

Democracy and Law: Situating Law within John Dewey's Democratic Vision

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ABSTRACT

In this paper I argue that John Dewey developed a philosophy of law that follows directly from his conception of democracy. Indeed, under Dewey's theory an understanding of law can only follow from an accurate understanding of the social and political context within which it functions. This has important implications for the form law takes within democratic society. The paper will explore these implications through a comparison of Dewey's claims with those of Richard Posner and Ronald Dworkin; two other theorists that intimately link law and democracy. After outlining their theories I will use the recent United States Supreme Court case, *Citizens United*, to discuss how practitioners of the three theories would decide a case that implicates both the rule of law and democratic procedures. In order to do this judges following each theory, "Dews, Dworks and Poses," are imagined. Ultimately this paper will show that drastically different results to *Citizens United* would follow. The (tentative) conclusion of the paper is that Dewey's conception of the relationship between democracy and law is a superior option to either that of Dworkin or Posner.

1. Introduction

John Dewey is known for his democratic theory. He is less known for his philosophy of law. In this paper I will show that he developed a sophisticated philosophy of law that follows directly from his conception of democracy. Indeed, under Dewey's theory an understanding of law can only follow from an accurate understanding of the social and political context within which it functions. If correct, this claim has important implications for the form law takes within democratic society. This paper will also explore the theoretical relationship between law and democracy through a comparison of Dewey's claims with those of Richard Posner and Ronald Dworkin. After outlining their theories I will use the 2010 Supreme Court case, *Citizens United*, to discuss how practitioners of the three theories would decide a contemporary case that implicates both the rule of law and democratic procedures. Judges following each

theory, “Dews, Dworks and Poses,” will be imagined. Ultimately through using this device this paper will show that drastically different results to *Citizens United* would follow from the theories of Dewey, Dworkin and Posner. The (properly tentative) conclusion of the paper is that Dewey’s conception of the relationship between democracy and law is, in a complex world such as ours, a superior option to either that of Dworkin or Posner.

2. *Dewey on Democracy*

It is often stated that Dewey’s philosophy of democracy is difficult to pin down with precision.¹ Whether or not this claim is accepted, and I do not think it should be, there are some core ideas that can be noted without much controversy. First, democracy in its most central meaning is, for Dewey, a way of life that is social before it is seen more narrowly as a political concept. Real democracy to be realized “must affect all modes of human association.”² Most important here is the claim that political institutions are secondary to, and are the effects of, the underlying culture. For there to be a working political democracy there is the antecedent need for various aspects of a democratic culture. Not only is it the case that a solely political democracy will not suffice, but we must “realize that democracy can be served only by the slow day to day adoption and contagious diffusion in every phase of our common life of methods that are identical with the ends to be reached and that recourse to monistic, wholesale, absolutist procedures is a betrayal of human freedom no matter in what guise it presents itself.”³ Second, for Dewey democracy entails pluralistic values and a decentered picture of social institutions. By having plural and decentered institutions as well as a form of life that practices democratic social habits there are multiple avenues that allow for information to be communicated and solutions to be proposed. The pluralism also relates to Dewey’s specific acceptance of the great complexity of causal forces in human

¹ For instance the generally very sensitive and friendly expositor Robert Westbrook states, “In the case of Dewey, knowing a lot about what his beliefs were is a difficult task, for precision and clarity often escaped him.” Robert Westbrook, *John Dewey and American Democracy* (Ithaca: Cornell University Press, 1991), p. xiii.

² John Dewey, LW 2, p. 325. (All references to Dewey’s work will be to the scholarly edition edited by Jo Ann Boydston and published at Southern Illinois Press. The convention used will be as follows: for the early works “EW,” middle works “MW,” and later works “LW,” followed by volume number and page number.)

³ Dewey, LW 13, p. 187.

society. A “monistic view” just cannot handle the multiple forces that operate in human society. Indeed, one of the great challenges for human society is being able to coordinate, communicate and understand such multiple and diffuse forces. As Dewey describes the process, social groups feel consequences before being able to label them. Noting and finding ways to control/solve unfortunate consequences of social life demand the construction of symbols. Common or “mutually understood” meanings are created through the construction of symbols and therefore animate a public discussion. This whole process is optimized by the proliferation, interconnection and overlapping of associations. Third, Dewey defines the public in functional terms. Here is where a distinctly political democracy comes into being. A public is created when social consequences that affect people beyond the immediate group are noted and found to be in need of social control.⁴ Political democracy, therefore, comes into being where there is a recognized need to control consequences of social activity. Because problems are in constant change, states need to be continuously “re-made.”⁵ Indeed, the state is seen as a secondary type of association formed because of perceived externalities of individual or group activities and based upon the given fact of social and intersubjective life. Once the democratic state is defined by the consequences it is constructed in response to, “The only statement which can be made is a purely formal one: the state is the organization of the public effected through officials for the protection of the interests shared by its members.”⁶ For Dewey this eliminates the possibility that there is an *a priori* rule or procedure identifiable as sufficient to define democratic government. As a prime example of the naïve and mistaken hope for an *a priori* solution to democracy, Dewey cites the imposition of constitutions “ready-made” upon governments.⁷ In a properly democratic state, instead of a top-down constitutional structure determining the parameters of governmental rule, the state reacts to multiple groupings formed upon the basis of interests and acts in order to encourage more socially desirable associations. Fourth, going back to democracy as a social way of life prior to the political and to the functional idea of the public as formed in relationship to specific and immediate social issues, Dewey claims that a living democratic society rests upon experimental intelligence. For Dewey, though, this is only taking a type of intelligence that has proven useful across various human societies and that every

⁴ Dewey, LW 2, p. 244-245.

⁵ Dewey, LW 2, p. 255.

⁶ Dewey, LW 2, p. 256.

