January 1977

Election Law and Election Reform: Strategy for the Long Run

Stephen E. Gottlieb
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Election Law Commons, Law and Politics Commons, and the Political Science Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol79/iss2/4
ELECTION LAW AND ELECTION REFORM: STRATEGY FOR THE LONG RUN

Stephen E. Gottlieb*

I. INTRODUCTION

The fundamental question posed by this article can be put in the following way: Assuming that the purpose of election law is to provide for responsible choice, including, at a minimum, reasonable consideration of alternatives, and for an accurate reflection of the public decision, can that best be done by rules and regulations which narrowly circumscribe the process, by example, or by encouraging personal involvement? What role can law properly play?

In the long run, this article will argue, a piecemeal approach to election reform is probably doomed to fail. Election reform has seemed primarily a matter of financing, equal time, and voting rules. Several pieces of legislation which lie well outside the provisions of the election laws themselves seem crucial to any long run strategy for election reform: creating a system of national service or similar system of real bridgebuilding among the diverse peoples of our country; revamping the provisions of federal communications law to include a fair and mandatory system of debate among candidates; and expanding direct media access by national and grass root political organizations. Those changes in turn need to be supported by other changes which cannot and should not be the result of national legal requirement but which the bar can help encourage: reorganization of school curricula to introduce specific discussion of methods of thought; habituation in those methods of thought, using ritualistic ways, such as debate, of including the devil's advocate; and broadening the base of new-style, open, and voluntary political organizations (which are sometimes referred to as the club movement) to include services to the communities and contact with community leaders.

This is written on the heels of a presidential campaign in which one candidate went beyond most existing bases of power to fashion victory. The process, however, must have raised questions

* Associate Professor of Law, West Virginia University College of Law; B.A., 1962, Princeton University; LL.B., 1965, Yale Law School. The author would like to express his appreciation to Professor Harold Lasswell for his teaching and encouragement and to Professor Frederick F. Schauer for detailed criticism of the manuscript.
even in his mind about the implications for the future of present election devices. And for many elections for lesser offices a great deal of ground remains to be covered. It may seem early, but now is the time to begin examining systematically and realistically the difficulties, the alternatives, the complexities, and the possibilities for election reform.

To the author, jimmying with the mechanics seems necessarily a shortsighted view of election reform. When, on the other hand, the mechanics reinforce the spirit of democracy, lasting election reform can be expected. This involves a concerted demand centering around well-understood mechanisms, like debate, open clubs, or even identifiable factions—some more appropriate way of identifying candidates than by which ad agencies they have hired—for responsibly presented choices. Election reform requires defining what we are all for, rather than the easier task of defining what we are against. Campaign financing only begins to raise these questions, coming as it does at the end of what still seems to be a jerry-built process.

II. THE PERVERSIVE ROLE OF LAW AND THE NEED FOR SYSTEM

Nominating and electoral systems are defined by law.\(^1\) Law defines who can vote, where, for whom, and when.\(^2\) Law defines what are a party,\(^3\) a candidate,\(^4\) and a political contribution.\(^5\) Further, the law establishes how the parties and the money and the voters get together.\(^6\) The law has been used to solidify the power of boss and reformer alike.\(^7\)

---


3 See Jenness v. Fortson; 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23 (1968).


Proposals for changes in the law regulating political power are abundant. But the task of analysis is quite complex. Legal proposals for change in the political area are the focus of research in many different disciplines of which law is only one. More important, the laws involved describe a system of enormous complexity. Laws now control the power to base power on existing power (the Hatch Act, election laws, civil service laws), on knowledge (freedom of speech and press, equal time, fairness, public information, conflict of interest, libel, and fraud), on wealth (spending limits, bribery, competitive bidding), and on force (extortion, blackmail, secret ballot, intimidation, Bill of Rights guarantees). Though more indirectly, these laws also affect the significance of different kinds of skill for political activities and the political significance of various loyalties, beliefs about right and wrong, and the opportunity to gain honor or respect through political action.

Many proposals, however, deal explicitly with only a single variable. This would be acceptable if, but only if, it were against

---


9 For research in the areas of history, political science, and sociology see, e.g., The Great Debates (Kraus ed. 1962); in the area of economics see, e.g., Dahl & Lindblom, Politics, Economics and Welfare (1953); and in the area of mathematics see, e.g., T.C. Schelling, The Strategy of Conflict (1960).


13 U.S. Const. amend. I.


25 T.C. Schelling, supra note 9, at 19.


27 See, e.g., note 8 supra.
the background of a commonly understood and accepted analytical system, which would help us to identify and account for the impact or impotence of each proposal on other aspects of the electoral system. However, such a system of analysis has not been common to the discussion, and analysis of the proposals has suffered in consequence.

Successful strategy must be systemic in its orientation. It must focus on all of the variables and the interrelations. Legal remedies are often only part of what may become a successful strategy. The contribution of the legal remedy should, therefore, be seen from the vantage of the choice of strategy for dealing with these problems.

III. The Areas to Examine

A preliminary word about the organization of this paper and the framework of the analysis will aid in the presentation. One useful method of developing and of evaluating strategy in a systematic way is to start with a checklist of major goals and resources of action and to trace the impact of each proposal against each area on the checklist. The checklist used here is drawn from the work of Harold Lasswell. The goals and resources have been enumerated supra: power, knowledge, wealth, physical safety and well-being, skill, affection (loyalty or commitment), beliefs or ethics, and honor or deference. Each of these areas has its corollaries in groups of institutions like the media, corporations, and organized crime, which control it, although not uniquely. Using these goals and resources as a checklist provides a systematic basis for analysis of political reform proposals and requirements.

This list of goals and resources also suggests choices. In effect, this checklist enumerates competing systems, like clubs, patronage, and personal wealth, each of which can be a source of power. A reform proposal preferring certain sources of power may pose a threat to groups which rely on other bases. That threat might not materialize if those groups were abused or poorly served by the system of political power on which the groups relied and by the representatives it produced. Groups are not necessarily well or

---

badly served by any method. Leaders always have an opportunity to divert the efforts of the group.\(^2\)

It is a presumption of free government that a political system based on knowledge and information should be more likely to reflect the interests of any group than other kinds of systems on behalf of that same group.\(^3\) The purity of the theory is, of course, confounded by a somewhat middle-class technocratic bias since an information system favors those groups. It would be a mistake to conclude that an information-based organization in one area is in any way qualified to represent the people now served, for example, by a loyalty system in another.\(^4\) Indeed, the very demand that political decisions be based on open discussion and public choice is a reflection of changes in the electorate and declining confidence in institutional leadership in America. There may be no cure for such skepticism, however, save more democracy or, more precisely, finding, creating, or strengthening institutions in which people can have more confidence. In any event, much effort at political reform is intended ultimately to strengthen public information and discussion as sources of power and to weaken other sources of strength. The implementation and usefulness of that strategy, however, have frequently been frustrated by partial or incomplete analysis of the political system to which it was applied. Because the whole is greater than the sum of its parts, a systematic approach is essential.\(^5\)

This article tries to do four things: (1) demonstrate the value of using a systematic basis of analysis and criticism, (2) put various proposals in clearer perspective, (3) explore the strategic choices outlined at the start of this article among options such as circumscribing the election process, encouraging a better example, "See\(^9\) R. Caro, supra note 7, describing the abuse of people under a patronage-loyalty-based system; R. Michels, Political Parties (1915), describing the dominance of educated elites over socialist workers parties.


\(12\) For information on systems analysis see G. Black, The Application of Systems Analysis to Government Operations (1968); Couger & Knapp, System Analysis Techniques (1974). In systems terms Lasswell's checklist catalogues both inputs and outputs. It catalogues the inputs of motives and resources, to which should be added perspectives and other input variables of Lasswell's system. Further, it catalogues outputs as competing systems of power, plus distribution of benefits and perspectives. The nominating and electoral systems are, in turn, subsystems of the system of democratic government. See H.D. Lasswell, supra note 28.
and encouraging personal involvements in the process, and (4) explore the role of law in those areas.

