Election Reform and Democratic Objectives—
Match or Mismatch?

Stephen E. Gottlieb†

I. AN EVALUATION OF DEMOCRATIC GOALS

Discussion of campaign reform tends to center on specific proposals, often leaving goals implicit as if they are too obvious for discussion. However, the proposals often appear less important, contradictory, or perverse when the discussion centers on goals.

This essay focuses on the goals of campaign reform. To demonstrate the significance of discussing campaign reform’s objectives, this article will explore the often illusory relationship between election law reforms and their desired goals.

Several related propositions will be developed. First, the process of reform is not an end in itself, an unevaluable taste. Rather, reforms can be evaluated for their effectiveness in serving the public and for their responsiveness to ordinary people, the “little guys.”† Second, it is not clear that purity in the electoral process creates anticipated, or even desired, results. For example, instead of leading toward the democratization of power, current reform efforts may actually lead away from it. Third, while there is a good deal still unknown about which democratic processes would work better, those which have been getting all the shouting—led by individuals with political careers at stake—2—are clearly not superior. Enfranchisement of disenfranchised Americans and attention to competition would increase responsiveness much more directly.

Although ensuring popular support of democracy is important, part II of this article demonstrates that popular support of electoral reform cannot be the only justification for change. Instead, as part III shows, modification of democratic processes must be directed toward specific goals, most importantly the achievement of rational popular choice and control. Although two popular reform agendas, developing a more competitive democratic process (part III.A)

† Professor of Law, Albany Law School. B.A., Princeton University, 1962; L.L.B., Yale Law School, 1965. Roman Hedges, friend, political scientist, and political player, has spent a good deal of time educating me. He, G. Bingham Powell, Jr., and Robert Nakamura read this article in draft form; I have benefitted greatly from their comments. Also, I would like to express my appreciation to Beverly Mitchell, a former student, who stimulated my thinking about aspects of the separation of powers considered in this essay, and to my research assistant, Suzanne M. Bernard, for indispensable help.

1. But see ROBERT WEISSBERG, PUBLIC OPINION AND POPULAR GOVERNMENT (1976), for a critical examination of the ambiguities of public opinion and the relationship between public opinion and public policy.

and increasing the individualization of politics (part III.B) are often touted by reformers, neither can be substantially effective unless enfranchisement is increased (part III.C). A much neglected concern, the survival of a democratic form of self-government, must also be considered in order to ensure that today’s reforms do not preclude democracy tomorrow.

It is beyond the scope of this paper to develop a conclusive case for or against any specific remedy. Rather, this essay is designed to suggest that many of those discussions have been impoverished by the failure to examine what may or may not be accomplished.

II. PUBLIC SUPPORT: AN INSUFFICIENT JUSTIFICATION FOR CAMPAIGN REFORM

The Declaration of Independence announced that since government is founded on the consent of the governed, the people may alter the structure of their government. In America, the people have often altered the political rules. Examples include the secret and official (or “Australian”) ballot and the primary process, all initiated as the direct result of the Progressive movement; the anti-boss movement of the 1960s; and campaign finance reform, which was in large part a result of Watergate. Although considerable public support for further altering the campaign process appears to exist, it is a non sequitur to conclude that the people are entitled to whatever electoral rules they want. Rather, the adoption of political reforms, no matter how popular, must be tempered by the effect of those reforms on the present and future of the democratic system.


5. Anne H. Bedlington refers repeatedly to popular reaction to election rules and behavior. Nevertheless, she is careful to focus her proposals for greater restrictions on the private, nonpolitical use of political contributions and honoraria. This distinction implies that Professor Bedlington places limits on the public’s rights. See Anne H. Bedlington, Abuses and Loopholes, in MONEY, ELECTIONS AND DEMOCRACY: REFORMING CONGRESSIONAL CAMPAIGN FINANCE, 69, 69-70, 73-74, 84-86 (Margaret Latus Nugent & John R. Johannes eds., 1990) [hereinafter MONEY, ELECTIONS AND DEMOCRACY]. Frank J. Sorauf is less explicit, though more focused on the public. He effectively shatters the notion that there is clarity in what the people want, as well as the idea that there is a link between the appearance and the actual presence of corruption. Frank J. Sorauf, Public Opinion on Campaign Finance, in MONEY, ELECTIONS AND DEMOCRACY, supra, 207, 216-19 [hereinafter Sorauf, Opinion]. Nevertheless, he ends by discussing the ability of the people to unite behind an effective package of campaign reform, id. at 219-20, and elsewhere has argued that democracy requires judicial (though not necessarily legislative) deference to the people’s collective will, whether informed or not, as expressed in legislation. Frank J. Sorauf, Caught in a Political Thicket: The Supreme Court and Campaign Finance, 3 CONSTITUTIONAL COMMENTARY 97, 121 (1986) [hereinafter Sorauf, Thicket]. Thus, he has argued, campaign reform should proceed because of public demand. See also Johannes & Nugent, Conclusion: Reforms and Values, in MONEY, ELECTIONS AND DEMOCRACY, supra, 263, 275-76; Nugent & Johannes, Introduction: What is at Stake?, in MONEY, ELECTIONS AND DEMOCRACY, supra, 1, 6.
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Public approval of the specific rules of the political contest plays a role in overall public support for the political system, a role many refer to as legitimacy. The proper role of legitimacy is sometimes expressed as how far the “political culture” justifies political rules. Even the Supreme Court, in Buckley v. Valeo, justified campaign finance regulation on the basis of popular reaction—much like a loose concept of legitimacy. However, the Court quickly abandoned such a concept of legitimacy and rejected the relevance of polls.

Although some campaign regulation clearly is warranted, public approval is not a sufficient justification. First, it is necessary to distinguish between rational choice and control (the goals of democracy) and public opinion (which may prove transient). From the perspective of the public (unlike that of a representative), justifying legislation by public opinion would be circular: the public should support legislation because it does. Second, even if the argument were stronger, public will is complicated by competing objectives—it is not plain that the public has clear conclusions on proposals for electoral reform. It is even less clear that revolution or civil disobedience are near due to these issues. Indeed, the public often tolerates policies which run against its views; people do not view as illegitimate all which they oppose. In fact, the people may quite consistently desire a government that will do better than a plebiscite.

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6. See Nugent & Johannes, supra note 5, at 6 (“legitimacy [is] defined as the public’s acceptance of the government”); Johannes & Nugent, supra note 5, at 275-76 (proposing electoral reforms to enhance legitimacy of governmental system).
7. See NELSON W. POLSBY, CONSEQUENCES OF PARTY REFORM 185 (1983) (discussing how mixed nominating systems better express “varied political cultures” and therefore better educate prospective candidates).
9. “It is unnecessary to look beyond the [Federal Election Campaign] Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1000 contribution limitation.” Id. at 26.
10. On the public’s opinion of campaign finance, see HERBERT E. ALEXANDER, WHITE PAPER ON PUBLIC FUNDING OF POLITICAL CAMPAIGNS 29-30 (1984); Sorauf, Thicket, supra note 5, at 118-19. A major objective of the continuing dialogue between the public and its full time legislative body is to clarify issues that the public does not fully comprehend.
11. See Sorauf, Opinion, supra note 5, at 212-14, 216-17 (public opinion on campaign finance is largely unorganized and unmobilized; it is thus not strong enough to affect legislatures on issues of campaign finance).
12. Historically the Constitution did not embody the “right” to instruct representatives how to vote in the legislature; many, however, continued to believe that representatives had a duty to obey constituents. Akhil Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043, 1058-60 (1988) (discussing right of instruction; arguing that people retain right to replace or amend Constitution outside boundaries of Article V).
13. See DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL (1980) (discussing different levels of consent to government employed in America’s founding generation). See also THE FEDERALIST No. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961) (A large republic would “refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”).

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Third, understanding the purpose of election reform as satisfying popular demand tends to truncate analysis; we need only read polls. If we attempt to hypothesize the public purposes underlying popular support for election reforms, we are no longer serving public opinion. Current opinion cannot be allowed to end dialogue.

The principal limitation on the public right to restructure the political process is the extent to which "jimmying" with the mechanics of political campaigns results in the disenfranchisement of other groups and coalitions, both now and in the future. For example, restrictive ballot access requirements, which accompanied the introduction of pre-printed ballots, were designed to narrow the choices available on the ballot; they largely eliminated third parties. A second political reform largely brought about by public will, direct primary elections, eroded party government and destroyed the traditional patterns of party accountability and responsibility. If, as many political scientists argue, the result of these "reforms" has been to leave American politics more elitist and less faithful to majority will, then the loss of popular control undermines the claim that those reforms were properly carried out.

Moreover, popular reforms can clash with the freedoms protected by the First Amendment. Thus, the First Amendment requires significant justification for damaging restrictions on speech, including advocacy in political campaigns. The First Amendment precludes restrictions on party endorse-

14. On contemporary equality, see Reynolds v. Sims, 377 U.S. 533, 566 (1964) (the equal protection clause requires substantially equal legislative representation for all citizens in a state, regardless of where they reside); Wesberry v. Sanders, 376 U.S. 1, 8 (1964) (one person, one vote); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."). See also JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 4-5 (T. Pearson ed., 1952).


