

Fixing American Democracy: The Quandaries of Political Reform

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SECTION ONE: INTRODUCTION

CHAPTER 1: MAKING DEMOCRACY BETTER?

If the US political system seems to have fallen short of its lofty democratic ideals, it is not for lack of effort. Reform groups abound. There are nonprofit groups working for greater transparency (Open Secrets and Open the Government), more effective oversight (Fund for Constitutional Government), lessened partisanship (No Labels), improved fiscal responsibility (OMB Watch), tighter lobbying and campaign finance controls (Democracy 21 and the Campaign Legal Center) and better voting procedures (Little Sis and the Center for Voting and Democracy). Others--Common Cause, the League of Women Voters, the Brennan Center, and US PIRG--have broad reform agendas. Only a few organized groups are on the other side (the Center for Competitive Politics).

Despite all this reform effort and some significant political victories by the pro-reform forces, there is no evidence that voters are any happier or more confident in their political system. The perception of government dysfunction is as great in states that routinely dabble in bold initiative driven experiments (e.g. California) as it is in states that are resistant to experimentation (e.g. New York). But how much of the perception is rooted in reality? If people are unhappy with conditions or the failure for elected officials to find solutions, is a broken system necessarily the cause? Complicating matters, the US is increasingly split along partisan lines on many reform issues such as voter identification, campaign finance rules and lobbying regulations. It seems like political reform needs a consensus blueprint, but is that possible? And if it is not, can democracy be improved?

Political reform in a mature democracy, such as the US, is inherently problematic because many of the underlying democratic concepts are themselves contestable in principle and have different consequences for policy and political power. Beyond the minimal formal

requirements of a democracy (which enjoy high consensus), there are many different valid variants of the democratic form, involving tradeoffs of core democratic values. The fact that specific rules and institutions also confer political advantages on some groups (and the policies they prefer and not others) further complicates the task of achieving a reform consensus.

Consider the voter photo identification controversy. Voter photo id proponents, mostly Republicans, believe that voting fraud is a significant problem in America and that ballot integrity should have the highest priority. Opponents, mostly Democrats, believe that fraud is a minor problem and that full participation should be the most important goal. Republicans also suspect that more restrictive ballot qualifications would be politically advantageous for their party while Democrats believe the opposite. In other words, the partisan divergence on this issue involves both differences in principle and expected political consequences.

Failing to appreciate fully the implicit value trade-offs in reform proposals and the problems associated finite citizen capacity can undermine efforts to improve democracy. In essence, many American political reform efforts try to cure the ills of democracy with more democracy—to remedy the system’s perceived flaws by increasing the amount of participation, accountability, transparency, fairness, and popular control. This has significantly expanded democratic opportunities for citizens and interest groups and redefined the democratic form of government, but not always in a consistent, coherent or complementary fashion. But does this trend necessarily lead to outcomes that serve the interests of the many, or does it at some point serve the interests of the few who are better organized or have more resources? *The fundamental challenge of American political reform, ironically, is how to maintain accountability to the broader majority while accommodating pressures to expand democratic opportunity.*

There are also now more pathways to reform, each with its distinctive advantages and problems. As constitutional reform efforts at the state and federal levels have essentially ground to a halt in the modern era and legislatures balk at comprehensive or radical solutions to governance problems, reformers and their opponents have increasingly used the courts and direct democracy to change the rules of the game. But political reform venue shopping has consequences: reforms introduced by the courts or through state initiative constitutional amendments have more inertial/lock-in force than procedural reforms enacted by legislatures or statutory initiatives. At the same time, political players of all persuasions have become more sophisticated in their ability and inclination to game the system. Efforts to undo or work around previous changes spur new fixes to the old fixes, leading to ever more convoluted rules and institutions in a dynamic of mutual anticipation between reformers and political actors.

This book has three aims. First, I propose an organizing framework for thinking about the varieties of political reform problems and to identify the underlying democratic themes underlying contemporary American reform issues. Traditional Democratic theory usefully

distinguishes between the basic characteristics and ethical merits of democracy from other forms of government (e.g. oligarchy, dictatorship, etc.). It also weighs the advantages of specific forms of representation, the ethical dilemmas that citizens and elected officials face, and the value of full citizen participation, but there is too little focus in democratic theory on the specific issues of modern reform like campaign finance and lobbying regulation, transparency innovations and the like.

Reform issues are regularly deliberated in various public arenas. Reform opponents and proponents and the judges who hear the cases when the reform disputes spill into the court system invoke democratic principles, but rarely if ever in an explicit framework. When there is an immediate problem to be solved, there is usually little incentive or time to reflect of the deeper meaning of what is at stake. And what is the point, some might ask, of looking for consistency and coherence in a hodge-podge of typically scandal driven repairs to the basic democratic framework. But deeper reflection, I will argue, might limit mistakes and the creation of unrealistic expectations that contribute to reform fatigue and public cynicism about efforts to improve the system.

Democratic forms and expectations continue to evolve, so much so that earlier versions of American democracy (e.g. those that limited the right to vote on the basis of property, gender or race) no longer seem sufficiently democratic by contemporary standards. The simplest and most intuitively appealing assumption is that any change that increases or maximizes a core democratic value is necessarily an improvement, but that assumption turns out to be wrong in many instances. In practice, US government recognizes this in various ways—for example, exemptions to FOIA laws for privacy and national security purposes, or provisions for closed sessions in open meeting laws.

But what does the existence of these exemptions imply for a democratic theory of reform? At a minimum, it means we need a more nuanced theory that recognizes that democracies frequently balance not only different competing values but also the practicality and likely effects of rules changes for governance. In the end, the democratic process is an imperfect, noisy second best welfare calculus—an approximation of majority public utility constrained by rights. Democratic processes indisputably have inherent moral worth (e.g. affirming individual equality), but they are also an imperfect means of achieving public and individual welfare.

I argue that simply *maximizing a particular democratic value*—fixing democracy with more democracy—is a flawed reform strategy that sometimes perversely serves the interests of the few rather than the many. I will also argue that consistency (i.e. a coherent single vision of a specific democratic form) is neither achievable nor necessary. As reforms from different traditions get enacted over time, the US reform landscape has come to resemble a patchwork

rather than a consistent pattern. Attempts to fix this comprehensively through constitutional conventions at the state level have been thwarted in recent years by a coalition of divergent interests and conflicting reform ideals. However, what are ostensibly inconsistent systemic features at various levels can cohere into a complementary whole and achieve a relatively stable political equilibrium if the ostensibly inconsistent features offset one another in functional ways. Our fate in the US is an ever evolving, hybrid democratic form that increasingly demands more from its citizens while retaining many feature of traditional representative democracy. Are there principles of hybridization that can make the system work better for us?

Secondly, the study aims to address the election law community and the courts, both of which get drawn into disputes over proposed reforms to the political system. With the lowering of the political question barrier in 1962, the US has relied on the courts to provide guidance about the constitutionality and legality of political institutions at all levels of government, and in some cases, to be the agent of last resort when the political system fails to act (e.g. line drawing). But how far should the courts go in this direction, and if limits are desirable, how can they be defined and achieved? The political question doctrine as developed by legal scholars has focuses primarily on the dangers posed by intervention for the court itself and the relative competencies of the various branches, but not enough on what it means for the political system as a whole for the courts to decide institutional design questions. As a consequence, it has overlooked or downplayed the danger of the Federal courts in particular locking in essentially contestable democratic institutions and practices.