The sections that follow will focus on comparison of the major strategies used or available for nominating and electoral reform. The strategies will be grouped by the basis for political action which they most directly approach. The grouping is inevitably somewhat arbitrary, however, since all of the strategies have impacts on all of the basic systems of action.

IV. REGULATING POWER OR WEALTH

It sometimes seems necessary to say that power does exist. One major argument represented by books such as Scammon and Wattenberg's *The Real Majority* is that the parties are quite responsive to the American voter. The voters got what they wanted in each election of the 1960's. However the political machinery worked, and it worked in a wide assortment of ways, it generally yielded to the popular will. And that is a pretty good record.

The argument goes further. The admen, too, operate within a limited framework. They can package potatoes, but they cannot sell them for cheese. All they really do, it would seem, is to pick up a candidate—Jimmy Carter, for example—who, on the basis of his prior experience and strength, merits packaging and then to help him put his best foot forward. It is the invisible hand, like free market economics with the added plus that it is democratic.

However, the record also tells another story that looks far less inevitable, far less self-adjusting. While the issues of morality, race, crime, and violence were controlling American politics, other issues, even major ones, were exerting relatively little control. If we are to believe Scammon and Wattenberg, not only did the voters, concentrating on those social issues, pick a bewildering array of liberals and conservatives on economic issues, but even as major a problem as Vietnam was not seen as ground for a political choice. It was dissatisfaction on the social issues, say Scammon and Wattenberg, that sent votes flowing to Gene McCarthy and Robert Kennedy, that brought down Lyndon Johnson and that later sent votes to George Wallace and Richard Nixon. Concerned about Vietnam, Americans could not deal with it politically—the doves,

---

24 Id.
25 Id.
they say, did not flock to McCarthy, and the Nixon-Humphrey election offered no choice on Vietnam, or so it appeared. What was true of Vietnam, of course, was even more true of a variety of less notorious subjects. And the social issues which predominated were issues on which few Presidents could have done anything, a fact of which many voters even seemed to be aware.

If a social issue without definable alternatives could lead to a choice of candidates and wild fluctuations across the rest of the political spectrum, is there not power in the system of discourse, the system of nominating, the system of selection, which reinforces these unsatisfactory choices and blocks a better response?

A number of efforts have been designed to limit or prohibit the exercise of undue power by politicians, corporations, or persons of great wealth. Other reform attempts have been aimed at equity among voters. Efforts to restructure the electorate alter or redistribute power among the leaders. A decade of reapportionment has

---

36 Id.
37 E.g., Note, supra note 8, suggesting a nonpartisan election commission without, however, analyzing whom that system would empower; Note, *Primary Challenges in New York*, 73 Colum. L. Rev. 318 (1973), analyzing election law primarily in terms of judicial convenience.

While the plethora of proposals to limit power certainly suggests that power itself is the source of the problem, some writers define democracy as the competition of powerful elites. J. Schumpeter, *Capitalism, Socialism and Democracy* 269 (1950). A basic decision is whether to pursue limitations toward more effective control of power or to structure the political system to take advantage of power. Powerful political parties on the English model could foreclose some of the sectionalism and logrolling that characterize American parties. COMMITTEE ON POLITICAL PARTIES OF THE AMERICAN POLITICAL SCIENCE ASS'N, *TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM* (1950). The broad constituencies of senators, for example, often force more cosmopolitan approaches in their campaigns. See V.O. Key, *American State Politics* 217-65 (1956). To reverse the perspective, larger constituencies separate the people and their needs from their government. See The Federalist Nos. 55-58 (A. Hamilton or J. Madison). Powerful national parties would change the sphere of influence and corruption and, therefore, the dynamics of power. See E. Costikyan, *Behind Closed Doors* 237, 296-307 (1966). However, powerful national parties might also enlarge the problem of distortions of power because, on all but a few national issues, the party could be far out of control.

On the other hand, powerful parties or parties with sufficient funds in their treasuries, as would result from public financing, could afford to hire and reward talent, instead of loyalty and other forms of support. That change in emphasis might have major consequences on the quality of judges and other public officials serving at every level of government.
brought some improvements.\textsuperscript{38} The elimination of racial barriers\textsuperscript{39} has been quite effective on a sectional basis. Legal improvements have been made in limiting durational and other voting requirements.\textsuperscript{40} These changes redistribute power. By changing the constituency and by giving power to or taking power away from urban, rural, suburban, racial, ethnic, or religious groups, they incidentally alter the system on which power is based to the extent that those different groups handle themselves politically in different ways.

Efforts to limit power directly have not always been successful. Civil service reform and the welfare state have gone far toward cutting off some sources of power but manifest diminishing returns, among other difficulties.\textsuperscript{41} Both have left considerable opportunities for evasion and the exercise of executive power.\textsuperscript{42} Indeed, as power has moved from party to agency, so has the locus of corruption—it is now plain that one does not have to buy the party in order to buy favors.\textsuperscript{43}

The effort to require proportional representation for presidential nominating conventions\textsuperscript{44} is designed to eliminate the power of national leaders and to restore local strength. Studying the effects of such changes on the participants at each level, from local to national figures, yields some surprising conclusions. The record is still being compiled, but there is good reason to expect the development of a vacuum to be filled. One early hypothesis suggested that the elimination of winner-take-all primaries would create an opportunity for minor candidates to step in the breach.\textsuperscript{45} By splintering representation in this way, proportional representation could create enormous opportunities for logrolling and brokering at the

\textsuperscript{38} See W. Elliott, supra note 7; Gottlieb, Identifying Gerrymanders, 15 St. Louis U.L.J. 540 (1971).
\textsuperscript{40} Oregon v. Mitchell, 400 U.S. 112 (1970).
\textsuperscript{41} Compare W. Riordon, Plunkitt of Tammany Hall (1963), with Note, Official Coercion of Patronage Employees to Campaign for Party Endorsed Candidates Violates Other Candidates' Right to Equal Chance and Voters' Right to Equally Effective Voice, 84 Harv. L. Rev. 1547 (1971).
\textsuperscript{42} R. Caro, supra note 7; E. Costikyan, supra note 37, at ch. 26.
\textsuperscript{43} E. Costikyan, supra note 37.
\textsuperscript{45} Kraft, The Cast, The N.Y. Times Magazine, Nov. 17, 1974, at 32.
national level, which had been minimal in recent years. It did not happen that way. Instead, power seemed to flow to new kinds of fundraisers, rock groups, pollsters, and media specialists. Power shifted to a new group but, within that group, remained as decentralized and unpredictable as it had among the older breed when large campaign contributions were allowed.46

For many, that decentralization, the pushing aside of encrusted forms of political power, is the very definition of election reform. Decentralization surely gives the people some voice, but under neither a centralized nor a decentralized system is it clear that they are given much ground for decision or responsibly selected alternatives. The 1976 campaign seemed to combine a true appeal to the people (who made a President out of an underdog) with a great popular malaise, which combination suggests that the problem of democratizing power is not as simple as eliminating the latest bastion.

Still more opportunities for filling the power vacuum abound. If 30-odd presidential primaries continue to snowball toward a single candidate, the parties or major blocs of the parties might find themselves organizing preprimary caucuses to unite themselves against all challengers—like the so-called challenge primary concept.47 In that form a single preselected liberal standard bearer might oppose a predetermined moderate for the Democratic nomination, with a similar Republican conservative-moderate contest. Since the primaries channel choices only at the culmination of a long process, many arrangements are possible.

It remains to be seen whether, over the long run, the 1976 conventions herald the power or impotence of media, money, bosses, or imagemakers. In effect, some other forms of political power may gain over money without improving the responsiveness of the process. (On the concurrent shift toward an "open" process see section VI infra.)

