

PARTIES BY DESIGN: PLURALIST PARTY REFORM IN A POLARIZED ERA

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While the debate over the role of political parties is longstanding and not completely resolved amongst scholars, most reform groups are skeptical that stronger parties are the solution to contemporary problems in the American political system. Looking at the effects of past reforms and related court rulings, we maintain that many of them strengthened the hand of party activists, independently financed candidates, and donors in the nomination process at the expense of elected officials and national party officials. This has not only fueled partisan polarization due to pressures from party activists and donors, but it also removed any ability of the party to conduct what some have termed “peer review.” Instead of focusing on reversing past party reforms, however, we propose taking a different tack. We ask what changes might make the political parties more effective umbrella organizations that promote coalition building and better governance in this period of high polarization. Toward that end, we propose some changes that might incentivize American political parties to serve that function better. The parties themselves would have to adopt some of these reforms. Others might require that reform groups and the courts be willing to give political parties a more privileged role in campaign finance.

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INTRODUCTION

Although political parties are not acknowledged in the U.S. Constitution, they have been incorporated into the American political system through various state constitutional amendments,¹ statutes,² and court rulings.³ This incremental development filled a void in the government's initial design, acknowledging the critical function that political parties perform by coordinating like-minded voters, interest groups, and public officials in order to contest elections and govern.⁴

While it might seem that the role of political parties in American politics should be a settled matter by now, it is not. America's historical ambivalence toward political parties has resurfaced in the current debate over rising partisan polarization. Many observers believe that extreme partisanship is a root cause of the current political dysfunction at the state and federal levels.⁵ Since the concept of partisanship

¹ While the Federal Constitution does not reference political parties, state constitutions often do. For instance, the California Constitution, sets out which state office elections are elected by partisan ballots and which are not, and affirms the right of candidates to designate a party label. See CAL. CONST. art II, §§ 5, 6.

² Various sections of the California Elections Code, for instance, state the conditions for qualifying a new political party for the ballot. See *Political Party Qualification*, CALIFORNIA SEC'Y OF STATE, <http://www.sos.ca.gov/elections/political-parties/political-party-qualification/> (last visited Aug. 16, 2018) (explaining how to qualify as a political party and citing the California Elections Code). The wide variation in the legal treatment of political parties in the various American states is analyzed in Joseph R. Starr, *The Legal Status of American Political Parties*, I, 34 AM. POL. SCI. REV. 439 (1940).

³ See, e.g., Brian L. Porto, *The Constitution and Political Parties: Supreme Court Jurisprudence and Its Implications for Partybuilding*, 8 CONST. COMMENT. 433 (1991).

⁴ See Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 787 (2000) (describing the essential role that parties play in brokering group interests, "solving voters' collective action problems," "provid[ing] voters with an important heuristic that organizes and lessens the expense of information about candidates and policies," and "creat[ing] a collective responsibility for actions in office that allows voters to reward or punish based on the policies and conditions that they observe"). It is also well established that parties offer citizens avenues to participate in politics, serve as a majoritarian counterbalance to narrow special interest groups, act as a moderating force in their pursuit of middle-of-the-road policies that can guarantee broad governing coalitions, and are more transparent than outside groups. See IAN VANDEWALKER & DANIEL I. WEINER, BRENNAN CTR. FOR JUSTICE, *STRONG PARTIES, STRONGER DEMOCRACY: RETHINKING REFORM 3-5* (2015), https://www.brennancenter.org/sites/default/files/publications/Stronger_Parties_Stronger_Democracy.pdf (collecting citations and providing examples).

⁵ There is a great deal of scholarship about the rise in partisan polarization as well as speculation about its causes in recent years. Some of the most notable books on this topic include: ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* (2010) (arguing that polarization in government reflects a broad polarization within the public and that polarization reflects political engagement); MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2005) (challenging the pervasive belief that political polarization is indicative of a culture war in the United States); JACOB S. HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION AND THE*

presupposes the existence of party entities, it is understandable that some would blame those entities for the current state of American politics. While party loyalty (i.e., consistently supporting a particular party over time) creates partisanship, party systems do not inevitably become highly polarized and dysfunctional.⁶ Institutional incentives, socioeconomic conditions, and other factors must typically conjoin in some way to lead to that outcome. In fact, it is our contention that American parties properly designed could actually mitigate polarization and dysfunction to some degree through the process of coalition formation.

In the parts of the paper that follow, we first argue that while the debate over the role of political parties is longstanding and not completely resolved amongst scholars, most reform groups are skeptical that stronger parties are the solution to contemporary problems in the American political system. Secondly, we maintain that many past reforms and related court rulings have strengthened the hand of party activists, independently financed candidates, and donors in the nomination process at the expense of elected officials and national party officials. This has fueled not only partisan polarization, due to pressures from the party bases, but also has removed any ability of the parties to conduct what Elaine Kamarck and others have termed “peer review.”⁷ It may not be possible to reinvigorate peer review at this point in time.

In the last section of the paper, instead of focusing on reversing past party reforms, we propose taking a different tack. We ask what changes might make the political parties more effective umbrella organizations that promote coalition building and better governance in this period of high polarization. And we propose some changes that might incentivize American political parties to serve that function

EROSION OF AMERICAN DEMOCRACY (2005) (explaining why the Republican party has strayed dramatically from the political center); THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2d ed. 2016) (identifying two overriding sources of dysfunction in modern American politics); SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* (2008) (examining congressional history to understand the current problem of polarization).

⁶ Partisan polarization in the American political system was quite low in the immediate post-war period and began to increase sharply in the late 1970s. See NOLAN McCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 7 (2d ed. 2016). This has been linked to various factors such as rising income inequality, changing immigration patterns, and changing campaign contribution patterns. See *id.*

⁷ See ELAINE C. KAMARCK, CTR. FOR EFFECTIVE PUB. MGMT., BROOKINGS INST., *RE-INSERTING PEER REVIEW IN THE AMERICAN PRESIDENTIAL NOMINATION PROCESS* (2017), https://www.brookings.edu/wp-content/uploads/2017/04/20170227_presidential-nomination_gs.pdf.

better. The parties themselves would have to adopt some of these reforms, while others might require that reform groups and the courts be willing to give political parties a more privileged role in campaign finance.

I

AMERICAN POLITICAL PARTIES IN PERSPECTIVE

Political parties perform a crucial coalition-building function in all competitive democracies, but they do this differently depending on the structure of the particular democracy. In proportional representation systems, parties tend to run on narrow ideological platforms knowing that they may join a broader post-election coalition government after the votes are counted.⁸ American parties, by comparison, forge their electoral and governing coalitions during the nominating stage of caucuses, conventions, and primary elections.⁹ Because the resulting alliances generally span a broad spectrum of interests and ideology, political science characterizes the resulting parties as “catch-all” or “umbrella” parties.¹⁰

Some scholars disparage American political parties as just another example of America’s quirky institutional “exceptionalism.”¹¹ This is true in a sense, but it overlooks the parties’ functional importance in the context of America’s distinctively decentralized framework of governing institutions and electoral rules.¹² As compared to other advanced democracies, the American system fractures political

⁸ See André Blais & Marc André Bodet, *Does Proportional Representation Foster Closer Congruence Between Citizens and Policy Makers?*, 39 COMP. POL. STUD. 1243, 1246 (2006) (concluding that proportional representation systems offer more parties and more choices to narrow subsets of voters).

⁹ See JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 7–14 (1995) (discussing three existing views of the major parties); DAVID KAROL, *PARTY POSITION CHANGE IN AMERICAN POLITICS: COALITION MANAGEMENT* 183 (2009) (describing parties as “coalitions of groups with intense preferences on issues who come together to win elections”).

¹⁰ The term and concept of “catch-all” parties is attributed to Otto Kirchheimer. See Otto Kirchheimer, *The Transformation of the Western European Party Systems*, in *POLITICAL PARTIES AND POLITICAL DEVELOPMENT* 177, 184–95 (Joseph LaPalombara & Myron Weiner eds., 1966) (describing the decline of the old-style bourgeois party and the rise of a “catch-all people’s party” following the Second World War). Because the term “catch-all” party is sometimes used to describe one-party politics in nondemocratic settings, we prefer the term “umbrella” party to mean broad coalitional parties in competitive democracies such as the United States.

¹¹ See, e.g., MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 21–23 (trans. Barbara North & Robert North, 2d ed. 1962) (discussing the American party system as “archaic” and tied to the “deep individualism” of the American worker).