⁷ Dewey, LW 2, p. 264.

human being habitually enacts in everyday life and utilizing it more consistently for the problems of governance. This is why Putnam notes that for Dewey, democracy is a precondition of full application of intelligence.⁸ Fear of change and the psychological need for greater certainty have kept society from fully utilizing this greater use of experimental intelligence in social life. Instead, “we have set undue store by established mechanisms.” A blatant example of this is “idolatry of the Constitution.”⁹ Fifth, the public and its government are institutions based upon real conflict. Democracy is based upon specific problems as problems. It needs no argument to acknowledge that here are real conflicts.¹⁰ The only question worth answering is how to settle them in manner that is best for the widest amount of people. Finally, for Dewey democracy utilizes both scientific knowledge and creativity for communication and solution. But, importantly, social problems cannot be solved through allocation of decision-making to technocrats. There are unavoidable problems in the appeal to expertise and “elite” democracy where voting is relegated to the function of safety valve. For example, Dewey argues that if this theory of “elite” representative democracy is accepted it cannot account for democracy’s usefulness because: 1) the populace’s purported inability to understand, deliberate and vote upon the complex and technical issues of the day is not remedied by representation of an elite because the same problems are just replicated one step later (the general claim is that governmental problems are too complex for the voters to understand, but why at one step removed and at the level of voting for representatives the issues would be better understood by the voters is unclear); 2) policies must be framed before technical expertise can be utilized and technocrats are not any better or more informed at foundational policy choice than the general populace (indeed the general populace will be better at identifying the location of the “pinch”); and 3) the “elite” become necessarily isolated from the social world and therefore cannot represent the voters needs.¹¹

⁸ Hilary Putnam, *Renewing Philosophy* (Cambridge: Harvard University Press, 1992), p. 186.

⁹ Dewey, LW 13, p. 175.

¹⁰ Indeed, it is surprising the number of claims to the effect that Dewey underestimates the kind and amount of social conflict. This is absurd. First, Dewey does not feel the need to “prove” there is social conflict – this is accepted as a given. Second, Dewey does not claim that all conflict is, in the end, eliminable. What is claimed, is that if it is eliminable in a manner that harmonizes interests, his proposed form of government is best placed to find the solution.

¹¹ Dewey, LW 2, p. 364.

This is a picture of democracy decidedly at odds with those more in current favor. As Robert Westbrook describing Dewey's theory puts it, and I think correctly, "For him, it was always liberalism that that had to meet the demands of democracy, not democracy that had to answer to liberalism."¹²

3. *Dewey on Law*

Dewey's philosophy of law neatly dovetails with his overall philosophy of democracy. Law, ultimately, is seen as just one of multiple social institutions that might, when utilized properly, further the social goal of a truly democratic society. "My Philosophy of Law," will serve here as a helpful general statement upon which will be constructed a more detailed description of Dewey's philosophy of law. In this article he describes three central questions as most important: what is law's: (1) source; (2) end; and (3) application?¹³ All are important in order to properly justify and critique existing legal practices. Ultimately, all philosophy of law needs to answer one main question; what standard or criterion are we to use to evaluate legal practice? The quest for a standard, though, Dewey claims, does not transcend the issues of the period in which the analysis is produced because legal philosophies are products of their time and place and the issues relevant to that specific context. Therefore standards cannot be judged outside of acknowledgement of context. It follows that law "can be discussed only in terms of the social conditions in which it arises and of what it concretely does there."¹⁴ This specificity of context and use "renders the use of the word "law" as a single general term rather dangerous."¹⁵ In good pragmatic fashion, Dewey writes, "A given legal arrangement is what it *does*, and what it does lies in the field of modifying and/or maintaining human activities as going concerns."¹⁶

When investigating the sources of law, Dewey's philosophy of law becomes clearer in the context of his critiques of two other jurisprudential theories, legal positivism and natural law. Dewey examines legal positivism and finds issue with Austin's "confusion of sovereignty with the organs of its exercise."¹⁷

¹² Westbrook, *John Dewey*, p. xvi.

¹³ Dewey, LW 14, p. 115.

¹⁴ Dewey, LW 14, p. 117.

¹⁵ Dewey, LW 14, p. 117.

¹⁶ Dewey, LW 14, p. 118.

¹⁷ Dewey, EW 4, p. 73.

On Dewey's view, Austin confuses sovereignty with a specific source of command. Further, Austin's search for the location of sovereignty is doomed from the start due to his unexamined assumption that sovereignty must be numerically determinate. For Dewey this assumption is problematic because it conflicts with the possibility of popular sovereignty. Dewey tests the theory against what he sees as the actual practice of sovereignty in the United States. In this context Austin's theory is described as resting sovereignty on the electorate as an aggregate body. But Dewey counters that this raises innumerable problems for the concept of the numerically determinate sovereign. For instance, is this electorate a class or a set of particular members? And what happens to each individual when they vote with the minority or majority? These problems mean that in this case "sovereignty is not determinate until after it is exercised," and this fails to satisfy Austin's conceptual need for it to be always discretely or numerically identifiable.¹⁸

What Dewey finds most problematic in Austin's positivism is the identification of government with sovereignty. Dewey argues that law is only explainable on the theory that government is an organ of sovereignty, not sovereignty itself. First, in the US, constitutional law determines government, therefore there is some other force behind the government that determines its character. In order to avoid this problem, Austin denied that constitutional law is law at all, but called it "positive morality," a type of pseudo-law. This claim Dewey believes is plainly unacceptable in relation to a document that is universally described as the law of the land. Further, for Dewey it appears that any change, from constitutional to the most minor modifications of daily government, is left conceptually unexplained (and unexplainable) in Austin's theory. This problem is seen, for example, in the relationship of custom and development of law within the state. Austin's theory forces the claim that custom is not law until expressly declared by the judiciary. Dewey, on the other hand, believes that with the exception of legal positivists, nobody finds this position descriptively or normatively tenable.

Positivism's hope for a single determinate source of law is therefore thought indefensible. Dewey's legal theory, to the contrary, rules out any search for a unifying rule of recognition, and instead allows for plural sources of law. But not every potential source of law is equal. For instance, Dewey is quite suspicious of natural law. Not that Dewey ignores the central importance of natural law in jurisprudential history; in fact, Dewey finds that in the

¹⁸ Dewey, EW 4, p. 79.

past appeals to natural law have often served to promote legitimate and progressive human aims. Dewey, though, notes that “nature” can also be taken as the given, the status quo. This means that injustice may also be supported by an appeal to natural law. Therefore, appeal to natural law may be used to fossilize given values or rules. For Dewey, “the effect of any theory that identifies intelligence with the given, instead of with the foresight of better and worse, is denial of the function of intelligence.”¹⁹

Instead of positivist or natural law answers to the sources of law, Dewey develops an empirically interesting description of law as emanating from “the minor laws of subordinate institutions – institutions like the family, the school, the business partnership, the trade-union or fraternal organization.”²⁰ This allows for a pluralistic and “bottom-up” conception of the sources of law, one that maps nicely on to traditional legal practice. For instance, it easily handles the case-based and analogical reasoning central to the common-law tradition. It can also handle statutory law as well as the thought that constitutional law is law and not positive morality.