Consider the case of the “one person, one vote” rulings. Instead of merely enforcing the apportionment rules as set out by state constitutions, the Court imposed a theory of representation on state and local governments even as it left intact at the Federal level the US Senate and Electoral College. My argument is not that “one person, one vote” theory is wrong (especially as it applied to lower houses that were supposed to be re-apportioned on a regular basis), but that when the Court decided *Reynolds v Sims* (in which it overturned the so-called federal system at the state and local level), it locked-in a contestable democratic theory into institutional design. Similarly, when the Court decided in *Buckley v Valeo* and subsequent cases culminating in *Citizen United* that corruption was the sole justification for limiting first amendment activities like contributing and spending money in political campaigns, it distorted the campaign reform discussion in lamentable ways (shoe-horning all arguments under the rubric of corruption and away from equality) and locked in a campaign finance framework that was both inherently contestable and has serious practical consequences. The potential of judicial lock-in powers varies between the federal and state courts—higher at the federal level due to insulation to life-time appointment and the high bar for constitutional amendment, and lower for state courts for the opposite reasons. Courts can play an essential role in reform

ecology but its exact nature should vary with a decision's lock-in potential and the system's structural (not merely political) capacity for self-correction.

Thirdly, I hope to provide some guidance for future political reform. Political reform discussions occur on the two parallel tracks: the rational academic analytic mode and the experiential, often politically motivated calculation of reform advocates and political practitioners. In some ideal world, good political reform is a coherent and consistent package. In practice, reform lurches forward when there are opportunities created by propitious political events. Consequently, consistency is an unattainable goal: separate reform actions taken at different moments in time under varying political conditions will inevitably yield inconsistencies and even contradictions. Any realistic conception of reform must therefore accept that changes will usually be incremental and that the whole will be an accumulation of separate efforts reflecting different emphases and contexts. Hopefully, a greater awareness of the trade-offs of democratic values, legal lock-in problems and the practical need to balance outcomes with procedural values can limit changes in the future that take us in the wrong direction. More importantly, I will argue that *coherence*, as opposed to *consistency* might be a more important goal, and that coherence might involve systemic self-adjustments at one level to changes at another.

CHAPTER 2 CRITICAL THRESHOLDS AND THE DEMOCRATIC INTERVAL

Sincerely proposed political reforms, by definition, intend to improve democracy, but there is no single roadmap to follow once a democratic polity rises above the threshold institutional conditions that distinguish it from other forms of government. The core democratic concept is a government's accountability to its constituents, which is minimally achieved through periodic contests for power (i.e. elections). Leaving aside momentarily the very important expansion of accountability in advanced democracies beyond candidate elections, electoral accountability itself requires enabling laws and institutions—rules that establish voter eligibility, methods for counting votes and determining winners and losers, etc. The principles underlying these rules are values such as equality (e.g. establishing the equal right to vote or an equally weighted vote), autonomy of choice, integrity of the count, and freedom of speech and association. These values have intrinsic or expressive worth to be sure (e.g. equality as an affirmation of human dignity), but they also have functional worth in the sense of underlying the proper operation of democratic accountability. Significant inequality in the distribution of the voting franchise (such as prohibiting certain types of individuals from voting) can be seen as an expressive affront to human dignity and equal rights, but it can also cause democratic harm by distorting electoral outcomes and undermining accountability.

Principled justifications for reform appeal to core values. Reform through Institutional and rule changes seeks (at least implicitly) to improve upon the realization of those values. A

particular democratic system could in theory be ranked by the degree to which it realizes specific goals or values (as in Gerken's democracy index). For instance, it could be ranked or scored by how fully and equally it extends the voting franchise to its residents (e.g. how restrictive the franchise rights are). Maximizing this value might mean extending the franchise to all residents with little or no restrictions while highly restrictive systems that exclude women, non-property owners, or racial minorities would represent the low end of the continuum. A democratic system could then be evaluated by the aggregation of its scores across the spectrum of democratic values.

The **floor** of democratic values demarcates the transition of a nondemocratic system into a democracy (i.e. the threshold of an **emerging democracy**). Many early US reforms are this type: opening up participation to previously excluded groups, obliging the government to release information that is critical to forming electoral judgments, preventing material corruption of the public calculus by outlawing various forms of quid pro quo corruption, and the like. Over time, our minimal expectations have risen (e.g. think of earlier participation restrictions). What we called a democracy at the inception of this country's history would not meet the criteria of a mature democracy by contemporary standards. Much of this has played out in state legislatures and Congress, but the Court has also had an important role in elevating those minimal standards to judicially enforceable conditions and policing against slippage.

Above the critical levels of democratic values and conditions is the realm of competing but equally valid conceptions of democracy. Many democratic variations involve tradeoffs between and different levels of these values as expressed in institutional differences. So, for instance, the US has expanded the reach of its FOIA laws to a greater degree than Italy, reflecting a different emphasis on transparency. A so-called hybrid system (with direct democracy opportunities) provides more opportunities for participation than a pure representative system. And so forth. Some democratic forms might be more suitable for certain socioeconomic, cultural or political contexts than others, but all are valid democratic institutions meeting minimal democratic standards: e.g. parliamentary versus presidential systems or PR versus SMSP methods of election. These alternative valid forms of democratic institutions fall within what I term the **Democratic Interval**; above the minimum threshold or democratic floor but below the upper threshold or democratic ceiling where maximization of democratic opportunities can have perverse and unintended consequences. From an Election Law perspective, this is where court involvement can embed specific variants of democratic government, robbing the system of potentially valuable institutional design flexibility.

The area of political reform that is distinctively problematic for advanced democracies is the upper boundary (the threshold of **democratic excess**) where attempts to make democratic procedures better by maximizing a given democratic value can sometimes mean less in terms of

democratic outcomes or result in unfavorable trade-offs with other values. The expansion of opportunities to observe and participate in government can outstrip average citizen capacity. This can lead to democratic pathologies, such as when groups organized for the realization of concentrated benefits overwhelm the interests of the more numerous but more weakly interested majority, thereby introducing policy bias or obstructing majority preferred outcomes.

These upper and lower thresholds might also vary to some degree in different social, economic and cultural context: some societies have more democratic capacity than others; e.g. higher numbers of educated citizens, or stronger citizenship norms, etc. But pragmatic democratic reform theory moves us away from a purely procedural focus and factors in outcomes: it judges democracies consequentially, and asks whether the form of government produces better outcomes on average for the majority (subject to rights protections for individuals). In effect and somewhat counter-intuitively, limits on democratic processes--and by implication democratic values--can under certain conditions promote democratic governance.

In the end, it is up to political majorities themselves to define upper threshold levels since it is their collective interest that is at stake. Across a number of areas, there are exceptions to the rule of democratic maximization that demonstrate that democracies are in fact capable of defining the upper threshold: exemptions to FOIA laws for reasons of security and safety, restrictions on public participation and observation that create deliberative space, subject limitations on direct democracy, and the like.

This chapter also looks at the relative advantages and disadvantages of different pathways to reform. The demise of the political question doctrine and the increasing use of the popular initiative to introduce political reforms opened up new pathways for reform that bypass potential resistance from incumbent legislators. There are however characteristic strengths and weaknesses with each pathway. The courts can bring consistency and stable commitment to the democratic principles, but at the cost of locking-in democratic practices and rules that belong in the Democratic Interval. Reform by initiative can allow voters to bypass legislators when they refuse to accept changes that affect them adversely as a class, but it can also be captured by the very interests that it was intended to overcome. In the end, this framework seeks a healthy ecology of these various reform paths, resisting the extremes of self-correction and legal imperialism.

Since the reform debate occurs at the borders of as well as within the Democratic Interval, and takes different characteristic forms depending on what is at stake, this book is organized in three sections, looking at reform issues that arise below, within and above the Democratic Interval.

SECTION TWO: PROTECTING THE ELECTORAL CALCULUS

While US democracy has largely settled most of its core minimum value questions, a few remain. One lingering concern is corruption—i.e. the potential for office holders to exploit the state’s power for personal material gain. This is of course a government efficiency problem (driving up the costs of government through the extraction of rents) but also a democratic accountability problem if financial gain rather than electoral consequences or public duties primarily motivate public officials. A second persistent concern is faulty or biased electoral administration undermining the validity and legitimacy of a vote count. In both cases, the democratic harm is to the integrity of electoral accountability either by the existence of conflicting material incentives or by a biased accounting of public preferences. Both chapters will discuss the “blurry boundaries” problem: namely, that some corruption and voting administration issues either straddle or cross over the lower democratic boundary into the democratic interval.

