Book Review of Caroline Morris *Parliamentary Elections, Representation and the Law* (Hart Publishing 2012)

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This is a slim, tightly focused book. Within the already discrete field of electoral law, Morris brings considerable analytical skill to the concept of representation as engaged by "the law of being elected to [the Westminster] Parliament".[1] The method is predominantly the "historical analysis of law".[2] Moving from theories of political representation to candidate eligibility rules, the means of challenging elections and candidate selections, and finally the means of removing elected MPs from Parliament (chapters 2 to 6 respectively), the book's substantive chapters are models of close legal research and analysis. This review engages selectively with those chapters, considering some of the broader questions raised by this book and its methods.

The concept of representation is Morris's starting point and in definitional terms, the discussion closely maps Pitkin's seminal work.[3] This initial focus serves to introduce the reader to the role of identity in representation, the function of political parties, and questions of whether representatives operate as delegates or trustees. Much of this will be familiar to many constitutional lawyers, although Morris does a good job of tying abstract arguments to recent developments, such as the debate over the underrepresentation of BME communities in Westminster. Morris makes references to more detailed literature but space precludes its exploration — the entire book runs only to 157 pages. There are, however, occasional missteps. In opening the discussion on "ideas about party representation", Morris states that these ideas are "sourced not so much in theory but as an account of practice. This lack of developed

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1 Caroline Morris, *Parliamentary Elections, Representations and the Law* (Oxford: Hart Publishing, 2012) at 2.

2 *Ibid* at 4.

3 Hannah Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967).

theory is surprising".[4] Indeed, it might surprise any number of political scientists who have spent decades reading, teaching and researching in exactly this vein. Does Schattschneider[5] not count and if not, why not? And what of the vast literature in his wake? What of the more recent work which judges the democratic process by how well it represents the median citizen?

These bodies of work cannot be dismissed on the basis that Morris's focus is purely legal. It is not. The above quoted text at page 22 cites Duverger as a notable exception but he is, of course, merely part of a large archive that is neglected herein. Further, the extent to which political science is engaged in this section is an engagement with a rather elderly literature. The overwhelming majority of the references are to works published in the twentieth century, and there is not a single reference to anything published after 2006. This is not just nitpicking — some of the most powerful and illuminating work in this area is thereby missed because of this blindspot, not least the contributions of the late Peter Mair and his analyses of electoral entropy,[6] party patronage,[7] and their subversion of parties' traditional representative functions.[8] Morris's strong claims about the nature of political science vis-à-vis law make these gaps more important.[9]

Morris is on firmer ground when returning to law. Chapter 2 looks in detail at candidate eligibility laws — who may be a candidate, the limits imposed on this by law, the historical development of these rules in the UK — in considerable and enlightening detail. These are matters which are either dealt with in the briefest terms in textbooks or in infinite, grinding, detail by practitioner handbooks. Hitherto there was little in between but Morris brings a novel, scholarly quality to the treatment of the positive law. The consequences of well known episodes such as Viscount Stangate/Tony Benn's renunciation of his peerage or IRA prisoner Bobby Sands's successful election to the

4 *Supra* note 1 at 22.

5 Elmer E Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America*,1st ed (Belmont: Wadsworth Publishing, 1975).

6 Peter Mair, "Ruling the Void: The Hollowing of Western Democracy" (2006) 42 New Left Review 25 at 34.

7 Petr Kopecký, Peter Mair & Maria Spirova, *Party Patronage and Party Government in European Democracies* (Oxford: Oxford University Press, 2012).

8 Richard S Katz & Peter Mair, 'Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party' (1995) 1 Party Politics 5.

9 "What is striking from this overview is that the law seems to place considerably more emphasis on the personal qualities of a representative than do political theorists. In fact, discussion of the personal characteristics of representatives from a normative perspective appears to be overlooked by political scientists." *Supra* note 1 at 39. Here and elsewhere — see 41 — the terms 'political theory' and 'political science' are used interchangeably.

Commons in 1981 are cast in a new light, being synthetically placed in the context of what little scholarly treatment they have received, combined with much excellent and amusing ephemera.