Efforts to limit the role of money in politics48 also redistribute power. Giving and spending limits which preceded the most recent

46 Id. For a discussion on the significance of logrolling see T.C. Schelling, supra note 9, at 32-33.
amendments had not been very effective.\textsuperscript{49} Preliminary reports suggest that the latest version had a greater effect.\textsuperscript{50} The litigation over the funding and spending laws suggests their significance in reallocating power.\textsuperscript{51} However, public financing hands to recipients powerful fiscal leverage.\textsuperscript{52} Since money has been a prime weapon against bosses, these reforms, to the extent they succeed, suggest, not real reform, but a shift of power from money to new kinds of manipulators. These reforms also shift power to prosecutors and investigators. In the wide-open and unorganized sphere of the primaries, the advertising industry seems so far to have been most significant, limited, of course, by the attractiveness of the candidates they take on but making and affecting choices just the same. Whatever the degree of influence they may or may not exert, whether power will remain in the advertising industry and whether advertisers will prove more or less responsible and useful kingmakers than bosses, newspaper chains, or banks remain to be seen. It is not, of course, possible to make the possession of power go away. The only possible quest is to mold it into a form which is useful and responsible.

The elimination of legal barriers like filing fees has been but a minor sideshow; though aimed at making it possible for people without means to enter the political arena, it has hardly made campaigning a poor man's pastime.\textsuperscript{53}

Another major effort at reform has focused on the media. Some concern regarding the media has involved competition largely between the major parties: debates, equal time, fairness.\textsuperscript{54} Whatever these options may do to improve competition among the giants, they do not directly democratize internal party power, though, as will be argued below, they can generate significant effects indirectly. On the other hand, efforts to open channels of expression to the masses usually involve suggestions for splintering the media—via cable or an increase of channels. The intended

\textsuperscript{49} Sterling, Control of Campaign Spending, 59 A.B.A.J. 1148 (1973).


\textsuperscript{51} See Buckley \textit{v.} Valeo, 519 F.2d 821 (D.C. Cir. 1975) (per curiam), modified, 424 U.S. 1 (1975).

\textsuperscript{52} Plattner, Campaign Financing—The Dilemmas of Reform, \textit{The Pub. Interest}, fall 1974, at 112.

\textsuperscript{53} Bullock \textit{v.} Carter, 405 U.S. 134 (1972).

ELECTION LAW AND REFORM

objective is to reduce at least the networks' power. To the extent that it does, the proper inquiry is to whom or to what the power flows. If multiplying television channels reduces the impact of television, we would need to examine what other institutions would gain. If multiplying channels splinters the audience, we would have to consider whether a class of voters would be more insulated from competing viewpoints than at present. It seems less likely that viewers would expose themselves to more diversity than they do now. To suggest that some viewers would be less exposed to divergent viewpoints is to suggest that they are more reliant on preexisting loyalties and preconceptions, that bases of power other than knowledge ultimately control more of their electoral behavior. Some have suggested common carrier status, in which the stations would merely sell time and give up the power to choose programming, but that suggests a vacuum to be filled, as in the early days of broadcasting, largely by existing wealthy institutions.  

These legal weapons are restricted in their effects. Some redistribute power with minimal effects on the system. Others alter the relationship of power and money without altering the fundamental irresponsibility of power itself in either form. The reason for these limited effects may become clearer with a brief catalogue of the power relationships required to run a political machine, whether in the style of the old ward heeler or the more modern broker and fundraiser or in more newly emerging styles.  

It is necessary to examine both what people can give the bosses (managers, brokers, the people in control by whatever title) and what bosses can give the people.  

(Despite the fluid situation in presidential politics, bosses and machines continue to dominate a large part of the remaining election process.) Political power is itself derivative. Bosses need the elements of control over elections, whether primary or direct. Those elements include work (canvassing, poll watching, electioneering, fundraising, envelope stuffing, etc.) and money (at best for advertising and other campaign costs, at worst for bribes or favors) or, sometimes—and it has not died,  


out—physical threats (meetings can be and quite often have been ruled by violence and intimidation) and information.\textsuperscript{57} Bosses can get these in several ways. They can use money to get other forms of control through bribes, graft, appointments, or payments.\textsuperscript{58} They can use preexisting power or anticipated power over those elected or among those seeking favors or their power to hire people, to control the flow of jobs, or to affect the manner of law enforcement. They can depend on and utilize ethnic or family or racial loyalties. They can use physical power to obtain many of these elements of control through underworld connections.\textsuperscript{59} Thus, most boss power has been based on money, preexisting power, loyalty, and fear of physical harm. Occasionally bosses have used control over the media; that is, they have used knowledge as a basis of power.\textsuperscript{60} Although information has meant power since the days of Sam Adams,\textsuperscript{61} it seems even more manipulable in the days of television. One result of this very brief catalogue is to demonstrate that changing any one of these variables changes, but does not eliminate, the distortions of political power. It merely changes what the powerful do to maintain power and who is in power, without fundamentally altering the fact of control.

Thus, to return, proportional representation and the new campaign financing laws appear to have shifted discretion away from large financiers and national politicians to some new breeds of power brokers. Restructuring the electorate and controlling spending or the media, at least in the forms proposed, are all effective in shifting power around, but none of them cuts off the bases of power over the people (probably an impossible task) or, more importantly, promises to build a more responsible and reliable foundation with which to amass that inevitable power. This analysis of attempts to controls power and wealth largely by legal sanction is not to suggest that some measures (the Hatch Act, the secret ballot) have not made a difference or that other measures might not, but it is to suggest the difficulty, the costs as in the case of the Hatch Act, and the dependence of such measures on other resources left after the changes.

\textsuperscript{57} E. Costikyan, \textit{supra} note 56.
\textsuperscript{58} E.g., R. Caro, \textit{supra} note 7, at 209.
\textsuperscript{59} W. Moscow, \textit{The Last of the Big Time Bosses} (1971).
\textsuperscript{61} J. Miller, \textit{supra} note 60.
There are two alternative means of controlling power: a plethora of prohibitions by law, such as we have discussed, or development of other and perhaps more legitimate sources of power. (This choice resembles the distinction Davis draws between confining and structuring administrative power in *Discretionary Justice*.)

We turn to some of these now.

V. BUILDING ON THE PEOPLE’S AFFECTIONS AND BELIEFS (THEIR DEDICATIONS)

If attempts to regulate the impact of power and wealth on the electoral system are not wholly satisfactory, is dedication the answer to the problem of making democracy more capable and more responsible? And if dedication is the answer, can it be engineered? It seems difficult to account for developments such as the growth of political clubs, the changes in party rules, and most of all the break in the dyke of Jim Crow at every level from politics to literature unless one refers to generic changes in attitudes and dedication to principles of free government. In just such changes of attitude the law has significant long-term effects.

A. Dedication to the System

The first attempt to have law play a positive long-term role in the development of free electoral institutions derives from a utilitarian view that people would support a democracy if it responded to and satisfied their desires (on all goals and resources from wealth to honor). As far back as the 1780’s this view suggested strengthening or centralizing power to increase the effectiveness of government. Attachments are not automatic. The legal system often seems quite unresponsive. And losers have been plentiful. Nevertheless, the Constitution has been enormously successful. The valuable conservatism resulting from dedication to the system, however, does not resolve problems of needed change.

---

4 "The Federalist Nos. 9, 11-13, 15-17 (A. Hamilton); id. No. 10 (J. Madison); id. No. 18 (A. Hamilton & J. Madison).
B. Dedication to the People

A more prevailing approach toward obtaining loyalty to free electoral institutions and commitment to staff them is based on an ideal of public service. This ideal is perpetuated in the Peace Corps, VISTA, ACTION, and other programs, not to mention the military and other government positions. An early expression, involvement of many citizens in the militia, sought, not only to make self-defense possible and to prevent military rule, but also to secure loyalty to the system itself. (On Lasswell's list, affection and physical safety are intertwined at every level—internal strife, external defense, and the operation of the democratic machinery.)