CHAPTER 3 IS THE PROBLEM CORRUPTION OR DISTORTION?

In emerging democracies, material corruption issues are often pervasive. In advanced democracies, they exist as well, but are often more subtle, lurking below the radar until some dramatic incident or scandal shines a bright light on shady dealings. However, the public conversation about corruption has been distorted in part by the Supreme Court’s rulings in campaign finance matters, essentially incentivizing reform groups to recast their arguments in language that fits the Supreme Court’s view that preventing corruption and the appearance of corruption is the sole justifiable reason to curb political speech in order to pass judicial scrutiny. Corruption has now acquired at least three meanings in the contemporary reform debate: traditional material corruption, equity distortion and deliberative distortion. I argue that material corruption is a legitimate lower threshold issue while the other two—corruption as one of two types of distortion—are contestable democratic concepts.

Traditional material corruption—bribery, extortion, self-dealing, etc-- is both an efficiency and a democratic accountability problem: an efficiency issue because it allows those in power to exploit the monopolistic power of the state for personal advantage (i.e. extracting rents), causing citizens to pay more for the government services they receive, and an accountability issue if personal material gain undermines or distorts the public mandate as expressed in the electoral arena. Examples of recent reforms that have targeted this form of corruption are gifting restrictions, revolving door regulations, and limitations on the personal use of campaign resources.

In various ways, material corruption problems persist. In some instances, it is a bad apple problem: there will always be individuals who flout the rules and expect to avoid detection. But some institutionally condoned practices look very much like material corruption. One particularly glaring example involves revolving door practices: in the frequent shuffle between government and the private sector, some office holders and their staff have used their positions to enhance their employment prospects out of office by doing favors for future employers. In response, the federal government has adopted limits and prohibitions on lobbying contacts after holding office, required disclosure of ongoing job negotiations and banned lobbyists from holding political appointee positions in the executive branch. But both the inflow and outflow issues are complicated, especially in a political system that is as permeable and decentralized as the US and that relies so heavily on outside expertise.

A key consideration in identifying residual material corruption is the specificity of government action in terms of substance and process: the more specific the action and the power, the greater the corruption potential. Closing the loopholes with increasingly strict legal standards and reliance on an appearance of corruption standard can be problematic, lessening the information and expertise that flows into government and sometimes taking political purity to the extreme. The legal regulatory approach is at odds with basic architecture of the US Government, which relies to a greater degree on political appointees than most advanced democracies. Without addressing the government's permeability by lowering the number of political appointees and enhancing the ranks of professional staff (e.g. consider the success of the CBO), it is not clear that the regulatory approach has much hope of success in the long run. This is an illustration of where structural/institutional change might lessen the burden on the courts and the regulatory apparatus, an approach much in line with such Election Law scholars as Gerken, Foley, Kang and others.

In contemporary US political reform debates, the term "corruption" is also used with reference to two types of democratic distortion. Deliberative distortion is the corruption of a public interest orientation by self-interested motives. This is more commonly invoked in academic than in political circles, and clearly falls in the democratic interval. The proper balance between self-interested and general good perspectives in representative democracy is a contested issue—a debate worth having but certainly not a resolved one.

Equality corruption is not about personal material gain but rather deviations from the norm of equal voice, as when large campaign donations or lobbying by interest groups are said to over-ride and interfere with the responsiveness of elected officials to voters. It is in short a "corruption" of the democratic ideal of equality. The potential democratic harm is that some individuals or groups have more say over policy than others because office holders are indebted to them for their contributions or lobbying advice. Framing distortion as corruption also makes

the argument more compatible with the Supreme Court's prior rulings on political speech and more compelling to average voters who reflexively reject "corruption" in general.

Since democracy entails many types of quid pro quo exchanges between voters, interest groups and officials seeking offices, defining democratic distortion as either deliberative or equity corruption can potentially be very expansive, potentially raising questions about whether endorsements, canvassing and other volunteer activities might also distort or "corrupt" the accountability calculus. The goal in short becomes not just an equal right to an equally weighted vote, but a right to equal influence over the vote. Add to this the increasing reliance on an appearance of corruption standard, and the potential constraint on many currently standard practices is significant. The potential chilling effects of this line of reasoning on campaign related activity are quite large.

Finding a good place to draw the line between material and influence or deliberative corruption is a "blurry line" challenge. To this end, I propose the distinction between exchanges in the electoral currency and those without. A donation, if properly regulated, can only be used for electoral purposes (to persuade or mobilize others to vote for a candidate). A gift for personal use falls outside the electoral currency and involves personal enrichment. There is room within the democratic interval for debate over whether and at what level donations should be limited in order to preserve the equality of influence in a one person one vote system (recognizing that it is both impossible and undesirable to eliminate all influence inequalities e.g. activists, pundits, etc), but a system is not inherently undemocratic because it allows inequalities of influence (whereas certain types formal vote inequalities fall below the lower threshold of democracy). While material corruption is a lower threshold concern, the influence inequality debate, by contrast, falls within the democratic interval and needs to be considered in context.

CHAPTER 4 AN ACCURATE AND UNBIASED ELECTORAL COUNT

Democratic accountability requires that those in power face electoral consequences for their actions and performance in office. In advanced democracies such as the US, elections are necessary but not sufficient for democratic accountability. Decisions and choices can be delegated to unelected officials (experts, commissions, civil servants, and the like) but in the end there has to be a moment of democratic reckoning, and regular elections are the universally adopted method for this task in modern democracies. To be sure, other forms of accountability exist to supplement elections (criminal charges, ethics resolutions, civil penalties, and the like), but none of them fully replace the role that elections play in fostering responsiveness to constituents and a sense of legitimacy about the government.

An important step in the evolution of American democracy has been the gradual voting franchise expansion to previously excluded groups (women and racial minorities). This was achieved initially by legal recognition of their voting rights through constitutional amendment and subsequent Court interpretation, and since 1965 for certain racial minorities by the passage and implementation of the Voting Rights Act. Women's voting rights were acknowledged by constitutional amendment in 1920 and implemented with little controversy since. By contrast, the right of Africans-Americans to vote, affirmed also by constitutional amendment in 1870, was not realized until the passage of the Voting Rights Act of 1965. Even now, the issue of the African-American voting participation remains controversial given voter caging and efforts to impose voter identification requirements.

In essence, we can distinguish between a formal right to vote, the way that right is implemented in laws and procedures, and its actual effects. The formal right to vote made its way through the formidable procedural gauntlet of the federal amendment process. It is broadly stated as a protection against "right of citizens of the United States to vote" being "denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." When the formal voting right was undermined by intentionally discriminatory practices and rules, these obstacles were removed by application of the 14th amendment and then the VRA. And when practices and rules, even if imposed in a nondiscriminatory fashion on historically under-represented groups, proved to be discriminatory in effect, they were prohibited under Sections 2 and 5 of the VRA.

The VRA clearly imposed constraints on the choice of formally valid democratic institutions. Multi-member at-large district systems are no less inherently democratic than single member systems. Proportional results are not inherently more democratic than the S-shaped curves of single member simple plurality systems. But under certain conditions, rules and processes will straddle the lower threshold's blurry line. Allowing certain processes—at large elections for example—in effect perpetuated an inherently biased pattern of participation. The Congress and the courts adopted a conditional solution: prohibiting certain institutional choices under specific historical (Section 5) or existing (Section 2) conditions. By so doing, they avoided a lock-in of the remedial processes while addressing the bias at hand. But conditional reforms can create their own political inertia, making it hard to adapt old laws to new circumstances. Political stickiness, however, poses less of a constraint than a legal lock-in based on an interpretation of constitutional rights. Courts can continue to rely on the factual tests presented to them to determine the applicability of the VRA until the Congress cobbles together a coalition for updating the law.