Morris's easy familiarity with her sources comes through strongly; when asking whether the legal basis for candiditure should be changed, however, the treatment is less satisfying. Morris notes that whilst there is a requirement that electors in a particular constituency must reside in said constituency, candidates "themselves incur no such obligation".[10] This is a very curious concern that illustrates a degree of detachment from both the practicalities of electoral life and its scholarly literature. To require candidates to reside in the districts that they contest would be a restraint of trade unique to the political profession. What of those many local parties that have limited or no membership in a particular area and are hence unable to field local candidates — are they to be constrained from fielding a candidate at all? The havoc that such a proposal would wreak on competitive elections would be considerable. Anyone involved in practical politics would know this but so too ought any student of contemporary electoral and political studies. The decline in party membership is a staple of party political studies and provides the ready answer to the question of, "why is one not even required to live in the constituency for which one stands when the electoral system is based in geographically-defined communities of interest?".[11]

Chapter 4, "Controverted Elections" looks at the process by which elections may be challenged in the courts. As the legal regime here is particularly antiquated, Morris's historical approach is particularly well deployed. The origins of the electoral petition system may be somewhat familiar in outline, but the tale of their transformation from the thirteenth century to the present day — by way of the Elizabethan Star Chamber, enduring skirmishes between courts and Parliament for control over elections, and Victorian electoral reform — is very well written. The reliance on historical sources is painstakingly and deftly handled, adding real energy to what might otherwise have been a descriptive trawl. The current UK system of parliamentary election petitions is thus not much changed from that introduced in the 1880s and underwent a significant 'stress test' in the period 1997-2007, as a result of electoral fraud flowing from the extension of postal voting.

10 *Supra* note 1 at 56.
11 *Ibid* at 67.

In line with much other political scientific and practitioner opinion, Morris infers from those cases that a provision for the raising of public interest petitions is required. However, this begs the question of which public official would be given such a competence. Morris suggests that this falls to the UK Electoral Commission, as "[i]t is not a large step giving it a further role in maintaining the integrity of elections by granting it standing before an Election Court, as with the Australian model."[12] Whatever the merits of the Australian model, its institutional positioning is not the same as UK's Electoral Commission which has always striven to avoid any appearance of partisanship (manifested most clearly in its separation from the Boundaries Commission), much less its actuality. Whether it would wish to raise public interest petitions is unlikely. The question of legal costs and access to justice is a much clearer issue and Morris's arguments about civil litigation rules, legal aid, and alternative administrative procedures are all well made. One wishes, however, that they were made at greater length.[13]

The final substantive chapter, *Reconceptualising and Reforming Electoral Law*, presents a series of findings and reform proposals. Morris is indignant that UK electoral law is substantially private law, treating political parties as "clubs or as employers, rather than conduits of public power."[14] True though this may be, Morris's reasoning is rather formal, relying on a public/private distinction that is far from uncontentious or terribly convincing. Even if the "State …take[s] on more responsibility for electoral law",[15] what difference would it make? The proposals — consolidation of electoral and eligibility law, expanding the already expansive role of the Electoral Commission,[16] and expanding public law rights and freedoms to candidate selection litigation — are rather modest.[17] The methodology that leads to these conclusions is often comparative. However, when comparators are selected, they are rather under-defended. Morris often draws 'lessons from the Commonwealth' by which is meant New Zealand, Canada, and Australia (Morris herself is Australian).

12 *Ibid* at 94.

13 Brevity in this volume is often achieved at the cost of light — only two pages deal with "three common law jurists", Coke, Blackstone, and Dicey, and their thoughts on representation and representatives. There are, however, some *bon*, even excellent, *mots* here, not least Coke's likening of representatives to elephants, "First, that he hath no gall: secondly, that he is inflexible and cannot bow: thirdly, that he is of most ripe and perfect memory". *Ibid* at 30.

14 *Ibid* at 151.

15 *Ibid* at 153.

16 See generally Navraj Singh Ghaleigh, "The Regulator: The First Decade of the Electoral Commission" in Keith Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?*, 1st ed (New York: Routledge, 2012).