17. See infra text accompanying notes 63-66.

18. Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (strict scrutiny required where statute limited party right to support candidate in primary); Tashjian v. Republican Party of Conn., 479 U.S. 208, 216-17 (1986) (restriction on "the 'basic function' of selecting the Party's candidates" and "the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action and hence to political power in the community" requires that interests asserted justify the burden); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (discussing effects on political system of restriction on rights to associate and to cast an effective ballot; requiring strict scrutiny); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (right to association requires strict scrutiny since it is fundamental to a free society); American Party of Texas v. White, 415 U.S. 767, 780 & n.11 (1974) (in ballot access context, restriction of rights of political expression requires strict scrutiny); Williams v. Rhodes, 393 U.S. 23, 31 (1968) (same). But see Gottlieb, supra note 15, at 202-03 (criticizing Buckley Court for failing to adhere to its own standard).
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denial of places on the ballot, and maximum amounts that candidates might spend on their campaigns because those measures have interfered with public discussion of issues of public concern.

A final limitation on regulation, regardless of popularity, is posed by the impact it would have on the future of democracy. Democratic theory does not give the people a right to sacrifice the power of self-government of future majorities and populations.

Thus, despite the simplicity of adopting the political reforms most favored by the public, other concerns must supplement the analysis. We must consider the effect those reforms will have on the present and the future. And, we must determine how those reforms will bring about the real goals of reform—the public’s ability to choose its leaders and control its destiny.

III. ACHIEVING THE GOALS OF CHOICE AND CONTROL

Several assumptions underlie the argument made in these pages. First, a democratic process can be evaluated. Second, the purpose of democratic reform is to augment rational public choice and popular control of government. Third, government must be responsive to ordinary people, not just to powerful elites. Fourth, the role of the candidate is subsidiary to rational popular control. And, fifth, the requirement of equality—of the people as voters—is implicit in the definition and justification of democracy. The goals of political equality of the population and its increased choice and control, not the often errant prescriptions which aim to achieve them, must be constant throughout all reforms. All reform efforts must, therefore, be evaluated for how well they improve equality, rational choice, and control.


22. See Stephen E. Gottlieb, The Dilemma of Election Campaign Finance Reform, 18 Hofstra L. Rev. 213, 251-52 (1989) (majority rule must be limited in order to pass on its values to succeeding generations).


24. See Gottlieb, supra note 22, at 242-43 (discussing formal model of democracy).

25. See James G. March, Preferences, Power, and Democracy, in POWER, INEQUALITY, AND DEMOCRATIC POLITICS 50 (Ian Shapiro & Grant Reeher eds., 1988) ("Political equality among an appropriately inclusive set of citizens is a necessary, though not sufficient, condition for democracy."); Jack H. Nagel, The Marriage of Normative Values and Empirical Concepts: Mutual Integrity or Reciprocal Distortion?, in POWER, INEQUALITY, AND DEMOCRATIC POLITICS, supra, 73, 75 (arguing for "the ability of citizens acting collectively to control outcomes" as well as an approximation to equality of individual power).
Based on these assumptions, this section examines the effect two competing strategies for election reform have on voter equality and rational popular control of the government. The first strategy, the development of a more competitive process, calls for a strengthening of the two-party process. Although the potential of competition alone is limited, electoral competition—in some areas with less regulation—is essential to the achievement of democratic values. The second strategy, individualization of the process, seems to hinder the attainment of democratic values. Emphasis on individual candidates and campaigns, such as restrictions on campaign contributions and primary nomination rules, appears to lead toward elite rule, not toward equality (as most seek and anticipate).

A. Option 1: Developing a More Competitive Process

One possible reform is to introduce greater competition into the electoral process. Increased competition alone is not sufficient to achieve campaign reform's ends. Thus, other reforms must also be implemented to supplement the successes heightened competition can have. Nevertheless, competition is an essential element of a reform strategy.

1. Early efforts: The Committee on Political Parties. In order to demonstrate the importance of the goals, not the methods used to achieve them, this section looks to a rather famous, or infamous, report of the Committee on Political Parties of the American Political Science Association. In 1950 the Committee on Political Parties published a report which specified a set of goals for the American political system. Their view not only reflected the work of an extraordinary body of scholars, but also captured an important strand in American political thought.

Consistent with the view taken here, the APSA Committee described rational choice and popular control as the fundamental objectives of political reform. These objectives require a campaign which explores the issues—thereby revealing the practical outcomes of different choices among the competing candidates. Moreover, they assume that the election makes a difference—that the people or parties selected will do approximately what they


27. APSA COMMITTEE REPORT, supra note 26, at 1 ("Popular government in a nation of more than 150 million people requires political parties which provide the electorate with a proper range of choice between alternatives of action.").
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were elected to do. Finally, they presuppose equality among the members of
the body politic appropriate to a democracy rather than an oligarchy.28

The Committee report assumed an efficient campaign with parties simplifying
and organizing the voters’ choices and delivering programs after the
election.29 Party campaigns would provide economies of scale. They would
allow issue discussions sufficiently salient that people could reasonably consider
the options. Party organizations dedicated to party platforms would also
police the results and demand the obedience of elected party members.30 For
the Committee, political parties were not an impediment to popular will, but
a guarantor of it; candidates would not be entirely independent and the voters
could count on it.

The Committee also focused on the judgment of the electorate.31 It was
less concerned with fairness to candidates than with the presentation of their
positions to the electorate. That objective embodies a definition of equality—the
significant form of equality is among voters.

Finally, and most importantly, the Committee sought effective govern-
ment.32 The advantage of parties was that they could govern. In turn the
ability to govern made choice more rational. The objective was not a plebiscite; rather, it was action, and parties were the bodies able to deliver that action.

Thus, the APSA Committee called for strengthening the American two-
party system. To do that, the Committee, among other things, urged expanding
the primary system, opening party councils to a representative cross section
of its constituency, and instituting party committees to steer party policy and
platforms.33

Subsequent events have revealed the enormous ambiguity in strategies
implied by the Committee’s democratic goals.34 Some of the Committee’s
recommendations clashed with their own objectives, and some of their pre-
scriptions were championed by reformers who did not share the Committee’s
competitive party strategy. The results of their prescriptions have been equally
ambiguous. Some of the proposals—principally the call for an expanded primary system—appear to have undermined the strategy. Moreover, the

28. Id. at 1-2. The Committee’s commitment to equality is explicit in its prescriptions for voting. Id.
at 30, 76-77.
29. Id. at 1-2 (the parties develop, define, and present policy alternatives prior to election, elected
party must carry them out).
30. Id. at 2 (discussing party discipline).
31. Id. at 1-2, 15 (discussing role of political parties in public policy).
32. Id. at 16-17, 92-93.
33. Id. at 5-11 (suggesting proposals for party responsibility).
34. The taxonomy developed focuses on the perspective of voters. For a more complete taxonomy
of positions developed from the perspective of political actors, see Robert T. Nakamura & Denis G.
Sullivan, Party Democracy and Democratic Control, in AMERICAN POLITICS AND PUBLIC POLICY 26
(Walter Dean Burnham & Martha Wagner Weinberg eds., 1978).
Committee's pro-party strategy has been rejected by a generation for whom parties appeared to conflict with, rather than implement, populist intentions.\(^{35}\)

Post-Committee reforms have led away from the Committee's objectives as well. Rather than strengthening parties, expansion of the primary system has all but eliminated them by excluding them from the nomination process.\(^{36}\) Campaign finance restrictions, contrary to the Committee's recommendations, have directed campaign financing through committees controlled by the candidates,\(^{37}\) thus further reducing the parties' role in campaigns and their contribution to accountable government. Moreover, reforms which put the candidate in control of the campaign, thus making the party organization a passive recipient of the primary, treat the election/government linkage as an individual candidate matter rather than as an institutional party one.\(^{38}\) Finally, while the Committee tried to neutralize power by opposing the two national parties to one another, it understood that interest groups and large contributors, to which we might add grass roots activists and media, were potential competitors.\(^{39}\) Subsequent reformers have attempted to remove all forms of power in the hope that the people could exercise power more directly.\(^{40}\)

Although the Committee's specific prescriptions have little enduring significance, there are two important conclusions to be drawn from the Committee's work. First, unintended consequences predominate as the result of the Committee's remedies. The Committee's proposals had the consequence of stripping the parties of their power rather than strengthening them. But unintended consequences reflect on the Committee's specific prescriptions, not on its ultimate objective of empowering the public and augmenting rational control over the political system. The second conclusion is that the

\(^{35}\) Americans had come to associate parties with the worst excesses of corrupt machines and sought to displace party organization by means of direct nominations at primary elections. See Gottlieb, supra note 15, at 225-35.

\(^{36}\) There is an irony here—the Committee would have approved of the extension of the direct primary system, APSA COMMITTEE REPORT, supra note 26, at 70-72, which proved a principal engine of weakening the parties; however, it would not have approved the results. See CEASER, supra note 3, at 288 (describing consequences of party reform); POLSBY, supra note 7, at 132-33 (discussing trends in political intermediation); Gottlieb, supra note 15, at 191-92 (discussing legislative evisceration of parties).

