficulty to the field of the law of democracy and is not irresoluble by the Court itself.[223]

The second but arguably more fundamental reason against the proposed legislation is based on the very purpose of the political antitrust approach. As Part II of this article suggests, the approach not only aims at protecting competitive democracy from excessive self-interested political regulation. It also seeks to rein in the judicial constitutionalization of democratic politics. While the former may be considered the central task and the latter the ancillary one, the duality of political antitrust commitment is deeply rooted in its genealogy. Moreover, it is under the influence of the Elysian tradition that political antitrust theorists aspire to advance the approach as an overarching theme of the constitutional law of democracy. To take on the hypothesized legislation strategy, therefore, would mean to disown the Elysian aspiration, for a statutory regime of political antitrust could not have any direct impact on the way the constitutional issues of the law of democracy are adjudicated. It is debatable whether the structural thesis and the primacy thesis of political antitrust can effectively discipline the exercise of judicial review, but it is unlikely that any political antitrust theorist would concede the debate lightly.

B. Rethinking the Internal Debate

However reasonable it is to speak of the political antitrust approach in singular term, the approach is rather a coalition of theories than a single unity. The diversity within the political antitrust approach can hardly be overlooked, and in the pluralistic and complicated world we live in, it is only natural that different political antitrust theorists do not always see eye to eye with each other on the theoretical construction and practical application of this judicial approach to the law of competitive democracy. Still, it is worth examining the grounds of the internal disagreement to see what, if anything, we can do to consolidate the political antitrust enterprise.

Consider first a prominent view in the literature that frames the internal debate as one about the choice between competing models of political competition. Richard Posner is a leading author in drawing political antitrust inferences from a sharp distinction between the "static" model and the "dynamic" model of political competition. By assuring that a number

[223] The way the U.S. Supreme Court addresses the issue of standing in election law cases provides an example of how the conventional rights-based doctrines can be adapted to a structural approach; *see* Pildes, *Foreword*, *supra* note 1, at 46-7.

of parties compete, with "each representing the interests of some segment of the population," the static model posits that voter welfare can be maximized through compromise among the parties.[224] The dynamic model, by contrast, 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.[225] On the ground that "monopoly profits serve the socially valuable function of creating incentives to risky, socially beneficial innovation," Posner chooses the dynamic model to inform his political antitrust theory.[226] Under this view, what matters is not the "competitiveness," but the "contestability" of political/electoral markets. It doesn't matter whether the state of political competition is monopolistic, duopolistic, or oligopolistic—so long as the existing parties do not entrench themselves against new entry.[227]

David Schleicher also draws a sharp distinction between the static/equilibrium model and the dynamic/Schumpeterian model of political competition, with the former seeks to promote representation and the latter highlights the values of clarity and decisiveness concerning the outcome of election.[228] Criticizing the Issacharoff-Pildes political markets approach for being too parsimonious and for mistaking the "natural" duopoly in American politics for an "ordinary" one, Schleicher suggests that the economic theory of natural duopoly regulation provides a better analogy for thinking about American law of democracy.[229] Under the principle of "efficient competition" as drawn from the natural duopoly model, Schleicher is much more tolerant than Posner and other political antitrust theorists towards regulations that help entrench the two-party system in the United States.[230] "[C]onstitutional review of electoral regulation of parties should permit rules that favor the existence of a two-party system," Schleicher argues, "because creating barriers to entry for small third parties makes it more likely that the winner of an election will be the choice of the majority."[231]

There are indeed different ways of structuring competitive democracy,

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[224] POSNER, *supra* note 22, at 246.

[225] *Id.*

[226] *Id.* at 246-47.

[227] *Id.*

[228] *See* Schleicher, *"Politics as Markets" Reconsidered*, *supra* note 26, at 176-84.

[229] *See id.* at 190-92, 192-96.

[230] On the notion of "efficient competition," see id. at 196. Schleicher's departure from Posner and the other political antitrust theorists is clearly registered in his defense of the Court's anti-fusion decision in *Timmons*; *see id.* at 198-202.

[231] *Id.* at 198.

and, as Richard Pildes acknowledges, "[a] pressing question for competitive theories of judicial oversight is therefore whether resources exist within competition theory for choosing among these approaches."[232] However, it is questionable whether the posited distinction between the static and the dynamic models of political competition adequately captures the nuanced value choices facing the American political antitrust theories. After all, Issacharoff and Pildes recognize the force of the two-party system in the United States and do not take proportional representation as the ultimate objective of their political markets approach.[233] Nor does Schleicher press the logic of the case for decisive elections to the extreme of excluding all third parties from participating in the electoral process.[234] By choosing the dynamic model of political competition, Posner and Schleicher may have meant to contextualize their political antitrust theories in light of the basic electoral and party systems in the United States. But, while the basic design of electoral system and the basic features of party system in a given democracy impose certain constraints on the subsequent political engineering and the constitutional adjudication thereof,[235] they do not settle once and for all the normative disputes over the law of democracy.