Law often arises out of other habits, traditions and customs within society. Importantly though, when law recognizes a custom, it also “represents the beginning of a *new* custom.”²¹ Further, Dewey observes “while there would not be laws unless there were social customs, yet neither would there be laws if all customs were mutually consistent and were universally adhered to.”²² Of course law itself is a type of custom, and Dewey notes that much of law is made up of the concepts it inherits from earlier decisions. So, Dewey develops a historicized picture of law that, for example, explores the survival in modern maritime law of the concept of a ship “as personal and responsible being.”²³ For Dewey, this illustrates that in law, “the old is never annihilated at a stroke, the new never a creation *ab initio*. It is simply a question of morphology. But what controls the modification in the historic continuity is the practical usefulness of the institution or organ in question.”²⁴

Ultimately Dewey argues that law is “social in origin, in purpose or end, and in application.”²⁵ It is historically based and yet contextually varied. In-

¹⁹ Dewey, MW 7, p. 63.

²⁰ Dewey, EW 4, p. 87.

²¹ Dewey, LW 3, p. 327.

²² Dewey, LW 3, p. 327.

²³ Dewey, EW 4, p. 40.

²⁴ Dewey, EW 4, p. 40-41.

²⁵ Dewey, LW 14, p. 117.

deed, law as an institution and as a concept “cannot be set up as if it were a separate entity, but can be discussed only in terms of the social conditions in which it arises and of what it concretely does there.”²⁶ Finally, for Dewey, because his theory of law is decentralized and flexible it can allow for multiple sources for law and, further “the development of quite new organs of law-making.”²⁷

The end of law is, for Dewey, a matter of how and why legal force will be used in society. Dewey refuses to call all force violence because, he claims, force can be utilized in different ways. For instance various uses of force can be described as energy, coercion and/or violence. Law, when properly utilized, can be thought “as describing a method for employing force economically, efficiently, so as to get results with the least waste.”²⁸ Law is not a substitute for force – but institutionalized force. Law should be justified, therefore, not by its “lawfulness,” but by whether or not it is “an effective and economical means of securing specific results.” If it is not effective and economical, then “we are using violence to relieve our immediate impulses and to save ourselves the labor of thought and construction.”²⁹ Power becomes violence “when it defeats or frustrates purpose instead of executing it or realizing it.”³⁰ Dewey realizes this analysis might scare people who admire legal stability and adherence to tradition. But, as he sees it, the analysis doesn’t call for radical changes across the board. For example, experience has shown that it is inefficient for parties to judge their own case, so some type of third part adjudication seems pragmatically warranted. Further, existing legal systems were built up “at a great cost” and constant recourse to other means “would so reduce the efficiency of the machinery that the local gain would easily be more than offset by widespread losses in energy available for other ends.”³¹ Ultimately, though, for Dewey the use of force within a legal system is judged by an external standard. In Dewey’s case the standard is that of a democratic society and the values this entails. This conclusion entails that the legal profession cannot be fully justified by appeals to an internal perspective, but must always be sensitive to the greater goals of society.

²⁶ Dewey, LW 14, p. 117.

²⁷ Dewey, LW 17, p. 102.

²⁸ Dewey, MW 10, p. 212.

²⁹ Dewey, MW 10, p. 214.

³⁰ Dewey, MW 10, p. 246.

³¹ Dewey, MW 10, p. 247.

Finally, Dewey details the area of application. For instance, recall Dewey's critique of natural law. According to Dewey, Spencer's *laissez-faire* theory of human reason is a form of natural law theory and, accordingly, appeals to the natural simply to avoid acknowledgement of alternative possibilities. Dewey outlines the implications of this idea in a series of legal decisions pertaining to ideas of *due diligence* and *undue negligence*, wherein reason is used as the standard, and personal liability rests upon whether the care and prudence exercised was "reasonable." Courts, Dewey notes, often equate the word "reasonable" with "the amount and kind of foresight that, as a matter of fact, are customary among men in like pursuits."³² Further, this use of reasonable is then applied even though the results are undesirable. Dewey would redefine reasonable functionally as the "kind foresight that would, in similar circumstances, conduce to desirable consequences."³³

Dewey also explores the concept of corporate personality used in law and considers the practical function it serves. Dewey finds that the content of "person" in law is attached to a "mass of non-legal considerations," among which are "considerations popular, historical, political, moral, philosophical, metaphysical and, in connection with the latter, theological."³⁴ Dewey argues that instead of following the various meanings resulting from the concept's historical attachments the legal content of "person" should be centered upon the practical results created by adopting the doctrine. Any appeal to a "metaphysical" nature of person is misguided. Instead he offers a pragmatic option – define corporations, and legal persons, by the specific consequences that they bring about, not by any inner or intrinsic essence. The problem is that metaphysical conceptions of personhood, just as metaphysical notions of natural law, function as "rationalizations" to support specific parties in legal struggles. Dewey thus calls for the elimination of "any concept of personality which is other than a restatement that such and such rights and duties, benefits and burdens, accrue and are to be maintained and distributed in such and such ways, and in such and such situations."³⁵ Concepts are to be applied and understood in terms of consequences, and not intrinsic essences.

The nature of how legal reasoning is applied in specific cases is also investigated by Dewey. Logic, for Dewey, "is ultimately an empirical and concrete

³² Dewey, MW 7, p. 59.

³³ Dewey, MW 7, p. 59.

³⁴ Dewey, LW 2, p. 22.

³⁵ Dewey, LW 2, p. 38.

discipline.”³⁶ This conception of logic is contrasted with that dismissed in Holmes’ famous line that “the life of law has been experience and not logic.” Dewey explains that Holmes is attacking a picture of logic based solely upon “formal consistency,” whereas according to Dewey’s conception of experimental logic, “the undoubted facts which Justice Holmes has in mind do not concern logic, but rather certain tendencies of the human creatures who use logic, tendencies which a sound logic will guard against.”³⁷ For Dewey, the formalist picture of logic is dangerous because it distorts the actual reasoning process and gives rise to a unrealistic expectation of certainty. For instance, in the actual activity of legal practice, premises are not just found but “only gradually emerge from analysis of the total situation.”³⁸ Further, the lawyer usually begins with the conclusion that is hoped for, and then analyzes the facts so as to “form” premises. But this is only part of the real story. Courts are also expected to justify their decisions. This is a different type of logic. The judge’s exposition of a decision aims at making the investigatory logic seem clearer, less vague and situational. Dewey argues that this is where formalist legal reasoning comes most clearly into play. Courts are tempted to substitute for the “vital logic” which had been used in the process in order to reach the conclusion, “forms of speech which are rigorous in appearance and which give an illusion of certitude.”³⁹ Such exposition may have the salutary effect of strengthening legal stability and regularity, but the packaging also risks confusing a form of apparent logical rigor with stability of practical results in the world. The implication is that law needs to focus much more upon a “logic *relative to consequences rather than to antecedents*.”⁴⁰ Dewey does not argue that logic is useless, or that there is only the illusion of logical reasoning in law. What is argued is that there are various types of argumentation in law - various types of logic - and that a conflation of the various tasks and tools used creates mistaken expectations and distorted processes.

