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July 10, 2018: Needed: A Nonpartisan Pro-Democracy Caucus Among Law Professors

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Title: Needed: A Nonpartisan Pro-Democracy Caucus Among Law Professors

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7/10/2018--Below is a proposal I sent to a law review for inclusion in an issue on election law--too broad for their tastes. But, unless democratic norms are seen as constitutionally protected, there may not be any future election law. Ironically, once President Trump's nominee is confirmed, conservatives may be open to a new direction.

The Role of Law in Preventing the Death of American Democracy

American democracy is in serious crisis. The recent book *How Democracies Die*, by Steven Levitsky and Daniel Ziblatt, chillingly illustrates how close America's experiences are to those of other nations that have actually lost their democracies. It can happen here. Unless something is done to prevent it, it will happen here.

Law cannot address all of the threats to democratic norms, many of which involve the violation of soft conventions, such as not treating political rivals as illegitimate, that do not rise to the level of illegality. Law is already responding to the current crisis where previously established constitutional norms are threatened, such as racial equality, freedom of speech and freedom of the press. What is lacking is the formal adoption of the norm of democratic self-government as a general constitutional principle. If this were done, the response by the courts to claims of partisan gerrymandering, forms of vote suppression and manipulations of the Electoral College would be much more aggressive and effective than they have been to this point.

The reasons that law has been largely ineffective in addressing the crisis are, first, the natural tendency to assume that everything is "politics as usual," rather than the potential death throes of our system. Second, law professors and judges currently participate in the hyperpartisanship that is threatening public life. Third, disputes over substantive constitutional claims, such as abortion and same-sex marriage, and differences over interpretive methodologies, have overshadowed the much more fundamental threat to democracy that we are now facing. Finally, the adoption of any norm in constitutional law is fraught today because of value relativism and the fear of judicial activism.

These barriers to the recognition of the norm of democratic self-government can be overcome. Recognition of the fragility of our democracy is growing. In light of that growing recognition, it is conceivable that American law professors, who still share a commitment to constitutional democracy, can reach a bipartisan consensus over the need to protect self-government. Recognition of the norm of democratic self-government does not require surrender of substantive or methodological disagreements. There will still be controversy over abortion cases like *Roe v. Wade* and *Obergefell v. Hodges* and there will still be debate over originalism versus the living constitution. The norm of democratic self-government transcends these differences. Nor does the adoption of the norm of democratic self-government require establishing substantive and objective moral and political standards. This latter point was demonstrated beyond dispute years ago, in John Hart Ely's classic work, *Democracy and Distrust*.

Adoption of the norm of democratic self-government would mean that any attempt to permanently embed partisan advantage so as to impede the ability of the people to express their decisions on matters of policy or election would be presumptively unconstitutional. That would include gerrymanders, voter ID laws, voter registration, election rules, voting roll purges and any national effort to manipulate the Electoral College through selective State abolition of winner-take-all.

By itself, law cannot prevent the death of American democracy. But, law does have a potential role to play in the attempt to save it.