The hope has always been that a dedicated, concerned people would supply the manpower needed to keep the polls and the politicians clean and democratic. Paradoxical though it may seem, mass armies have often strengthened democratic institutions by strengthening mutual respect for the diverse people of the nation. They bring people together from widely separated parts of the country to live and work, to share the same problems, and to learn about different sections of the nation. Calling on the young for public service can build many bridges on the shoulders of youthful energy and enthusiasm.

However, such national service could also backfire. Integration creates both brothers and enemies. There is good reason to believe that the benefits would be greater if it were compulsory and therefore encompassed a true cross section of American society. There are additional dangers in sending inexperienced young people into difficult situations in which they might be exposed to this country's most difficult problems. The results might not be predictable—enthusiasm can turn into cynicism, impatience, or even

---

64 U.S. CONST. amend II.
65 See note 28 supra.
71 For a provocative theoretical discussion see K. DEUTSCH, NATIONALISM AND SOCIAL COMMUNICATION 97-126 (1962).
intolerance, possibly leading to less democratic and more authoritarian ideas for many. Violence can flow from cynicism. Thus, it is important to know whether and when universal service would increase or decrease the volume of cynicism.

Conscription, in Lasswell's terms, can create affection toward a system or a people if and only if the underlying common beliefs are sufficiently strong. The resulting dedication, however, has only a very generalized impact on most power relations and can have more or less democratic results depending on the political system. What conscription does is raise the stakes. The content is elsewhere. Nevertheless, with that qualification, the single step, taken within the past decade, with the greatest long term impact on election machinery in the country, may well turn out to be the end of conscription and the demise of a mass army.

C. Dedication to Institutions—the Struggle

More focused than dedication to the system or to the people are loyalties toward those institutions which monitor and alter the democratic system. Constant vigilance is plainly the price of freedom. One major strategy for eliminating improper power over nominating and electoral systems has involved the network of voluntary organizations which seek to preserve and protect free and democratic institutions. Looking well beyond particular cases, these groups stand as relatively permanent watchdogs. The cases on which they work alter the rules but seldom the system. Nevertheless, the groups do alter the system by their very presence.

These watchdog groups tackle endless abuses of power which directly and indirectly affect the political system: mass, political, or warrantless arrests or searches, harassment, murder of demonstrators, refusal of permits, censorship, and electronic snooping. On the political side, they tackle endless perquisites of power: tax breaks, large political contributions and favors, clouds of secrecy surrounding lax enforcement of all kinds of regulations, unequal

71 E.g., the ACLU, the anti-Defamation League, Public Citizen, Common Cause, League of Women Voters, and many other clubs, leagues, church groups, federations, and local organizations that are active in these areas, together with a variety of more political groups from all parts of the political spectrum, ranging from the Conservative Party to the National Lawyers' Guild.
districting, financial barriers to filing for office, and lack of representation for minorities, among other issues.\textsuperscript{75}

The problem of these private organizations is keeping their groups together to deal with the never-ending series of problems. This requires dedication. Many organizations use the struggle itself to develop commitment.\textsuperscript{76} The process of organizing and cooperating around a common purpose creates its own solidarity.\textsuperscript{77} In this form, the emotional ties are more closely related to the issues and to knowledge of the issues than to traditional political loyalties.\textsuperscript{78} The process resembles Jefferson's insight that repeated revolution would be necessary to renew the sinews of democratic and free government.\textsuperscript{79} Issue-oriented organization is itself a more positive approach to the problems of democratic government than the regulatory approach described in Part IV\textsuperscript{supra} (though the one may be the grist to the other's mill). This approach attempts to build a base of power and to drive out less worthy systems.

To develop a strong organization, mere agreement has to be built into commitment, and the ranks of each organization and its public must be constantly renewed. To do this, each issue must be used to intensify the commitment of the people to reform, because no one issue resolves the problem.\textsuperscript{80} The political trial was clearly aimed at this problem.\textsuperscript{81} Thus, procedural issues—disclosure, freedom of information, wide latitude for the press—do double duty. They not only make a vigilant public more effective, they also help make the problems public and, therefore, keep the public alert.\textsuperscript{82} Consequently, the struggle itself becomes a strategy used to create commitment. Freedom of information laws and the fight against the secrecy and disclosure rules being considered as part of the

\textsuperscript{75} See reports, publications, and dockets of and literature about those organizations listed in note 74\textsuperscript{supra}.

\textsuperscript{76} S. Alinsky, Rules for Radicals (1972).

\textsuperscript{77} See H.D. Lasswell & A. Kaplan, supra note 28, at 31.

\textsuperscript{78} For discussions on traditional systems see W. Moscow, supra note 59; K.P. Phillips, The Emerging Republican Majority (1970).

\textsuperscript{79} Letter from Thomas Jefferson to James Madison, Jan. 30, 1787, in 11 Papers of Thomas Jefferson 92-96 (J. Boyd ed. 1955); letter from Thomas Jefferson to William Stevens Smith, Nov. 13, 1787, in 12 id. 355-57.

\textsuperscript{80} S. Alinsky, supra note 76; see Lin, The McIntire March: A Study of Recruitment and Commitment, 38 Pub. Opinion Q. 562 (1974-75), observing that prior commitment is the greatest single determinant of future activism, not merely ideological agreement.

\textsuperscript{81} P. Zimroth, Perversions of Justice (1974).

\textsuperscript{82} R. Michels, supra note 29 (keeping the public alert is no mean feat).
proposed recodification of the criminal laws (popularly known as Senate 1) are, in this view, critical to the integrity of the election process.

This strategy of relentless, organized struggle has become the dominant American strategy. In this tradition, the struggle for freedom, crucial to a democratic electoral system, is most readily identifiable as a defensive court battle against injustice—an doubt a measure both of success and of failure, as are Watergate and the continued distortions of power.

The strategy of struggle can mold consensus into commitment and alert the believers. Ordinarily, however, it is not a strategy which can create a consensus about what is right. Quite the opposite, the strategy of struggle polarizes people. Indeed, the polarization is part of the method—it creates an enemy to be fought. Although the continuing struggle for freedom and democratic government is essential, it is also incomplete, leaving out a significant segment of the population. The Warren Court and its constituency left out the Burger Court and its adherents. Indeed, Hoover's FBI and its constituency supported wiretapping, political fraud, and sabotage in flat violation of statute but with such increasing political support that the Justice Department even tried to use the disclosures to increase its authority. Battles also can be a way of spending, not winning, adherents. Although the battles for peace in Asia, for impeachment, and, until recently, for civil rights on behalf of blacks have been largely successful, the battle for civil liberties and truly free and frank discussion have been increasingly problematical. At this point, the relationship among dissent, democracy, and election reform remains needlessly clouded, and the dedication to operate and maintain a responsible electoral system remains very much in doubt.

---

83 The strategy of freedom, interestingly, was at one time in large part a process of cajolery and gentle consensus building. See R. Hofstadter, Academic Freedom in the Age of the College (1964).
84 S. Alinsky, supra note 76.
87 See, e.g., Board of Governors of Society of American Law Teachers, Supreme Court Denial of Citizen Access to Federal Courts to Challenge Unconstitutional or Other Unlawful Actions: The Record of the Burger Court (1976).
VI. STRATEGY BUILT AROUND KNOWLEDGE, INFORMATION

Education, information, and communication have enormous impacts on us. Can the flow of knowledge and perceptions, from doctrine to example, be molded into the service of free government? Can it make power more responsible? Can it make power both worthy and accountable? Can it be made to improve the system of elections?