In the context of a couple of notorious cases of his time Dewey inquires into the ways in which legal process can be misused. Through an analysis of the Fuller advisory committee’s report on the Sacco and Vanzetti case he shows how legalistic reasoning can be misused. Dewey contends that the final report represented the use of “strictly legalistic methods of reasoning” in a

³⁶ Dewey MW 15, p. 68.

³⁷ Dewey, MW 15, p. 69.

³⁸ Dewey MW 15, p. 71.

³⁹ Dewey MW 15, p. 73.

⁴⁰ Dewey MW 15, p. 75.

manner that enabled the committee to avoid the main issue at question. The committee did this by, first, segregating the question of fair trial procedure from that of newly discovered evidence and, second, by splitting the issue of whether the speed to execution had constituted a miscarriage of justice into six separate and isolated questions.⁴¹ Dewey claims that the important question was whether the cumulative impact of various irregularities gave reasonable ground for the possibility of a miscarriage of justice. But, by investigating the six issues in isolation, the commission moved from the conclusion that each by itself was inconclusive to the very different conclusion that all together must be inconclusive as well. This type of argument by divide and conquer allowed the committee to “whittle down the significance of the admitted facts.”⁴² Further, this approach was used in combination with the ability to shift the standards of evaluation throughout, therefore allowing the commission to conclude whatever they wanted. A concrete example was the inconsistency in levels of credibility afforded the various participants. The jury was portrayed as accurate and unbiased. On the other hand, every statement made by the defendants was treated as highly suspicious. Here Dewey shows sensitivity to the way alternate legal procedures, different agenda setting strategies and various levels of evidentiary scrutiny, can profoundly change the outcome.

On the other hand, legal procedure can also have its proper place. Dewey, to show this, analyzes the case of *Kay v. Board of Higher Education of the City of New York (1940)*,⁴³ where Bertrand Russell was found unfit to teach at The College of the City of New York. The evidence the court used was Russell’s writings on ethics, marriage and sex. First, Dewey admits that the passages cited by the court as evidence of moral turpitude are contained in Russell’s writings. “And yet,” he explains, by adopting the same editing method employed by the court he could show that Russell’s opinions were “in substantial harmony” with traditional views on the topics involved.⁴⁴ Dewey further notes that the Court’s opinion is largely an attack upon Russell’s views, which, “by the justice’s own admission,” were outside of his professional jurisdiction.⁴⁵ Here Dewey highlights the virtues of legal process and properly constructed evidence laws and therefore argues that it is important to encourage limits to judicial reach. What this shows is that Dewey is not properly read as a full

⁴¹ Dewey, LW 3, p. 188-189.

⁴² Dewey LW 3, p. 190.

⁴³ 18 N.Y.S.2d 821 (1940)

⁴⁴ Dewey, LW 14, p. 237.

⁴⁵ Dewey, LW 14, p. 243.

“anti-formalist,” or as against procedure or professionalism in law. He clearly accepts the necessity and virtues of institutional rules. What is not accepted, on the other hand, are self-justifying institutional rules untested by empirical and scientific methods. For Dewey law is one of a number of institutions that, at best, helps further democratic society. As such, law is evaluated as a system in terms of its effectiveness towards this goal.

4. Dworkin on Democracy and Law

Dworkin's philosophy of democracy and its relationship to law is in great contrast to Dewey's. If for Dewey law is just one institution within political democracy, which in turn is parasitic upon democratic social habits, it appears fair to say in Dworkin's theory democracy is fully reliant upon law. The issue of democracy is first raised for Dworkin in context of his advocacy of rights as “trumps,” where the individual is expressly protected from the group will, even in the face of policies that are thought to be more beneficial to society as a whole.⁴⁶ This conception of rights creates the problem of antimajoritarianism, that is, the fact that the popular vote can be overturned by an elite tribunal. Dworkin claims that despite the anti democratic appearance of antimajoritarianism, judges and law in general actually have a distinctly foundational role in a democracy. Dworkin's ideal judge, Hercules, does not always defer to legislative acts because he sees himself as the ultimate protector of real democracy. Indeed, this is why constitutional law is so important and central to Dworkin's philosophy of law. For him, a strong “moral reading” of the constitution is “practically indispensable to democracy.”⁴⁷ As opposed to what he calls democracy based upon the majoritarian or statistical premises, where democracy is conceived of as just an aggregation or market device, Dworkin advocates a “communal” or “cooperative” constitutional democracy founded upon the aim of treating all members of the state with “equal concern and respect”, as well as having “inherent value” and “personal responsibility.”⁴⁸ Legal decisions, when made by Hercules, protect the democratic conditions necessary for a properly structured democracy by utilizing these concepts. Judges

⁴⁶ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), p. xi.

⁴⁷ Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996), p. 6.

⁴⁸ Dworkin, *Freedom's Law*, p. 17, see also *Is Democracy Possible Here?* (Princeton: Princeton University Press, 2008) p. 9-11, p. 133.

are, therefore, the supreme “guardian’s of principle.”⁴⁹ For Dworkin, “The American conception of democracy is whatever form of government the Constitution, according to the best interpretation of that document, establishes. So it begs the question to hold that the Constitution should be amended to bring it closer to some supposedly purer form of democracy.”⁵⁰ The Constitution is “America’s moral sail,” and Hercules is the United States’ moral interpreter.⁵¹

What exactly such a communal or cooperative constitutional democracy entails, other than judicial review and a strong moral interpretation of the Constitution, is not made explicit by Dworkin. He allows that there must be structural and relational conditions as well as the assumption of personal moral independence. These conditions include equality and respect conditions. Further, the communal conception of democracy presupposes a type of collective agency. This requires that the whole community can and must see the law as “theirs,” as being properly of “the people.” Though pretty bare in its characterization, this conception of democracy is stated by Dworkin to be more “realistic” than Dewey’s.⁵² Whether or not it is more “realistic,” it clearly conceives of democracy as resting upon a foundation created by legal means, and so relies heavily upon law.