\(^{37}\) See 2 U.S.C. § 441a(a) (1988) (limiting contributions to and from parties); 2 U.S.C. § 441a(d) (1988) (limiting party expenditures). Although the limits for contributions to parties are larger than the limits on contributions to candidate committees, most campaign funds must be and have been channelled through candidate committees because of the limitations on contributions and expenditures by the parties to or for the candidates.


\(^{39}\) APSA COMMITTEE REPORT, supra note 26, at 19-20, 34-35, 75 (discussing relationship among parties, interest groups, and large contributors).

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Committee’s competitive pro-party strategy has not been implemented, much less tested; it differs significantly from current reform proposals. Heirs of the Committee, observing the unintended consequences of the Committee’s prescriptions, retained the goal of strengthening parties as the means to rational control, and developed a new set of prescriptions to accomplish it. The Committee’s view is currently reflected, for example, in calls for channelling campaign funds through parties  

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 even though that proposal is questionable for First Amendment reasons  

2
. The Committee view is also reflected in efforts to expand party decisionmaking autonomy,  

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 to improve political competition (for instance, through public funding, which would “level up” less well-funded candidates  

4
), and to restore two-party competition through more effective court restraints on gerrymandering.  

5

2. Is competition enough? As developed by the APSA Report, a strategy focusing on voter equality suggests efforts to develop a competitive process; significant opposition permits real choice.  

6
 Competition must be the central value of election law.  

7
 Although competition is not a fundamental democratic goal, it is a necessary means for achieving the objectives of choice and control.  

8
 Without competition, no other values can be achieved.

The importance of competition leads to two crucial observations. First, competition is poorly implemented in present election law. Achieving competition requires public funding, tighter restrictions on political gerrymandering,


42. In modern doctrinal terms, there is a significant breach of the obligation of official neutrality toward competing speakers in either favoring or curtailing parties as channels of public sentiment and support. See Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 94-96 (1972). The neutrality requirement has been widely discussed. My criticism of the doctrine as insufficient is in Stephen E. Gottlieb, The Speech Clause and the Limits of Neutrality, 51 ALB. L. REV. 19 (1986).


46. Choice can be reflected proportionally, nationally, or in each district. The principal means for encouraging choices are consistent with each of those models.

47. See Nugent & Johannes, supra note 5, at 12 (“[G]enuine competition seems to be the best guarantee that citizens are actually able to control their government.”).

looser restrictions on party involvement in campaigns, and party autonomy. Public funding helps to assure a contest. Gerrymandering eliminates competition.\textsuperscript{49} Parties provide voters with economies of scale. To date, courts have implemented only some party control over the primary campaign and returned some control of parties' decisionmaking processes. Much more can be done.

The second observation is that a well functioning competitive political system will solve many, but not all, of the ills we ascribe to democratic systems. It is important to understand the limits of competition. The quest for a perfectly pure political system threatens to destroy the merely good one we could construct and to obscure the impact of cultural factors that operate beyond the rules of the electoral system itself. Competition must be supplemented with, but not supplanted by, other measures designed to improve the political process.

Competition is not a perfect solution. In the marketplace, for example, a knowledgeable person can almost always find better goods, often at a better price, than those that are currently popular. Economic competition, though important, can be costly and somewhat ineffective. The same is true in politics. For instance, although I have argued in favor of a debate process at the presidential level,\textsuperscript{50} no similar solution is available for all elections. There are far too many offices involved, and it is doubtful how many races voters would follow even if the tube time could be commandeered. The best one can hope for are economies of scale that might be provided by parties or other large and enduring political organizations. This solution, however, submerges individuals.

The value of competition is also complicated by the many different kinds of competition.\textsuperscript{51} There might be competition over issues, skills, personalities, or symbols. And the major parties can either collude like oligopolists, especially if the law blocks the entry of new competing organizations, or compete over exciting and relevant matters. Thus, while competition is essential, it is not enough of an answer.

This conclusion has three ramifications. First, we should not expect congressional election campaign processes that are more rational than the

\textsuperscript{49} See Davis, 478 U.S. 109 (1986) (discussing effect of gerrymandering on transfer of power); Gottlieb, supra note 45, at 14 (homogeneous districting, a technique of gerrymandering, eliminates competition at the local level; at statewide level, gerrymandering decreases likelihood of transfer of power).

\textsuperscript{50} Stephen E. Gottlieb, The Role of Law in the Broadcast of Political Debate, 37 FED. BAR J. 1 (1978) (political debate should be reestablished as a fixture of American political life). Such a process could provide for the debates and pay for the time for whomever showed up. Candidates could be allowed to speak from studios of their choice if they fear the effects of television on their make-up.

\textsuperscript{51} Competition can take place among the branches of government, among the parties, or among candidates (either nationally or locally). It is necessary, however, to determine whether some levels of competition are more important than others. In fact, competition among the branches is not sufficient to define equality as the branches do not necessarily compete for the suffrage of the American voter on equal terms. It may be that the courts could affect that balance on the assumption that media coverage follows power.
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presidential process. Political scientists have repeatedly reported on the difficulties in getting the public to identify issues involved in a campaign, let alone to make reasonable choices. Even where these issues are sufficiently communicated to the public, it is clear that the public is often unable to respond at a level more rational than a response to symbols. Few campaigns, particularly congressional campaigns, advance beyond this symbolic level.

Second, competition will not produce virtue, sacrifice, or caring among the electorate or the elected. To the extent reformers seek to improve the electorate, they must look beyond the campaign. For example, by creating ties among the population, education, national service, and war are more effective at changing the political will. Moreover, public training, values, and experience place strong limits on the political process. Those who wish to reform the aims of the process cannot leave the public—or certain portions of the public—out of consideration.

Third, there are trade-offs. The congressional election campaign process was probably much more issue-oriented—and to that degree more rational—when it was a party process. Congress used to change hands before the recent surges of campaign reform eliminated most of the remaining nominating conventions. Prior to 1960, Republicans and Democrats each were able to dominate both the executive and the legislative branch by turns. Perhaps representatives devoted more time to legislation, but the process produced a number of less competent people. The current primary process, with mandatory separation of individual and party financing in the campaigns, may produce better people, but it is dominated by public relations, swamps representatives in a constant bid for reelection, and weakens Congress as a manageable entity.

There is no free lunch.

3. The need to reinvigorate parties. Parties have, in the past, been a major engine of competition in American politics. Nevertheless, many political reforms have presupposed that the parties, when stronger, ignore their constituents, become far too self-protective, avoid issues in pursuit of victory, and

52. The data is summarized in Gottlieb, supra note 22, at 246 n.193, 257-60, 267-71.
54. See infra part III.C.
55. See Bernard A. Weisberger, Keeping the Political Score, 42 AM. HERITAGE 24-25 (Feb./Mar. 1991) (noting frequency of presidential and legislative turnover as well as control of both branches by same party).
57. If strong parties did ignore their constituents, then the debate over parties—at least insofar as it refers to the two major parties—may be irrelevant to improving representation of the public. However, the weight of current scholarship seems to indicate otherwise and strongly advocates the pro-party position.
hide private manipulations that serve the party professionals at the expense of the electorate.58

Despite the commonly held view that parties are undemocratic, there are reasons to believe that the parties were stripped of power in part because they appeared to represent the lower classes too well.59 Thus, parties arguably democratize politics;60 strengthen the parties and you will strengthen the average American.

One reform which has greatly weakened parties is the expansion of the primary. Primaries in the period of the Committee Report were advocated both by those who wanted to strengthen parties and by those who sought to weaken them. Their common objective was to take power away from the political bosses and to reduce the corruption of the partisan process.61 Although it is not clear that replacing conventions with primaries had much to do with reducing corruption or bossism—most political scientists believe that the welfare state, coupled with World War II and the GI bill, ended most of the boss-driven machines and irrevocably changed American party organization62—primaries greatly affected the party structure of American politics.

See APSA COMMITTEE REPORT, supra note 26; CEASER, supra note 3 (criticizing candidate-oriented or plebiscitary system and suggesting ways to strengthen political parties); V.O. KEY, JR., SOUTHERN STATE POLITICS (1949) (showing that reliance on one party led to the atrophy of party organization and undercut the honesty, representativeness, and value of the political process to the people of the southern states); POLSBY, supra note 7 (defending role of American state parties); SABATO, supra note 3 (suggesting deregulation of parties).

58. See WILLIAM CROTTY, THE PARTY GAME 176-77 (1985) (criticizing romantic view of parties as they existed from New Deal through the 1960s); Gottlieb, supra note 15, at 221-23, 238-43 (discussing impact of corruption on political process). See also WILLIAM L. RIORDON, PLUNKITT OF TAMMANY HALL (1948) (analyzing Tammany organization through observations of a leader); FRANK S. ROBINSON, MACHINE POLITICS (1977) (describing history of political machine in Albany, N.Y.); ALFRED STEINBERG, THE BOSSES (1972) (following careers of six powerful and corrupt political bosses during 1920s and 1930s).

59. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS DON'T VOTE 3-25 (1988); Walter Dean Burnham, The Class Gap, NEW REPUBLIC 30, 30-34 (May 9, 1988) (reviewing PIVEN & CLOWARD, supra); Thomas Byrne Edsall, The Return of Inequality, ATLANTIC MONTHLY 86, 86-94 (June 1988); Thelen, supra note 16.