The professionalization of voter registration and election administration has eliminated or at least limited some of the problems associated with processing votes, but the 2000

Presidential election vividly demonstrated that the US system is alarmingly inadequate. Random errors—lost ballots, mistakes by volunteer poll workers, etc-- are of course inevitable in large decentralized system, but if large and frequent enough, or if they happen in a sufficiently salient election, such errors can undermine faith in the electoral outcomes. This is largely a competency problem.

An even more serious set of American voting administration problems is the potential for biases that arise from partisan election officials, different standards for absentee or conditional ballots, or unequal resources leading to wide variations in voting machinery and poll worker training. If voting requirements like voter photo have differential consequences for certain groups or political parties, and if election administration officials have known partisan affiliations, questions of racial or political bias inevitably arise. Even if there is no intended bias on the part of election officials, a vote count, can be biased in effect by a significant inequality of resources across different jurisdictions. The quality and training of the poll workers, the state of the voting equipment, the cognitive skills of the voters, etc can vary widely and influence the number of disqualified and spoiled ballots. If that occurs, it can affect electoral outcomes and potentially the system's responsiveness to certain groups in a systematically biased way.

As before there are three basic reform strategies: legal attempts to make changes through the application of the 14th amendment, extension of regulations through new legislation or a VRA revision, and improved institutional design. A broad application of the equal protection doctrine could go a long way towards developing national standards and limiting potential biases in the vote count, but in *Bush v Gore* and decisions since, the Court has been reluctant to move in that direction. Attempts to deal with this legislatively have been disappointing (e.g. HAVA), in large part because the right and power to administer elections is so localized. Because this is an issue about formal voting which is at the core of democratic accountability, there is a plausible case for Court intervention when the system is racially biased but locked up by structural constraints (constitutionally protected decentralization of election processes and high neighborhood based inequality of resources) and incapable of self-correction. As with franchise restrictions, a biased electoral count violates the equal right to cast a valid vote: a valid vote is one that has a fair and unbiased shot at being counted accurately. The basic right to cast a vote and to have an equal chance of it being counted accurately is a lower threshold issue. Where there is intentional discrimination in electoral administration, the Courts should treat it as a basic franchise right under the 14th and 15th amendments. Where the effect is discriminatory, an approach similar to that taken by the amended 1982 VRA is appropriate, spurring states and counties to remedy the sources of bias with new conditional legislation that is permitted by the Court under the 14th and 15th amendments.

SECTION TWO: REFORM AS COMPETING DEMOCRATIC VARIATIONS

Most contemporary reform debates fall within the Democratic Interval of competing conceptions of democratic forms. This includes the merits of different voting systems (PR v Semi-PR v SMD/SMSP), direct democracy versus representative democracy, descriptive versus substantive representation, nonpartisan versus partisan government, and so forth. Rhetoric aside, these debates are not really about which institutional form is more democratic but rather the trade-offs and relative merits of adopting one over another in a particular political context. The strongest arguments in favor of one form over another are those that focus on an institution's suitability for a particular social, economic and political context. For the same reason, transplanted institutions do not always operate in expected ways if the wrong socio-economic or cultural setting does not fit with what is being proposed. In this section, we consider two of the most vexing issues that arise in what Dan Lowenstein termed intermediate level democratic theory: namely, the quests for political fairness and for coherent and consistent reform.

Chapter 5 WHAT IS FAIR POLITICAL REPRESENTATION?

Considering that accountability to the majority is a defining democratic concept, it is unsettling to realize that the meaning of the term "majority" is contentious. The "majority" choice is very much a function of the number of options, the preference orderings of the public and the particular rules that structure the sequence and method by which "winning" is determined. A winning candidate under simple plurality rules, for instance, might not prevail under supermajority or proportionality rules.

Merely understanding that the "majority" is a social construction poses a challenge because it means that positions about rules are tied up with policy preferences. Consider the way that Democrats and Republicans have shifted their views on the desirability of the filibuster depending on control of the Congress and Presidency. When in power, the filibuster will seem to the dominant party to be a hindrance to majority rule. Out of power, the same party will see that supermajority rules give them a voice in governing and will prevent them from being steamrolled. Sophisticated political actors cannot easily banish thoughts about the political consequences of rule changes. Their high minded side sees the wisdom in thinking beyond the moment, but there is too much at stake for them to live up to that ideal. Fairness debates therefore occur on two levels: a more detached and abstract consideration of fairness in the broadest sense (e.g. Rawls) and an on the ground pragmatic level with people advocating for

the rules that will likely yield the outcomes they prefer, all the while defending their positions with a thin veil of principled justifications.

Given this central ambiguity about what constitutes a winner in a democracy and the policy/position outcomes at stake, it is not surprising that fairness debates pervade American reform discussions, arising at the electoral, legislative and administrative stages of policy making. At the electoral stage, this means rules dictating how to count votes, which candidates and parties qualify for the ballot, the size and composition of legislative districts, and so forth. At the legislative stage, fairness issues emerge in the allocation between the majority and minority party of committee chairs, staff, resources and the relative powers to initiate, amend and pass legislation. Even at the administrative level, with the expansion of sunshine and participation opportunities, there are important questions about the fair opportunity of opponents to observe, amend and obstruct policy as it is implemented. In short, the “continuous campaign” and the blurring of legislative and administrative functions have extended throughout the government the kinds of fairness issues that were previously largely fought out in the electoral arena. But all too often reformers look at each fairness question in isolation, ignoring the total effects across the policy making process as a whole.

Democratic fairness has both formal institutional and behavioral components. The formal aspects are such as the counting rules that determine outcomes, the relative seat shares and the political power allocated to interest groups and parties. A system can be “skewed” to the degree that the rules play to the advantage of some individuals, groups and parties and not to that of others. Some expectations go beyond the purely formal to the perception of fairness. Many believe that formally fair rules are unfair if they consistently exclude from power or under-represent some interests as compared to others. Pluralists maintain for that reason that democratic stability and legitimacy hinge on the condition that winning and losing coalitions should not be fixed and reinforced over long periods of time, across various levels of government and on all issues. For those reformers who aspire to this ideal, the unequal power situation that develops when concentrated interests regularly go against the dispersed interests of a broader majority is highly problematic.

This chapter will consider three persistent fairness debates. The first, redistricting, illustrates the complexity of resolving fairness when there is no agreed upon baseline standard (e.g. proportionality) for electoral outcomes. The Court was able to invoke a constitutional basis for limiting racial unfairness but struggled with finding practical guidelines for political gerrymandering. The rationale it has applied to both derives in part from the pluralist rationale about preventing permanent exclusion, but as many have observed, this as a practical matter amounts to non-intervention by the courts. Those who seek to solve the political gerrymandering problem institutionally are constrained to fall back on second best strategies

that lean heavily on the impartiality of the line-drawing “process” (e.g. California’s redistricting committee), or on bipartisan bargaining (e.g. the NJ system with the 13th member) or on attempts to shame legislatures into better efforts through so-called “shadow” efforts by citizens and outside groups. Assuming that neither the Court nor the political system clearly adopts proportionality as a baseline standard in the future, the redistricting fairness debate is destined to fester.

The second issue is majority versus supermajority rules for legislatures. The high-minded arguments for supermajority rules in legislatures focus on fairness to smaller coalitions and the value of inclusion. But the consequence of these rules is to blur accountability and undercut the electoral mandate. This fairness issue also illustrates the need to judge a system’s political accountability in a broader framework that extends through all the stages of the policy-making process, not just the electoral stage.

Finally there is the debate over the unequal influence of lobbyists. Here the issue is the inequality between dispersed and concentrated interests, with the latter more able to pursue their policy at all stages of the policy process even to the point of altering outcomes at the implementation phase. I will argue that the burden to fix this lies with the majority and in the political realm as it is their interests that are at stake. I will discuss some political fixes the US could pursue that focus less on limiting concentrated interests and more on enhancing dispersed voices. I will also discuss the danger of lock-in when the federal courts get more involved in these questions.