A. Legal Doctrine Regarding Speech, Press, Assembly

The expression of legal doctrine in rules, laws, and constitutions is an exercise of power. They also have another function. Concepts such as fairness, equal time, and freedom of speech and press, as well as secrecy, privilege, and the like, provide a definition of right and wrong. They are a public example of what freedom and liberty mean. They are not necessarily good ones. For example, the doctrines of fairness and equal time, both, have failed to produce a decent public model of discussion and, instead, have encouraged growing bureaucratic complacency with censorship. Good or bad, however, they are models.

The question relevant here is the feedback from legal doctrine, the ways in which application of law may strengthen the consensus on which democratic government rests. The protective aspects of law are vital to the extent that they preserve physical well-being, which is essential to further development of free government. But legal emphasis on protecting the opportunities for expression, assembly, association, and participation is scant nourishment for the consensus supporting a democratic election process. The opportunity for expression has often seemed futile for ourselves and a nuisance when exercised by others. No election system can function well on so cynical a base. As we shall see, however, a more positive model can have both direct and indirect impact on the allocation

---


ELECTION LAW AND REFORM

of power among political organizations based on patronage, money, information, or other resources.

B. Legislation

1. Media—the Use of Models

The colonists saw religion as the source of the spirit of the people, of their morality, and, therefore, of their ability and will to operate a good system of government. Historians have laid greater stress on tradition. Political scientists have substituted for tradition the slightly more sophisticated concept of congruence between democratic traditions and other decisionmaking traditions in the same society. All these formulas have in common their reliance on the people's sense of righteousness, however formed, and of honor—a sense that can, in part, be forged.

Though having far different purposes in mind, two groups of professionals—educators and advertisers—have been concerned with the process of forming the people's sense of righteousness and honor. Educators came up with the not very surprising conclusion that children copy their parents even more than they listen or obey. The advertising world proved long ago that learning by copying is equally effective with adults. Further, the advertisers developed a formula: put one of the right people or a superstar on a screen with your product, and people buy it. Apparently, people either perceive the image as right or are anxious to bask in the same glory or both.

Their example suggests that a strategy of creating and reinforcing a model could reach and affect a very broad audience. We strategists could use the information media to create a tradition and invest it with honor and righteousness. The effect of such devices and traditions, about how to arrive at decisions, on the exercise of power, obviously, is quite indirect. Yet the evidence suggests that these factors are quite powerful in democratizing power. Perhaps the very indirection of the approach, by neutralizing some potential opposition, is part of its strength.

90 B. FRANKLIN, AUTOBIOGRAPHY 115-17 (1955); C. ROSSITER, SEEDTIME OF THE REPUBLIC 120-21, 295 (1953).
91 C. ROSSITER, SEEDTIME OF THE REPUBLIC (1953).
92 H. ECKSTEIN, TOWARD A THEORY OF STABLE DEMOCRACY (Research Monograph No. 10, Center of International Studies, Princeton University 1961).
94 H. ECKSTEIN, supra note 92.
2. A Model of Freedom

Freedom is now largely a set of negative commands: do not infringe; let him talk if he must; etc. However, because people react far better to positive stimuli, a model could be useful.

One strategy for strengthening democratic institutions is to build a model or tradition of free discussion—a public model of discussion, one which includes listening to the other side. One wonders, for example, what the results would be if television stations presented in succession all their soap commercials for the week or if political candidates, regularly, had to debate. Would people be better able to appreciate, evaluate, and incorporate dissent? Would it have meaning beyond distant contests between giant monoliths in presidential campaigns? There is, of course, good reason to question the legitimacy of legal rules which prohibit statements or advertisement’s being presented in other contexts. Censorship, after all, is the prohibition of statements, and, whatever distinctions might be drawn, it is unwise to approach the problem in that way. On the other hand, the legal system, instead of prohibiting, could provide opportunities for expression in a constructive and evenhanded way. This does not vault all legal problems, but at least one need not censor in order to improve discussion.

Models include both form and substance. Adversary discussion is the form or medium for some set of standards and methods, perhaps, as indicated below, inculcated through the educational system. Forms of adversary discussion, including debate as a common example, do not automatically create reasoned argument.

---

95 T. I. Emerson, supra note 89, at 627.
96 For a variety of proposals with regard to opening discussion see J. Saloma & F. Sontag, Parties (1972).
97 Scott, Candidate Broadcast Time, 56 Geo. L.J. 1037 (1968); Sterling, supra note 49, at 1152.
98 Both Miami Herald and Red Lion, supra note 88, dealt with access to the media based on contingent events. The contingencies result, if access is required, in discretion in some government oversight agency or court as well as possible inhibition of the publisher or broadcaster. Neither case dealt with access based on a formula. In this area the election finance and petition requirement for ballot access cases may prove more persuasive. See Buckley v. Valeo, 424 U.S. 1 (1975).
99 S. Kelley, Political Campaigning (1960); The Great Debates, supra note 9. As anyone who has held a position of responsibility knows, some issues are so charged and/or so complex that discussion is either prohibitive or not helpful, regardless of the truth about the issues.
Certainly experienced speakers can avoid issues. Their objects are, not to persuade, but to agree. Time, more sophisticated audiences, and the form itself may have their effects on the content. But, more important, in McLuhan's phrase, the medium is also the message.\textsuperscript{109} And the message must include weighing or, better, analyzing conflicting arguments.

The soapbox, pamphlet, article, and book provided lively models of discussion in earlier periods, when the relevant audiences were more closely knit.\textsuperscript{101} Sometimes diversity had to be tolerated.\textsuperscript{102} In a less closely knit world, it is easier to turn away from, turn off, or put down an unwanted thought. It seems wise, therefore, to add a tradition of listening to both sides—a tradition of working with, not just tolerating, a loyal opposition. Debate, hearings, and open discussion seem essential models now.\textsuperscript{103} But what of the allocation of power?

3. Crowding out Other Forms of Power

Power can be channeled, but rule by a few cannot be eliminated by outlawing it.\textsuperscript{104} That is the significance of the people's determination, or lack of it, to be free and to share their freedom. There is no known form of political organization, from town meeting to primary, that cannot be controlled.

Power is like a balloon. Press it in one place; it bulges in another. It is possible to let the air out. Civil service, welfare, and social security all changed fundamentally what power had to offer to the poor, but only to the poor. Public financing springs from a recognition that it is possible to alter fundamentally what the wealthy have to offer to power. But public financing would give power to those who receive the dollars or to those whose early efforts draw the financing. Power changes; it does not disappear.

One of the most important facts about the several bases of political action is that they can crowd each other out. This suggests the possibility of building on improvements in communications—public discussion, education, and decisionmaking—to

\textsuperscript{109} M. McLuhan & Q. Fiore, \textit{The Medium Is the Message}.
\textsuperscript{101} N. Cunningham, \textit{supra} note 60.
\textsuperscript{102} R. Hofstadter, \textit{supra} note 83.
\textsuperscript{103} For discussion on the difficulties of and possibilities for a constitutional model for debate see Scott, \textit{supra} note 97.
\textsuperscript{104} R. Michels, \textit{Political Parties} (1916).
crowd out other forms of power. If communications are good enough, they can break down most forms of non-issue-oriented power.