60. See CEASER, supra note 3, at 343-44 (criticizing view that more closed parties are “fundamentally undemocratic”).

61. Since the 1950 APSA Committee Report, both the spread of primaries and the FECA reforms have weakened the parties. For a discussion of the impact of primary reform, see infra text accompanying notes 63 to 66. Limitations on campaign contributions and expenditures have also severely restricted the role of parties in the electoral process. For a full discussion of the FECA impact on American political associations, see Stephen E. Gottlieb, Fleshing Out the Right of Association: The Problem of the Contribution Limits of the Federal Election Campaign Act, 49 ALB. L. REV. 825 (1985).

62. For a discussion of the evidence and a redefinition of the concept of a political machine, see generally SAMUEL J. ELDERSVELD, POLITICAL PARTIES IN AMERICAN SOCIETY 152-54 (1982). Corrupt machines persisted long after the first wave of primaries were instituted near the turn of the century, and even dominated the primaries for a considerable period. Such machines have been at least as strong among the personal organizations that dominated one-party states as among the territorial organizations in two-party states. See KEY, supra note 37, at 11-12, 62-69, 162, 196-98, 386-87, 407, 443-60 (describing misuse of party process in one-party states). The probity of the political system appears to have improved substantially before the most recent great wave of primary reform and little, if at all, after. Sorauf points out that the effect of campaign disclosure rules has been to increase the perception that politics is crooked. Sorauf, Thicket, supra note 5, at 112-15, 117, 118.
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Primaries skewed the parties toward the extremes,63 eliminated the “ticket” system, moved the parties closer to the upper middle class and further from the views of blue collar workers,64 led to the withering of whichever party functioned as the opposition party in large sections of the country, and contributed to the decline of organized party leadership.65 Thus, even though the relevance of parties has often been questioned, political scientists continue to call for the return and strengthening of the party system in order to return the power to the people.66

The history of parties is inconsistent; sometimes they have seemed important, at other times irrelevant. Professional commentary often seems to assume that the people’s view of party relevance is beside the point—that analysts can show statistically and scientifically whether parties are good or bad.67 In reality, they need not be either. Who or what is helpful may depend on which persons or institutions are addressing concerns in a valuable way. The desire to impose a permanent structure on American politics ignores this variability.

Reversing the decline of parties won’t necessarily restore parties as they were or restore popular sovereignty. A much more valuable approach would be one which allows the public to put its faith in parties only when it believes such faith to be appropriate. This kind of approach to parties, however, has

63. Primaries promoted extremes through turnout. See V.O. Key, Jr., AMERICAN STATE POLITICS 152-65 (1956) (describing tendency of party leadership and candidates to become less representative of their constituency as a whole due to unrepresentative primary voter turnout). For the mathematics of divided electorates, see STEVEN J. BRAMS, THE PRESIDENTIAL ELECTION GAME 13-25 (1978) (illustrating squeezing out of moderates by left and right through primary process; even if everyone turned out, both primaries would still fail to represent the general election constituency); Peter H. Aranson & Peter C. Ordeshook, Spatial Strategies for Sequential Elections, in PROBABILITY MODELS OF COLLECTIVE DECISION MAKING (Richard G. Niemi & Herbert F. Weisberg eds., 1972).

64. See WILLIAM J. CROTTY, PATHS TO POLITICAL REFORM 67, 77-81, 106-07 (1980) (discussing consistent decrease in American voter participation; fact that nonvoters tend to be less educated or wealthy);

65. KEY, supra note 63, at 169-96 (discussing atrophy of party organization).

66. A distinguished group of political scientists has formed the Committee for Party Renewal, publisher of the Party Line. The avowed purpose of the organization and the paper is to strengthen the party system in the United States. See, e.g., CPR Statement on Strengthening the Congressional Parties, PARTY LINE 4 (Winter 1987).

67. See APSA COMMITTEE REPORT, supra note 26, at 3-4 (arguing for the superiority of a stronger model of parties on the basis of the then-current scientific understanding); JEANNE KIRKPATRICK, DEMANTLING THE PARTIES 5 (1978) (describing the importance of parties in performing critical electoral functions); POLSBY, supra note 7, at 182 (describing parties as essential in the nomination process because of their functions of mobilizing voters, recruiting candidates, and sponsoring campaigns). But see CEASER, supra note 3, at 235 (arguing for the generic superiority of parties but considering citizen reactions to parties); SABATO, supra note 3, at 135-37 (illustrating citizen attitudes about political parties).
rarely been part of the party debate. It could be implemented by allowing the parties a greater role in campaign finance (for instance, by loosening the current restrictions on contributions and expenditures to and by parties), providing for greater autonomy in choosing candidates (by allowing parties to nominate by convention and support candidates in primaries), controlling gerrymandering, and improving the ease of ballot access for third parties.

These approaches to campaign finance contrast with both existing rules, which restrict the funds that can be channeled to or from the party for individual campaigns, and proposed rules, which envision directing campaign funds to the parties. Moreover, they do not presently appear to have a constituency in the legislatures or in the courts. Decisionmaking autonomy has a stronger constituency among the parties and the courts, although the Supreme Court may have drawn the line at conventions.

4. The First Amendment. In the pursuit of competition, it is important to consider the First Amendment. The diminished regulation stressed above is, of course, quite consistent with the First Amendment, which requires that laws be neutral among views, speakers, and chosen media or associations unless pressing justification is present. The Supreme Court need not and should not choose to stress the person, as modern campaign finance reform has done; the party, the issue, and the ability to govern, as the Committee wished; or something else. However, the Court has wavered. Its rulings on campaign finance have largely ignored the significance of the party, focusing instead on the power of individual contributors. Similarly, its rulings on gerrymandering have shown great reluctance to take account of the political divisions in the electorate. In some decisions, the Court has struck down patronage systems that once formed the backbone of American political parties. By

68. But see Crotty, supra note 58; Sabato, supra note 3, at 204 (1988) (urging greater party autonomy and freedom from inappropriate state regulation); Gottlieb, supra note 22, at 279-92 (arguing that both strong and weak party solutions are appropriate solutions to different political problems).

69. For an argument about the right to nominate by convention, see Gottlieb, supra note 15.


73. See Buckley v. Valeo, 424 U.S. 1, 21 (1976) ("A limitation on the amount of money a person may give to a candidate . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe on the contributor's freedom to discuss candidates and issues."). See also Gottlieb, supra note 15, at 203-08 (discussing Supreme Court's "individualist philosophy of politics").

74. See infra note 78.

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contrast, it has balanced party claims to ballot access against third party competition,\(^76\) protected them from raiding,\(^77\) upheld political gerrymanders,\(^78\) and asserted party rights over aspects of the nominating process.

By taking positions that were hostile to parties, as in the campaign finance area, it has frustrated the ability of the public to use parties for its purposes. By taking positions that favored parties and protected the two major parties at the polls, through important though qualified support for gerrymandering and access restrictions, it has frustrated the public’s ability to reject either or both parties. In effect, the Court has made the double error of protecting parties, yet controlling how they behave. The results are not neutral but a double limitation on public choice.

More fundamentally, the Court has wavered on the crucial difference between restricting the political process in such a way that chosen values are maximized, and enabling people to pursue different chosen values in competition. An example of that difference in philosophy is the difference between providing public funding and restricting available funding—the first tends to empower, the second to limit or defeat, divergent entries into the political process. The Court has embraced both restrictions,\(^79\) independence,\(^80\) and empowerment.\(^81\)

The answer most consistent with First Amendment principles, under conditions of change and uncertainty, must be enabling rather than restricting public consideration of political argument.\(^82\) To the extent that we could identify which system would produce the best and most democratic results, that might function as a compelling governmental purpose, or even as satisfying the very purposes of the First Amendment. But the vagaries of history and the self-interest of elected officials who write the election laws defy that possibility. The point of democracy and of the First Amendment is precisely the absence of a single permanent answer to political questions. The argument in these pages therefore has not been to require but to permit a better campaign system.

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77. See Rosario v. Rockefeller, 410 U.S. 752 (1973) (sustaining primary voter requirement because tied to purpose of preventing intraparty raiding). But see Kusper v. Pontikes, 414 U.S. 51 (1973) (state’s legitimate interest in preventing party raiding cannot justify substantial restraint imposed by statute prohibiting voting in primary election if voter participated or voted in primary of another party within preceding 23 months).
81. Buckley, 424 U.S. 1 (sustaining public funding and overturning limitations on expenditures).
82. See Gottlieb, supra note 22, at 286-92.
That approach would not require the people to bypass parties, although it would permit them to do so. Parties in fact have been both advantaged and disadvantaged by the way elections are run. Parties, and only parties, gain lines and organization on the ballot even while their internal decision-making has been taken over by state mandated primaries.\textsuperscript{83} A more evenhanded approach to ballot language and definition as well as other aspects of campaign law is possible so that the people have options—to use parties to the fullest or to abandon them without the special incentive of the law.\textsuperscript{84} Additional means of empowering—without restricting—the electorate focus on districting that creates competition, and judicial strengthening of Congress.\textsuperscript{85}

B. Option 2: Increasing the Individualization of Politics

A second strategy for election reform is to place emphasis on individual candidates and campaigns; examples include the long ballot and the Federal Election Campaign Act. Reforms such as these often are intended to ensure purity in the behavior of political candidates. However, this goal has only a tenuous relationship with the true goal of election reform, the democratization of power. In fact, purity and individualization are not themselves adequate justification for political reform. Rather, they, too, must be justified. Such justification may not be forthcoming.