Ronald Dworkin offers his theory of law, “law as integrity” as centered around his ideal judge, Hercules. This imaginary and perfect judge is useful, Dworkin believes, because as an ideal construct he shows us the “hidden structure” of actual judicial decisions. That structure is, when analyzed, a scheme of abstract and concrete principles, which in turn provides a coherent justification for the practice of law in every realm. This, in turn is best conceived of as “law as integrity.” Integrity is a type of principled “coherence” or “consistency” in laws. Such laws are described as the opposite of “checkerboard” laws. Principled decision is thought more desirable, but this is not because checkerboard laws are by definition less fair, indeed in many cases they might bring about better results. “Principle,” though, is the central quality that justifies attachment to law as integrity. Principled legal practice requires a general style of argument that treats democratic community as distinct type of community, a corporate moral agent where people “accept that their fates are

⁴⁹ Dworkin *Freedom’s Law*, p. 31.

⁵⁰ Dworkin, *Freedom’s Law*, p. 75.

⁵¹ Dworkin, *Freedom’s Law*, p. 38.

⁵² Dworkin, *Is Democracy Possible*, p. 150.

linked.”⁵³ This, in turn, gives legal decisions moral legitimacy because principled integrity creates the reason for legal obligation.

According to Dworkin an understanding of law as integrity is properly informed by analogy to the project of writing a “chain novel.” In creating a chain novel, novelists write a novel as a team. After the previous writers have completed the earlier chapters in the order they are to be read, the author in question writes the next chapter so as to make the novel being constructed the best it can be. Each author is to construct the “best” novel through testing upon two dimensions. First, there is “fit.” This conceptual test entails that the next chapter should, as far as possible, “flow” and not leave “unexplained” major aspects of the text as previously constructed (for example it should not ignore already developed major subplots). Second, if after satisfying the fit requirements there are options left over, the author must construct a chapter that is best “all things considered,” or that best “justifies” the previous chapters. Here, though, Dworkin notes that the analogy is not perfect because the novelist uses aesthetic standards, but the judge must use moral principles.

Therefore, Hercules as the ideal practitioner of law as integrity practices constructive interpretation. That is, acting as a judge necessarily requires interpretation and construction of the activity at the deepest and most philosophical level. Indeed, “any judge’s opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of fact.” In fact, philosophy of law is the “silent prologue to any decision at law.”⁵⁴ Hercules therefore knows that only a community based upon law as integrity “can claim the authority of a genuine associative community and can therefore claim moral legitimacy—that its collective decisions are matters of obligation and not bare power—in the name of fraternity.”⁵⁵ Indeed, as Dworkin puts it, when Hercules “intervenes in the process of government to declare some statute or other act of government unconstitutional, he does this in service of his most conscientious judgment about what democracy really is and what the Constitution, parent and guardian of democracy, really means.”⁵⁶

⁵³ Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), p. 187-188, 211.

⁵⁴ Dworkin, *Law's Empire*, p. 90.

⁵⁵ Dworkin, *Law's Empire*, p. 214.

⁵⁶ Dworkin, *Law's Empire*, p. 399.

5. *Posner on Democracy and Law*

While Dworkin places law in a central position and highlights moral principle, Richard Posner sees law and democracy largely in terms of limits to the market economy. Posner begins by theoretically dividing all democratic theory into two types: *concept 1 democracy*, an aspirational, utopian or deliberative democracy, modeled upon a faculty workshop; and *concept 2 democracy* which is “realistic, cynical, and bottom-up,” a democracy based upon the aim of satisfying private interests, and founded upon economic competition.⁵⁷ Posner advocates for concept 2 democracy because he argues that it is constructed upon an “unillusioned conception of the character, motives, and competence of the participants in the governmental process.”⁵⁸ Within concept 2 democracy the private realm of the market is to be left alone as far as possible, and government’s limited function is to structure those areas where the price system is seen to be in need of small corrections. Concept 2 democracy sees the democratic process as a competitive power struggle of a political elite for the votes of the masses. This “realistic” democratic and pragmatic liberalism emphasizes “the institutional and material constraints on decision making by officials in a democracy.”⁵⁹ Ultimately, our “pragmatically successful democracy” is successful because it “enables the adult population, at very little cost in time, money, or distraction from private pursuits commercial or otherwise, to punish at least fragrant mistakes and misfeasances of officialdom, to assure an orderly succession of at least minimally competent officials, to generate feedback to the official concerning the consequences of their policies, to prevent officials from (or punish them for) entirely ignoring the interests of the governed, and to prevent serious misalignments between government action and public opinion.”⁶⁰ Under this conception democracy largely functions as a means of protecting the private sphere and enabling the public to create laws to curb the external costs of other people’s behavior. This type of democracy is “nonparticipatory,” because “the benefit of voting to the individual is negligible.”⁶¹

⁵⁷ Richard Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003), p. 188.

⁵⁸ Posner, *Law, Pragmatism*, p. 385.

⁵⁹ Posner, *Law, Pragmatism*, p. ix.

⁶⁰ Posner, *Law, Pragmatism*, p. 182.

⁶¹ Richard Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995), p. 26, see also Posner’s *Economic Analysis of Law* (New York: Aspen Law & Business), p. 773-774.

So, for Posner, democracy is not a way of social life, rather it is a particular manner of limited government parasitic upon commercial life. And here “Not only do philosophical, theological, and even scientific theories have little direct relevance to commercial life; they impede it, by drawing resources and attention away from the market and by stirring conflict and animosity.”⁶² Indeed, too much deliberation is seen as a recipe for social unrest. At the end of the day, “Commercial activity and private life are not only more productive of wealth and happiness than the political life; they are also more peaceable, which in turn reinforces their positive effect on wealth and happiness.”⁶³

Where Posner does seem to agree with Dworkin is that the question of what law is centers around the judge. The main issue in law is how an admittedly oligarchic judiciary fits in to the implementation of governmental aims. First, Posner believes that “pragmatism is the best description of the American judicial ethos, “in the sense that judges show a mood or disposition to look to facts and consequences before “conceptualisms, generalities, pieties, and slogans.”⁶⁴ The pragmatist judge is a forward-looking antitraditionalist who uses past cases as information, not as a source of duty to be followed. Most important is that pragmatic judge doesn't believe legal formalism is a viable option. “Principle” is not determinative, so the pragmatic judge will need to be better empirically informed than judges traditionally feel necessary. Of course all of this is in service of a picture of society bifurcated into a private realm of market transactions (the “price system”) and a limited public realm where government, and therefore law, is called for when adjustments are needed due to various types of market failure. This leads to the second major part of Posner's theory (and what he is most famous for); the law and economics theory that judges should make decisions that either further the functioning of markets or, if this is not directly possible, decide in a manner that “mimics” the market. Democracy itself is seen as only a useful means towards a better functioning “private” market.

