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John Roos

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## FOREWORD: VOICE IN GOVERNMENT

JOHN ROOS\*

This issue of the *Notre Dame Journal of Law, Ethics & Public Policy* is devoted to the question of "Voice in Government." This issue addresses, at the most fundamental level, a general sense among the American people that they are not being listened to and that their voice does not count in the halls of power. The five lead articles present a fully interdisciplinary approach, ranging from citizen activists to political scientists to law professors.

Professor Emily Calhoun of the University of Colorado Law School, in her article entitled "First Amendment, Petitioning and Colorado's Amendment Two," presents an interesting and provocative look at the often overlooked "Petition Clause" of the First Amendment. Professor Calhoun argues that the Petition Clause, while protecting "mere" speech which may have an adversarial aim, also protects a voice, and hence a set of interests, that are distinct from and irreducible to the speech interests in the Speech Clause. Calhoun argues that in addition to the ends served by adversarial speech, the Constitution points towards another set of ends served by the Petition Clause. She characterizes these ends as transactional interests or "a voice of the people for the common good." Calhoun makes good use of political scientist Jane Mansbridge's book, *Beyond Adversary Democracy*, which argues that our democratic polity stands in need of not only adversarial but also unitary democratic forms and practices.

After reviewing the small case law on petition cases, and the conditions under which it has been recognized and limited, Calhoun presents an extended analysis of Colorado's current Amendment 2 controversy. She argues that the ban on local ordinances providing relief for victims of discrimination on grounds of homosexual orientation not only violates a speech interest but also "affects transactional as well as speech interests."

Marty Jezer of the Working Group for Electoral Democracy and Ellen Miller of the Center for Responsive Politics, passionately argue that representative democracy is poisoned by the impact of private "special interest" money in elections. They argue that private money and personal wealth dominate the electoral process. They allege that money determines who has the

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\* Associate Professor of Government, University of Notre Dame.

resources to run, which issues will be allowed access to the agenda, and ultimately who will win the election.

Similarly, they argue that special interest money compromises the legislative process. The authors admit that proof is a difficult burden in such allegations, and hence they argue that there is a pattern of "empirical evidence, backed by statistical data to indicate that . . . public officials are beholden to those who provided the money for their election." Using examples, they try to show a correlation between financial backing and legislative action. They indicate that the influence will be greatest on specialized, concrete issues at the least visible parts of the process. Citing such cases as the Association of Trial Lawyers of America's opposition to tort reform they argue that often the greatest impact of special interests is to prevent action such as reform.

Arguing that the Federal Electoral Commission Acts of the 1970s have failed, they endorse a comprehensive alternative draft bill entitled Democratically Financed Elections. Under DFE there would be complete federal funding of primary and general elections, accompanied by spending caps. There would also be a ban on candidates raising and spending private money during the election cycle. The plan, in order to avoid the free speech problems raised by *Buckley v. Valeo*, would depend upon voluntary acceptance by candidates of spending limits and private funds in exchange for public financing. The bill would place qualification levels for primary and general eligibility for funding, and would attempt to limit political party and third party "independent expenditures," though the details of how this could be accomplished under *Buckley* are sketchy.

Gregory Schmid of the Institute for the Future presents the most sweeping and optimistic (possibly utopian) call for increased citizen voice in his article "Recovering Athenian Democracy in California." Schmid, believing that ancient Athens and modern California have a comparably educated citizenry, argues that California's increasing reliance on direct democracy mechanisms such as ballot initiatives is the normative wave of the future, showing the information age how to move from representative democracy to direct democracy.

Schmid argues that Athens, as a rich, homogeneous, open society, offered in the fourth century B.C. "the standard of pure democracy." He does mention the limitations of Athenian direct democracy, (though not those stated in the *Politics* and the *Republic*), but argues that this model now can be favored over representative democracy which is being undermined by new driving forces. Schmid argues that rising educational attainment, rising

wealth, the shift to information-related jobs, growing skepticism about authority resulting from education, and dramatic enabling technologies such as personal computers, cable television and Internet, have together created the time for a "more direct involvement of citizens in key decisions involving their own governance."

Schmid argues that California growing use of direct ballot measures provides a model. Direct ballot measures have grown dramatically since the 1960s, and have resulted in such major policy shifts as approval of the death penalty and the proposition 13 tax revolt in 1978. Schmid argues that California citizen's have high levels of support for the use of such mechanisms. As a result, they vote at high rates on them, discriminate between competing and confusing proposals, and have effectively used ballot measures to impose strategic guidelines on government. Though seeing some limitations (i.e., avoidance of detail and lack of minority protection), Schmid argues that the advantages (people like it, openness, breaking established political habits, symmetry with "driving" demographic and technological forces) outweigh the limitations.