¹² See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 276 (2000) (explaining that in America’s early years,

power to a more extreme degree, both horizontally across branches of government and vertically across federal, state, and local jurisdictions.¹³ As a consequence, effective policy making requires countless bargains among diverse groups and interests in order to assemble a winning electoral coalition.¹⁴ In addition, winner-take-all election rules for executive and legislative offices leave little room for losing parties to negotiate into the winning coalition after the votes are counted. The “exaggerated” seat allocations—exaggerated because divergent from proportional representation—characteristic of “first-past-the-post” systems often give the winning party all the support it needs to govern, especially when one party controls both the legislative and executive branches.¹⁵

The efficient logic of the minimum-winning-coalition theory dictates that the victors in both American primary and general elections do not have to pay for what they do not need.¹⁶ Hence, the losers in contests often have little or no political leverage in government.¹⁷ The maneuvering in American politics is therefore heavily front loaded: Pick the right candidate or party to back early on, or risk being left out in the cold until at least the next election cycle.¹⁸

a “key feature of [its] new federalism was the . . . system of decentralized national political parties, which . . . assured respect for state sovereignty”).

¹³ See Erin Ryan, *Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Pluralist Society*, 96 OR. L. REV. 123, 152 (2017) (noting the unique diffusing of power both horizontally and vertically among various branches of American government).

¹⁴ For how this plays out in Congress’s policy making, see Frances E. Lee, *Geographic Politics in the U.S. House of Representatives: Coalition Building and Distribution of Benefits*, 47 AM. J. POL. SCI. 714, 722–25 (2003) (detailing the challenge of coalition building in passing the 1998 transportation bill); Frances E. Lee, *Senate Representation and Coalition Building in Distributive Politics*, 94 AM. POL. SCI. REV. 59 (2000) (developing two hypotheses about coalition building in the Senate).

¹⁵ See DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* 25–28 (rev. ed. 1971) (discussing the disproportionality created by plurality voting systems, such as that in the United States).

¹⁶ See generally Russell Hardin, *Hollow Victory: The Minimum Winning Coalition*, 70 AM. POL. SCI. REV. 1202 (1976). For a more comprehensive discussion of the minimum-winning-coalition theory, see David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331, 353–55 (2001).

¹⁷ A situation where the vote margin in the legislature is so close that one needs to get a few votes from the other side to compensate for defections or to achieve a required supermajority threshold is one exception to this rule. See, e.g., John Sides, *What Do Republicans Need to Pass Tax Reform? Democrats.*, WASH. POST (Nov. 7, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/07/what-do-republicans-need-to-pass-tax-reform-democrats/>.

¹⁸ Presidents draw heavily from their campaign staff, at some cost to administrative efficiency. See generally Nick Gallo & David E. Lewis, *The Consequences of Presidential Patronage for Federal Agency Performance*, 22 J. PUB. ADMIN. RES. & THEORY 219 (2012). Backing the right horse early can also matter a lot for committee assignments in the House and State Legislatures, for instance. See, e.g., Eric D. Lawrence, Forrest Maltzman & Paul

Because U.S. nomination processes are so critical to obtaining and exercising political power, changes in the processes are frequent and hotly contested within the party ranks.¹⁹ These contests also take place within a permissive constitutional regime. Though the Supreme Court has determined that parties cannot exclude voters from participating in primary elections on the basis of race,²⁰ it has also determined that American political parties are private associations with the right to organize their affairs.²¹ Thus, state rules regarding political parties have evolved at different times and in various ways, resulting in an inconsistent, complex regulatory framework. In some state and local governments, party labels attach to all elected offices, including judges.²² In others, local elected offices are explicitly nonpartisan.²³ The Supreme Court also permits party patronage at the highest levels of government, but not for lower administrative positions.²⁴ In short, America's political system is a cumulative hodgepodge of conflicting interests and ideals.

Over the years, a few political scientists, journalists, and legal scholars have advocated for giving American political parties more prominence.²⁵ But the political reform community has for the most

J. Wahlbeck, *The Politics of Speaker Cannon's Committee Assignments*, 45 AM. J. POL. SCI. 551, 555 (2001) (examining Speaker Joseph Cannon's appointment for committees in the early twentieth century and concluding that party loyalty played a significant role). It is rare for U.S. Presidents to pick staff from another party. See, e.g., Robert Farley, *Three Cabinet Appointees from Opposing Party Is Unmatched*, POLITIFACT (Feb. 10, 2009, 5:34 PM), <http://www.politifact.com/truth-o-meter/statements/2009/feb/10/barack-obama/Three-Republicans-Cabinet-Most/> (finding support for President Obama's claim that his appointment of three Cabinet members from the opposite party was unprecedented).

¹⁹ A good example is the ongoing debate over superdelegates in the Democratic Party. See Eric Bradner, *Democratic Superdelegate Debate Left Unresolved, Will Continue into the Summer*, CNN (May 10, 2018, 3:49 PM), <https://www.cnn.com/2018/03/10/politics/democrats-superdelegates-debate/index.html>.

²⁰ See *Terry v. Adams*, 345 U.S. 461, 469–70 (1953) (striking down white-only pre-elections for county offices in Texas); *Smith v. Allwright*, 321 U.S. 649, 664–66 (1944) (striking down the Texas Democratic Party's policy of prohibiting African Americans from voting in primary elections); *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) (holding that white primaries violate the Equal Protection Clause of the Fourteenth Amendment).

²¹ See *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (“It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments.” (quoting *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986))).

²² For example, seven states use partisan elections for state supreme court justices. *Methods of Judicial Selection*, NAT'L CTR. FOR ST. CTS., http://judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Apr. 23, 2018).

²³ See, e.g., CAL. CONST. art. II, § 6(a) (“All judicial, school, county, and city offices, including the Superintendent of Public Instruction, shall be nonpartisan.”).

²⁴ *Elrod v. Burns*, 427 U.S. 347, 367 (1976) (prohibiting patronage dismissals for non-policymaking public employees).

²⁵ See, e.g., VANDEWALKER & WEINER, *supra* note 4, at 3 (arguing for the strengthening of party organizations); Bob Bauer, *Parties and the Rethinking of Reform*:

part disagreed. The Progressive Movement equated political parties with corrupt, inefficient political machines and sought to eliminate them to make way for a more merit-based, scientific, nonpartisan government that would better serve the people's interests.²⁶ After World War II, there was a brief party renewal movement that addressed some accountability and fair representation issues associated with Progressive Era nonpartisanship, but its reach was limited in scope and geography.²⁷ The reigning reform posture has been and continues to be populist, regarding parties as just another problematic faction and empowering the grassroots to have more say in formulating the party platform and choosing nominees.²⁸

Rising polarization in Congress, state legislatures, and public opinion in recent years also seemingly works against the case for more effective political parties.²⁹ How could political parties, critics ask, possibly be the solution to partisan polarization?³⁰ Don't parties by definition promote partisanship? For reform populists whose goal it is to eliminate all factionalism, political parties are not the solution. Many prefer direct democracy mechanisms to representative govern-

Part II, MORE SOFT MONEY HARD LAW (Sept. 21, 2015), <http://www.moresoftmoneyhardlaw.com/2015/09/parties-rethinking-reform-part-ii/> (finding a desire for the "reinvigoration of political party organizations" following the passage of the McCain-Feingold bill).

²⁶ See DWIGHT WALDO, *THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION* 128–35 (2d ed. 1984).

²⁷ See generally James MacGregor Burns, *Party Renewal: The Need for Intellectual Leadership*, in *PARTY RENEWAL IN AMERICA: THEORY AND PRACTICE* 194 (Gerald M. Pomper ed., 1981) (highlighting some successes in party renewal in Minnesota, Massachusetts, and California). As a practical matter, the movement mainly centered on the party's right to endorse and administer pro-party advocates and never extended successfully to the absolutely critical issues of campaign finance reform or primary rules. See Kay Lawson, *Challenging Regulation of Political Parties: The California Case*, 2 J.L. & POL. 263 (1985) (discussing California's party renewal efforts which primarily focused on the right of parties to conduct their own internal affairs and endorse candidates).

²⁸ See, e.g., Ronald A. Klain, *The Democratic Party's Nomination Process Isn't Democratic Enough*, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/opinions/the-democratic-partys-nomination-process-isnt-democratic-enough/2017/09/25/a56dc232-9f06-11e7-9083-fbdf6804c2_story.html ("It's time for an overhaul [of the Democratic primary process] around a core principle: The nominee should be democratically chosen by the broadest possible cross section of voters who can help elect the Democratic candidate for president.").

²⁹ See, e.g., McCARTY ET AL., *supra* note 6, at 17–74 (discussing polarization in Congress); Alan I. Abramowitz & Kle L. Saunders, *Is Polarization a Myth?*, 70 J. POL. 542 (2008) (discussing polarization in the electorate); Eric McGhee et al., *A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology*, 58 AM. J. POL. SCI. 337 (2014) (discussing polarization in state legislatures).