6. Dworks, Poses and Dews Decide Citizens United

In order to see what the theories of Dewey, Dworkin and Posner entail for legal decision making with a democratic framework I will analyze them in rela-

⁶² Posner, *Law, Pragmatism*, p. 31.

⁶³ Posner, *Law, Pragmatism*, p. 173.

⁶⁴ Posner, *Law, Pragmatism*, p. 3, 26.

tion to the results of a recent US Supreme Court case; *Citizens United v. FEC*, 558 U.S. ____ (2010).⁶⁵ In this section I will first outline the arguments in the case, and then look at how judges following Dewey, Dworkin and Posner would handle the issues. For this, I will imagine judges characterized as “Dews,” “Dworks” and “Poses” deciding the issues in *Citizens United*.

The question before the Court was whether or not a corporation or union could be prohibited from using the company’s general treasury funds for the express advocacy of the election or defeat of a candidate near the actual election. Congress had banned such direct corporate advocacy but allowed a corporation to create a separate political action committee (PAC), if it wanted to fund such messages. The regulation in question, the Bipartisan Campaign Reform Act of 2002 (BCRA), was passed ostensibly in response to the fear that the economic power of corporate entities in the US could both distort elections and create the appearance of corruption in government. An earlier case, *Austin*,⁶⁶ had accepted the antidistortion interest in relationship to corporate speech not only for the above reasons, but also because under U.S. law corporations, as “artificial persons” (as opposed to natural persons), get special privileges such as limited liability and perpetual life. In other words, *Austin* accepted the premise that it might sometimes be necessary and proper under the First Amendment to regulate corporate speech in service of a better functioning democracy.

The *Citizens United* majority opinion ultimately held that “restrictions distinguishing between different speakers” are flatly prohibited due to both the “history” and the “logic” of the First Amendment.⁶⁷ Chief Justice Roberts’ concurrence put it this way - that because the “text and purpose” of the First Amendment point the “same direction” it necessarily follows that “Congress may not prohibit political speech, even if the speaker is a corporation or union.”⁶⁸ They also found that there was no historical evidence for the allowance of a distinction between speakers under the First Amendment (Scalia’s concurrence is most insistent upon this point). In fact, they claimed that such regulation is a significant departure from “ancient” First Amendment principles.

⁶⁵ *Citizens United* is available as a slip opinion but does not have final pagination. I will refer to each section by the main author’s last name and then page number. All references are to page numbers from the opinion as available from the Supreme Court’s web cite: www.supremecourtus.gov/opinions/09pdf/08-205.pdf

⁶⁶ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

⁶⁷ Kennedy, *Citizens*, p. 24-25.

⁶⁸ Roberts, *Citizens*, p. 5.

Further, the Court stated, “we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”⁶⁹ The Court also found that the regulation created an ongoing chill of core political speech and interfered with the “open marketplace” of ideas, and therefore overruled the part of the BCRA that disallowed the use of corporate treasury funds for direct political advocacy for or against candidates and, further, overruled *Austin*. Ultimately, the decision announced the broad rule that “The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of political speech.”⁷⁰

A dissent written by Justice Stevens argued that the majority’s analysis was suspect on multiple grounds. First, Stevens noted that the majority had to go well beyond what the parties had claimed in their briefs or supported in the record. By doing this they not only ignored judicial values of only deciding real cases and controversies, but also made a decision uninformed by a fully developed record (indeed any real record at all). Stevens thought this especially worrisome because actual evidence is necessary to verify a real chill in speech as well as to not impede further “legislative experiments” aimed at constructing “democratic integrity.”⁷¹ Second, the dissent claimed (correctly) that the majority ignored precedent and cobbled together an opinion that mostly cited the earlier dissents of the various members of the new majority. Third, Stevens claimed that the distinction between the speech of natural persons and artificial persons such as corporations is significant, because corporations are not actual members of society or citizens of “We the People,” and cannot vote or run for office. Of course corporations can be owned or managed by nonresidents, and due to favorable government legislation, can also represent great concentration of economic power. In addition, Stevens noted, it is unclear who is speaking when a corporation spends money on political communications. Presumably not the customers, shareholders or the workers; and the officers and directors are legally obligated to not use corporate money for personal interests. Because of this position of the corporation in law, Stevens argues that corporate speech should be seen as “derivative speech, speech by proxy.”⁷² Further, without the limits legislated by the BCRA there may be an “escalating arms race” of corporate spending in elections. This escalation could ulti-

⁶⁹ Kennedy, *Citizens*, p. 42.

⁷⁰ Kennedy, *Citizens*, p. 49.

⁷¹ Stevens, *Citizens*, p. 56, 59-60.

⁷² Stevens, *Citizens*, p. 77.

mately act like an “election tax” because corporations will need to spend in order to be favored or avoid retaliation after an election.⁷³ Stevens also notes that only in a world of infinite time populated by creatures with perfect rationality would the assumption of the majority that more speech is always better speech make any sense. In the real world some speech can crowd out other speech both physically and cognitively. Fourth, the dissent argues that it is perfectly consistent with the history of American law to regulate corporations in relationship to political speech because the corporation in earlier American law had been a suspect form of association, and since the Tillman Act of 1907 (which banned all corporate contributions to candidates) regulation of campaign speech in relationship to corporations has been accepted. Finally, Stevens noted that the case at hand “sheds a revelatory light on the assumption of some that an impartial judge’s application of an originalist methodology is likely to yield more determinant answers, or to play a more decisive role in the decisional process, than his or her views about sound policy (39).”