17 *Supra* note 1 at 156.

On what basis should these lessons be drawn? Shared legal heritage, experience of the plurality voting system, etc, cannot alone be sufficient. Even if it were, the more proximate devolved legislatures of Wales, Northern Ireland, and Scotland would presumably be better choices since they are substantially based on the UK model and, to the extent that they exist, the departures are often deliberate and reasoned ones.

Moreover, unlike the Westminster Parliament, they are creations of statute and public authorities for the purposes of the *Human Rights Act 1998* and, as such, subject to the normative regime of the *European Convention of Human Rights*. One justification for the choice of comparators that *is* offered is that in the case of Australian and New Zealand, "[b]oth countries inherited the English law of parliamentary privilege".[18] Is there such a thing as *English* parliamentary privilege? Not since at least 1707. Given this fumbling of categories of law within the UK it is not surprising, though still slightly disappointing, that there is no engagement with other levels of electoral law within the UK. Why not consider other European legislatures? Are Australia and New Zealand *better* comparators for the United Kingdom than those which share the likenesses of multileveled systems (e.g. European Union law and European Convention of Human Rights system) of legal authority or pluri-/multi-national states or asymmetric forms of power sharing rather than federated ones?

This feeds into a larger issue, namely the subject matter of the book. On any view, electoral law is a niche interest within public and constitutional law.[19] To the extent that it garners broader interest, it addresses issues such as prisoner disenfranchisement,[20] or campaign and party finance,[21] or institutional questions such as the proper size of the House of Commons or House of Lords reform.[22] More conceptually, recent electoral and constitu-

18 *Ibid* at 4.

19 The most recent dedicated UK electoral law works are Bob Watt, *UK Election Law: A Critical Examination* (Portland: Cavendish, 2006) and H F Rawlings, *Law and the Electoral Process* (London: Sweet & Maxwell, 1988). Leading textbooks such as A W Bradley & K D Ewing, *Constitutional and Administrative Law*, 15th ed (London: Pearson Education, 2011); Colin Turpin & Adam Tomkins, *British Government and the Constitution: Text and Materials*, 7th ed (Cambridge: Cambridge University Press, 2012) offer only a brief treatment, others even less.

20 *Hirst v The United Kingdom (No. 2)* [2005] ECHR 681, (2006) 42 EHRR 41. Following this judgment of the European Court of Human Rights, which ruled the UK's blanket ban on serving prisoners from voting to be in violation of the ECHR, successive UK governments have prevaricated over the enfranchisement of prisoners — to much scholarly criticism.

21 Persistent party finance scandals — see Ghaleigh, *supra* note 16 — have lead for calls for limiting the donations of trade unions and corporations, with concomitant state funding.

22 Attempts both to reduce the size of the House of Commons from 649 Members of Parliament to 600, and to place the House of Lords on an elected footing have been frustrated by factions within

tional scholarship has considered the widespread crisis of turnout and broader participation,[23] the notion of dialogue between constitutional courts,[24] and the charge that elections "are merely mechanisms for making decisions."[25] Morris's steady focus on the relatively unfashionable stuff of representation is thus to be applauded. She has sought to recast the conventional understandings of settled electoral law in a historical and critical light. These attempts have not been evenly successful but they are never uninteresting and for this we owe the author much thanks.

the present Conservative/Liberal Democrat coalition government. The Conservatives are broadly in favour of reducing the size of the Commons whilst the LibDems have long argued for House of Lords reform. The inability to convince one another of the merits of their proposals has led to deadlock on both issues.

23 S*upra* note 6.

24 Alec C Ewald & Brandon Rottinghaus, eds, *Criminal Disenfranchisement in an International Perspective* (New York: Cambridge University Press, 2009).

25 Robert C Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven: Yale University Press, 2012) at 17. See also Goodin's remark that deliberative democrats concede to majority rule "in a spirit of resigned acceptance." Robert E Goodin, *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn* (Oxford: Oxford University Press, 2008) at 109.