From the proposed genealogical perspective, we may identify another two sources of normative disagreement within the political antitrust approach. The first one concerns the very ideals of competitive democracy and gives rise to persistent ideological contestation. Competitive democracy, as it should be clear by now, is not (or no longer) an ideologically homogeneous conception of democracy. To the extent that political antitrust theorists can coalesce around a set of incompletely theorized propositions about competitive democracy, the consensus is rather tenuous, and it is even more so as they seek to expand the normative commitment of competitive democracy beyond its traditional minimalist construction. So, it is of little surprise that in the United States, a progressive political antitrust theory may be more skeptical of the

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[232] Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, *supra* note 21, at 694.

[233] *See* Issacharoff & Pildes, *Politics as Markets*, *supra* note 21, at 674-81.

[234] *See* Schleicher, *"Politics as Markets" Reconsidered*, *supra* note 26, at 198 n.107, 210-11.

[235] On path dependence and its impacts on political institutional design, see, e.g., Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94(2) AM. POL. SCI. REV. 251 (2000); Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307 (2008). It should also be noted that electoral engineering has only limited power in shaping the landscape of democratic politics. For instance, despite the compelling logic of Duverger's law, pure two-party competition remains a rare phenomenon in democracies with first-past-the-post, plurality voting rules. *See, e.g.*, DUVERGER'S LAW OF PLURALITY VOTING: THE LOGIC OF PARTY COMPETITION IN CANADA, INDIA, THE UNITED KINGDOM AND THE UNITED STATES (Bernard Grofman, André Blais, & Shaun Bowler eds., 2009).

justifiability of the fusion ban in *Timmons v. Twin Cities Area New Party* (1997),[236] whereas a conservative political antitrust theory may be more distrustful of the various campaign finance regulations enacted by incumbents.[237] Such ideological contestation is bound to persist, especially since there is ample room for reasonable disagreement over what it means and what it takes to develop a reasonably well-ordered competitive democracy.

The second source pertains to the tension between the two objectives of the approach, and it generates disagreement concerning the role of judicial review. Much has been said about the duality of political antitrust commitment to protecting competitive democracy from political self-dealing and judicial overreach. It should be noted, however, that there are trade-offs to be made between these two objectives. Some political antitrust theorists such as Elizabeth Garrett seem to put emphasis on the Elysian aspiration to rein in the judicial constitutionalization of democratic politics and thereby would raise the bar for justified political antitrust intervention.[238] Others, by contrast, may give precedence to the post-Schumpeterian commitment to political fairness and envision, accordingly, a more robust role of judicial review in destabilizing political entrenchment. How to strike a proper balance between the two political antitrust objectives is, without doubt, an issue of debate, the fault lines of which cut across the usual spectrum of political ideology.[239] With these two sources of disagreement deeply embedded in its genealogy, the political antitrust approach has been and will continue to be a hotbed of internal debate.

C. Taking "the Political" Seriously: The Case for Theoretical Re-Alignment

Public choice analyses and markets/antitrust analogies have generated important insight for the development of the political antitrust approach. In light of the dominance of economic analysis in the field of antitrust law, some might expect that public choice would play a similar role in shaping the political antitrust principles for competitive democratic politics.[240] Or it

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[236] 520 U.S. 351 (1997). For political antitrust criticism of *Timmons*, see Issacharoff & Pildes, *Politics as Markets*, *supra* note 21, at 683-87.

[237] For criticisms of campaign finance regulation as incumbent-protection scheme, see, e.g., JOHN SAMPLES, THE FALLACY OF CAMPAIGN FINANCE REFORM (2006); BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (2001).

[238] *See* Garrett, *supra* note 28, at 132 n.114.

[239] It is beyond the scope of this article to weigh in on this debate. For an account of the factors to be considered and balanced in this regard, *see* Su, *supra* note 71, at 174-79.

