

CONSTITUTIONAL DEMOCRACY AND SCHOLARLY FASHIONS

SYMPOSIUM DISCUSSION: SCHOR

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DRAKE UNIVERSITY LAW SCHOOL

Jack Balkin: What is the prescriptive thesis? And is this prescriptive thesis an alteration of the rules of free expression?

Miguel Schor: No, I didn't make that argument. The point is that the problem is not political. It is deeply societal, and it's the very process of engagement with that amendment that can enable that kind of discussion.

Audience Member: Do you feel that as much as there is a problem on a constitutional level, is there a failure of electorates in democracies across the world by not doing what they can to regulate the governments that they elect?

Schor: The problem is, in terms of voters, that they were not as informed as they could be about that. I think one of the things to be most worried about is that we don't think of the news as a kind of public good. It's not being produced right now, and if we can't even begin to agree on some really basic facts, we simply don't have a functional government. For all of the promise of new technologies, it has not replaced what these newspapers once gave us.

Sanford Levinson: One of Frank's colleagues at Antonin Scalia, formerly George Mason, is Ilya Somin, someone who, in fact, has been here at one of these symposiums. Ilya has written a very interesting book on basically rational ignorance, which is the idea that the larger the society, the less incentive any individual citizen has to become well-informed. This also represents a triumph of economics as a way of looking at the world, as against the kind of civic-republican notion that you ought to be a well-informed citizen, regardless of whether you're getting a constant payoff from your investment of time and energy. The more you adopt the economist's one way of thinking, the more you realize it's a kind of silly expenditure of your time and energy, which I think is a fundamental problem with any modern political system. One thing that Frank talks about in his forthcoming book on secession is that the United States is just too large to function as a single country. We have too many people, too many views, and if you combine that with Ilya's kind of argument, then you will end up getting the kind of elites that Leah is talking about that do have incentives to participate. Iowa is really interesting in that respect. How many of you really make efforts to meet all of the candidates who are here day and night during campaign season, and how many of you shrug your shoulders and say you've got better things to do?

Schor: In my mind, that was the whole point of setting up a republic. But to my mind, that is the key to making a republic work. If citizens do not get more engaged, then corruption is what you get, and that's where we are right now.

Franita Tolson: Let me push back for just a second on the idea that we're so different. There was a great *Saturday Night Live* skit with Tom Hanks, and he's on "Black Jeopardy." He's answering questions just like the two black cast members, and they have very similar world views. The reason it's so powerful is that at the end of the skit, they get to a question about Black Lives Matter. That's when Tom gets tripped up, and the skit goes off because it shows that race is an issue that really divides us in many ways. I do think the skit tells an important story about what we have in common. When people make arguments about the fact that we're too big and there's too many of us, I wonder if that's true and if it keeps us from really having a country that we want to live in because we do have a lot in common. When Frank ended his presentation, he said, "Why would you want to live in a country where you think half of the population is deplorable?" My response to that would be because this is a suicide pact. After the Civil War, I'm not willing to do the whole 750,000 people dying again. We are in this together. So that is why I want to live in a country with people I fundamentally disagree with, and I say even if I disagree with them, that does not mean they don't have the space to articulate their views. I resist this notion that we're so different that we can't find common ground in order to build a country that we want to live in.