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Coherence or Bust: Telling Tales about Election Law

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Historians sometimes like to divide themselves into two camps: “lumpers” and “splitters.” Splitters, according to one account, “like to point out divergences, to perceive differences, to draw distinctions[,]” and “do not mind untidiness and accident.”¹ Lumpers, in contrast, “do not like accidents. . . . Instead of noting differences, lumpers note likenesses; instead of separateness, connection.”² Judging from the four responses to my Commentary, the distinction between lumpers and splitters in history finds a clear counterpart in legal academic writing. This should come as no surprise: lumping and splitting are standard techniques in the repertoire of lawyers. Plaintiffs, for example, are typically lumpers because they often must convince a court that their cases are functionally identical to prior ones, and thus governed directly by well-established legal principles. Defendants, in contrast, tend to be splitters, arguing frequently that the facts of the present case are distinguishable from those to which, under previous cases, the legal rules relied on by the plaintiff apply.

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¹ J.H. HEXTER, ON HISTORIANS 242 (1979).

² *Id.*

I cheerfully confess to being a compulsive legal lumpers³—as if this were not obvious from my Commentary,⁴ in which I argued that the Supreme Court's direction in election law cases can be explained to some degree by its misguided embrace of an underlying norm of radical democracy. Professors Neuborne,⁵ Paul,⁶ Persily⁷ and Pildes,⁸ sensing a lumping, have all (there I go, lumping again) responded to some extent with the classic splitter's retort of criticizing the fit between my analytic categories and the evidence. They thus argue that the cases I rely on do not illustrate a judicial embrace of radical democracy,⁹ fail to support a meaningful distinction between radical egalitarianism and radical democracy,¹⁰ cannot meaningfully be distinguished on the basis of whether they exclude people from politics or regulate their behavior in politics,¹¹ and even fail to demonstrate that the Court has construed the Constitution to place significant limits on state power to regulate political processes.¹²

To a lumpers, critique of this sort is not worrisome in the slightest—it comes with the territory. Of course a lumpers might always respond to such criticism by tidying up the original lumpings in light of the attempted splittings, but I shall rest content here to leave it to the reader to decide whether my interpretive account of the Court's direction is persuasive in light of these criticisms. For present purposes, I am much more interested in what follows from the splitting, assuming it is successful. We lumpers have a hard time believing that splitting ever is just that and nothing more; we are inclined, on the contrary, to suspect that splitting is usually just a prelude to the assertion of a different lumping that purports better to describe the relevant data. Consequently, I shall focus here on what the responders would offer to replace my account if it is, as they argue, inadequate.

Professors Neuborne and Persily argue mainly that the Supreme Court's election law jurisprudence is simply incoherent. For Neuborne, the Court's jurisprudence does not yield to any conceptually meaningful analy-

³ In fact, I have already lumped once in this reply, in the preceding paragraph, by claiming that the historian's distinction between lumpers and splitters applies to legal academics as well.

⁴ James A. Gardner, *Forcing States to Be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 CONN. L. REV. 1467 (2003).

⁵ Burt Neuborne, *Response to Professor Gardner: Is There a Theory in this Class?*, 35 CONN. L. REV. 1519 (2003).

⁶ Jeremy Paul, *Free States or Red States: The Supreme Court's Role in Recent Election Law Disputes*, 35 CONN. L. REV. 1535 (2003).

⁷ Nathaniel Persily, *The Search for Comprehensive Descriptions and Prescriptions in Election Law*, 35 CONN. L. REV. 1509 (2003).

⁸ Richard H. Pildes, *Formalism and Functionalism in the Constitutional Law of Politics*, 35 CONN. L. REV. 1525 (2003).

⁹ Neuborne, *supra* note 5, at 1520-21; Pildes, *supra* note 8, at 1528.

¹⁰ Neuborne, *supra* note 5, at 1522-23; Pildes, *supra* note 8, at 1531.

¹¹ Neuborne, *supra* note 5, at 1522-23; Paul, *supra* note 6, at 1537-38.

¹² Neuborne, *supra* note 5, at 1520-21; Persily, *supra* note 7, at 1510-11.

sis;¹³ for Persily, even attempting such an analysis might be to “expect too much . . . for such a diverse group of cases.”¹⁴ This is a contention to which no response on the merits is possible, for it rests either on a meta-assumption about the narrative limitations of law, or on a different narrative explanation that remains unstated. Although it will not satisfy them, I can respond to Professors Neuborne and Persily only by invoking the lumpner’s foundational belief that there is no incoherence so profound as to utterly resist narrative accounting. Perhaps sensing this, Persily gestures toward a possible cross-cutting principle—how aggressively federal courts should enforce rules governing elections¹⁵—but he wonders whether a distinct principle of judicial intervention in the electoral context is either desirable or possible. To this extent, his position is subsumed by that of Professor Pildes, so I shall deal with it in that context.

As I have suggested, what worries a lumpner is not the inevitable splitting, but a better lumping. Pildes offers a much stronger alternative lumping principle than Neuborne or Persily: for him, the confusing state of the Court’s election law jurisprudence can best be explained by its formalistic approach in such cases. By formalism, Pildes means that the Court takes “general” principles of constitutional law developed in contexts other than the regulation of politics, and inappropriately applies them, without modification, in the political setting.¹⁶ This is a potentially appealing account, since it appears to explain the charge of incoherence leveled by Neuborne and Persily.