³⁰ See Jane Mansbridge, *Three Reasons Political Polarization Is Here to Stay*, WASH. POST (Mar. 11, 2016), <https://www.washingtonpost.com/news/in-theory/wp/2016/03/11/three-reasons-political-polarization-is-here-to-stay> (arguing that political party polarization has resulted in legislative deadlock).

ment and want to keep a tight leash on the actions of office holders through recalls and referendums.³¹

In fact, whether parties exacerbate or mute political polarization depends upon context. In many proportional representation systems, parties can define their electoral identity and ideology narrowly, so one finds more extremist parties on both ends of the left-right spectrum than one finds in the United States.³² In the United States, however, the “first-past-the-post” election rules and other laws embed a party duopoly system that can serve as a potential break against extreme ideological drift if the parties compete for the median voter.³³ But if centrist voters sit on the sidelines, the centripetal forces weaken.³⁴

Importantly, there is no necessary correlation between strong, effective U.S. party organizations and ideology. Nineteenth-century urban political machines were effective in mobilizing their supporters and coordinating candidates and public officials, but they relied heavily on patronage—not ideology.³⁵ Polarization, particularly political fragmentation, thrives in the United States today, moreover, under conditions of interest group fracture and *weakened* party organization.³⁶ Partisan polarization has risen even as the official political parties have shattered into partisan networks and affiliated committees that compete with a multitude of ideological nonprofits, wealthy individual donors, and Super PACs for influence over candidates and elected officials.³⁷ This situation enables powerful ideological individuals and groups to exert leverage on elected officials

³¹ BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY* 68–91 (2015).

³² Cf. Jay K. Dow, *A Comparative Spatial Analysis of Majoritarian and Proportional Elections*, 20 *ELECTORAL STUD.* 109 (2001) (finding that parties and candidates in majoritarian systems are located significantly closer to the center of the distribution of voters than those in proportional systems).

³³ See Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 *SUP. CT. REV.* 331, 348, 367.

³⁴ ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 116–19 (Addison-Wesley 1985) (1957).

³⁵ See James Q. Wilson, *The Economy of Patronage*, 69 *J. POL. ECON.* 369, 369–70 (1961) (describing how the old system of patronage was effective in maintaining political systems and galvanizing voters).

³⁶ See Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 *YALE L.J.* 804, 809 (2014) (describing political fragmentation as “the external diffusion of political power away from the political parties as a whole and the internal diffusion of power away from the party leadership to individual party members and officeholders”).

³⁷ See, e.g., McCARTY ET AL., *supra* note 6, at 6–7 (showing that polarization in the House has increased consistently since 1977).

through threats of losing donations or “being primaried” and makes it harder for party leaders to induce compromise and whip votes when needed.³⁸

There has always been a tension in political parties between the goals of elected officials—to stay in power and govern pragmatically—and the policy purity of the activist base. Officeholders are repeat players in a policy game where the currencies of influence and power are keeping promises, compromising, logrolling, doing favors, and the like. Activists, by contrast, who are outsiders to this policy game, judge a policy by how closely it comes to their ideal.³⁹ Many nonprofits and Super PACs raise money and sustain membership for their organizations by advocating hard for the ideal, not by compromising with opponents.⁴⁰ The purpose of an umbrella party, or a functional equivalent, is to create an alliance of these groups and to aggregate specific demands into a broader governance agenda.⁴¹

A common misconception is that party renewal advocates want to bring back corrupt, nontransparent political machines.⁴² That is certainly not true for most of those who support strengthening parties.⁴³

³⁸ See generally ROBERT G. BOATRIGHT, *GETTING PRIMARIED: THE CHANGING POLITICS OF CONGRESSIONAL PRIMARY CHALLENGES* (2013) (discussing the motivations for and effects of congressional primary challenges); John Nichols, *America Gets Primaried*, NATION (Oct. 1, 2013), <https://www.thenation.com/article/america-gets-primaried/> (discussing how donors’ funding of primary challenges of “‘Republican-in-Name-Only’ incumbents” poses a real threat to such incumbents).

³⁹ See JAMES Q. WILSON, *AMATEUR DEMOCRAT: CLUB POLITICS IN THREE CITIES 3–4* (1962) (discussing the concept of the “amateur” politician and his or her proclivity to evaluate issues on the merits).

⁴⁰ See RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, *CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL* (2015) (noting that “independent,” nonparty donors are often ideological purists); THOMAS E. MANN & ANTHONY CORRADO, *CTR. EFFECTIVE PUB. MGMT. AT BROOKINGS INST., PARTY POLARIZATION AND CAMPAIGN FINANCE* 16 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/Mann-and-Corrad_Party-Polarization-and-Campaign-Finance.pdf (claiming that mega-donors to Super PACs have an “ideological zeal” and a “distaste for compromising”).

⁴¹ Cf. DANIEL J. GALVIN, *PRESIDENTIAL PARTY BUILDING 152* (Princeton Studies in Am. ed., 2010) (describing President Bush calling the Republican Party an “umbrella party” to united party interests and philosophy).

⁴² See THOMAS E. MANN & E.J. DIONNE, JR., *CTR. EFFECTIVE PUB. MGMT. AT BROOKINGS INST., THE FUTILITY OF NOSTALGIA AND THE ROMANTICISM OF THE NEW POLITICAL REALISTS* 11 (June 17, 2015), https://www.brookings.edu/wp-content/uploads/2016/07/new_political_realists_mann_dionne.pdf (“But restoring earmarks and reducing transparency are small arms in the reform arsenal of the new realists. They assert the best way to reduce extreme partisanship . . . is to strengthen parties by freeing them to raise and spend more money.”).

⁴³ See Nathaniel Persily, *Stronger Parties as a Solution to Polarization*, in *SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* 123–35 (Nathaniel Persily ed., 2015) [hereinafter *SOLUTIONS TO POLITICAL POLARIZATION*]; Nolan McCarty, *Reducing Polarization by Making Parties Stronger*, in *SOLUTIONS TO POLITICAL POLARIZATION*, *supra*, at 136–45; Richard H. Pildes, *Focus on Political Fragmentation, Not Polarization*:

Rather, the goal is to design political parties to be more effective in dealing with the effects of our highly dispersed, ideological political landscape.⁴⁴ It is unrealistic to think that party reform can fix all of the causes of polarization such as substantial wealth inequality, a growing racial divide, immigration, cultural backlash, and religious tensions. That said, the purpose of party renewal is to enhance political parties' umbrella function—that is, their role in coalition building and interest-aggregation—in order to mitigate the effects of polarization.⁴⁵

II

LESSONS FROM PREVIOUS REFORMS

For several decades after the tumultuous 1968 Democratic National Convention, various party commissions tinkered with the presidential candidate nomination processes. The initial efforts shifted power towards the party activist base by opening up the nomination process.⁴⁶ Later Democratic Party commissions sought to weaken the bolstered grassroots influence of earlier reforms and reinvigorate the role of elected and party officials.⁴⁷ Republicans also experimented with rule changes, altering the mix between proportional and winner-take-all delegate allocations in order to slow down the winnowing effects of the early primaries.⁴⁸ And both parties have had numerous internal debates over the years about the order and grouping of the state primaries and caucuses.⁴⁹

Re-Empower Party Leadership, in SOLUTIONS TO POLITICAL POLARIZATION, *supra*, at 146–56; Bruce Cain, *Two Approaches to Lessening the Effects of Partisanship*, in SOLUTIONS TO POLITICAL POLARIZATION, *supra*, at 157–64. The concern of the authors of these chapters is to lessen fragmentation and the dispersion of political power, not to bring back a particular form of political boss and patronage.

⁴⁴ See Persily, *supra* note 43, at 126.

⁴⁵ See *id.*

⁴⁶ See MARTY COHEN ET AL., THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM 159 (2008) (stating, among other things, that under the McGovern-Fraser reforms, “[i]f a state party opted to use a primary to select delegates to the party nominating convention, the delegates had to be awarded to candidates on the basis of voter support for the candidate”).

⁴⁷ See, e.g., Steven S. Smith & Melanie J. Springer, *Choosing Presidential Candidates*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS 1, 6 (Steven S. Smith & Melanie J. Springer, eds., 2009) (stating that, in 1972, “[a] commission headed by future senator Barbara Mikulski . . . adopted a new rule that allowed up to 25 percent of a state’s delegation to be made up of delegates chosen by the state party (now called ‘superdelegates’)”).

⁴⁸ See *id.* at 9–12.