It is clear that the issues in *Citizens United* created a strongly polarized Court. So how would *Citizens United* be decided under the legal theories discussed in this paper? First, Dworks, in order to decide *Citizens United*, start by imagining themselves as Hercules, the guardian of the Constitution. Of course, the Constitution is seen by Dworks as the ultimate “parent and guardian of democracy.” Further, there is no recourse to conceptions of democracy outside of the Constitution because whatever the Constitution is in relationship to Hercules’ best interpretation is what the word democracy means to a Dwork. To come up with this best interpretation, a Dwork must identify with the idea of integrity conceived along the lines offered by the image of the chain novel. Through principled and non-checkerboard reading of the law, Dworks construct a picture of “law as integrity” and see themselves as the ultimate moral readers deciding upon the proper foundations of communal or cooperative democracy.

Dworks would certainly identify with the appeals to principle made by Kennedy in the majority opinion. Further, the appeal to ancient ideas and the need for fit between precedents would be lauded. The majority members of the *Citizens United* Court certainly see themselves as being the final word upon the Constitution and how it structures the domain of U.S. democracy. Dworks probably would also agree that treating corporate speech differently than that

⁷³ Stevens, *Citizens*, p. 78.

of a natural person's speech seems too checkerboard to be principled.⁷⁴ As opposed to Scalia and Roberts, though, Dworks would be embarrassed to make statements as to the obviousness of the text and purpose of the First Amendment or pretend to read a literal categorical prohibition from one simple sentence. This would look to a Dwork judge to be either an ignorance of the underlying interpretive assumptions determining the judge's own opinion or a bad-faith attempt to disguise a policy decision under false literalism. This is, of course, because for Dworks all judicial decision making is interpretive and therefore even the clearest language is subject to various interpretations (Dworks further accept the right answer thesis that one of these interpretations will be best all things considered). Dworks would probably not agree with the dissent's claim that the majority in *Citizen's United* overreached, because practitioners of law as integrity do not value judicial restraint or humility as highly as they do the integrity of the whole system, especially because Dworks are self consciously the ultimate moral protectors of Constitutional and, therefore, democratic values. Further, the dissent's talk of the need for a more developed record of the facts and the need to allow for legislative experiments in democratic integrity seems to a Dwork to misunderstand the judge's role, which is that of guardian of principle, (a role which is not dependent upon the knowledge of specific facts.) Therefore, all the talk of policy, such as the worry that the decision might create an arms race of corporate spending, is difficult to reach within a purely moral and principled decision. Given these considerations, it seems likely that a Dwork (though, not necessarily Dworkin) would side with the majority.

Poses, of course, think that Dworks have an insufferably high opinion of themselves and their abilities to come to principled decisions based upon moral reasoning.⁷⁵ As opposed to seeing judges as central to law and as a foundational force protecting society's formal ground rules, Poses see themselves as peripheral to the main business of society, which is business. The price system and the market encompass the main system of allocation within society and

⁷⁴ Though Dworkin himself is of the opposite opinion and strenuously sides with the dissent. I side with the dissent as well, but I am not so sure that Dworks could really get there following the model of Hercules. Even if Hercules can get to the same decision it seems highly unlikely that the same decision would be guaranteed. This is a recurrent problem with Dworkin's work - he has a conclusion about a specific law, and he has his law as integrity, but the road from the one to the other is obscure and often left completely undeveloped.

⁷⁵ See Richard Posner, *The Problematics of Moral and Legal Theory* (Cambridge: Harvard University Press, 1999), p.7.

politics serves, at best, to temper rent seeking activities and correct market failures. Government does this by structuring clear laws and having periodic democratic elections in order to keep the most egregious failures of the market and various rent seeking activities under check. Economic elites contest for the public's votes and through this process get to pursue their own interests to an extent limited by the proximity of the next election. Poses see this description of liberal democratic society as realistic and unillusioned. They see themselves as "pragmatic" in relationship to this system of "elite" democracy and therefore judge so as to further the virtues of the private market and the limited and limiting factors of representative democracy. This pragmatism is more a tough-minded "mood" than a philosophy, but it does entail that the judge must look not just to moral principle but also more directly to policy and empirical fact.

Given this, Poses would have a difficult time with the majority opinion. Poses look at the talk of principle as so much window dressing for underlying policy preferences. In this sense Poses agree with Stevens that the majority's opinion in *Citizens United* is good evidence for the ultimate indeterminacy of appeals to originalist methodology. On the other hand, Poses will appreciate the majority's talk of a First Amendment "marketplace of ideas." Of course, the majority opinion utilizes the marketplace of ideas slogan, but does not pursue the implications of such a conception of speech. Poses, though, as practitioners of law and economics, are attuned to how markets might fail. Therefore Poses will agree with Stevens in the dissent when he states that sometimes Congress or the Court might actually enhance the functioning of a speech market by restructuring specific entitlements. The economic power of corporations might actually distort the speech market through distortion of the political vote "price system." More plausibly perhaps, because of the ability of political office to enhance rent seeking effectiveness, not limiting corporate electioneering speech might very well create an "arms race" of corporate spending, if only because of the possibility of political retaliation for not spending. On the other hand, Poses are not attached to the importance of rigorous democratic debate so therefore they are more interested in furthering the vigor of market transactions than in the foundations of a deliberative, cooperative and principled democratic vision. Ultimately, for Poses the decision would rest upon whether or not the BCRA furthers the proper functioning of the market. Because in this case what this entails is ambiguous, and because the Constitution is interpreted along a forward-looking fallibilist line, Poses probably would have not reached outside of the given issues that had been plead and in-

stead would have allowed for incremental regulations aimed at curbing potential failures of the speech market. On the other hand, because the Poses' representative democracy is modeled upon the idea of a voting market, it might be the case that corporate funding of speech could make the vote market more efficient. In light of this ambiguity, a Pose would not display the "principled" assurance of the *Citizens United* majority and would allow for flexibility in corporate speech regulation.

Dews are quite different than both Dworks and Poses. As opposed to Dworks, Dews think that appeals to principle, like that of appeals to natural law, might often support good causes, but could also support causes much less just. The problem is that "principle" is a quite vague term with multiple possible conceptualizations. Further, Dews are very skeptical of appeals to principle if such appeals are mostly retrospective because this ignores the real important constructive and active aspect of actual legal inquiry. Further, instead of seeing themselves as the ultimate moral guardians of the Constitution and the necessary structural conditions of democracy, Dews think such a picture is a type of naïve institutional fundamentalism.⁷⁶ For a Dew, society has to have a democratic set of habits for a democratic government to be possible, not vice versa. Further, to believe the latter is to put a quasi-religious worship of text or institution in place of careful empirical inquiry. In addition, not only do Dews think that society must have some democratic habits in order to create a democratic political realm, but law, at its best, is for them just one of a number of institutions both political and social that can further democracy. Law is not the ultimate and foundational rule creator or protector of democracy. Instead, social democracy creates the grounding for a political realm wherein law serves a limited role in public administration. Further, the Constitution is a document that must be constructed in practice, it is best seen as a blueprint for experiments, not a tether to the past.