Thus, providing space and time might be more effective than providing money in distributing power. Presidential debates—required, not optional—might influence the system by example. Together with campaign financing, the debates have already influenced the system. Power has flowed away from the traditional financiers both to new groups of fundraisers and to campaign technocrats, the pollsters and admen. What is disturbing about this change is the continued importance of ad hoc organizations of experts, whose primary qualifications have been gathered in selling other kinds of products, from songs to consumer goods. Political campaigning still rests on some unaccountable or irresponsible bases. And it must supplement public appearances, including debates, with other vehicles for information about the candidates, information which cannot come out in the speech or debate format alone. Indeed, too much reliance on debate, which now seems remote, would invite demagoguery. Nevertheless, the debate format places strong limits on the ballyhoo of marches, ticker tape, and bunting. The opportunity to observe the candidates directly is unquestionably an advantage. Further, providing space and time, as the League of Women Voters did, has the advantages and disadvantages of more restricted use than providing money as the campaign finance law does.105

Extending the debate form further down by requiring other candidates to debate would further decrease the opportunities for manipulation. (There were other debates—some limited to newspaper press rooms, few televised.)106 Providing places on the ballot in primary elections and between-election media space or time for elected clubs in each district (or for each area with, possibly, a


formula for proportional representation of views within the party) could bring power much closer to the people than does the present system of campaigning. Also worth consideration is giving the national parties the opportunity to make their own presentations directly to the people, not as reply time, as the Democratic Party requested some time ago in response to a speech by then President Nixon,\textsuperscript{107} but on a regular schedule (thereby avoiding all the discretionary problems of deciding when a reply is appropriate). When newsmen refuse to print position statements on the ground that such statements are, after all, press releases—and they do so refuse—there appears a clear need to give parties and candidates some direct access to the public without the real issues of second guessing newsroom judgment created by the fairness and equal time provisions. As the networks do not now seem prepared to lay the necessary foundations for our understanding of complex political issues, perhaps the parties will be.\textsuperscript{108}

These suggestions do not, of course, eliminate the opportunities to exercise and channel power. As should by now be clear, power cannot be eliminated, and, regardless of our ideologies, there is no practical way for the people to exercise power except through powerful institutions. The best we can hope for, then, is to alter the bases of power so that it is more rationally and responsibly exercised. What are the shifts of power these proposals are likely to create, and what will they mean?

First, power would be shifted to the various political consultants, advertising men, and pollsters. If space and time or, possibly, even money were widely provided to political machinery, the major role outsiders could perform for the organizations would be to help them assess with greater reliability what the people want and to think or write for the clubs. Even in this role, of course, these professionals would have no monopoly. The club that canvasses its members is likely to be stronger than the one that polls them. But disparities will remain, and the use of consultants might well continue to be a major form of reintroducing collateral sources of power. Even that use, confined within the outlet of public disputation, suggests a far more appropriate political and campaign pro-


\textsuperscript{108} The idea has at least been tried, although under somewhat different circumstances, in Britain. It might transplant. See Kilpatrick, Promoting the Ungreat Debates, The Dominion-Post, Sept. 8, 1976, at 14-A, col. 3; Mitgang, Tuning in the Public, N.Y. Times, April 20, 1976, at 35.
cess, a process in which knowledge and information would to some
degree have pushed aside other forms of power. (Knowledge does
not insure good government—the people may be unjust, and the
system may still favor some groups of the people over others.109
Knowledge is only more appropriate than money, preexisting
power, and loyalty.)

A second arena for the reintroduction of power over the politi-
cal process is concerned with who gets to use the time or space and
how that leads or contributes to who ultimately bears the parties'
standards in the general elections. There are two automatic checks
on this power: the need of each party to put forward its most
attractive spokesmen and the possibility that the press would be
stimulated by the challenge of direct political appeals to the public
to do a better job of explaining and covering issues. Beyond these
checks, it seems not unreasonable to suppose that local political
organizations would pool their time along such lines as the New
Democratic Coalition in the Democratic Party and similar move-
ments in the Republican Party, resulting in a broader spectrum of
ideas. A formula for third party time is, of course, essential. In
these ways the levels of public discussion would probably be signif-
icantly enhanced. Party leaders would be more identifiable, and
the local political organizations could begin to reacquire legitimate
roles in the political process. Ultimately, only if continuing politi-
cal institutions (local or national),110 unencumbered by the corrup-
tion of traditional machines, can begin to challenge the power of
the personal political organizations that have dominated politics
for the last several years, can power begin to flow back to the
people in any rational, reliable, and organized way.

It is not, of course, easy to reestablish politics on the basis of
popular local organization by creating “reform clubs” which oper-
ate as modern town meetings within the party. Democratically run
clubs are very fragile flowers on the political landscape. Sam
Adams showed the techniques of intimidation to Boston before the
Revolution.111 And Tammany Hall should be an ample reminder
of the opportunities for controlling a club.112 Union violence may

109 R. DAHL, A PRACTICE TO DEMOCRATIC THEORY (1962); THE FEDERALIST No. 10
(J. Madison).
110 See note 37 supra.
111 J. MILLER, supra note 60, at 66-71.
112 W. MOSCOW, supra note 59, at 16, 19-20. Meetings can be swamped, and
using the election machinery would make it more difficult for a boss to set up a
be the best known contemporary example of such control techniques, but there are equally appalling political ones. Aside from the so-called violent "fringe," the murder of reporter Don Bolles suggests the depths of violence in Arizona. The killing of Yablonski suggests more than union violence in the eastern mountains. The rebirth of gang warfare is equally ominous in the cities. And a scenic rivers bill was the focus of violence in the midwest. Beyond all these, one suspects that violence is a more persistent part of American politics than we have chosen to notice in present years.

Every attempt to democratization has invited powerful personal organizations which have left us deeply disturbed at the continuing vagaries of democracy. Despite generations of reform, the Long, Byrd, and Daley organizations, among many others, persisted for decades. Tammany is gone, but Esposito took over from Brooklyn. And other power brokers continually rise to control the electoral process,

\[13\] though often far more discretely than their flamboyant predecessors. Attempts to open politics at the grassroots are susceptible to corruption of the spirit and ultimate cynicism and reconcentration of power, if not to outright violence and intimidation. The protections gained with the secret ballot are now challenged for the sake of democracy. It may be a costly exchange. It is this fatal war between the need to rest a true democracy on popular (and well-informed) involvement and the vulnerability of open meetings that has doomed most efforts to strengthen our political system beyond its current compromise and balances.

There are, of course, those whose solution to this conundrum is a political elite—wiser and more well-informed than the rest of us. The closest we can come to these benefits of elite representation, however, is in nurturing strong and responsible political parties, based on a well-informed public and opened to competition from the leaders, rather than a loose system of personal organization based on image management. If this analysis is true, as it seems to be, then the better solution is to place the needed knowledge and tools at the disposal of the people instead of providing complex avenues for manipulation. Debate for major candidates and space and time provisions for party organizations might well strengthen and enlighten more direct democracy. It is well within the possibilities of election law reform in these ways to replace second club to choke off insurgents.

\[13\] See V. O. Key, American State Politics (1956).
ballyhoo with discussion, privilege with leadership, and images with debates.

Beyond these reforms, competition might provide some control over the vulnerability of open political organizations. Space and time could be provided to two clubs per primary per district. Money, so long as it is not a prerequisite to campaigning, could provide useful competition. Wealth is the unpredictable wild card of politics; it can unseat encrusted power and help keep clubs honest. Competition might stem from candidates' meeting requirements for signatures on petitions.\footnote{McCarthy v. Briscoe, 97 S. Ct. 10 (1976); Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23 (1968).} To assist competition further, overlapping tickets might be prevented.\footnote{For the definition of party membership see A. BICKEL, THE NEW AGE OF POLITICAL REFORM 34-37 (1968).} All of these factors might provide real change in a democratic direction if the public were sufficiently moved to operate the system well. Therein lies the ultimate need for a well-integrated political system that matches the cleverness of its formulas with the strength of its spirit. Like the impact Adlai Stevenson had on political organization in 1952,\footnote{J.Q. WILSON, supra note 31, at 52.} that strengthening of the spirit may be the most lasting contribution of a more elevated form of political discussion.

C. The Role of Education—Developing Skill as Well as Belief

Although education is often thought of as a non-legal strategy, in fact, the curriculum is often defined by law.\footnote{See, e.g., W. VA. CODE ANN. § 18-2-9 (1977 Replacement Volume).} Conversely, education is basic to any strategy of reinforcing those aspects of our legal and political system that define freedom, popular rule, due process, and equal protection. And lawyers have successfully urged many school administrators to include law-related subjects in the curriculum.