Chapter 6 CONSISTENCY AND POLITICAL REFORM

Institutional inconsistency arises when reforms from different democratic traditions accumulate over time and across various jurisdictions or when solutions are adopted in piecemeal fashion rather than comprehensively. The implementation of one reform at one point in time does not necessarily mean the negation of earlier ones. Reform inconsistency is almost inevitable given the decentralized structure of US government and the fact that the propitious political circumstances necessary for passing political reforms only occur occasionally. Inconsistency can also arise because a reform proposal only addresses a problem partially and does not jibe with other incentives in the system.

As a result, there are many examples of contradictory and inconsistent elements in the US political structure: for instance, an 18th century constitution and structure at the national level and 19th century populist and early 20th century progressive constitutions at the state level. This gives rise to glaring anomalies: equally populated districts mandated for every level of government except the US Senate and the Electoral College, direct democracy mechanisms

layered on top of traditional representative governments in so-called hybrid states, supermajority rules for budgetary matters in some states but majority budget reconciliation rules in the US Senate, and the like. The multiplicity of US reform ideologies also means that the same institutional arrangement can be construed in different ways by different reform ideologies: e.g. the initiative as a supplement to representative government for progressives and as supplanting representative government to populists.

Does this inconsistency matter? Sometimes it does not. Many states have partisan offices at the federal and state level but nonpartisan city management governments at another. Conflict of interest and campaign finance regulations vary significantly from one level of government to another, but most candidates successfully negotiate the differences as they move up the political ladder. Indeed one could make the argument that variation in electoral rules and processes opens up political opportunities for coalitions and groups at one level that are not available at another: in other words, that structural heterogeneity in effect supports political pluralism.

Inconsistency does not always amount to incoherence. Madison's logic—with counterbalancing powers and representational interests based on varying term lengths, constituency size or geography—is built on the principle of “complementary” institutional features. As we saw in the previous chapter, there are equilibrium adjustments at one level that compensate for characteristics at another: supermajority rules at the legislative level may have proliferated as an offset the increasing electoral partisanship.

But in other instances, inconsistencies can be deeply problematic, especially when the incentives are not properly aligned. This, many would argue, is the case with California's state government. Supermajority revenue raising rules adopted by initiative over the decades since the introduction of the popular initiative combined with the simple majority vote hurdle for any initiative that mandates additional government spending enabled a disconnect between the demand for services and the willingness to pay for them. In general, political opportunity flows along the path of least resistance. When different fiscal and legislative paths in a so-called hybrid democracy have different vote thresholds, it incentivizes interest groups to venue shop their policies to the most favorable policy arena.

Some problems with democracy require comprehensive solutions, but it is harder to achieve comprehensive reform in the modern era. Consider the problem of excessive partisanship. Many believe that partisanship has become too strong in American government, and that it impairs the compromises necessary to make government work in the US system. But political science evidence is pretty clear that there is no one simple cause to party polarization, and therefore no simple cure. Leaving aside the inherent limitations of using institutional design to fine tune the behavior of political representatives, a simple change in one

rule or at one level of government cannot succeed when the causes are various and at multiple levels. A coordinated approach requires a comprehensive solution. That used to be the purpose of constitutional conventions or constitutional revision commissions, but the modern trend is against that type of solution.

Since state constitutional change is easier to achieve, this trend is more evident below the federal level. Until recently, states had the option of total constitutional re-dos, but constitutional reform has become nearly impossible in the modern era. While constitutional reform theoretically makes possible a re-examination of the whole government structure and provides an opportunity to iron out inconsistencies or weed out the unnecessary historical remnants, the political logic against systematic reform is formidable. As the data shows, most modern efforts at constitutional conventions fail largely because they inspire a coalition of enemies, each of which opposes the specific change that affects them. Together, they have been sufficiently savvy and mobilized to block every attempt at constitutional conventions since the mid-1980s (i.e. the curse of increasing interest group political sophistication).

Another obstacle to any rational reconstruction of government for the sake of consistency is the demise of respect for or deference to expertise, and the parallel rising cult of the ordinary citizen. The enthusiasm for finding guidance among the average citizens can be seen in the popularity of deliberative polling and citizen commissions. There has even been serious consideration of choosing convention members by lottery in California. Lottery was also adopted as part of the selection of the state's new redistricting commission. The cult of the ordinary citizen is related to a more fundamental divide between representative systems that rely on un-mediated public opinion for guidance and those that recognize and harness intermediate groups. The former are more prone than the latter to the democratic excesses we will consider in the Section 3 of this book.

In theory some believe that the courts could play a role in promoting democratic consistency if they reviewed government institutions as a "neutral referee," and if they had some guiding principles to work with. But In practice, at the federal level, this would mean locking-in particular theories of representation such as electoral markets or maximized democratic values approaches, but there really is no constitutional basis for this and likely no political will as well. The risk of lock-in is less at the state court level, and there the courts could help the coherence cause by usefully and more aggressively patrolling the line between revision and amendment which would encourage more deliberative approaches to fundamental structural change. But it is clear that public opinion pressures channeled through judicial recall and election processes limit the capacity and willingness of state courts to play this role. Therefore, inconsistency, good or bad, is our fate.

SECTION THREE: AVOIDING DEMOCRATIC EXCESS

An increasingly important concern for modern advanced democracies are design issues that belong on the upper threshold or ceiling of democratic systems, where citizen opportunities have ostensibly been maximized in the interests of fixing democracy with more democracy. The next two chapters consider two areas of greatest concern: transparency and public participation.

Chapter 7 CREATING DELIBERATIVE SPACE

Nowhere is the trend of expanding democratic values clearer than in the growth of public transparency expectations. Transparency is a critical minimal condition for democratic accountability: in order for voters to hold governments accountable at the voting booth, voters need to have enough information to judge the actions and consequences of those in office. But should the right to know and observe what governments do be absolute? Some believe the answer is yes, but there are far more reasons to think the answer is no. The transparency issue illustrates why democratic values cannot be simply maximized and why citizens and governments need to have deliberative space.

Transparency issues in American government can broadly be classified along two dimensions: 1. the branch of government and 2. the temporal stage in the decision-making process. Transparency rules apply to all branches, but given their different functions in the separation of power, they do not apply in the same way. To take an obvious example, the burden to be immediately transparent is higher for candidates running for office than for CIA or Foreign Service Officers. Transparency demands also vary by whether information is given before, during or after a decision is taken. Since voters need to have information about the candidates in order to decide how to cast their votes, electoral accountability relies heavily on immediate information while accountability for national security agencies relies on retrospective information. This is in essence the difference between the right to observe what officials are doing or plan to do as opposed to the right to obtain information about what public officials have done.

The most important contemporary electoral transparency issue is campaign finance disclosure. The regulatory policies with respect to campaign finance disclosure are different from those we apply to other information about candidates. Candidates sometimes hide or obfuscate their positions, but however deplorable that might seem, there is no right to clarity or even to the candidate's true positions per se. We rely instead on the electoral marketplace: the pressure from the opposing side or the press is usually enough to force a candidate to take a position. Whether candidates should be forced to disclose health or financial information is

sometimes an issue, but again, the self-correction of electoral market forces is typically enough. But the expectations for campaign finance disclosure are higher in part because of our concerns about material corruption, but also because of our less openly expressed concerns about undue influence. Disclosure has become more controversial in recent years, particularly since the Citizen United line of decisions and the emergence of Super PACs with their ties to 501c4s.