[240] On the ascendance of industrial organization economics in American antitrust law and policy,

may not. Political competition is quite different from economic competition, and, as a result, many people have strong reservations about transplanting doctrines from antitrust law to election law. But exactly what are the differences between political and economic competition that cast into doubt the public choice analyses and the efforts for analogical transplantation? Many critics point to the lack of price signals or any metric that is comparable to price in the political arena.[241] But Richard Posner argues that the lack of price only affects the efficiency of the invisible hand in the political market.[242] Kevin Mitchell also downplays this difference by noting that antitrust law governs not only price competition but also non-price competition.[243] Many critics of the market/antitrust analogies contend that, although perfect competition is ordinarily a useful model for assessing the competitiveness of product markets, the model simply has no place in the political sphere.[244] But while acknowledging the improbability of perfect competition in political markets, some political antitrust theorists argue that, in analyzing political competition, valuable lessons can still be drawn from the economic models of monopolistic or duopolistic competition.[245] That the political antitrust approach should focus on the "contestability" rather than the "competitiveness" of political markets is indeed a powerful insight.[246] But we still need to see to what extent the economic models of imperfect competition can help to resolve issues of political antitrust adjudication.

Take ballot access for example. Restrictions on ballot access for third-party and independent candidates are often characterized as legal barriers to new entry in the electoral markets, and they often serve as textbook examples of the problem of incumbent collusion in the law of democracy.[247] The whole story of ballot access appears to be more

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see, e.g., THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY (John E. Kwoka, Jr. & Lawrence J. White, eds., 4th ed. 2004).

[241] *See, e.g.*, Persily, *The Place of Competition in American Election Law*, *supra* note 6, at 176.

[242] *See* POSNER, *supra* note 22, at 189-93 (2003).

[243] *See* Mitchell, *supra* note 101.

[244] *See, e.g.*, Bartolini, *Part II*, *supra* note 192, at 34-41; Justin Buchler, *The Statistical Properties of Competitive Districts: What the Central Limit Theorem Can Teach Us about Election Reform*, 40(2) POL. SCI. & POL. 333 (2007).

[245] *See, e.g.*, POSNER, *supra* note 22, at 246-47; Schleicher, *"Politics as Markets" Reconsidered*, *supra* note 26, passim.

[246] It is telling that Daniel Lowenstein, a prominent critic of the political antitrust approach, takes issue with the conception of electoral competitiveness but not with the conception of free competition in politics, which is akin to the idea of political contestability. *See* Lowenstein, *Competition and Competitiveness in American Elections*, *supra* note 6.

[247] *See, e.g.*, Shaun Bowler, Elisabeth Carter, & David M. Farrell, *Changing Party Access to Elections*, *in* DEMOCRACY TRANSFORMED?: EXPANDING POLITICAL OPPORTUNITIES IN ADVANCED

complicated, however. On the one hand, high ballot access barriers may serve to entrench the major party incumbents. With no meaningful threat of new entry, the existing major parties may be less responsive to the interests of certain voters.[248] On the other hand, the fact that challenger entry is costly provides voters with valuable information about candidate quality.[249] A restrictive ballot access regime may also benefit voters by inducing decisive elections that promote electoral accountability.[250] Furthermore, the correlation between electoral contestability and the stringency of ballot access regime is anything but simple. For instance, Jamie Carson et al. argue, "the cartel-like control of ballot access by nineteenth century political parties created competition in races that the modern market-like system simply does not sustain."[251] Daniel Lowenstein goes further to contend that "[m]ore liberal ballot access laws will not make electoral politics more competitive."[252] In discussing the judicial oversight of ballot access regulation, Posner admits, "the task of weighing the entry-retarding against the confusing-reducing effects of ballot access is inescapable."[253] Posner is only half right. Even assuming that electoral contestability is the core concern here, a political antitrust court would have to sort out and weigh factors that are more complicated and more difficult than the entry-retarding and confusing-reducing effects Posner suggests.

The complicated story of ballot access is not exceptional. Political antitrust adjudication, just like other forms of constitutional adjudication, usually involves a myriad of ethical, political, and institutional factors to be considered and balanced. Normative disagreements and empirical uncertainties abound in this process, and the court ultimately has to make its decision as a matter of political judgment. Public choice offers critical but limited insight. In any event, it is only one among many viewpoints. There are other ways of thinking about competitive democracy, and there is no reason why all the eggs of political antitrust must be put in the basket of

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INDUSTRIAL DEMOCRACIES 81 (Bruce E. Cain, Russell J. Dalton, & Susan E. Scarrow eds., 2003); Issacharoff & Pildes, *Politics as Markets*, *supra* note 21, at 683-88; Klarman, *Majoritarian Judicial Review*, *supra* note 24, at 521-22, 535-36.