Michael Schudson from the Communications Dept. at the University of California San Diego draws from another political scientist, Theda Skocpol, to analyze the relationship between the state and the public sphere. Schudson questions the way in which the conventional account of civil society and the state is presented. In a tradition reaching back to Hegel in Europe and Tocqueville in America, it is often assumed that the voice of the people is formed in the autonomous space in between state mechanism and private society. In this analysis, civil society is the place where voices emerge, and then the question becomes one of whether the state responds to those voices.

Schudson argues that we must remind ourselves of the many and varied ways in which "governmental institutions" help and hinder the formation of the "voice" of citizens in the first place. He does so by closely inspecting the effect of variations in governmental structure, legislative investigative functions, overlap of spheres (i.e. broadcasting), government construction of civic personality, the role of parties, and governments role in providing (variable) forums for citizen access. In each of these areas, and then collectively, Schudson argues that the state, rather than responding (or not) to an autonomous voice, is in fact responding (or not) to voice shaped in part by the state's own activities. Schudson suggests that we have to reject the Marxist notion of the state as superstructure, and instead think of the state as a

framework for shaping voice, which was Skocpol's original aim in coining the phrase "bringing the state back in."

George Adler, in his article entitled, "Community Action and Maximum Feasible Participation," addresses the history of the Office of Economic Opportunity attempt to increase the voice of the powerless in the planning and implementation of federal anti-poverty and urban redevelopment efforts. Adler points out that the original mandate of the OEO to include the "maximum feasible participation" of the residents of the areas and members of the groups served by the anti-poverty programs, was beset by several problems.

Adler points out that the OEO from the beginning was faced with a struggle between city halls and local citizens groups over control of scarce resources. Further more, the Act never clarified its priorities. The Act never answers the question of whether delivery of service is primary, or is restructuring of local power relationships primary? Adler draws upon commentators of the period such as Alinsky, Mansbridge and Moynihan, though he spends little time on Moynihan's analysis. Interestingly, Adler points out that the consensual assumptions of participatory democracy may have to be (and can be) reconciled with adversarial elements of program design.

Adler further argues that despite the shortcomings of the OEO, there are lessons to be learned which might help us devise a strategy to increase the voice of the poor with more success. He introduces the concept of "participatory justice," which he distinguishes from its new left predecessor of "participatory democracy" by emphasizing that rather than individuals within communities being the sole focus of empowerment, we should recognize that subsidiary institutions like church, neighborhood, community organizations and other similar groups can and should be vehicles for allowing the voice of the individual poor to be heard. Pointing to successful groups such as the hundreds of community development corporations (CDC's) around the country, Adler argues that while more resources are an essential part of any urban redevelopment strategy, the employment of local groups and organizations holds promise for actual implementation.

As stated before, what binds these articles together, regardless of their difference on details, is their common assumption that the problem in American democracy is responsiveness. If government would simply listen to the will or "voice" of the people, our civic lives would be better. To question such an apparently unobjectionable goal would be unwise. And yet, as a political scientist, it is incumbent upon me to at least mention

other possible analyses of the problem. In addition to the voice and responsiveness strain of analysis seen here, there is another strain both in our democratic heritage and in political science that needs to be mentioned. Certainly the Founders wanted more "voice" than George III allowed. But they also had a decade of experience under the state constitutions of the Articles of Confederation, in which legislative responsiveness was widespread. Part of the problem they faced was how to reconcile democratic responsiveness with the common good. Put simply, James Madison reminds us that a majority faction is still a faction if it acts against the "permanent and aggregate interests of the community." Madison felt that democratic opinion did not simply and automatically align itself in accord with the common good, and both the character of representatives and virtues of institutions were necessary to refine and enlarge public opinion.

Today some political scientists make similar points. For example, Gary Jacobson, David Mayhew and Leroy Rieselbach all point out the tension between the virtue of "responsiveness," which would maximize "voice," and the virtue of governmental "responsibility," which would emphasize the needs of the common good even if unpopular. One prime example each looks at is the question of deficits. To the extent that government is responsive, our "voices" tend to say we want higher services and lower taxes. At the same time, however, our voices say that we want fiscal responsibility. When election time comes around, we tend to reward with re-election the representatives that listen to our desires for high services and low taxes, rather than those who listen to the fiscal responsibility voice.

To give another example that came up in the papers: if we maximize direct citizen voice in government, the death penalty will be expanded, because it is popular among high majorities of Americans. My point is not to oppose mechanisms that increase citizen voice. All five articles rightly point out the frustration and the alienation that citizens feel about their ability to influence their government. But in increasing this voice, we must be aware that certain issues will not be resolved by "voice." We must simultaneously pay attention to theories of representation which allow us to grapple with issues like spending, taxing and minority rights where voice must be reconciled with the demands of the common good.