1. The long ballot. The post-World War II battle against the political machines spawned a reform movement that attempted to restrain the power of the organization. At the same time the civil rights and women’s rights struggles led to an understanding of politics that looked past the organization to its constituencies, resulting in formulas that defined representation by ascribed and inherited characteristics rather than party position. And the Vietnam War, by splitting the public on non-party lines, further reduced the already waning strength of party organizations.

In the wake of those movements, the Committee’s pro-party prescriptions were adopted by anti-party reformers seeking the same underlying goals: rationality and control. For instance, primary elections, organized around the competition of individual candidates, were extended to the point that few conventions retain any power over nominations.\textsuperscript{86} Primaries now function as

\textsuperscript{83} See Gottlieb, supra note 15, at 237 (discussing exclusion of factional names, listing states which place or permit names of party factions on primary ballot).

\textsuperscript{84} See Gottlieb, supra note 15, at 245 (discussing possibility of including factional names on ballot).


\textsuperscript{86} See CEASER, supra note 3, at 236-38 (describing triumph of “candidate supremacy”); Gottlieb, supra note 15, at 232-33 & n.248 (cataloguing use of direct primary).
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the first ballot in a two-stage election in which virtually all campaign organizations are based on individual personal organizations.

This emphasis on individual candidates and campaigns has been based on a competing route to rationality and control—essentially, the long ballot. Primaries, it is assumed, allow the people to exercise direct control through "direct" nominating primaries rather than indirect primaries for party office. 87

Like the primary nomination rules, campaign finance legislation 88 has sought a route to direct popular control by attempting to exclude the parties and other middle men. For example, the Federal Election Campaign Act routes contributions directly to candidate organizations and limits the role of parties in the funding of campaigns. 89 In addition, some states even prohibit the parties from taking any role in the primary nomination and reserve party intervention for the general election. 90

This focus on the people elected, rather than on their political organizations, has been based in part on two assumptions: that democracy is best run by good people and that institutional ties are inherently unequal. In effect, competition in the general election has been secondary to the elimination of bonds that would affect candidates' judgment. In other words, the focus has been largely on candidate purity, defined as freedom from entangling alliances. 91

However, the ultimate goal of candidate freedom is uncertain. For some, good representatives should be responsive to the electorate. 92 For others, good representatives are independent and thoughtful agents who do what appears correct in their opinion, not the public's opinion. (The latter may be a particularly appropriate choice for voters who think of themselves as apolitical—it

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87. See CEASER, supra note 3, at 271-75 (discussing origins of modern party primary reform movement, its relationship to efforts to democratize parties); Gottlieb, supra note 15, at 232.
88. When Congress began to consider campaign finance reform in the 1970s, the movement became entangled with the political goals of incumbents for whom parties and all political power represented a threat. Members of Congress sought to attack the amounts that could be raised and spent to defeat them. The Court invalidated direct expenditure limits but sustained contribution limits which advance both incumbent goals, by limiting the funds that could be marshalled against them, and reform goals, by limiting the influence that flows from large contributions. Buckley v. Valeo, 424 U.S. 1 (1976). The latter necessarily has functioned as the justification for campaign finance reform.
89. For a description of the relation of the several portions of the act and regulations to produce this result, see Gottlieb, supra note 61, at 839 n.66.
92. Not because of organization but presumably because they would want to be responsive.

allows delegation rather than choice.) In either case, purity cannot be the objective; rather, it can only be a means toward the deeper objectives of democratic self-government—i.e., choice and control. The strategy may surrender some electoral control in return for post election fidelity to duty.

Proposals in the current Congress, which attempt to fine-tune rules which structure the campaign as a contest between individuals, are most consistent with this approach. Further restraints on PACs and out-of-state contributions would reduce the role of noncandidate organizations in politics. Reduced postage and broadcast rates reflect the burdens and uncertainties of incumbents campaigning as individuals against opposition of widely varying strength and would be much less important in campaigns dominated by national parties. Limiting the number of terms a representative may serve appears to stem from a desire for new—i.e., individual—blood (although increased party and/or executive power is likely to be the (unintended) result).

2. Limits on campaign financing. Accompanying the individualizing reforms has been a demand for greater equality, a value that is often left undefined. One implicit definition of equality is an equality of inputs—everyone should be able to make the same inputs into the political system. The reform agenda of the past three decades has focused on an equal playing field for activists and candidates, rather than an equal presentation to voters. As a result, the focus has been on the fairness of the nominating process, not the general election. Under this approach, contributors should be limited to sums within common reach. Candidates should have direct access to the public without the burdens of party attachments. Candidates should make attachments only to their own independent judgment (and possibly to their districts).

Such a definition of equality is purely formal; democracy does require equality, but it requires the equality of citizens who act within the decision-

93. Sorauf argued that contributors to noncandidate PACs are delegating judgment in that manner. SORAUF, supra note 4, at 51. But see Roman B. Hedges, Reasons for Political Involvement: A Study of Contributors to the 1972 Presidential Campaign, 37 WESTERN POL. Q. 257 (1984); Lynda Watts Powell et al., Male and Female Differences in Elite Political Participation: An Examination of the Effects of Socioeconomic and Familial Variables, 34 WESTERN POL. Q. 31 (1981); Lynda Watts Powell et al., Belief Structure in a Political Elite: Contributors to the 1972 Presidential Candidates, 13 POLITY 134 (1980); Lynda Watts Powell et al., Modes of Elite Political Participation: Contributors to the 1972 Presidential Candidates, 24 AM. J. OF POL. SCI. 259 (1980) (arguing contributors are deeply involved in politics on many dimensions).

94. See Gottlieb, supra note 22, at 242-43.


96. Compare Weisberger, supra note 55 (on party campaigns) with proposals to protect against negative and privately financed campaigns or the imposition of total limits.


99. See CEASER, supra note 3.
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making public. Thus, a second—and connected—definition of equality looks to voter equality on the basis of the factual hypothesis that equal inputs will assure the equality of voters. This second version of equality is achievable only if equal inputs equalize the competitors, or if candidates, once elected, are faithful to the public interest.

Again, one must not be lured by the illusory goal of candidate purity. For instance, it is assumed that limitations on contributions and expenditures will equalize the candidates’ ability to appeal to the voters and therefore equalize the voters’ impact on the election. It is also assumed that restrictions will maximize fidelity to the public interest. Both of these assumptions, however, should be questioned.

Regarding the first assumption, there is no good evidence that campaign finance restrictions have contributed to equalizing campaigns or have promoted competition. In addition, there is good reason to fear that campaign finance restrictions have caused harm.

It is not self-evident that limitations on contributions result in equality among voters. First, without public funding, contributor restrictions prevent some candidates from obtaining a bare minimum of funds, much less from matching their opponents’ “war chests.” Thus, to the extent that campaigning requires a minimum of funding, even many major party general election nominees will not prove competitive. Second, equal contributor restrictions seem to assume that there must be a direct relationship between the number of supporters and the number of contributors, as well as between the number of contributors and the size of their contributions. Only if we assume that contributors and contributor wealth are evenly distributed among the supporters of competing parties and candidates do restrictions ensure equality. Once this assumption is rejected, it is not clear which group of voters is more injured by restrictions on their contributors. As several political scientists have pointed out, the parties have not been equally dependent on large contributors and the dependence may increase with the number of low-income supporters.

Thus, instead of benefitting voters of low and moderate income, restrictions may cut them off disproportionately from their sources of funds and drive

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101. Democrats, possibly due to their larger share of low income voters, have been more dependent on large contributions. Gary C. Jacobson, The Republican Advantage in Campaign Finance, in THE NEW DIRECTIONS IN AMERICAN POLITICS, 143, 157 (John E. Chubb & Paul E. Peterson eds., 1985); Sorauf, supra note 4, at 130. But see Jacobson, supra at 145 (declining shares of large PAC contributions in Democratic receipts).

102. Robert Michels argued, in a classic study, that parties of the lower economic classes are inevitably led and supported by leaders of the upper classes. ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHAL TENDENCIES OF MODERN DEMOCRACY (Edan Paul & Cedar Paul trans., 1915).
them below funding thresholds needed to achieve voter recognition. In short, contribution restrictions may well be anticompetitive, regardless of the effect they have on the wealthier party or candidate.\footnote{103}

The second assumption is that the elected representatives will serve the common interests of the constituency. It is possible that restrictions have achieved their objective—that is, decreased the misuse of power in favor of funding sources. However, the impact of this success is not likely to have been terribly significant.

The first shortcoming is based on the failure of the first assumption: if contributor restrictions do not ensure that the voters are well represented in the election, the legislator-elect is likely to start on the wrong track.