What, to begin with, is “formalism”? The term is often used in such widely disparate ways that, as one commentator has observed, “it [is] tempting to conclude that ‘formalist’ is the adjective used to describe any judicial decision, style of legal thinking, or legal theory with which the user of the term disagrees.”¹⁷ But that would be unfair, and Pildes provides ample contextual evidence of what he means. “Formalist” is of course a term of disapprobation, and Pildes clearly expresses disapproval when he argues that the Court should not apply doctrines developed in one setting to other settings that are materially different. Yet “formalist” usually implies something more than merely “inappropriate” or “wrong.” There are different ways of being wrong, and being wrong on account of formalism is clearly worse than being wrong for having made some other kinds of mistakes. What makes an error “formalist,” at least as Pildes seems to use the term, is that it results from a kind of thoughtlessness or rigidity. To misap-

¹³ Neuborne, *supra* note 5, at 1520.

¹⁴ Persily, *supra* note 7, at 1515.

¹⁵ *Id.* at 1513-15.

¹⁶ Pildes, *supra* note 8, at 1528.

¹⁷ Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 510 (1988).

ply legal principles outside their appropriate setting is formalistic because it is done reflexively, out of habit, without adequate attention to the propriety of using the habitual approach in the new setting.

On this definition of "formalism," however, I think the phenomenon Pildes describes supports, and certainly does not conflict with, my contention that the Court has embraced a form of radical democracy. According to Pildes, the fundamental error of the Court's election law jurisprudence is its application of constitutional doctrines developed for the "domain" of "civil society" to government regulation of democracy.¹⁸ In civil society, Pildes argues, constitutional rules are framed in a setting of privately ordered, and thus largely unconstrained, pluralism. In the domain of democracy, he claims, things are different: electoral politics is necessarily constrained and structured by law in ways that "would not be permissible in other arenas."¹⁹

But in making this insightful observation, I think Pildes is merely describing in different language the same phenomenon that I have described as a judicial preference for radical democracy as a political system. Civil society is, as Pildes claims, properly characterized as a realm in which individual actors should be as free as possible to determine their ends and to pursue them by the widest possible variety of means. Yet by applying rules developed in the civil society setting to the realm of politics, the Court is taking a position—it is denying that there is any meaningful difference between the two domains; it is saying that individuals acting in the political sphere should presumptively be free to determine how they will pursue their political ends, just as they are in civil society when pursuing private ends. That amounts to a political theory, albeit a misguided one, and I don't see much difference between that formulation and saying that the Court expresses a preference in recent cases for radical democracy, which I define as the belief that "popular control . . . over political outcomes should be (1) universal, and (2) complete."²⁰

In fact, the main difference between our accounts of the Court's position is Pildes's characterization of it as formalist, in the sense of thoughtless. I am not so sure. The Court certainly has not bothered to justify its treatment of the two domains as demanding identical constitutional rules, but a lack of explanation is not the same as thoughtlessness. Clearly, Pildes would be equally vexed if the Court attempted an elaborate justification of an analogy that, in his view (and mine), is simply false. In addition, I am reluctant to attribute the Court's position to mere inattentiveness, not

¹⁸ Pildes, *supra* note 8, at 1528-30.

¹⁹ *Id.* at 1531.

²⁰ Gardner, *supra* note 4, at 1474.

only because, as I have said, lumpers do not think mere incoherence is usually a very good explanation of legal phenomena, but also for the more important reasons raised by Professor Paul.

Paul argues, mainly on the basis of *Bush v. Gore*, but also more generally from the pattern of Rehnquist Court decisions in other areas, that the real determinant of the Court's election law jurisprudence is ideological: a conservative Court is simply issuing decisions that assure that the political arena remains as friendly as possible to ideological conservatives and their political organizations, candidates, and supporters.²¹ I must confess that I find this possibility difficult to dismiss. It is, however, entirely consistent with my description of the Court as pursuing an agenda of radical democracy: the Court may simply at some level suspect, probably accurately, that the elimination of most regulatory constraints on the behavior of political actors will tend to favor ideological conservatives. As Paul points out, this is undoubtedly true when it comes to the limitless expenditure of money in the political arena, and it is probably also true when legislatures are unconstrained, since the same forces that buy political influence in an unconstrained electoral arena also seem to buy similar influence in a minimally constrained legislative arena.²²

To the extent that Paul's formulation makes me at all uncomfortable, my discomfort is rooted in the standard objections to realist explanations of judicial behavior. First, such explanations tend to prove too much. Everyone has ideological beliefs, and every judicial outcome can be characterized in ideological terms, but it does not follow that the former causes the latter; sometimes conservative judges reach a conservative result because it is right rather than because it is conservative. Second, realist explanations do not accord well with the internal experience of judging. Most actors in the legal system feel themselves to be significantly constrained by the law, a constraint that judges often experience as a bar to following their ideological predispositions. Nevertheless, with those limitations in mind, I think Paul and I are at bottom using different language to describe essentially the same phenomenon.

In the end, then, it seems to me that the differences between my account and the accounts of Professors Pildes and Paul are relatively minor. But then, as I said at the outset, I am a lumper, so should anyone be surprised?

²¹ Paul, *supra* note 5, at 1539-44.

²² *Id.* at 1540.