Disclosing an individual's support for a candidate, financial or otherwise, potentially exposes that person to intimidation and retribution. For that reason, an individual's vote choice is protected by the secret ballot. But contributions are treated differently from the vote, even when the contributions are so small that they could not possibly corrupt or even influence an elected official once in office. If the purpose of campaign contribution or expenditure were solely to reveal potential corruption, then this information could be revealed to regulatory agencies only. If the purpose is to inform voters which occupational and sector interests support the candidate, then the information could be semi-revealed in the manner of sensitive census information (in aggregate categories, but without specific identities). But requiring disclosure of the specific identity of large individual and corporation contributors and spenders is sometimes really an attempt to accomplish by shame and consumer pressure what cannot be proscribed by formal law. Given that there is no guarantee that this pressure represents a majority opinion and that citizens need to have some deliberative space to formulate genuine views and preferences, there are troublesome aspects to this type of disclosure with respect to individuals, if not nonprofits and corporations. Semi-disclosure, I argue, is the appropriate compromise, preserving the individual's right to privacy while giving voters the information they need to make informed choices. Voters would know that a corporation or trade union or a certain type had spent on behalf of or contributed to a given candidate, voters could make an inference about the candidate's values and viewpoint.

Access to information about the legislative and executive branches initially focused on the right to official documents. The conditions and rights of citizen access to this kind of information are set out in freedom of information laws (i.e. FOIA). While the idealized view of FOIA is that it provides relevant information to individual citizens for accountability purposes, my own research shows that intermediaries like the press and interest groups bear most of the monitoring costs, and that citizens primarily use FOIA to pursue individualized claims. A critical point is that advanced democracies, not just the US, universally limit the right to know (although in different ways and to different degrees) to protect individual and company privacy. In short, the citizen's individual right to know can conflict even after the fact with the collective interests of the citizenry as a whole.

A related right is that of observing decisions as they are being made—in process transparency. This is codified in open meeting laws which typically require that meetings be

noticed (so that those who want to observe or comment know where and when the meeting will be held and what the subject will be), and that all group discussions and meeting be held in public (prohibiting various attempts to circumvent through serial discussions, off agenda informal meetings, etc). While there are exceptions that allow for closed door sessions, they are narrowly defined. In process observation and participation raises important questions about deliberative space. Research shows that people tend to posture and take more rigid positions when they negotiate in public than in private. Indeed, this problem is so widely acknowledged that prosecutions are rare even though there are undoubtedly violations of these rules every day. Moreover, the increased opportunities to observe are costly, and so there is a tendency as with FOIA requests for those who take advantage of this situation to be more often than not those with concentrated costs or benefits at stake. While the democratic ideal is greater responsiveness to the public generally, the iron law of intermediaries suggests that those with concentrated interests will pay closer attention than the less interested or disinterested many. Expecting too much of average citizen interest and capacity means that accountability rests with interested sources. This can have policy effects down the road.

The reform community tends to focus more on deliberative polling than on deliberative space, and this reflects a bias towards more market based populist conceptions of democracy. The former addresses the problem by selecting a sample of the public and educating them with a rich dose of information, and then recording their opinions—in short replacing the shallow opinions of regular polls with the enlightened views of these deliberations. But implicit in this position is that true decision making should be made by the citizens and not by officials and elites. A pluralist, more traditional notion of representation might welcome this information as better inputs for decision makers to work with, but would focus on the quality of deliberative space in order enable better negotiations by interest groups and public officials. In the end, there are inevitable trade-offs between accountability and governability. A purely procedural perspective that focuses more on the former than the latter can unintentionally contribute to systemic sclerosis.

Chapter 8 CITIZEN OVERLOAD AND HYPER-DEMOCRACY

The trend towards maximizing democratic opportunities in the name of better accountability can be seen at many levels and across other OECD democracies, but it is particularly strong in western US states. Across advanced democracies as a whole, there are both new opportunities to participate and an expansion of traditional ones such as elections. The amount of electing has gone up, especially the number of initiatives and referenda, and at the local level, recall contests as well. Direct democracy places greater cognitive burdens on citizens, especially if there are many measures on a ballot. In addition, the US multilayered

federalism structure multiplies the decision-making burden in hybrid states as the number of offices and measures that voters have to decide goes up at each level at both the local and state levels. Are citizens up to the task making more choices at the ballot box?

This is a matter of debate both in political science and among reformers. The political science evidence suggests that citizens are woefully ignorant of the details of their political system, their representatives and government policies and navigate the process through cues and simple decision rules. Some argue that this is enough for them to act as if they would if they were truly informed about the actual details. But relying on cues can cede power ironically and unintentionally to key “trusted” interest groups and to political parties. Asking people to be more involved if they are not willing or able to take on the burden of being well-informed can ironically increase the influence of intermediary groups and highly motivated voters, which is not the intent of giving voters more choices.

One approach to reform is to improve voter information through better more informative balloting. The jury is out as to whether this can work, and whether cues can be too easily manipulated. This approach fits within the populist, market based reform framework. The alternative approach is to restructure direct democracy to work more interactively/symbiotically with representative government such that direct democracy does not throw the system out of balance.

Even if voters could be better informed, there are deeper coordination problems with relying on direct democracy for policy-making. Legislatures can make, remake and amend decisions as political circumstances dictate. Policy making by direct democracy requires petition gathering and qualification, fund-raising and an election campaign. So the transaction costs are higher in direct democracy. Given contradictions in public opinion and changes in the voter sentiment over time, measures passed at various points in time can create dysfunctional incentives. A recurring one is the disjuncture between the desire for public goods and services and the willingness to pay for them. Elected officials fall prey to the same thinking, of course, but are forced at various points to try to reconcile their competing concerns. The same is not true of initiative sponsors whose efforts and concerns end when their measure passes.

One option would be to regulate direct democracy in a more serious way, or at least enforcing those rules that are intended to prevent initiatives from being misused by become a mish-mash of unrelated measures or altering the constitutional structure for the advantage of one voter group over another. However, the state courts have not been a strong or consistent ally, as they have assumed initiative measures to express the pure voice of the people (despite evidence suggesting that the process is heavily driven by money and professional consultants) and have been loath to enforce single subject and revision versus amendment distinctions. Given that many state court judges are subject to some sort of electoral check through periodic

reelection or recall, it is unlikely that the Courts can or will play a more active role in this regard. Structural change is hard because voters like the idea that they have the ultimate say in political and policy matters even as they recognize that the direct democracy process is flawed and manipulated. In the end, however, voters will have to recognize the limitations of the process and be willing to fix them if any progress is going to be made.

Another aspect of democratic expansion is the proliferation of opportunities for citizen to participate in the legislative, executive and constitutional phases of government. Mostly, these are opportunities to give input and testimony at the public hearings of government bodies, but in some cases, this means delegation to citizen councils and advisory boards. Given the potential for capture by interested groups, there is more interest in lottery selection and mandatory participation schemes in recent years. A coalition of business and civic groups seriously considered a proposal to do a constitutional convention by lottery in California. Tom Mann and Norman Ornstein, among others, have proposed that electoral participation should be mandatory to alleviate the undue voice that the party activist bases have in elections. The common idea behind both proposals is by choosing the participants as opposed to letting the participants choose themselves, one can avoid self-selection biases. Others have taken this one step further, suggesting that citizen could be drafted into public service roles much as they are currently obliged to serve on juries. Assuming away the practical considerations (will people be willing to serve, will they vote or act responsibly, etc), the involvement of citizens in tasks formerly performed by elected and unelected officials raises the fundamental tension between expertise and representativeness. The fundamental tension that underlies principal agent relationships remains: unless citizens as principals become as expert as the officials as agents, they will still be at an information disadvantage. The vision of citizens replacing representative government is a potentially dangerous illusion in a large complex society like the US.