⁴⁹ For some early history on this topic, see AUSTIN RANNEY, CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA (1975). For the contemporary debate, see Caroline J. Tolbert et al., *Reforming Presidential Nominations: Rotating State Primaries or a National Primary?*, 42 PS: POL. SCI. & POL. 71 (2009).

What have we learned from all this? At least half-a-dozen things. To start, it seems clear (if indeed there was ever any doubt) that no particular set of rules can guarantee a winning candidate or even one who gives his or her party the best chance at winning. In 2016, the Democratic and Republican Parties managed to produce the two most unpopular presidential candidates in recent memory in two distinctively different ways. The Republicans, who typically could be counted on to clear out the rest of the field for a favored establishment candidate,⁵⁰ instead had a wild, chaotic brawl that eventually yielded Donald Trump. The Democrats, on the other hand, took a page out of the Republican playbook and cleared the field for Hillary Clinton,⁵¹ only to discover that their seemingly pragmatic choice was undone by a “change election,” email controversies, lucrative Wall Street speeches, tactical mistakes, sexism, and quite possibly, FBI and Russian intervention.⁵² The rules per se did not preordain these outcomes. Hillary Clinton and Donald Trump were nominated under rules that were not dramatically different from those that led to the successful elections of George W. Bush in 2000 and 2004 and Barack Obama in 2008 and 2012.⁵³

Second, past party-led efforts have taught us that it is very hard to resist the populist logic that dictates that voters, as opposed to party leaders, should decide party nomination contests. Since the late nineteenth century, the general trend at both the state and national levels has moved away from candidate nominations by the “party-as-organization” or “party-in-the-government” and towards the “party-in-the-

⁵⁰ See Stuart Rothenberg, *Party's History of Establishment Picks Could Be Over*, ROLL CALL (June 2, 2015), <https://www.rollcall.com/news/republican-presidential-candidates-2016-establishment-vs-insurgent> (“[E]xcept for 1964, when an insurgent Barry Goldwater defeated a slew of establishment opponents . . . the establishment has won the[] fight[] to select the party’s presidential nominees.”).

⁵¹ Nicol Rae, *Political Parties*, in DEVELOPMENTS IN AMERICAN POLITICS 83, 95–96 (G. Peele et al. eds., 2018) (comparing Clinton’s nomination to a “copybook illustration of *The Party Decides* thesis,” but explaining that despite her being “a frontrunner with overwhelming support from party elites and major constituencies who used these advantages to clear the field during the invisible primary,” and a clear path to her nomination, she “had to fight harder to secure the nomination than expected”).

⁵² Annie Karni, *Clinton Aids Blame Loss on Everything but Themselves*, POLITICO (Nov. 10, 2016), <https://www.politico.com/story/2016/11/hillary-clinton-aides-loss-blame-231215>.

⁵³ *Compare Election 2012: Presidential Primaries, Caucuses, and Conventions, January 2012 Through September 2012*, THE GREEN PAPERS (June 25, 2012, 11:55 PM), <http://www.thegreenpapers.com/P12/> (describing the rules by states in presidential elections in 2012), with *Election 2016: Presidential Primaries, Caucuses, and Conventions, January 2016 Through September 2016*, THE GREEN PAPERS (Mar. 23, 2018, 12:34 AM), <https://www.thegreenpapers.com/P16/> (describing the rules in 2016).

electorate.”⁵⁴ One unintended result of this shift is that it has greatly enhanced the activists’ more ideological voice in the primaries, special elections, and off-year contests at the expense of those who pragmatically adhere to the Downsian logic of moving to the middle to win elections.⁵⁵

When Hubert Humphrey became the Democratic nominee in 1968 without running in any primaries, the McGovern-Fraser Commission opened the nominating process to more caucuses and primaries.⁵⁶ But by the 1984 cycle, the Democratic Party tried to put the activist genie back in the bottle (at least partially) by awarding more convention slots to party and elected officials in their role as “superdelegates.”⁵⁷ On paper, this seemed promising and consistent with the American institutional tradition of achieving balance through the offset of clashing incentives (in this case, ideological purity versus electoral pragmatism).⁵⁸ But over time, ever-rising populist expectations have undermined the superdelegates’ willingness to act as an independent check on primary voters. In the 2008 Democratic primary, for instance, most superdelegates held their finger in the wind until the contest was almost over, refusing to weigh in publicly between Hillary Clinton and Barack Obama until they knew which candidate the primary voters preferred.⁵⁹

In 2016, we never got the hard test of what the Democratic superdelegates would have done if Bernie Sanders had won more

⁵⁴ In a seminal work, political scientist V.O. Key disaggregated the generic descriptor “party” into these three components. V.O. KEY, JR., *POLITICS, PARTIES & PRESSURE GROUPS* 163–65 (5th ed. 1964). The party-in-the-government includes the President and representatives from his party in the legislative and executive departments. The party-as-organization includes the parties’ state and national committees and the people who work for the parties at any level. The party-in-the-electorate refers to voters who identify with a party. *See id.*; *see also* RANNEY, *supra* note 49 (describing the way party nominations changed with the introduction of new party nomination rules after 1968).

⁵⁵ For a discussion on when it is beneficial for incumbents to adopt the preferences of the majority of voters and when adopting minority preferences on key issues may result in election wins for opposition, *see* DOWNS, *supra* note 34, at 55–74.

⁵⁶ *See* NELSON W. POLSBY, *CONSEQUENCES OF PARTY REFORM* 26–35 (1983).

⁵⁷ Elaine C. Kamarck, *A History of Super-Delegates in the Democratic Party*, HARV. KENNEDY SCH. BELFER CTR. FOR SCI. & INT’L AFF. (Feb. 14, 2008), <https://www.belfercenter.org/publication/history-super-delegates-democratic-party>.

⁵⁸ *See, e.g.*, THE FEDERALIST No. 10 (James Madison).

⁵⁹ *See* Adam Nagourney & Carl Hulse, *Neck and Neck, Democrats Woo Superdelegates*, N.Y. TIMES (Feb. 10, 2008), <https://www.nytimes.com/2008/02/10/us/politics/10superdelegates.html> (explaining that delegates often wait for the presumptive nominee before pledging support) While Clinton had the early lead in 2008, Obama eventually won the total superdelegate vote, 438 to 256, essentially following the results of the pledged delegates that Obama won, 1763 to 1640. *See Election Center 2008*, CNN POLITICS, <http://www.cnn.com/ELECTION/2008/primaries/results/scorecard/> (last updated Aug. 20, 2008).

pledged delegates than Hillary Clinton without attaining the requisite 2283 delegate threshold needed to secure the nomination. For certain, it would have been a tough, potentially divisive decision to deny the presidential nomination to the candidate with the most popular votes on the basis of superdelegate opposition. And the wisdom of such a pragmatic, “undemocratic” choice would have been highly controversial after the fact given Clinton’s troubled candidacy in the fall. The superdelegate experiment dodged what might have proven to be a terminal blow thanks to Clinton’s modest popular vote and pledged delegate margins over Sanders.⁶⁰

Third, presidential nomination reform efforts have been and will continue to be shaped and constrained in critical ways by the U.S. federal system. For instance, the fact that New Hampshire insists on holding the first primary election—and there is nothing that the parties or other states can (or are willing to) do about it—stems from the constitutional power of states to determine the time, place, and manner of elections.⁶¹ New Hampshire has made it clear that it will always be the first mover,⁶² and it has little or no sympathy for the plight of larger, more diverse states like California. Even if New Hampshire were not so determined, it is difficult for a large state like California to move up a primary date without enormous resistance from its state legislative incumbents, who need time to raise money for their own expensive professionalized primary races, or from their taxpayers who do not like the idea of footing the bill for a separate presidential primary election.⁶³

Over the years, a good deal of time and effort has been devoted to debating the order of elections and to contemplating whether a more rational regional primary system could replace the current

⁶⁰ Clinton won the pledged delegates 2205 to 1846 and the superdelegates 602 to 48. See *Election 2016—Democratic Delegate Count*, REALCLEARPOLITICS, https://www.realclearpolitics.com/epolls/2016/president/democratic_delegate_count.html (last visited May 15, 2008).

⁶¹ The Elections Clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” U.S. CONST. art. I, § 4, cl. 1.

⁶² See Eric Moskowitz, *Why New Hampshire’s Primary Gets to Go First*, BOS. GLOBE (Jan. 21, 2016), <https://www.bostonglobe.com/magazine/2016/01/21/why-new-hampshire-primary-gets-first/CMmp3ZFaqhtLH2L5avVdgJ/story.html> (discussing how the New Hampshire Secretary of State “has fended off a series of efforts to supplant New Hampshire” as the first state to have its primary).