One approach to education focuses on its relevance. Law is now being taught in high schools and colleges along with other courses that deal with today's concerns, such as drugs and racial history.\footnote{ABA SPECIAL COMM. ON YOUTH EDUCATION FOR CITIZENSHIP, LAW RELATED EDUCATION IN AMERICA (1975).} Using this approach, history—including legal history, the history of freedom, due process, and equal protection—can teach our dependence on each other by bringing out the fact that
ELECTION LAW AND REFORM

history has not been kind to many. It has enslaved and impoverished, not only blacks, but also white Christians, as well as Jews, Muslims, miners, Indians, and Japanese, among others. Indeed, few are aware that this country rounded up Japanese Americans into concentration camps for several years. Honest history would reveal quite clearly how fragile the flower of free government really is.

Nevertheless, relevance is not enough. Beyond such broad historical themes, the effort to be relevant, or timely, largely condemns the school to explore problems that will not be relevant to the students when they leave school. Even more fundamentally, schools are not teaching—cannot teach—what the demand for relevance presumes. The only answers education can give are methodological. The rest are hypotheses. However, schools, with some narrow exceptions, do not teach method. Thus, they are most relevant to specialists and to students willing to risk a variety of preconceived notions, not to the everyday business of problem solving.

There are other approaches to education. Education has, in fact, been used for tradition building for some time, through, for example, civics courses and discussion as a form of instruction. Discussion does help to teach democracy. It can, however, help to teach either the best aspects of democracy—effective, cooperative, joint resolution of problems—or the worst aspects of democracy—a mindless conformity. The effectiveness of discussion depends, in


120 For cases regarding Japanese Americans in concentration camps see Korematsu v. United States, 323 U.S. 214 (1945); Hirabayashi v. United States, 320 U.S. 81 (1943).

121 See generally H.D. LASSWELL, supra note 28. For more specific studies of method see, e.g., D. BRAYBROOKE & C. LINDELOM, A STRATEGY OF DECISION (1963).

122 For an aptly titled book of much influence see J. DEWEY, DEMOCRACY AND EDUCATION (1916).

123 The literature of management is replete with material on the best ways to
part, on whether the participants have in mind a model of how to resolve problems.

Teachers once taught methods of reasoning. Rhetoric now refers to florid argument. Although it was relegated to matters of style in the colonial period, rhetoric was, along with logic and other studies, part of an attempt to teach methods of thinking. At present, method is taught as advanced collegiate electives: logic, statistics, scientific method, polling, and other highly specialized courses. Law schools teach a form of analytical reasoning. Business schools may teach systems analysis, and other graduate schools may teach methods of inductive reasoning, all taught for specialists. Thus, the first smattering of discipline—not just hard work, but a logical, systematic approach to problem solving—generally comes, if at all, in graduate school, after 16 years of schooling. Effective discussion, freedom, and democratic government could be strengthened by greater emphasis on method in the educational system.

VII. THE NEW CLUB MOVEMENT—INFORMATION AND DEDICATION IN AN OPEN MEETING FORMAT

Although political parties are extensively regulated by state laws, the internal organization of the factions competing for party control remains largely unregulated. The problem of whether or not those competing factions themselves have to be democratic reached the courts in O'Brien v. Brown. O'Brien involved the right of the Democratic Party to enforce its own rule requiring that each step in the nominating process be conducted democratically or, at least, with open and wide public participation. For the Supreme Court, which had regulated elections in the apportionment cases and primaries in the white primary cases, this was a third generation challenge to find a key to democracy. The court declined. Despite the decision in O'Brien, can discussion of issues encourage constructive discussion. For writings on conformity see D. Reisman, The Lonely Crowd (1953); 1 A. de Tocqueville, supra note 64, ch. 16, at 263 (1957).


113 The socratic method is very useful, for figuring out the common ground among divergent positions; i.e., compromise. It is much less useful for solving problems.

114 469 U.S. 1 (1972).

and candidates, nevertheless, be made the cornerstone of the political system at the grassroots?

A. Competing Values

Internally, the reform movement in politics represents another form of information strategy. It tries to neutralize individual power by keeping decisions open until after discussion at meetings open to all members. The clubs also reflect a mode of focusing the loyalty and affection of people. Clubs focus loyalty and affection both on a model and on the clubs themselves, which embody and depend on the acceptance of that model. In a word, the clubs involve people as a town meeting might. They create a community within what was merely a residential area.

Involving people could be pursued in other ways. The efforts to reform registration laws and provide permanent registration may bring more to the polls. The act of voting might create more interest for some. But the vote must seem very hollow for many people. The club movement creates deeper ties.

Within clubs, as well as within the larger political system, however, knowledge, affection, and belief compete with other bases of action—safety, power, money, honor. Left for another day in O'Brien and Cousins v. Wigoda128 was the question of whether or not the courts can define or enforce democracy among these complexities at the grassroots level of organization.

The issue, as it was and is being developed within the reform organizations and as it was and, no doubt, will again be presented to the courts, is quite different from the issue as it might be presented to a legislature. Legislatures announce rules for qualification and election, which can include rules for access to media, funds, and other resources. The courts, however, are not free to choose among systems. It is their job to measure compliance with due process, equal protection, the guarantee of republican government, etc. Lacking that, they can demand a plan for compliance (the primary route of the apportionment and segregation cases), but there is scant authority for creating their own. Thus, the issues are posed as lack of public notice or opportunity to be heard.

Those issues define what the Democratic Party rules called openness—open meetings, open discussions, openly arrived at. Yet

---

that openness, the strength and objective of modern political reform, is also its most vulnerable point. It is vulnerable because it returns to political forms which themselves have been decimated by direct modes of intimidation and bribery. The results depend, after all, on who takes advantage of the open invitation and why. Given these restrictions on the courts, the variety of expectations and motives for political participation, and the vulnerability of open meetings, the courts and, indeed, national institutions may be able to influence democracy by example, but they cannot control it by rule.129

Clubs are subject to the same kinds of domination by organization as primaries and elections are—domination by default or lack of interest or by fear or favor in money or other power. Motivated or favored workers can canvass the members before the meetings and swamp or intimidate the members at the meeting. If any faction in a club has special resources through loyalty, favors, or force, it may swamp meetings consistently. Indeed, if the club is powerful, it may suffer its leaders to control its members. Further, the club may have to consider appropriate membership restrictions: attendance, duration, dues, work, etc. (On the other hand, if the club remains powerless long, it may well atrophy.) The larger the club, the more possible such domination becomes, e.g., Tammany Hall.

The battle is endless and ever more complex: elections, primaries, conventions, clubs, etc.—each was conceived as a response to the last. Of all the responses, open clubs may show the most variation, ranging from the most democratic to the most undemocratic of institutions.

Changes in political expectations, from Jacksonian commitment through Guilded Age laissez-faire and back to modern participation, and in attitude among different classes or groups of the electorate appear to have been much more significant than changes in form. With those changes, there have been changes in the rewards and substance of political participation, varying among favors, canvassing, petitioning, discussion, advising, checking, and sounding—from money and power to information and morality—and back. National attitudes toward public service,

129 The viability of the Teamsters after being expelled by the AFL-CIO some years ago suggests the problem of enforcement. See also H.D. LASSWELL, supra note 28, at 63ff.

https://researchrepository.wvu.edu/wvlr/vol79/iss2/4
public service agencies, and conscription affect these swings and the viability of the club movement by influencing the objectives which people are seeking.

These characteristics of clubs and other open meeting systems at the grassroots impose limitations on the power of the courts or of the party itself to declare and supervise a democratic system at that level. It is clear that no one form or set of procedures works across the political spectrum.