A second difficulty is the lack of evidence that campaign finance reforms have reduced corruption or lessened legislative deference to special interests. In fact, students of the political process continue to attack the favoritism that exists in the legislature.\footnote{104} Although one can use this continued favoritism to call for additional reduction in contribution limits, this position also reflects the failure of the very significant prior restrictions which reduced virtually unlimited contributions in the millions of dollars to a maximum contribution to a candidate of $5000.

Moreover, there are other reasons to believe that campaign finance reforms have failed to reduce the power of “special interests.” First, more time must now be spent in fundraising. Second, what David Adamany called aggregators of influence—fundraisers, parties, pollsters, the press, issue oriented organizations, and other brokers between the public and the candidates—are inevitable in a complex political society. The public has become far too large to handle its politics around pot-bellied stoves, is occupied with all the cares of everyday life, and confronts issues of considerable complexity which require specialized knowledge. It, therefore, must be led.\footnote{105} Third, candidates have less ability to choose their sources of funding, given the decreased ability of preferred supporters to carry the weight. Fourth, there is less insulation for individual candidates from funding sources—the funds are funneled through separate candidate committees rather than multicandidate party organizations. Finally, restrictions on the expenditure of money within campaigns has increased expenditures on lobbying and other public relations efforts; influence does not simply disappear. Restrictions do make a difference, but can backfire. In this instance, it looks as if they damage many of the pre-existing buffers between candidates and their sources of funds. Money which used to be concentrated

\footnote{103. Alternatively, Powell, Hedges, and Brown have argued that it is not clear the contribution limits significantly restrict the ability of individuals to speak since most contributors participate in other ways. See supra note 93.}

\footnote{104. See generally JACKSON, supra note 91.}

\footnote{105. See Gottlieb, supra note 22, at 273-74.}
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on the campaign process (because it was a cheaper, more manageable way to fight the battle than general grass roots lobbying efforts) must now be moved to a larger stage which requires even greater expenditures.

Finally, this candidate-centered system shuts some voters out of the process. For those whose goal is party unity, there is nowhere to spend their money in the primary process. Thus, one can easily conclude that influence is not necessarily unacceptable within the electoral and political processes. Voters across the spectrum—fundamentalists, business people, union members, and others—may want to have some assurance that people with whom they sympathize have a role in government; financial support may provide that assurance. People know their candidates—and their enemies—by the alliances they make. As Sorauf pointed out, attachments compete with and often outweigh, in people’s minds, negative views about campaign finance.106 Legitimacy—i.e., public approval of the rules—is important. It is also important that the public gets its preferred candidates, those who espouse positions the public deems important and who possess the institutional ties which provide the public with security.

In the face of the widespread urge to limit campaign funds and the evidence of large contributions and legislative scandals, it is difficult to assert that increasing the purity of the process will not result in a more democratic system. However, in order to achieve the ultimate goal of increasing choice and control, the assumption that limiting campaign funds and contributions democratizes politics must be questioned. It is probably wrong.107

C. Increasing Representation through Enfranchisement

Parts A and B explored competing routes to a single basic goal, electoral equality coupled with popular choice and control, and focused on the organization and individualization of politics. An essential means of achieving voter equality and voter control is the enfranchisement of disenfranchised Americans. Much of the development of election law has dealt with representation in this direct fashion; other means are far less relevant.

106. Sorauf, Opinion, supra note 5, at 208.
107. A caveat is in order. As Roman Hedges pointed out to me, it is not clear that any set of conclusions about campaign finance, or other issues considered below, holds true for campaigns at different levels of government. The background circumstances tend to be very different. The availability of funds and the ability to communicate with the public differ widely, and there is little reason to expect these to be the same. As circumstances differ, the effect of remedies must vary. It is inappropriate routinely to copy federal rules on the state level or state rules on the federal level or either set of rules on the local level. Restrictions may eliminate candidates on the federal level but not on the local or state levels. Large contributions may loom much larger locally. And, group affiliation may be much less important in local elections.
There are at least three elements to enfranchising the populace. The first is registration reform. Far too many Americans cannot vote and are thus inadequately represented in government. In this respect, process alone is neither neutral nor satisfactory. The substance of democratic representation requires a process adequate to achieve it. Electoral control justifies the registration process, not the reverse.

A second element of enfranchisement requires that the political system be open to the needs and views of different segments of the public. To the extent that existing parties, or the primary system, shape the political agenda, they can deny the public meaningful choices in the general election and can deny a political voice to segments of the public. A good argument can be made that the major accomplishments of American politics were engineered not by established parties, but by new parties and third parties. Today, a larger role for third parties might contribute to the rejuvenation of American politics. As the Congress has not been addressing this issue, opening American politics to third and new parties will necessarily be a task for the courts.

Finally, a third element of enfranchisement is legislative representation. Representation of public views is better accomplished through Congress than through the executive branch. Theoretically, the sampling of public opinion provided by the election of 535 different people is superior to the election of one individual. Practically, it is impossible to organize a single campaign around all of the issues which concern the public. The objective of enfranchising the entire population requires a balance between the partially inconsistent means of strengthening the legislature, which reflects the general public, and allowing the flowering of internal legislative factions, which represent segments of the public.

108. See Campaign Spending and Voter Turnout: 1986 Senate Races, 16 CAMPAIGN PRACTICES REPORTS 4 (May 1, 1989); CROTTY, supra note 64; M. MARGARET CONWAY, POLITICAL PARTICIPATION IN THE UNITED STATES 130-38 (1985); PIVEN & CLOWARD, supra note 59, at 24-25; Timothy Bledsoe & Susan Welch, Patterns of Political Party Activity Among U.S. Cities, 23 URBAN AFFAIRS Q. 249, 264 (1987); Burnham, supra note 59; Edsall, supra note 59, at 93; Richard L. Berke, Voter Decline is Found Among Most Groups, N.Y. TIMES, Mar. 12, 1989, § 1, at 25.

109. We need here to avoid a conflation of process into substance or the reverse. Policy outcomes cannot justify process. The point of democracy is popular control, not preordained results. But not all electoral processes can establish the existence of democratic government. Democracy is a particular type of electoral process with a specific purpose—electoral control.

110. BRAMS, supra note 63, at 13-25.

111. See DANIEL A. MAZMANIAN, THIRD PARTIES IN PRESIDENTIAL ELECTIONS (1974).

112. See G. BINGHAM POWELL, JR., CONTEMPORARY DEMOCRACIES: PARTICIPATION, STABILITY, AND VIOLENCE 123-32 (1982) (demonstrating that the less representative a multiparty system is, the less likely it is to involve citizens legitimately in political process). In addition, recent reforms have diminished most forms of participation except the writing of checks. Fleishman & McCorkle, supra note 44.

113. Thus, a presidential "mandate" is difficult to achieve and its existence is doubtful in fact.
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IV. THE SURVIVAL OF DEMOCRATIC SELF-GOVERNMENT

The effect campaign reform has on future electorates is an extension of the effect it has on present electorates. Both are aspects of the democratic standards of equality, rational choice, and popular control. To the extent that people are obligated to make democracy available to each other and to their children, the stability and survivability of democracy must be an objective of democratic reform.114

The legal profession pays very little attention to the future;115 virtually the entire legal effort has been devoted to definition of present constitutional rights and statutory programs under contemporary circumstances. Yet there is a literature on what political scientists describe as stable democracy. For them, the goal is to define the requisites for the establishment and survival of democratic systems.

This concern is not new. Since the founding of the republic, statesmen have been concerned with the attachment of the people to their political system. Hamilton's efforts to secure the support of men of wealth is well known.116 Washington, Jefferson, and Jackson, among others, were concerned with the precedents they set for the support of democratic institutions.117 Historians have been recovering the importance that the entire founding generation placed on efforts to develop a "republican" sensibility;118 the system of checks and balances arose partly out of concern for the survival of republican government against popular disaffection as well as executive overreaching.119

Current accumulated knowledge about the requisites of stable democracy is most fully developed in the work of G. Bingham Powell,120 one of the preeminent scholars in the field. Building on generations of work by numerous eminent scholars, his work reveals that, in order to avoid military takeover, a combination of reasonably balanced separation of powers (in a presidential

114. See Auerbach, supra note 23.
116. See NATHAN SCHACHNER, ALEXANDER HAMILTON 244, 256 (1946).
119. They conformed their own proposals to principles the people would accept, relied on popular attachment to the House of Representatives, and were concerned by popular attachment to the states as sources and obstacles of obedience to law and the success of other official undertakings.
120. POWELL, supra note 112.
system) and a tolerant political culture in which citizens broadly participate appears to be necessary. Unfortunately, the current spate of reform proposals assumes that the critical ingredient in protecting the people’s allegiance to democracy is campaign purity rather than institutional competence. Thus, serious questions about our ability to maintain an adequate system of checks and balances and sufficient levels of tolerance—and thus democracy—are raised by these reform efforts.

A. The Separation of Powers.

The major risk to stable democracy is the risk of what the founders termed “despotism” by the executive (in contrast to legislative usurpations). The founders endeavored to avoid executive despotism by means of separation of powers and by removing some of the inducements to takeover. The founders were right to be concerned; presidential systems are quite prone to executive and military takeovers. Moreover, no example of a democratic presidential system without a legislative body comes to mind. A legislature is an essential element of a democracy. The question then becomes how to balance the departments. A weak legislature is more subject to executive takeover, yet a strongly divided government is more subject to a military coup.