⁶³ California recently moved up its primary from June to March, but may end up switching back in the next fiscal crisis. See John Myers, *California Moves Its Presidential Primary to March in Push for Electoral Relevance*, L.A. TIMES (Sept. 27, 2017, 2:54 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-moves-its-2020-presidential-1506545303-htmlstory.html>.

hodge-podge order.⁶⁴ Moving Nevada and South Carolina up to the front has helped a bit with the diversity problem, but this move cannot fully proxy for the diverse interests of the larger, more urbanized states.

Moreover, two of the first four contests are caucuses, which raises another set of issues.⁶⁵ Caucuses tend to favor the candidates who have more motivated and better-organized followers, because it requires more effort to get people to devote an evening to a nomination contest by showing up at a several-hour meeting than to simply cast a vote in a primary.⁶⁶ While there is something to be said for rewarding grassroots fervor, whether caucuses should be encouraged in an age of hyper-polarization is at least debatable. In any event, states with caucuses will continue to resist strenuously any efforts by the national parties to get them to switch to primaries.⁶⁷

Fourth, competition for resources and endorsements in the invisible primary⁶⁸ still matters but is more complicated due to the growing importance of social media, the concentration of political money in soft money organizations, and the increasing number of self-financed candidates.⁶⁹ The 2016 Republican primary did not follow the usual so-called “party decides” script (i.e., nominations determined by party donors, party officials, and elected representatives).⁷⁰ Trump trailed

⁶⁴ See, e.g., Danielle Kurtzleben, *No Way to Pick a President? Here Are 6 Other Ways to Do It*, NPR (Jan. 26, 2016, 2:17 PM), <https://www.npr.org/2016/01/26/463870736/no-way-to-pick-a-president-here-are-6-other-ways-to-do-it> (discussing the pros and cons of a rotating regional primary system); Tom Schaller, *DCC Trying to Encourage Regional Primaries*, FIVETHIRTYEIGHT (Jan. 13, 2010, 8:42 PM), <https://fivethirtyeight.com/features/dcc-trying-to-encourage-regional/> (noting that the Democratic Change Commission “wants to steer the states toward grouping into regional or sub-regional primaries”).

⁶⁵ See *2016 Presidential Primary Election Schedule*, WASH. POST (Mar. 1, 2016), <https://www.washingtonpost.com/graphics/politics/2016-election/primaries/schedule/?noredirect=on> (depicting a full schedule of the 2016 election).

⁶⁶ See DAVID P. REDLAWSK ET AL., *WHY IOWA? HOW CAUCUSES AND SEQUENTIAL ELECTIONS IMPROVE THE PRESIDENTIAL NOMINATING PROCESS* 7–8 (2011) (discussing the differences in voter involvement and campaign styles between primaries and caucuses).

⁶⁷ In our opinion, this is not a fruitful avenue for party reform at the present time given the more serious problems of what the “party-as-organization” is and should be. See *supra* note 45 and accompanying text.

⁶⁸ The competition for endorsements and donations is conducted among the small universe of party leaders and donors, largely out of public view. See John H. Aldrich, *The Invisible Primary and Its Effects on Democratic Choice*, 42 PS: POL. SCI. & POL. 33, 33 (2009).

⁶⁹ See Marty Cohen et al., *The Invisible Primary in Presidential Nominations, 1980–1984*, in *THE MAKING OF THE PRESIDENTIAL CANDIDATES 2008* 1–38 (William G. Mayer ed. 2008) (discussing the importance of party insider endorsements to the outcomes of state primaries and caucuses).

⁷⁰ For a general discussion of the role of insiders in the invisible primary, see COHEN ET AL., *supra* note 46 (discussing the role of such party insiders in the invisible primary, and providing examples of party insiders’ roles in several contested nominations).

badly in campaign contributions and establishment endorsements but prevailed because he had celebrity, a strong social media following, and considerable (although undisclosed) personal wealth.⁷¹ The Democrats followed the traditional “party decides” script more closely but ended up nominating a losing candidate.⁷²

Aspects of the formal primary process rules—for example, how money is raised, whether a state contest is a caucus or a primary, and so on—still shape the invisible primary in important ways, except in small jurisdictions where retail campaigning is still possible.⁷³ But now there are new factors shaping the political landscape, such as the decline of traditional media and rise of social media, the lowered transaction costs for political organizing and small-donor solicitation on the internet, homophily among cyberspace communities, and the rapidity of the modern news cycle.⁷⁴ These developments have increased populist pressures on the nominating system and must be accounted for in any effort to maintain the party’s role as a coalition-building umbrella organization. Trump bypassed the invisible primary by leveraging Twitter, social media, and earned media in novel ways. Clinton’s invisible primary victory was much more conventional. Even her attempts at social media outreach seemed like conventional, professionally produced ads.⁷⁵

Fifth, state efforts at primary reform have taught us that political engineering cannot easily negate the seemingly inevitable participation biases that arise with caucuses and primaries. In California and elsewhere, reform groups have advocated for, and in some cases implemented, new primary rules aimed at addressing the increasing polarization between the bases of the Democratic and Republican

⁷¹ See Rae, *supra* note 51, at 92–95.

⁷² While it is difficult to prove such counterfactual claims, we doubt that Senator Sanders would have been more successful, even had the Republicans proceeded traditionally.

⁷³ See, e.g., Lynn Vavreck et al., *The Effects of Retail Politics in the New Hampshire Primary*, 46 AM. J. POL. SCI. 595 (2002) (discussing the effects of retail campaigning on voters in the New Hampshire primary).

⁷⁴ See Derrick L. Cogburn & Fatima K. Espinoza-Vasquez, *From Networked Nominee to Networked Nation: Examining the Impact of Web 2.0 and Social Media on Political Participation and Civic Engagement in the 2008 Obama Campaign*, 10 J. POL. MARKETING 189 (2011) (examining the Obama campaign’s use of social media and other technological tools to generate campaign contributions and volunteers).

⁷⁵ See David Kirkpatrick, *Is Your Media Strategy More Trump or More Clinton?*, MARKETING DIVE (Oct. 20, 2016), <https://www.marketingdive.com/news/is-your-social-media-strategy-more-trump-or-clinton/428655/> (describing Hillary Clinton’s “social media campaign [as] ‘far more traditional’” than Donald Trump’s campaign, highlighting Clinton’s use of “paid Facebook ads”).

Parties.⁷⁶ The most illustrative examples are the blanket and top-two systems in California. The thinking behind these reforms was that if voters could migrate across party lines freely, choosing the candidates that are closest to them, it would lessen the centrifugal tendency in primaries and more closely mimic the centripetal incentives of a general election. Independents and more moderate supporters of the opposing party would then help select a more centrist, second-best candidate, and defeat a more extreme, worst-case candidate.⁷⁷

To date, the evidence that these strategies have actually lessened the polarizing effect of primary electorates is not encouraging.⁷⁸ Voters do not clearly recognize the differences between the ideologies of candidates from the same party, and they do not easily abandon candidates from their own party even when the fate of those candidates is sealed.⁷⁹ Above all, the subset of voters who show up for primaries is more polarized than the general electorate.⁸⁰ In short, it is hard for these mechanisms to work as they are supposed to if the primary voters view politics through stronger ideological filters than the rest of voters. Short of compulsory voting laws, it is hard to see how the primary and caucus participation bias problem can be rectified.

⁷⁶ A good example is the so-called top-two primary that was intended to help moderate candidates and encourage the participation of centrist voters. See Douglas J. Ahler, Jack Citrin & Gabriel S. Lenz, *Do Open Primaries Improve Representation? An Experimental Test of California's 2012 Top-Two Primary*, 41 LEGIS. STUD. Q. 237, 238 (2016).

⁷⁷ For an explanation of the intent and the effect of this type of primary system, see Douglas et al., *supra* note 76, at 240 (observing that voters in a top-two primary intended to incentivize centrism could not meaningfully distinguish between centrist and more extreme candidates); Eric McGhee, *California's Top Two Primary and the Business Agenda*, 7 CAL. J. POL. & POL'Y 1, 2–3 (2015) (describing the top-two system's goal of electing more moderate candidates and noting that the evidence that the system has had an effect has been mixed). For a fuller analysis of primary system design and an earlier effort at the blanket primary, see Bruce E. Cain & Elisabeth R. Gerber, *California's Blanket Primary Experiment*, in VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA'S EXPERIMENT WITH THE BLANKET PRIMARY, 3, 5–9 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002) (explaining the form of the blanket primary, which California voters chose intending to take nominating power away from party loyalists, and the areas of voter behavior that the primary election format affects).