CONCLUSION: MANAGING EXTENDED DEMOCRACY

As mature democracies continue to evolve into more complex and hybrid forms, the fundamental challenge will be how it can maintain accountability to the broad electoral majority. The extension of TPOC--democratic opportunities--into more policy-making domains in order to enhance democracy will undoubtedly continue in the future, especially in the US. In early periods of US democracy, representative power was divided between branches (the 18th century) and then within branches (e.g. the plural executive or independent regulatory agencies) in order to prevent distortions associated with the accumulation of excessive power

in any part of the government. In the 20th and 21st Centuries, power has been further dispersed by extending contestation and public participation into the policy-making and implementation process. While this development brings advantages in terms of information exchange and citizen buy-in, they can be offset by losses in accountability to the majority due to complexity or weak collective organizational incentives. The answer in some cases might be limiting the continued extension of advocacy democracy, but it might also mean building compensatory features to offset participation biases and the influence of interest groups.

The concluding chapter will outline some core themes in my proposed theory of democratic boundaries. An appropriately bounded system exercises democratic restraint when it does not serve the interests of the majority, and assists the majority in maintaining accountability in the system. The principles can be adapted to many of the equally valid forms of representative government in the democratic interval. It is not for instance necessarily a purely representative system—it could include direct democracy components as well for instance—or a return to democracy as it was in some earlier era. Rather it is one that aims to align new democratic opportunities with citizen capabilities and to ensure through strong accountability systems that political and policy outcomes attained by democratic processes serve the interests of the many rather than the few. Since the average capabilities of citizens vary across time and space, the actual form of moderated democracies will not be identical in every place or moment, especially for features that fall within the democratic interval.

Because democratic forms are dynamic in this sense, a complete theory of reform must also include thoughts about how reform should come into being. In particular there are some issues that can be treated as dealing with fundamental rights (with strong legal protections) and others that should be left to the political system to correct (with minimal legal involvement). With the demise of the political question doctrine as traditionally formulated, I will offer a rationale and guidelines for constructive judicial intervention. I will also reflect on when political self-correction seems to be most effective—i.e. when interest groups are contesting with each other—versus when it cannot because groups of citizens are excluded from the table or lack the organized protection they need.

Chapter 5

Fair Representation

No other reform goal has more far-reaching consequences for US democracy than fair representation. Sometimes an allegation of “unfairness” is only the loser’s lament, a catch-all phrase that really means “but for these rules or this process, we would have won.” But that is not always true. When derived from agreed-upon equality principles and cultural norms, fairness considerations can have and have had considerable moral force in American politics, pushing political institutions toward a more equal division of democratic opportunities and outcomes. The pursuit of “fair representation” resulted in the expansion of the voting franchise to women, 18 year olds and African-Americans as well as the elimination of mal-apportioned districts. But more recent efforts to extend this value in new directions are highly controversial. What is a fair redistricting plan? Is proportional representation fairer than the first past rules favored by Anglo-American democracies? Are supermajority rules more or less fair ways to decide issues? Is it right that some groups and individuals have more access and opportunities to influence policy than others?

Fair representation is quintessentially a democratic concept, one that does not apply to autocratic governments where authority rests on power, not popular approval. Although in principle, a democracy’s legitimacy rests upon its accountability to the citizenry, the very ambiguity of what this means in practice gives rise to multiple interpretations and disagreements. Holding governments accountable requires that officials face consequences (e.g. be removed from office) if citizens disapprove of their performance: i.e. that political power is contestable. But how do we determine when citizens approve or disapprove? Democratic theorists refer to the “will of the majority,” but as a practical matter, how does one determine what either the “will” or the “majority” is?

Most established democracies determine “the will” through periodic elections, and in practice, “periodic” may mean set intervals (e.g. every 2, 4 or 6 years), at the discretion of elected officials in power (e.g. parliamentary general elections or special elections in the US) or determination by citizen petition (e.g. recall elections). And the term “majority” can range in meaning from deciding by plurality to majority or super-majority. When people complain about “unfair representation,” they usually mean that their views concerning a collective decision were not properly accounted for. But determining whether a particular unfairness claim has merit requires going beyond fundamental democratic theory to flesh out additional, often contested institutional architecture. This is the realm of intermediate democratic theory and the democratic interval.

In mature democracies like the US, the application of the fair representation principle extends beyond the electoral phase. US policy contestation does not end on election night. It often passes on to the legislative and executive phases of government. Citizens and groups increasingly demand the right to transparency, participation, observation and control (i.e. TPOC) at the legislative and executive branch levels. Whereas electoral fairness typically refers to the way that votes are counted or are translated into legislative seat shares, legislative or executive fairness concerns whether there are equal opportunities for citizens, journalists or opposition legislators to participate in or observe deliberations, have access to information about what the government is doing, and to influence outcomes—in short the allocation of TPOC opportunities. Since we take up some of these questions as they apply to the executive branch in Chapter 7's transparency discussion, this section focuses on three much discussed electoral and legislative fairness issues: redistricting, the use of supermajority rules and lobbying influence.

Redistricting, the seemingly simple technical task of allocating population to districts to achieve equal district numbers, raises central questions of partisan and racial fairness. Because it is a self-conscious and regularly repeated exercise, it invites manipulation for political gain that in theory could be constrained by some agreed upon fairness principle (e.g. proportional representation that would give each group its expected share of representation based on its share of the electorate). But there is no popular consensus about the best principle, and the Court has so far been unwilling or unable to offer one. As a consequence, reformers rely on divergent second best redistricting strategies that they hope will approximate fair outcomes via neutral procedures. This creates an unresolved tension between fair share outcome versus neutral process approaches in political and judicial attempts to improve the line-drawing process.

The second issue is the role of supermajority legislative rules. Supermajority rules (e.g. thresholds of more than a majority for approval of a bill or motion) have become more prevalent at both the state and federal levels in recent years. Requiring supermajority approval seems to some to be more inclusive and fairer to the minority, but at the same time, it undercuts accountability to the majority. Is it more “democratic” to cede power to the minority in this way? Does it matter whether the voting majority implicitly or explicitly approves supermajority rules? And can we really only look at the effect of supermajority rules in isolation from forces and incentives at other level, or is the system's bias and responsiveness a compound effect of the electoral and legislative rules at all stages of the policy process.

And finally, there is the problem of unequal influence in a political system predicated on formal equality. Modern reform has moved towards greater equality in the voting franchise and in the weighting of individual votes. But is formal voting equality undermined if informal

influence at the legislative stage is unequal? Do the fact that individuals and groups who lobby and have unequal access to elected officials undermine democratic principles? This issue goes beyond the earlier concern with corruption with respect to campaign finance and asks whether unequal influence causes democratic distortion.

Looking across the various fairness questions, there is an over-riding question about the value of consistency at all levels of democratic government. Consistency refers to whether the same democratic conception or principle is used throughout the political system. Is it a problem, for instance, that the US uses the “one person, one vote” principle for state legislatures and the House of Representatives, but not the US Senate or the Electoral College? “Populists,” believe that it is, and their reforms intend to eliminate such inconsistencies. But others, the pluralists, believe that complementary inconsistency can potentially serve a valuable purpose, off-setting biases at one level against those at another.

Fairness at the Electoral Level—Redistricting Revisited.

What does fairness have to do with the mechanical process of district line-drawing? It turns out almost every aspect of this decennial exercise raises fairness questions. When district populations are adjusted, it affects many sorts of interests.¹ Districts can become more or less Democratic or Republican as they incorporate and shed neighborhoods to achieve an equal population. *Ceteris paribus*, the more a given new district resembles the old one, the more it favors the incumbent due to advantages in name recognition and general familiarity, and the less it favors challengers. One plan may divide a particular city, county or other jurisdiction into several parts while another keeps it together. The Supreme Court’s apportionment decisions ended the unfairness inherent in unequally sized districts, and its voting rights decisions have reduced racial gerrymandering to a considerable degree, but the Court has left other redistricting fairness questions (e.g. to local jurisdictions, incumbents, political parties, etc) to resolution by the political process.²

There are two key attributes to fair political design: first, the removal of short term advantage considerations to the extent possible, and secondly, the existence of some agreed upon principle of fairness as the basis of the institutional structure. Unfortunately, in the case of redistricting, both conditions are problematic. Critics of the legislative redistricting process—the most prevalent US redistricting method—argue that incumbents have a vested interest in how the lines are drawn.³ This is of course true, but it overlooks the fact that many other actors other than incumbents also have an interest in the way the lines are drawn, including potential challengers for the seat, party activists, businesses and unions and almost anyone who has an interest or stake in policy outcomes. Even conceding that office holders might have a more intense and immediate self-interest in the placement of new district lines, one only has to attend a few redistricting hearings to realize that while most of the public is blissfully ignorant

of the stakes in drawing new district lines, some constituents (e.g. party activists, neighborhood groups, developers, prospective office holders, etc) will invariably have very substantial and intensely felt concerns as well. The fact that the US constitution mandates a new round of redistricting every ten years means that this Pandora's Box of potential zero-sum conflicts is never closed for very long.