[248] *See, e.g.*, Holcombe, *supra* note 173.

[249] *See* Sanford C. Gordon, Gregory A. Huber, & Dimitri Landa, *Challenger Entry and Voter Learning*, 101(2) AM. POL. SCI. REV. 303 (2007); Gordon, Huber, & Landa, *Voter Responses to Challenger Opportunity Costs*, 28 ELECTORAL STUD. 79 (2009).

[250] *See, e.g.*, Bartolini, *Part II*, *supra* note 192, at 458-59; Schleicher, *"Politics as Markets" Reconsidered*, *supra* note 26, at 198.

[251] Jamie L. Carson, Erik J. Engstrom, & Jason M. Roberts, *Candidate Quality, the Personal Vote, and the Incumbency Advantage in Congress*, 101(2) AM. POL. SCI. REV. 289 (2007).

[252] Lowenstein, *Competition and Competitiveness in American Elections*, *supra* note 6, at 281.

[253] POSNER, *supra* note 22, at 238.

public choice. Without denying the contributions of public choice and analogical reasoning from antitrust economics, it is nonetheless worth trying to realign the political antitrust approach with a "political" theory of competitive democracy—a theory that takes seriously the political as opposed to the economic rationales of competitive democracy. In a sense, such a theoretical realignment is an attempt to "decolonize" political antitrust from public choice reasoning and markets/antitrust analogies. It challenges political antitrust theorists to re-engage the uniqueness and complexity of competitive democracy. And only by taking on this challenge can they shorten the noticeable gap between their theories of political antitrust and the contemporary theories of competitive democracy.

One possibility worth considering here is the realignment of the political antitrust approach with Stefano Bartolini's theory of political competition. At the heart of Bartolini's theory is a collusion-centered thesis of competitive democracy: "In politics, cooperation and negotiation—that is, collusive interactions—between political leaders are the rule; competitive interactions are a small island in the big sea of collusion."[254] This insight points to a fundamental but under-appreciated difference between economic and political competition:

> Contrary to economic competition, in which the normative and legal capsule is outside the range of competitive interactions, and in which it is therefore safe and under the responsibility of people other than the competitors, the capsule of political competition is set by the political competitors themselves and can be an object of competition. In politics this determines a situation in which a certain level of collusion among the suppliers is both implicit in and a precondition of political competition itself. To subtract the capsule of competition from the chance principle inherent in competitive interaction is necessary and beneficial.[255]

What Bartolini argues is not only that cooperative/collusive interactions are much more common in politics than in economics, but also that they are actually the foundation for political competition rather than an imperfect, anomalous aspect of competitive democracy.[256] Bartolini's collusion-centered thesis of competitive democracy, therefore, provides a powerful explanation of why the analogy-based, public choice arguments about political competition often meet with strong resistance, for they tend to overemphasize the role of competition and overlook the "inherently

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[254] Bartolini, *Part II*, *supra* note 192, at 63.
[255] *Id.* at 38.
[256] *See id.* at 41.

collusive pushes of politics."[257] Bartolini is silent on the possibility of political antitrust. But one can still make a strong case for the political antitrust enterprise in a Bartolinian world. After all, there are agreements/deals among political agents that are elemental for democratic electoral games to take place and repeat, but there are also collusive or unilateral self-dealings of power elites that are simply bad for democracy. Acknowledging the significance of the former does not mean we cannot but tolerate the latter as necessary evil.

Of course, we still need to draw a sensible and principled distinction between harmful and benign collusion/cooperation for the political antitrust approach to succeed in a Bartolinian world. In addressing this and other baseline-drawing difficulties facing the approach, we also have to take into consideration Bartolini's other insight—that political/electoral competition is multi-dimensional and tension-ridden.[258] In terms of the issue dimensions upon which the normative baselines are drawn, there are basically two types of political antitrust theory.[259] *First-order theory of political antitrust* seeks to define the floor of competitiveness or contestability of a given political market. Viewing such qualities as independent democratic goods, it directs political antitrust courts to assess the *structural effects* of the political regulation under review on political competition. *Second-order theory of political antitrust*, by contrast, seeks to regulate the *political dynamics* through which a political regulation is made. Taking political antitrust norms as more about the process and conducts than about the end state of competitive democracy, it directs political antitrust courts to inquire into the power relations behind the scene. Bartolini's analysis of the multi-dimensionality of political competition may have cast into doubt any attempt to build a robust consensus on the first-order issues of political antitrust. It is therefore not surprising that many political antitrust theorists have envisioned the political antitrust review more in the form of intent/purpose-based scrutiny than that of effect-based, result-oriented inquiry.[260] Some of them—such as Ian Shapiro and Yasmin Dawood—have further invoked the republican political ideal of non-domination to inform the ethical-political considerations political antitrust courts have to make.[261] Though much remains to be studied about

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[257] *Id.* at 63.