⁷⁸ See McGhee et al., *supra* note 29, at 338 (2014) (“The results of this analysis suggest that the openness of a primary election system has little to no effect on the ideological positions of the politicians it elects.”).

⁷⁹ See Ahler et al., *supra* note 76, at 240 (highlighting voters' description of extremist grassroots movements and moderate politicians as “equally centrist”).

⁸⁰ See, e.g., GARY C. JACOBSEN, THE POLITICS OF CONGRESSIONAL ELECTIONS 20 (7th ed. 2004) (“Primary electorates are much more partisan and prone to ideological extremity”); David W. Brady, Hahrie Han & Jeremy C. Pope, *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 LEGIS. STUD. Q. 79, 80 (2007) (“[P]rimary constituencies tend to favor more-extreme [sic] candidates than do general-election constituencies, and challengers create a credible electoral threat for incumbents by catering to the primary constituency.”).

Finally, we have learned that in the crucial campaign finance domain, the political reform community and campaign finance law have treated political parties as interest groups, limiting contributions to the political party to levels equal to multimember PACs.⁸¹ For the purposes of preventing quid pro quo corruption, national and state political parties (like PACs) are limited in the amount of money they can receive from individuals, albeit with higher thresholds.⁸² PACs, in turn, are limited in the amount of money they can contribute to political parties for essentially the same reason: to limit powerful interests from engaging in material corrupt bargains with the official party or its elected officials.⁸³ And like PACs, parties can spend independently because the Supreme Court has reasoned that there is a difference between directly receiving a contribution and being the beneficiary of independent spending.⁸⁴ One advantage that political parties have over interest groups is that they can transfer unlimited amounts of their money between their state and federal entities, a concession to the norms of efficient targeting and low corruption potential.⁸⁵

There is no direct public subsidy for political parties, although states do in fact subsidize them indirectly by paying for the primary elections and underwriting caucus expenses in legislative settings.⁸⁶

⁸¹ See, e.g., *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431, 456 (2001) (rejecting “[t]he Party’s arguments for being treated differently from other political actors” and “apply[ing] to a party’s coordinated spending limitation the same scrutiny . . . applied to the other political actors”).

⁸² See 52 U.S.C. § 30116(a) (Supp. III 2016) (limiting individual annual contributions to candidates to \$2000, to political party committees to \$25,000, to other political committees to \$5000, and to State political party committees to \$10,000); 11 C.F.R. § 110.1(a)–(d) (2018) (elaborating on individual donor limitations).

⁸³ See 52 U.S.C. § 30116(a) (Supp. III 2016); 11 C.F.R. § 110.2(c) (limiting annual aggregate contributions by multicandidate political committees to national political party political committees to \$15,000).

⁸⁴ See *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado Republican I)*, 518 U.S. 604, 614–15 (1996) (“Beginning with *Buckley*, the Court’s cases have found a ‘fundamental constitutional difference between money spent to advertise one’s views independently of the candidate’s campaign and money contributed to the candidate to be spent on his campaign.’” (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985))); *id.* at 616 (“The independent expression of a political party’s views is ‘core’ First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees.” (citing *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214 (1989))).

⁸⁵ See Carrie Levine, *Soft Money Is Back—and Both Parties Are Cashing in*, POLITICO (Aug. 4, 2017), <https://www.politico.com/magazine/story/2017/08/04/soft-money-is-back-and-both-parties-are-cashing-in-215456> (discussing how many state parties have taken advantage of their “ability to transfer unlimited cash to their national affiliates”).

⁸⁶ See 22. *Are There Provisions for Direct Public Funding to Political Parties? – United States*, INT’L IDEA, <https://www.idea.int/node/259722> (last visited Aug. 4, 2018) (“Public funding is only provided to the party convention committees and candidates. Presidential candidates who accept the public funding must limit spending to the amount of the grant.

There are no financial incentives for expanding the voting electorate, even though there are matching systems for small contributors.⁸⁷ Importantly, these matching systems for small donors may contribute to polarization by enhancing the more ideological voices of small contributors.⁸⁸ This reinforces the centrifugal drift of contemporary representation and the focus on turning out more ideological base supporters who are also more likely to turn out and vote loyally, rather than concentrating on persuading or converting undecided and other party voters to vote for your candidate.⁸⁹

Essentially, the current campaign finance regulatory structure reflects the legal focus on corruption as opposed to other goals, such as furthering equity or encouraging pluralist goals of aggregation, compromise, and coalition building. What is missing, from a pluralist perspective, is an emphasis on giving parties (or broad-based interest groups that functionally act like parties) incentives to expand participation and to act as more effective umbrella organizations.

III

DESIGNING EFFECTIVE PLURALIST PARTIES

What might be done to adapt the parties' umbrella function to current political and social circumstances? Below we offer several

There are public grants available for candidates in both the primary and general elections.”). For related information on public funding provisions in the United States, see *Political Finance Database*, INT’L IDEA, <https://www.idea.int/advanced-search?th=Political%20Finance%20Database> (last visited July 23, 2018, 9:09 AM).

⁸⁷ See Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031–9042 (2012) (providing federal contribution matching for eligible presidential candidates).

⁸⁸ See Joseph Bafumi & Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 AM. POL. SCI. REV. 519, 519–20 (2010) (observing that “there is more congruence between donors and their representatives in Congress than between nondonors and the elected officials who represent them” and that “the median American voter was leapfrogged at the aggregate House level”); Michael J. Barber, *Ideological Donors, Contribution Limits, and the Polarization of American Legislatures*, 78 J. POL. 296, 306 (2015) (summarizing recent scholarship that concludes that “on average, individual donors are more ideologically extreme than the average voter”); Adam Bonica, *Ideology and Interests in the Political Marketplace*, 57 AM. J. POL. SCI. 294, 302, 308 (2013) (finding that most PACs are ideological and that a candidate’s political specialization will lead to specialized donations).

⁸⁹ Conventional wisdom suggested that the parties should compete for the undecided voters, but the Bush campaign in 2004 turned the logic upside down and focused on the base vote. See GARY C. JACOBSEN, *A DIVIDER, NOT A UNITER: GEORGE W. BUSH AND THE AMERICAN PEOPLE* 138–39 (2008) (describing the Republican strategy of targeting religious conservatives in Bush’s 2004 reelection campaign). The role of mobilizing core voters is explored in Thomas M. Holbrook & Scott D. McClurg, *The Mobilization of Core Supporters: Campaigns, Turnout, and Electoral Composition in United States Presidential Elections*, 49 AM. J. POL. SCI. 689, 701 (2005) (concluding that mobilization of core constituencies “is an important component of presidential elections” and that mobilization effects that shape the electorate are “most pronounced among partisans”).

ideas. Three of these are changes that can be adopted by the parties. One would require legislation regarding the party's role in campaign finance. This latter idea might require a shift in legal doctrine and in the orientation of reform groups away from simply preventing conduit corruption and towards facilitating enhanced political participation and effective governance. At bottom, the central question we wish to grapple with is how to empower political parties to be more effective coalition builders in this new political world.

A. *Retain and Reform Superdelegates*

To start, the parties should retain the use of superdelegates. This would not be advisable under the purely populist view that the party should faithfully channel the will of the voters under all circumstances.⁹⁰ But it is advisable from a pluralist perspective, which aims to balance the elected officials' pragmatic, winning-above-all viewpoint against the preference of the activist/small donor base for ideological purity.⁹¹ Balancing in this way requires at a minimum giving each of the diverse party elements (e.g., grassroots activists, party officials, other public officials, and ordinary voters) a seat at the table in the nomination process and at the convention.⁹²

A critical consideration in this regard is the ratio of unpledged as opposed to pledged superdelegates. Pledged delegates have the right to attend but not to exercise judgment independent of the outcome in their state's contest.⁹³ Unpledged delegates have the freedom to form their own judgments, although as we have already indicated, there are informal pressures that often limit how much discretion unpledged delegates feel that they actually enjoy.⁹⁴ A populist position would

⁹⁰ See, e.g., Diane Russell, Opinion, *Abolish Superdelegates. It's Only Democratic.*, N.Y. TIMES (July 22, 2016), <https://www.nytimes.com/2016/07/23/opinion/campaign-stops-abolish-superdelegates-its-only-democratic.html> (explaining the populist rationale behind a proposed Democratic party rule change that would eliminate superdelegates).

⁹¹ See Persily & Cain, *supra* note 4, at 791–92 (“The Pluralists view the political world as filled with group-based competition, bargaining, coalition formation, vote-trading and the like.”); *id.* at 792 (“[O]perating under widely understood rules of democratic engagement, teams of factions gather together to advance each other’s particular causes or advocate collectively for broader public policy programs.”).