B. Participants

Nevertheless, if the national committees and parties are dedicated to maintaining popular democracy, they can redistribute access to the party. The attempt to strengthen the grassroots of democracy by requiring democratic forms is as intriguing as it is unusual. The willingness of the parties to require democratic forms has in practice, however, often been compromised. Their desire to seek democracy as an objective has often been secondary to political advantage. Even when the will and desire existed, efforts to restructure local politics by national leaders have had limited success. These problems raise the question of how much power should be accorded to national institutions to achieve their objectives, for such power may be used well or abused. In fact, however, the new rules for the 1972 Democratic Convention had made a substantial impact on the Democratic Party by the time of the convention. These revisions made important changes and reflected basic changes in the party’s active leadership. The allocation of power among different local and national segments of the parties was one of the difficult questions the Court avoided in O’Brien.

The question of defining membership is similarly difficult.

---

131 W. Moscow, supra note 59, describing DeSapio as encouraging more democracy, up to a point.
132 W. Elliott, supra note 7.
133 R. Caro, supra note 7, describing city, state, and national efforts.
134 Pressman & Sullivan, supra note 130.
135 Of course, by not deciding substantive issues, the Court left intact the prevailing relationships within the party.
136 A. Bickel, supra note 130; Note, Bode v. National Democratic Party, 85
Externally, who can the clubs represent? From whom and on what basis do they derive their power? Reform clubs, for example, recruit with posters, parties, meetings, and personal invitations. They recruit for meetings, discussion, and political activism. Their self-defined market is the upper-middle class that wants to meet. The clubs represent the expression of a particular kind of skill, style, interest, and confidence that is class-based. The history of political parties is, of course, that they are run by small groups. Perhaps that is the closest human equivalent to power to the people. Nevertheless, open political clubs could improve their power and their ability to represent the community by reorienting their thinking to marketing. To do that, however, they would have to know of whom their market could consist and what it would want. Further, they would have to be prepared to serve their market. That would change the club.

The problem of definition is inherent in the political dispute itself. For courts to regulate the membership of clubs would run afoul of the right to associate freely to pursue political goals. Nevertheless, the degree of democratic power sharing is intimately connected with the resolution of this definitional question. Moreover, the appropriate resolution is not a constant, because the definition does, and must, change with the shifts in political dispute and the sharing of other values. Who is prepared to work with whom? Who is prepared to share powers in discussions or elections with whom? Thus, restriction can either preserve internal democracy or prevent it. These variations reinforce the need for flexibility in any applicable rules.

C. Are Nonlegal Approaches More Effective?

Political organizations often vault the definitional problem with a consultation process. What do the people want? That question has been handled by caucuses, conventions, open meetings, surveys, polls, and leader-to-leader consultation. The consultation

HARV. L. REV. 1460 (1972). For a discussion of some of the differences and problems involved in the conflict between the free speech and association approach and the right-to-vote approach see Note, supra note 127, at 113-19.

138 R. MICHELS, supra note 29.
139 P. DRUCKER, supra note 66, at 39-166.
140 Reform and spoils are cyclical, in part precisely because of shortcomings in the abilities of succeeding organizations to find out who wants what. S. MITCHELL, ELM STREET POLITICS 25-43 (1959).
process is the procedural *sine qua non* of power. In addition, it is the basis for many new communications techniques.

Some of the applications of the consultation process have names and some do not. Community organizers commonly bring community leaders together to decide priorities, a procedure which involves a large number of people through a personal network in a high level of sharing of information. Businesses call what is much the same process organizational development (also, OD and planning by objectives), incorporating many echelons of staff into priority-setting conferences. They also refer to polls—a less effective way of involving people, but a very good way to get information—as market research. Bosses do much of this consultation in private, but, by operating privately, they concentrate the information flow in themselves.

The organizer, in any of these forms, uses knowledge as a major basis of action. However, instead of appealing to people by holding up an example, he reaches them more personally. Out of that participation he endeavors to have information shared to such an extent that it drives out other forms of power. Community organization is, in large part, a technique of using personal interaction, affection, and respect to broaden the base of political action. Participation, to the extent it can be generated, creates a degree of loyalty to the organization or system.

Political groups with reform objectives need to use an open process. In that form, the clubs have available techniques for community involvement, if they can define their purposes more clearly. Although, at this point, clubs exist primarily to serve the political views of their members, they do also try to represent communities. While keeping their memberships open, they must find ways, such as these, of bridging the gap to those who do not join.

Community involvement or sharing of power, however desirable, would by its very nature reopen the goals of the clubs. This kind of organizational development might lead to a set of priorities

---

111 E. Costikyan, *supra* note 37, at 289ff.
112 P. Drucker, *supra* note 66, at chs. 21, 34.
making it possible for clubs to offer more services to the officeholders they support. Indeed, clubs might then have a mandate from the community to take some chores off the shoulders of their representatives.

Clubs can offer, and some have offered, many things: advice to tenants, administrative counseling, charitable programs, the ability to arrange meetings with officeholders, experienced advocates, lectures, disclosures, social life, and recognition for members. Although most clubs start with political objectives only, constituents also have important nonpolitical objectives. Does purity require neglect? If the club handles them fairly, are these nonpolitical needs inconsistent with political objectives, or do they actually furnish support for the club goals? An ombudsman could offer few of these things. He could hardly perform even the advocacy job without power. The club, on the other hand, needs both the constituent pressure and the satisfaction from performance. The club can provide some of the services with which representatives have generally been plagued. In return, the club gains a better relationship with the community. It is thus strengthened, and a strong club can protect its elected representatives from unwarranted pressures.

The difference between a democratic club and a boss may lie less in what the club can do than in how it is governed. However, as the clubs become stronger, the pressures against an internal system based on ideology and dialogue and for a system based on seniority or service or power become stronger. To resist such pressures, there may be no good answer save rebellion. Because all the extra services provided by the clubs reintroduce all of the noninformational bases of power, the problem of eliminating these bases from a system not systematically organized for their elimination remains. Regardless of the possibility of reinforcing one system above the others, the multifaceted needs of people remain.

Nevertheless, these strategies seem to be pieces of an essential whole: a model of democracy, a forum for democratic involvement, a commitment to service, and the intellectual tools for cool and careful policy analysis. Moreover, if these approaches are effective, legal rules defining membership and voting entitlements may be inappropriate.

VIII. Conclusions

While proposals for reform focus primarily on the sharing of
power, the problem of reform is intertwined with the strengthening of democratic institutions, values, and expectations. Most analyses of political reform are based on a static model. The questions are definitional: is this democratic or fair or equal? A more difficult task is to trace the outcomes, particularly the long run outcomes.

Strategies are largely concerned with the long run. Changes which are imperceptible in the short run are irresistible in the long run. This is particularly true of changes of will and sentiment because democracy rests heavily on those two factors.

The long run of political reform and of freedom blend. Both involve the sharing of power and strengthen the will and the occasions for sharing power. Political reform necessitates nourishing the roots of freedom as well as pruning its branches.

Democracy requires at its core four interdependent and well-functioning systems: (1) a system of free discussion, (2) a system of education, (3) a system of elections, and (4) a system of public service—the institutions primarily shaping and sharing knowledge, skill, power, and affection. Major changes, however, have affected each system. Freedom has been affected by the drastically changed immigration patterns that followed changes in the immigration laws and by major social and political movements of this century. Education has been revolutionized by public subsidy legislation and appropriations, specialization, method, and other changes. Elections are increasingly complex. National service has been voluntarized by ending the draft and by developing the ACTION programs. Thus, the foundations of democracy have been changing, and they are not to be taken for granted.

Dealing with problems of this magnitude and complexity requires a systematic approach. The long run may need special guardians. One must account for each different base of power and assess the changes in each area. Strategy must be formulated with a map of the terrain.

\textsuperscript{145} H.D. Lasswell, \textit{supra} note 28, at 65.