The separation of powers attempts to formulate that crucial balance. Congress controls the purse and makes rules which the executive must follow. As long as Congress retains the support of other significant political actors,

121. On a tolerant political culture, compare LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986) (on tolerance and the First Amendment); DAVID C. MCCLELLAND, THE ACHIEVING SOCIETY 203 (1961); ROBERT P. WOLFF ET AL., A CRITIQUE OF PURE TOLERANCE (1969); David C. McClelland, National Character and Economic Growth in Turkey and Iran, in COMMUNICATIONS AND POLITICAL DEVELOPMENT 152, 163 (Lucian W. Pye ed., 1963) (lack of concern for feelings of others associated with prevalence of dictatorship). On the civic republican concept of virtue important to the founders (public spirit critical to the survival of democracy), see WOOD, supra note 118; James, supra note 118; Onuf, supra note 118. See also THE FEDERALIST No. 10 (James Madison) (on need to transcend faction).

122. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 254 (Max Farrand ed., 1966) (June 16, 1787, remarks of James Wilson); 2 id. at 105 (July 24, 1787, remarks of Gouverneur Morris). James Wilson’s June 1, 1787, proposal that the executive consist of a single person encountered considerable reluctance. 1 id. at 65. Edmund Randolph, who had introduced the Virginia Plan without specifying the number of members in the executive, argued “strenuously” against this proposal as “the foetus of monarchy.” 1 id. at 66.

123. See 1 id. at 139 (June 6, 1787, remarks of George Mason); 2 id. at 31 (July 17, 1787, remarks of Gouverneur Morris); 2 id. at 298 (Aug. 15, 1787, remarks of John Francis Mercer).

124. The Constitutional Convention subjected the armed forces to Congressional authorization and rule-making under a maximum two year appropriation and established some Congressional control via the necessary and proper, financial authorization, and impeachment clauses.

125. An example is a too sharply limited term of office.

126. POWELL, supra note 112, at 171 (using a table to illustrate overthrow or suspension of democratic regimes through internal conflict in twentieth century).

127. This is particularly true when the branches are divided among the parties. Id. at 218-29.

128. Id. at 173.
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it can exercise authority; as long as it maintains its independence and matches its development of oversight technique to contemporary situations, it can restrain the other branches of the government from arbitrary behavior and the usurpation of individual liberty, civilian authority, and electoral machinery.129

To accomplish these ends, the legislature must be an effective governing body.130 A strong Congress is necessary to give expression to diverse interests and to counterbalance the presidential voice. Moreover, both the executive and legislative branches must be capable of compromise. Although the early presidents may have carried deference to the legislature to an extreme by failing to veto legislation unless they believed it unconstitutional, a legislature forced to stand on the sidelines is too weak to guarantee a stable democracy.131 And, a Congress which is both actually and apparently weakened may intensify alienation from the existing system and increase support for executive government.132

Election rules are closely intertwined with visions of the separation of powers. The APSA Committee assumed the primacy of Congress; thus, legislative parties dominated the structure of its proposals. Although the relation to stable democracy was not spelled out, strong parties tend to strengthen the legislative role vis-à-vis the president or state governors. By stressing executive government, attacking legislative government as parochial,133 and individualizing legislative campaigns, contemporary reformers have tended to weaken the legislature vis-à-vis the president and state governors.134

For instance, if the latest version of limits on legislatures, term limits, succeed in reducing entrenched power within the legislature, they will also weaken the legislature in its conflict with the President.135 The best that

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129. For an example of the reassertion of congressional authority, see Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans, S. Rep. No. 755, 94th Cong., 2d Sess., bk. II (1976).
130. Good results without the perception of a satisfactory process, however, are not sufficient to assure stability. See Powell, supra note 112, at 109-10, 204-05.
131. The judiciary can, of course, play a part in sustaining a proper understanding of executive and legislative roles.
132. One could respond to a weak branch by trying to strengthen it. Thus the relationship between presidential hero worship and a weak Congress is somewhat ambiguous. Nevertheless the risks appear substantial and alienation from both parties and Congress appear to have grown in tandem with a weakened legislature. Buckley v. Valeo, 424 U.S. 1, 25 (1976), decided on the ground of legitimacy (the appearance of corruption as a compelling government interest), may have aggravated the problem by sustaining legislation which requires individual campaign organizations. See Sorauf, Thicket, supra note 5.
134. Brans et al., supra note 56.
135. Although the issue is quite recent and has not yet produced extensive scholarly commentary, Clifford Brown, a political scientist and advisor to John Anderson in his presidential bid, has written that term limits are "a bad idea [because it will seriously undercut the ability of Congress to deal with the federal bureaucracy]." Clifford Brown, Term Limits: Fixed Terms Would Make Government Less Responsive, Sunday Gazette (Schenectady), June 2, 1991, at E1.
might be said about term limits is that they might fail to weaken the legislature if new and inexperienced legislators turn to outsiders—such as parties, the bureaucracy, lobbies, and other organizations—for strength. Nonetheless, any contest between a powerful executive bureaucracy and an inexperienced legislature must result in a transfer of power from legislators to others.

Thus, efforts to reform the electoral system threaten to reinforce or increase executive dominance. Moreover, this tilt toward the executive is magnified by a snowball effect. As stronger, more powerful executives speak with a relatively unified voice magnified by a hierarchical bureaucracy and media attention, they can cast the blame on the legislatures for governmental failures and delays. This results in reforms, such as the extensive financial rules designed to limit the public’s ability to influence congressional candidates, which also limit the extent of congressional campaigns.

Since parties can provide cohesion among representatives pulled in disparate directions, election rules which weaken parties also weaken Congress. A strong legislature capable of ensuring the survival of democracy probably demands strong parties. Existing work among political scientists does not suggest the survival of a legislative system built on weak political parties.

Although Congress may be an example of such a system, it is not clear how long it can withstand the pressures of presidential leadership without stronger organized party ties to the population.

Thus, the individualist direction of current campaign finance and primary reform fractionalizes Congress and weakens its institutional capacity. This outcome not only has significant short term ramifications, but also immense future ones.


138. For example, President Reagan generated a budget imbalance and managed to blame Congress for not dealing with it. Indeed Congress is on the horns of a dilemma, standing accused of improper deliberation when it compromises among the 535 positions represented, and of not deliberating enough. See Fitts, supra note 133. All of this implies a still more frightening conclusion—that Americans have lost respect for the politics of democracy.


140. See Fitts, supra note 133. For a competing and chilling account of legislatures without parties, see POLSBY, supra note 7, at 146-52.

141. By weak parties, I refer to parties which are largely individual personal organizations. Weak parties weaken legislatures, but weak legislatures may be overcome (as in the Philippines). See POWELL, supra note 112, at 152 (describing widespread legislative defections to president’s party as a result of immensely powerful presidency). Parties which are loose aggregations of personal organizations should not be confused with fractional parties—parties which represent narrow electoral groupings but which, nevertheless, may reflect significant electoral cleavages. The impact of fractional parties on democracy is a separate question which Powell discusses at length.
Election Reform and Democratic Objectives

B. Tolerance

The second criterion for the stability or survival of democracy is the conviction among political elites that they must work together, that maintaining control of office is secondary to maintaining democracy. That conviction ultimately restrains those who could effect a coup—primarily the executive and the military. Cross-national studies reveal that deadly violence results from elite strategy; even military intervention depends on a loss of civilian pro-democratic consensus which allows the military consensus and unity necessary to sustain such a move. Where people view power as more important than cooperation, bloody struggles for power are often the result.

Since Martin Van Buren, Americans have expressed a strong stake in the two-party system to preserve tolerance. As Van Buren made clear, each party had a stake in the strength of the other. Only with a strong opposition party could each side determine who was for and against it; without a strong opposition, there are only opportunists. As alienation increased during the 1960s, election rules facilitated running against the parties, old machines crumbled, and party loyalists gained the label “special interest”; in the process, Americans also lost one of the critical ideological underpinnings of tolerance.

Maintaining a tolerant political culture requires bridges across differences. Some societies have tried to achieve stability by avoiding exposure to difference through segregation of different native groups. Ours has rejected that means on moral grounds. Differences without exposure are complementary volatile chemicals awaiting mixture; it is not a stable solution for a free society. Instead of resting on this type of ignorance, tolerance in a free society must rest on respect, mutual concern, and identification. These attributes may

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142. POWELL, supra note 112, at 212-25 (discussing consociational practices and extremism variable—extremism is associated with instability of democratic government). Although revolution is not closely related to riots and protests, enfranchisement is crucial to order as it provides an outlet for frustration. Id. at 132, 206, 208. Brandeis referred to both the justice and the instrumental aspects of participation in his famous remarks on freedom of speech in Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

143. POWELL, supra note 112, at 155.

144. Id. at 173.

145. See supra note 121.

146. There is, of course, little to expose and little to bridge in homogeneous societies; thus, they are marked by relatively little violence and instability. See POWELL, supra note 112, at 45. They may also be very unfair, as Madison suggested in THE FEDERALIST, No. 10.