⁹² See *id.* at 791–92.

⁹³ See KEVIN J. COLEMAN, CONG. RESEARCH SERV., *THE PRESIDENTIAL NOMINATING PROCESS AND THE NATIONAL PARTY CONVENTIONS, 2016: FREQUENTLY ASKED QUESTIONS 11* (2015) (defining pledged delegates as those who are “required to express a presidential candidate or an uncommitted preference as a condition of election”).

⁹⁴ See Fredereka Schouten, “*Super Delegates*” *Feel Pressure of Tight Clinton-Obama Race*, ABC NEWS, <http://abcnews.go.com/Politics/story?id=4377991> (last visited May 10, 2018) (illustrating informal pressures placed on unpledged superdelegates in the 2008 Democratic Primary through the example of one such superdelegate’s experience with candidates courting her for her support).

prefer all superdelegates to be pledged. In contrast, a pluralist position would want them to be unpledged to better enable the “peer review” element that many critics of the current system believe is missing.⁹⁵ A weaker and possibly more politically acceptable variant of this idea would be to designate the unpledged superdelegates only as a tiebreaking option in the event that no candidate achieves the pledged delegate threshold at the end of the state primary contests.

B. Introduce Ranked-Choice Voting into Party Nomination Processes

Another option that parties might want to consider would be ranked-choice voting (RCV) for the unpledged superdelegates. RCV balloting works by having each delegate rank all of the candidates. With each round of counting, the last place finisher is eliminated, and the votes of the last place candidate would be redistributed according to each delegate’s next top choice. The votes of the remaining candidates would then be re-tabulated.⁹⁶ A common criticism of RCV is that it requires voters to learn too much information.⁹⁷ But this would not be a problem for superdelegates, as they are better informed and more engaged than the average voter.

Introducing RCV would have a number of benefits for the superdelegates and the party. RCV encourages coalition building and civility because candidates want to be listed as an alternative choice by the opposing candidates’ supporters.⁹⁸ That is more likely to happen if candidates do not call their opponents “lying Ted,” “low-energy Jeb,” or “little Marco.” RCV is therefore likely to decrease negative campaigning, which has a polarizing effect and, at times, can depress turnout.⁹⁹ RCV also encourages like-minded voters to forge coalitions

⁹⁵ See Cohen et al., *supra* note 69, at 29–30 (stating that one important quality that party insiders have in their favor is that “they are usually familiar with the candidate they choose to support” and that “[t]his sort of peer review has been considered vital to assuring the character and ability of presidents from the time of the Framers”).

⁹⁶ For a fuller description, see *Ranked Choice Voting / Instant Runoff*, FAIRVOTE, <http://www.fairvote.org/rcv#rcvbenefits> (last visited May 10, 2018).

⁹⁷ David Sharp, *Ranked Choice as Easy as 1, 2, 3? Not So Fast, Critics Say*, AP NEWS (Oct. 9, 2016), <https://apnews.com/62c997cfd2ab403ca0b3c3333e1a9312> (describing criticisms of RCV, including that it confuses voters, in the context of a proposed voting change in Maine).

⁹⁸ See Todd Donovan, Caroline Tolbert & Kellen Gracey, *Campaign Civility Under Preferential and Plurality Voting*, 42 ELECTORAL STUD. 157, 158 (2016) (observing that preferential voting systems may decrease negative campaigning and increase candidate reciprocity and cooperation because of incentives to appeal to other candidates’ supporters for lower-ordered support in ranked votes).

⁹⁹ See STEPHEN ANSOLABEHERE & SHANTO IYENGAR, GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE 99 (1995) (“[P]olitical advertising . . . is slowly eroding the participatory ethos in America. In election after

across similarly-minded candidates.¹⁰⁰ And it tends to eliminate candidates who have a core of rabid support but are otherwise unpopular with the rest of the party's voters.¹⁰¹ It also alleviates some of the intense pressure on unpledged superdelegates to commit to one candidate to the exclusion of others because candidates will be less inclined to view the choice as an all-or-nothing endorsement. It is better to be ranked highly, even if some other candidate is a superdelegate's first choice.

C. *Constructively Leverage Social Media to Encourage Citizen Engagement*

Media shifts have disrupted politics in the past. Candidates and parties had to adapt to the introduction of radio and later television.¹⁰² The same is now true with social media. Increasingly, young voters eschew traditional media, such as newspapers and television, for online platforms. On average, the most recent presidential debates have drawn smaller audiences as measured by rating than did the Kennedy-Nixon debates in 1960.¹⁰³ Though the audience—measured in viewership—for the first Clinton-Trump debate broke the previous record held by the Carter-Reagan debate in 1980, that was likely an

election, citizens have registered their disgust with the negativity of contemporary political campaigns by tuning out and staying home.”); Yanna Krupnikov, *When Does Negativity Demobilize? Tracing the Conditional Effect of Negative Campaigning on Voter Turnout*, 55 AM. J. POL. SCI. 797, 797 (2011) (analyzing how critical timing of negative advertisements can create demobilizing effects on voter turnout). *But see* Drew Penrose, *Voter Turnout Surges in All Four Cities with Ranked Choice Voting*, FAIRVOTE (Nov. 8, 2017), <http://www.fairvote.org/voter-turnout-surges-in-all-four-cities-with-ranked-choice-voting> (reporting on increased voter turnout in 2017 elections under new ranked voting systems in Minneapolis and Saint Paul, Minnesota; Cambridge, Massachusetts; and Takoma Park, Maryland).

¹⁰⁰ *See* Dean E. Murphy, *New Runoff System in San Francisco Has the Rival Candidates Cooperating*, N.Y. TIMES (Sept. 30, 2004), <https://www.nytimes.com/2004/09/30/us/new-runoff-system-in-san-francisco-has-the-rival-candidates-cooperating.html> (describing cooperation and collegiality between candidates in a race for San Francisco County Board of Supervisors under a new instant-runoff system).

¹⁰¹ *See id.*

¹⁰² *See* THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT 1960*, at 279–95 (1961) (describing the impact of televised debates on the Kennedy-Nixon election); *see also id.* at 189–90 (describing the change in party convention organization to accommodate television viewership).

¹⁰³ *See* Tony Maglio, *You'll Never Guess the Most Watched Presidential Debate in History*, WRAP (Sept. 25, 2016, 3:34 PM), <https://www.thewrap.com/trump-clinton-presidential-debate-tv-ratings-history> (showing that three of the four Kennedy-Nixon debates had higher Nielsen ratings than all subsequent presidential debates through the 2012 election); Alex Weprin, *First Trump-Clinton Debate Is the Most-Watched Debate of All Time*, POLITICO: ON MEDIA (Sept. 27, 2016, 1:59 PM), <https://www.politico.com/blogs/on-media/2016/09/first-trump-clinton-debate-smashes-ratings-records-228788> (reporting a record-breaking average of eighty-four million viewers for the first Clinton-Trump debate).

anomaly related to Trump's celebrity status.¹⁰⁴ And it is hardly coincidental that the two most-watched television debates featured an entertainment figure.

The parties can ignore the trend away from traditional media only at their own peril, especially as they increasingly grate at the superficial, ratings-driven questions that moderators all too frequently throw at their candidates.¹⁰⁵ The big problem with relying on television for these debates is that it requires a one-size-fits-all approach when in fact there are multiple audience types in the electorate. The political advantage of social media platforms combined with big data is that they can target segments of the electorate more precisely. While this is problematic in some ways (e.g., such as reinforcing the tendency to believe only information from like-minded sources), it opens up the possibility of creating events for different audiences. It might also enable more citizen engagement.

The parties should make more effective use of social media platforms in their nomination processes. This might open up the candidate field to a much broader range of candidates at the earliest stages. And, if combined with RCV in either informal polls or caucus/primary electorate balloting, it might incentivize front-runners to debate and appear with less visible opponents who have some dedicated followers that could be enticed into adding a front-runner into their rankings.

One of the ways the parties could constructively leverage social media to encourage more citizen engagement about policy would be to orient the online discussion around the party platform. Parties could craft the platform at the beginning of the presidential nomination cycle and use social media to solicit input from all of the relevant constituencies.¹⁰⁶ For example, the parties could host platform debates inside a range of Facebook groups, ask committee chairpeople to host Twitter Q&A sessions on particular topics, or encourage voters to use Snapchat or Instagram "stories" to explain why they support or oppose particular policies. The parties could then use Facebook Live or YouTube to host events where the candidates discuss the input the party has received.

¹⁰⁴ Weprin, *supra* note 103.