As for Poses, Dews see them as false pragmatists much too attached to an *a priori* and non-experimental conception of what is humanly possible combined with dogmatic acceptance of free market ideas. Dews are more humble than Poses in their claims to knowledge of human nature and the relative virtues of disparate social coordination and arrangement strategies. They also are wary of reducing the complexities of human society down to a private realm of market transactions and a public sphere of elite liberal democracy. Certainly they will wonder whether or not the open marketplace of ideas is an apt image

⁷⁶ See Amartya Sen, *The Idea of Justice* (Cambridge: Harvard University Press, 2009), p. 5-6 for an analysis of this concept.

to account for the complexities of political speech. At the same time, Dews are open to a more ambitious and flexible conception of political aims and arrangements because without fixed assumptions as to what is possible, experiments in governance are encouraged.

As can be inferred from the above, Dews will have a difficult time with the majority opinion in *Citizen's United*. First, they will see talk of principle and constitutional requirements as either an unproductive and indeterminate appeal to a duty to the past or, just as worrisome, as a quest for logical certainty that gets in the way of facing the complexity of political reality. This will also be true of any appeals to plain readings.⁷⁷ Second, Dews would see the conflation of natural persons and artificial persons under the general category of "speakers" as a confusion caused by an analogical and historically accidental use of the word "person" to help reason out earlier corporate cases. In other words, the majority fell into bad metaphysics through the (unconscious?) assumption that using the same word entails meaning much the same thing. What should be emphasized instead are the actual ends in view. For Dews, corporations are functional social institutions (as is law) that are politically and legally engineered to bring about the best possible social results with the least amount of waste. Therefore, they should be seen as subject to re-engineering, including the creation of new limits, if changes can plausibly be thought to bring about more desirable social consequences for natural persons. More strikingly, Dews would find a Court holding that certain social practices do not give rise to the appearance of corruption without any empirical data to be an example of extreme conceptual hubris. Maybe not real corruption, but certainly the appearance of corruption is a matter of public perception and not something the Court can in any manner decide through judicial fiat. Of course Dews accept that there is no *a priori* guarantee that different corporate laws will actually enhance the effectiveness of election speech, but just because of this they will decide each case in a manner that reserves as many options for the other branches to socially experiment with as possible. Because of this, Dews would find the majority decision tragically wrongheaded. Dews will not

⁷⁷ Just like Stevens they will have no difficulty using the same style of reasoning to show how easy it is to refute a claim like Scalia's that the First Amendment makes no distinction between speakers. All that needs to be noted is that after referencing speech, the clause also separately references the press. This either distinguishes between types of speakers or pushes towards a narrow reading of speech more attuned to what would happen in a town hall meeting and less like monetary support. Either way, Scalia's literalism is blatantly selective and not fully literal either.

ignore the need for strong side constraints to certain types of state regulation, but will aim to not prematurely rule out plausible options.

Dews have much more in common with the reasons offered by the dissent. Stevens emphasizes the need for facts and data, talks of legislative experiments, and seems quite wary of looking at the Supreme Court as the ultimate and properly inflexible word on the Constitution. More specifically, Dews find it more than plausible to see a strong distinction between the speech of natural persons and artificial persons (especially when boats are included in the category of artificial person). It is also plausible to see corporate speech as derivative speech as well as speech by proxy. Dews, of course, will test all options by looking to results. In this sense the decision will be largely determined by forward-looking aims and goals and not ancient ideals. Precedent, for Dews (as for Poses), functions as important data, and as important determinants of social expectations. But precedent does not carry the moral weight that Dworks or the members of the majority opinion hold it to have. Further, Dews will find economic reasoning important to utilize as a tools of analysis all the while being sensitive to the virtues and limits inherent in such reductionist systems. Dews are pluralists and therefore expect multiple values to be present and important to weight in just about any but the easiest case; indeed, it is plausible to think that the clash of values is why there is a case or controversy to begin with. (In this sense Dews have more in common with Dworks than Poses who seem to think that all values can be mapped on to one metric.) Finally, Dews are not nearly as comfortable in placing the judge in the center of attention as are Dworks and Poses. Further, Dews are cognizant of the shifting issues that create the need for various publics, and are suspicious of any conception of "Law" supposedly able to structure a solution to every need, or to any need in a once-and-for-all fashion. Dews therefore defer to more empirically effective and sensitive branches of government unless they have overwhelming reasons. Therefore, in the case of *Citizens United*, Dews would most certainly defer to Congress.

7. Conclusion

Of the above theories, Ronald Dworkin's clearly puts the most pressure upon law in relationship to democracy. Constitutional law sets the game plan within which democracy functions and Dworkin's judge has to set that structure solely through recourse to principle. In an empirically simple world, or, con-

versely, a world of moral reasoning that was largely uncontroversial this might be plausible. In a highly complex modern world like ours, though, the idea that judges on high could understand all that needs to be understood, and structure it solely in terms of principle, seems doubtful. Richard Posner's theory, on the other hand, relegates law to the position of minor player. Of course his theory also relegates democracy to a marginal position as well. In fact, if the market worked perfectly, it appears that Posner would be happy to see democracy disappear. Ultimately Posner's legal theory is too numb to values outside of the market system. This conception of society, of democracy and of law is not one that will commend itself to most people who place themselves in the role of citizen, judge or politician. Indeed, what Posner's theory gains in clarity and "tough-mindedness" it more than loses in its reductivist picture of society and its inability to appreciate the plural values people actually embrace. Finally, John Dewey's theory offers a bottom-up, pluralist and experimental conception of democracy and law. It certainly does not offer the priest-like certainty of Dworkin's system, or the tough-minded clarity of Posner's. On the other hand, it does offer flexibility and pushes for judicial humility. In light of a decision such as *Citizens United*, Dewey's theory seems to offer a more attractive alternative (subject to further testing, of course). In a complex world where technological changes and conflicting needs and values are the norm, a flexible and experimental description of democracy such as Dewey's seems proper. If this is correct, Dewey's philosophy of law, one that follows directly from his conception of democracy, is more conducive to the creation of a legal system that furthers democratic society than either Dworkin's or Posner's.