[258] *See supra* text accompanying notes 192-93.

[259] For a similar distinction between first-order and second-order democratic theory, see AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 126, 200-01 (2004).

[260] *See* sources cited *supra* note 206.

[261] *See* SHAPIRO, *supra* note 23, at 35, 56; Dawood, *supra* note 29, at 1428-39.

the ethical connotations of political antitrust in a reasonably well-ordered competitive democracy, the enlargement of political antitrust reasoning beyond the confines of public choice calculus should be a welcome move.

VII. CONCLUSION

The theoretical development of the political antitrust approach in the United States since the late 1990s is usually told either as being part of the movement seeking to transform the paradigm of American law of democracy, or as being motivated by and founded on the markets/antitrust metaphors and analogies for competitive democratic politics. Both the paradigm contestation narrative and the analogical transplantation narrative are partly incomplete and partly misleading. This article has proposed a genealogy of the political antitrust approach as an alternative account of this theoretical development. By retracing its intellectual lineages and transformative innovations, as well as lost opportunities, hopefully this article has shed some new light on the past, present, and future of the political antitrust approach to the law of democracy.

Modern political antitrust theories are united in their dual commitment to addressing the problem of excessive self-interested political regulation and the problem of judicial overreach in the law of democracy. Even though it is often dressed up with pro-competition statements and is often criticized for being too competition-centric, the approach is better understood as based, in part, on the limited proposition that those who stand to benefit politically from restraints of political competition cannot be trusted to determine whether the restraints are for the democratic common good or not. The political antitrust approach also seeks to contain the alarming development of judicial constitutionalization of democratic politics, and it seeks to do so by offering two integrated but severable limiting strategies. The first limiting strategy is the re-orientation of judicial scrutiny from rights to the structural concerns about political competition. The second one is the use of political antitrust as a primary mediating principle for determining the level of judicial scrutiny. These two strategies are sensible, though their practical application is not without difficulty.

It is evident that the Elysian theories of process-oriented judicial review and the Schumpeterian theories of competitive democracy have profoundly shaped the dual commitment of the political antitrust approach. Less obvious and often overlooked, though, are the transformative aspects of this intellectual genealogy. In response to the changing landscape of American constitutional law of democracy since *Baker v. Carr*, political

antitrust theorists have tightened up the rules of judicial engagement previously set up by the famous *Carolene Products* Footnote Four. Political antitrust theorists are also less enthusiastic about the anti-discrimination rationale and the representation-reinforcing project of the traditional process theory. Instead, they emphasize more the anti-entrenchment rationale for the judicial oversight of competitive democracy. We still have much to learn about the causes and consequences of the shifting emphasis of the post-Elysian process theory tradition from representation to competition.

A professional and substantive gap can be found between political antitrust theories and the other contemporary theories of competitive democracy. While embracing competitive democracy as the underlying democratic conception, political antitrust theories have by and large sought to eschew or reduce the complexity of competitive democratic politics. On the other hand, political antitrust theories contribute to the normative discourse of the post-Schumpeterian tradition with an alternative judicial approach to the constitutional law of competitive democracy. They also deepen the normative commitment that competitive democrats usually make to political fairness. To take on the baseline-drawing challenge to this judicial project, political antitrust lawyers rely heavily on intent/purpose-based inquiry and analogical reasoning. The question remains whether these tactics can manage the complexity of competitive democracy.

The proposed genealogy casts doubt on the need of political antitrust legislation for its inattention to the Elysian aspiration for democracy-reinforcing judicial review. Challenging the adequacy of a prominent view that frames the internal debate of political antitrust as one about the competing models of political competition, the genealogy suggests two sources of internal disagreement. The approach is deeply contestable and contested, in part because ideological disagreement persists over the meaning of and conditions for a reasonably well-ordered competitive democracy, in part because tradeoffs exist between the Elysian aspiration to contain the reach of judicial review and the post-Schumpeterian aspiration to expand the minimalist construction of competitive democracy. Judging from the limitations of public choice analyses and markets/antitrust analogies in further developing the political antitrust approach, a strong case can be made to realign the approach with a political theory of competitive democracy. The possibilities and consequences of such theoretical realignment are still in need of further study.