¹⁰⁵ See Matthew Jordan, *Ratings-Driven Presidential Debates Are Weakening American Democracy*, WASH. POST (Nov. 10, 2015), https://www.washingtonpost.com/posteverything/wp/2015/11/10/ratings-driven-presidential-debates-are-weakening-american-democracy/?utm_term=.f841f56e53da (arguing that ratings-driven presidential debates incentivize broadcasters to focus on entertainment).

¹⁰⁶ Each party, of course, would then need to determine who could participate (and how often they could participate), and how hacking and other problems could be prevented.

The parties could also host monthly podcasts with the candidates, which would allow candidates to explain in their own words why they agree or disagree with each policy proposal. Throughout this process, the parties would take pains to emphasize the many grounds upon which their candidates agree, promoting party unity. Once the final platforms are forged, the parties could ask each candidate to commit to supporting some minimum number of the agreed-upon platform policies.¹⁰⁷ At the end of the day, trust in the party is more likely to be built if there is a consensus forged in an interactive and transparent way in the party ranks and if the platform is taken seriously during the fall campaign and in office to a greater degree than it is currently.

D. Utilize the Campaign Finance Regime to Incentivize Citizen Participation

Nothing affects the power and influence of the party more than its place in the campaign finance network. Political parties have been undercut by the multitude of nonprofit organizations and Super PACs that have sprung up as a consequence of recent Supreme Court rulings.¹⁰⁸ Assuming that the Supreme Court is unlikely to change its orientation in the near future, if at all, what can be fixed in relation to the party's role in collecting and distributing campaign funds?

Public financing is an area worth revisiting. At the moment, we provide public funding only in relationship to the amount of private money received or the willingness to forgo taking donations altogether.¹⁰⁹ We do not use public funding to incentivize desirable actions. But full citizen participation in elections is important; the failure of citizens to vote can bias outcomes and contribute to polarization.¹¹⁰ Public financing should therefore be used to incentivize cit-

¹⁰⁷ To give a hypothetical example, each candidate would have to commit to supporting at least nine of thirteen platform policies. They would not have to support the *same* nine policies.

¹⁰⁸ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 318–19 (2010) (striking down restrictions on independent expenditures by corporations, unions, and other associations).

¹⁰⁹ Currently, matching systems provide public money matches for certain levels and types of individual contributions. A good example is the presidential primary system. See *Chapter 1: Primary Matching Funds*, FEC, <https://transition.fec.gov/info/chone.htm> (last visited May 11, 2018) (describing the primary matching fund system, including candidate eligibility and expenditure limits). In the November contest, presidential candidates receive public funding only if they forego taking individual donations. See *Public Funding of Presidential Elections*, FEC, <https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/presidential-elections/public-funding-presidential-elections> (last updated Feb. 2017).

¹¹⁰ See Brady et al., *supra* note 80, at 83 (demonstrating that the heavier turnout of loyalists and activists in the primaries affects the ideological composition of the candidates available to the general electorate).

izen participation, as opposed to merely subsidizing parties as entities. This could mean giving political parties a public funding match for new registrations, which could partially offset the effects of highly targeted registrations and “diminished universe” campaign tactics.¹¹¹ Moreover, a system styled in this manner would likely stand on firm legal footing. The proposed regulations would not discriminate against any candidate or point of view and would not restrict any person’s ability to speak.¹¹² The program instead would create more speech and broaden public debate, advancing the core purpose of the First Amendment.

In addition, we need greater incentives for individuals and entities to support parties so that they can compete more effectively with independent entities, such as Super PACs and 501(c)(4)s. The main obstacle to allowing unlimited contributions to the parties in the past was the concern about potential conduit corruption.¹¹³ The McCain-Feingold bill arose because the so-called party-building activities included communications with voters that were virtually indistinguishable in intent and effect from express advocacy ads. Nevertheless, to design more effective parties, the limits should be raised substantially for individual and PAC contributions to support voter registration and get-out-the-vote activities. If the voter outreach were undertaken as an independent activity and not transferred to the candidate, it would be no more conducive to quid pro quo corruption than any of the other independent expenditure committee activities.¹¹⁴ Congress

¹¹¹ To counter fraud, the public subsidies would be awarded only for new registrants and those who had moved addresses since the last election. Other possibilities in the same spirit would be higher subsidies in the off-year elections to counter the tendency for low turnout in those elections.

¹¹² See *Ariz. Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 727–28, 753–55 (2011) (holding that an Arizona law providing public funding for electoral candidates that matched their privately-financed opponents dollar-for-dollar substantially burdened the free speech of privately-funded candidates but that public financing of elections was not itself necessarily unconstitutional). A law providing funding without discrimination would therefore be easily distinguishable from the one struck down in *Arizona Free Enterprise Club’s Freedom Club PAC*.

¹¹³ See *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (finding that the Federal Election Campaign Act of 1971’s primary purpose of limiting corruption was a “constitutionally sufficient justification” for limiting campaign contributions and that large quidproquo donations undermined “the integrity of our system of representative democracy”); FED. ELECTION COMM’N, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976, at 452 (1997) (recording senators’ acknowledgment on the floor that the original purpose of FECA’s campaign contribution limitations was “absolutely” to avoid corruption).

¹¹⁴ See *McCutcheon v. FEC*, 572 U.S. 185, 225 (2014) (finding that “there is a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate . . . and money within the base limits given widely to a candidate’s party” and that “all members of the party or supporters of the cause may benefit” from widely

could effectuate this policy by increasing the contribution caps for parties, creating special accounts to facilitate the scheme, or allowing donors to earmark contributions for this purpose and providing matching funds to incentivize giving.

CONCLUSION

The time may be ripe for another round of reform, as both parties appear to be motivated by their 2016 experiences.¹¹⁵ To be sure, tinkering with party rules once again can only achieve so much. The roots of the current dissatisfaction with politics run much deeper. If the United States continues its populist drift away from its Madisonian foundations, we can expect the political system to become more fractured and polarized as well. Political parties, or their functional equivalent, are critical for the task of coalescing groups and individuals to win elections and govern. The current loose network of affiliated PACs and nonprofits arose to take advantage of the Supreme Court's rulings, but came at the expense of having an effective coordinating entity. The law of least resistance has directed the flow of campaign money to independent Super PACs and nonprofit organizations. The fear of being "primaried" or losing hard money donations and soft money expenditures has greatly complicated the task of governing.

It is possible that these trends are irreversible, at least in the immediate future. But if nothing else, our goal is to question the populist direction of past reforms and to highlight the value of balancing "peer review" by people who have to govern against the ideological and special interest enthusiasms of the party base. If the future consists of dispersed party networks conducting campaigns on internet platforms, it will not be the pure direct democracy that some imagine. Rather, it will, as in the past, give clout to new power and information brokers.

distributed support, but the "particular gratitude" party or group leaders may feel for general support is not a corruption risk sufficient to justify "dramatically expand[ing] government regulation of the political process").

¹¹⁵ See Ben Kamisar, *Dems Announce 'Unity Commission' Members*, HILL (Apr. 17, 2017, 4:22 PM), <http://thehill.com/homenews/campaign/329163-dems-announce-unity-commission-members> (describing the newly-formed commission within the Democratic Party responsible for, in the words of the Democratic National Committee Chairman Tom Perez, "enhanc[ing] the nominating process that continues to embrace the big tent of [the Democratic P]arty"); Jeremy W. Peters, *Reeling from 2016 Chaos, G.O.P. Mulls Overhaul of Primaries*, N.Y. TIMES (May 24, 2016), <https://www.nytimes.com/2016/05/25/us/politics/republican-primary-schedule.html> (reporting on Republican dissatisfaction with the 2016 primary election's unpredictability and proposals to limit it, in particular through closing primaries).

It is easier to run as a populist entity than it is to govern. The political debt on electoral promises becomes due the day a party assumes the government. And if the compromises necessary to govern are not made before the election, it simply means that the hard work of forging agreements has been postponed. At some point, a faction within the winning coalition will take that responsibility on. This is how parliamentary discipline emerged in modern democracies in the first place.¹¹⁶ Whether this coordinating group will be called a political party or something else is less important than the political law it illustrates: there must be entities that coordinate voters and allied groups in order to win elections and govern effectively. Whether these entities will be parties as they have been traditionally organized or functional equivalents in some new form is the only serious uncertainty.

¹¹⁶ See GARY W. COX, *THE EFFICIENT SECRET: THE CABINET AND THE DEVELOPMENT OF POLITICAL PARTIES IN VICTORIAN ENGLAND 9-18* (James Alt & Douglas North eds., 1987) (describing the general historical background of British political development from "an aristocratic and factional politics" to "a democratic and party-based politics").