Representation is also essential. Representation allows the conviction that one's interests are being taken into account. Without it the remaining options are subordination, indifference and hostility. Reasonably good representative forms have appeared essential to stable democracy. A weak Congress and extensive nonvoting sap confidence in the representative system.

In addition to the argument developed below, inherent executive power, if it means action without consensus, may polarize society and threaten stability.

147. It has come to seem improbable that stability can be achieved in that way.

be achieved either through reliance on self-interest (generated by pluralistic
institutional arrangements) or through psychological and educational processes
(which lead toward tolerant individual values).

Madison's famous argument about factions in *The Federalist* No. 10 can
be understood as a route to self-interested institutional tolerance. According
to Madison, regardless of individual predilections, a sufficiently divided
political system cannot gang up on any one group. Partly, this is due to the
lack of a majority. Also important, however, are the working relationships
necessary to sustain shifting coalitions. In other words, short term majority/
minority status is softened by the probability that members of each group
will need the support of members of another on subsequent issues. The
need for coalition building therefore encourages tolerance.

In the modern presidential system, however, the president defines how
political events should be understood. Without competing powerful voices,
the public tends to polarize into those loyal to the chief and everyone else, thus
threatening tolerance for competing approaches to political problems.

Moreover, election rules, with their focus on primaries and restrictions
on campaign funding by parties, thwart coalition building and thus exacer-
bate the problem. The election rules also frustrate moderate voices and
make legislative voices appear uniquely corrupt. By contrast, public fund-
ing of the presidential campaign avoids the seamy side of political
fundraising. Thus the rules subtly encourage the notion that bargaining,
implicit in the legislative process, is illegitimate; that legislative views are
unworthy because partial; and that there is a single correct—even patriotic—answer reflected in presidential policy.

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151. In parliamentary systems, coalitions might be built either in large districts, as Madison argued, or across districts in the legislature. In presidential systems the latter option is less significant because of the power of the president to shape a dominant national majority.

152. *See Gottlieb, supra* note 15.


154. *See Gottlieb, supra* note 61 (describing balkanization of politics by rules which channel campaign funds into numerous separate groups with constraints on interaction).

155. This is largely due to the way election rules highlight the foibles of the legislative process through extensive disclosure while restricting work with "special interests," a term which now apparently includes everyone. *See Sorauf, Thicker, supra* note 5, at 112-15, 117, 118.


157. *See Fitts, supra* note 133.

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Because of the relationship between tolerance for opposition and a multidimensional system, a stable democratic system is promoted by avoiding changes in election rules which weaken Congress and the parties as partners in government. That conflicts with proposals for term limits and steps toward the individualization of politics through campaign finance limitations and other means.

An alternate means of bridging differences is through education. Students of tolerance have long noted that education is related to tolerance of disfavored groups. The learning of tolerance occurs in many forms including: tradition, mimicry, and congruence of behavior in different situations. Integration educates when it takes place under conditions of equality, and particularly of common purpose. Conversely, the "spiral of silence"—reluctance to express views in conflict with views perceived as dominant—is a perverse though ambiguous indication of the legitimacy that flows from exposure. Thus, building bridges across differences suggests the necessity of cross-exposure, not only in electoral contexts like debates, but also in non-electoral contexts like public schooling, integration, and universal public service.

The polarization of American society seems to have undercut the more centrist, and often tolerant, parties. Mass-based political parties, which can facilitate significant and legitimate competing voices, are declining, thus making it easy to dismiss political opposition and fractious legislatures as

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159. SAMUEL A. STOUFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES (1955); JOHN L. SULLIVAN ET AL., POLITICAL TOLERANCE AND AMERICAN DEMOCRACY (1982) (showing that education affects targets of tolerance, rather than a willingness to tolerate an individual's most despised group; in either formulation, educational processes result in some groups coming to seem less threatening and more tolerable).

160. See, e.g., CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC (1953).


163. See GORDON ALLPORT, THE NATURE OF PREJUDICE 488-91 (1954) (discussions of contact hypothesis); Mark A. Chesler, CONTEMPORARY SOCIOLOGICAL THEORIES OF RACISM, in TOWARDS THE ELIMINATION OF RACISM 36 (Phyllis A. Katz ed., 1976); 4 SAMUEL STOUFFER ET AL., STUDIES IN SOCIAL PSYCHOLOGY IN WORLD WAR II (1950) (describing impact of ethnic and religious integration on soldiers). See also PHYLIS A. KATZ & DALMAS A. TAYLOR, ELIMINATING RACISM: PROFILES IN CONTROVERSY 360 (1988) (describing contact hypothesis). Desegregation has provided a very difficult test for the contact hypothesis because of numerous failures to meet the requisite conditions, but studies meeting the conditions support the hypothesis. Id. at 3, 362-63.


165. See DEUTSCH, supra note 148; Gottlieb, supra note 53, at 249-53.

166. NORMAN H. NIE ET AL., THE CHANGING AMERICAN VOTER 281-84 (1976) (describing sequence of changes in American attitudes toward politics between 1956 and 1964). See also CROTTY, supra note 64, at 84-89 (discussing increasing disenchantment with political system and resulting nonvoting). The decline of mass-based political parties may be both a symptom and a cause of declining toleration.
inessential in a well-run democracy. The decline of parties also hinders
tolerance, either because the mechanics of coalition building are not present
or because their educational authority has waned. These problems are made
worse by nomination and campaign finance rules which discourage parties and
other political organizations from active participation in the supposedly demo-
cratic process, thus barring tolerance. Those rules need to be rethought.

Thus, tolerance for opposition and restraint of hero worship that makes a
sitting chief executive appear indispensable depend on significant and legitimate
competing voices. Moreover, political rules must empower political
groups, not exclude them, and strengthen Congress in order to ensure that a
democracy responsive to all citizens prevails.

167. Stability might be accomplished by avoiding discussion of all public issues; but that, as Madison
wrote in THE FEDERALIST No. 10, might be worse than the disease. Discussion of public issues is, of
course, an independent advantage of any system which creates alternative significant and legitimate voices
capable of commanding attention.

Traditionally, political scientists have argued that comprehensive parties are a forum for compromise
and common action across political gulfs. Without them, what remains is interest group politics. Indeed,
the very term interest groups has undergone a transformation as it has dawned on people that all of the
public interest organizations in fact represent partial views and constituencies. If this view is correct, we
should not hasten or aggravate this turn toward splintered politics.

It is not clear that the compromise engendered by comprehensive parties leads to greater tolerance
than the compromise among more fractionalized parties. Powell notes that fractionalization poses a complex
set of consequences for tolerance, some of which may be positive. Fractionalization reduces riots, POWELL,
supra note 112, at 109, 204-05, and even extremism is not related to deaths. Id. at 109. But deaths and
government stability are not related, id. at 207, and extremism is related to executive instability and rioting.
Id. at 205. Nonetheless, it is clear that the path to a political voice provided by parties is an important outlet
for political frustration.

Although legislatures splintered among a number of non-extremist parties may promote political
tolerance, it is not clear that this holds true for fractionalized parties within a two-party legislature in a
presidential system. That structure might blur the represented groups too much to leave constituents satisfied
and leave no legislative voice capable of being heard respectfully against the chief executive's power. Thus,
it may be true within the constraints of the American political system that broad-based and well-organized
parties promote more tolerance than weaker, fractionalized ones.

Moreover, party systems may improve the representation of the public by internalizing large portions
of the public agenda. See Fitts, supra note 133, at 1604-09, 1614; Richard Jankowski, Preference
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The decline of mass-based political parties may be a cause of declining tolerance in another sense.
Within legislative sessions, both parties and presidents must negotiate for legislative programs. To the extent
that the personal fortunes of a chief executive are narrowed to his or her own next succeeding election,
while the fortunes of parties and their members and officers extend much further—both to different positions
and longer periods of time—the parties may be more prone to engage in consociational practices rather
than take greater risks for limited gains.

168. Tolerance also depends on avenues of mutual accommodation and compromise. A strong mass-
based, centrist, two-party system organizes much of the necessary compromise internally. A strong mass-
based, multiparty system organizes much of the necessary compromise in the legislative body. But splintered
systems—in which each representative owes little allegiance to any political organization or party—may
make compromise more difficult if each representative curries the support of his or own constituents without
regard to consequences elsewhere. This is particularly true if strong, "principled" positions are prized by
the voters.

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V. CONCLUSION—A CONFLICT OF OBJECTIVES

Campaign reform continues to be a confusing arena in which both the ends—democracy, equality, and the present and future maintenance of democratic government—and the means are ill-defined and ever-debated. We face choices between participant and voter definitions of politics, between purity and competition, between parties and individual campaigns, and between enabling and restrictive legislation. They are significant—and difficult—choices.

Yet, if one of our objectives—as it must be—is voter equality, then the terms of the debate must be shifted to explore what will best accomplish that goal, not whether we can find any evidence that fashionable measures are producing some small measure of success.

More broadly, the objective must be good government for ourselves and our posterity, a requirement that necessarily includes stable democratic government, voter equality, intelligent decision-making, and effective implementation of public choices. That is a difficult agenda from which we must not be diverted. The best currently available information suggests focusing on competition, enfranchisement, a more permissive environment for political organization, and a strengthened legislative government.