Political insiders, aided by advances in line drawing technology, can easily project demographic changes into the current districts, and assess their political prospects months before any actual lines are drawn.⁴ And since redistricting is a state responsibility, the outcomes of early state plans can affect the politics of later ones. Congressional redistricting especially has a deeply embedded prisoner's dilemma dynamic. A state that might want to take the high road by adopting an incumbent blind, nonpartisan/bipartisan process that impartially removes senior legislators from its state delegation has to consider that it potentially could lose influence in the Congress relative to states that follow the more traditional path that accommodates incumbency. Or if one state adopts a partisan plan, then another state controlled by the other party often feels compelled to adopt the same partisan strategy to offset losses in the first state. Even if it were possible to persuade office-holders, activists and political operatives that American politics would be better off if they adopted a longer term perspective on fairness, there simply is no "veil of ignorance" that can be magically invoked to banish such considerations from their minds.

The problem of short term gains distorting long term fairness perspectives is pervasive in political design. Proposals that change electoral or legislative voting rules generally have knowable immediate political consequences that can infect fairness deliberations. A clear example of this is the constant tinkering by US political parties with their primary election rules. The Democratic Party adopted more primaries with proportional rules for allocating delegates after 1968 to escape local party machines and elected official control. But dissatisfied with the results in 1972, they then moved back away from the proportional allocation of delegates and adopted super-delegates to offset the effects of the McGovern commission reforms and rebalance the process in favor of party regulars and elected officials.⁵ The Republicans, traditionally more averse to rule tinkering, nonetheless adopted a hybrid system for the 2012 nomination process that allowed proportional allocation in the early primaries in order to capture some of the organizational advantages of a longer nomination process and to move away from the seeming anointment by the GOP establishment that favored Bob Dole, George Bush and John McCain.⁶ Rule tinkering for the sake of reengineering political parties also occurs at the state level. For instance, moderate Republicans and the business community in California pushed for and won the adoption of a top two nomination process that they hoped would favor moderate candidates by allowing cross-over voting by other party identifiers and independents and weaken the influence of party activists.⁷

But what distinguishes these other electoral rule changes from redistricting is that they are self-inflicted, not court mandated: i.e. the Pandora's Box of fairness issues did not have to be opened. The Democratic Party learned the hard way in the 80's that the constant revision of nomination rules roiled the waters internally without helping them win the Presidency and has largely stuck to tinkering on the edges of rule changes ever since. Redistricting on the other hand cannot be avoided as long as the US population continues to grow and shift.

The second element to fair political design is agreement on a fairness principle, and here too, redistricting runs into severe problems. To be more precise, the difficulty is not the absence of any fairness rule, but the lack of consensus on any one standard, and the tradeoff between fairness however defined and other redistricting criteria. The simplest, and arguably most intuitive standard, would be that parties and groups should get a proportionate share of districts. But proportionate as compared to what? In European PR systems, the answer is seat shares equal to vote shares. In the US, where the winner take all rules do not regularly yield proportionate outcomes, several political scientists have advocated for a symmetry standard that would give all parties the same non-proportionate seat share given the same vote share.⁸ But in Voting Rights Act litigation, the baseline standard is rough proportionality based voting age population (VAP) or citizen voting age population (CVAP), not vote shares.⁹ They are in essence measures of a group's potential not actual vote share. The choice of a particular baseline measure can have significant political consequences: for disadvantaged immigrant populations, for instance, their expected fair share drops as the baseline shifts from votes to VAP or CVAP.

But even if the baseline problem could be resolved, the proportional standard is arguably at odds with the logic and needs of American state and federal government. Winner take all rules by definition tend to distort proportionate results, often in the interests of exaggerating the winner's share in order to avoid the factional pitfalls and political stalemates associated with coalition government. Given the division of US power into separate branches and by levels of government, winner take all electoral rules compensate to some degree for the structural dispersion of power at the legislative and executive levels. They create "artificially" larger electoral majorities and more decisive electoral outcomes that offset the inertia of the highly decentralized and fractured US system of government.

This touches on a recurring theme about meta-approaches to political reform. Some prefer a political system with consistent principles throughout while others see value in planned inconsistency. Consistency can take several forms: consistent majoritarianism (which I call the populist viewpoint) might logically favor winner take all election rules along with majority legislative rules, and perhaps even a stronger linkage between state and federal outcomes (e.g. by having all elections on the same day rather than staggered on off-years). A

consistent non-majoritarian, by comparison, might favor proportional counting systems and less linkage of electoral timing across government levels, which would enhance descriptive representation but weaken the capacity for governance. Planned inconsistency would mean mixing and matching features to offset one another. Then of course, there is unplanned inconsistency, the more common situation in the US, which is the accumulation of different reforms at different eras and political compromises between different groups, or of adaptive changes at one level that evolve in reaction to features at another. As an example, as will be discussed later, the increasingly reliance on legislative supermajority rules at the state and national levels may be an adaptive compensation for majoritarianism at the electoral level.

The fact that proportionate rules are out of synch with the American SMSP tradition has led some to advocate for “equal treatment” standards. Bearing in mind that the winner take all systems reward larger parties and groups and penalize the weaker, their notion is that an electoral outcome would be deemed fair if the treatment of the two parties was symmetrical such that if the parties were to trade vote shares, the seat shares would stay the same. While this standard is truer than proportional representation to Anglo-American electoral traditions, it has some obvious drawbacks. Most problematically, it rests on counterfactual comparisons: hypothetical as opposed to actual distributions of vote and seat shares. To be sure, there are political scientists who would enjoy the challenge and material reward of estimating these for the Court, but the results would be speculative at best, resting on arguable assumptions and subject to error.

Even assuming an agreed upon standard, getting the right calibration of fairness in the actual results is hard. The inexactness of electoral engineering is nicely illustrated by the efforts of the South Australia Electoral Districts Boundaries Commission (EDBC). In 1990, they incorporated an outcomes criterion in the South Australia Constitution Act that mandated the redistribution should “as far as practicable” ensure that “if candidates of a particular group attract more than 50% of the popular vote...they will be elected in sufficient numbers to enable a government to be formed.”¹⁰ However, despite a parliamentary system with strong party forces and a relatively uniform swing and a relatively weak electoral goal--making sure that a party that gets a majority of votes at least get a majority of seats—they could not get the outcome they designed. In the 2010 election the nationwide swing against Labour reduced their two party share of the vote to 48.4% but the party still retained control of the legislature. With the stronger incumbency advantages and larger turnout variations, electoral engineering at a precise level is even harder to pull off in the US.

Given the measurement and estimation problems, the best that one could hope for in the US would be to move the distribution of seats in the direction of more equal treatment, or to focus only on the condition of a few seats in the marginal range as oppose to worrying about

whether the parties are treated equally in the noncompetitive range.¹¹ If the underlying distribution of party or group strength is itself widely asymmetric (e.g. one group has a subpopulation that is concentrated highly inefficiently in ghetto like areas while the other groups are more evenly distributed), then there is only so much that one can do given other constraints like contiguity, compactness, respect of for communities of interest and jurisdictional boundaries to draw district lines that can compensate for that underlying spatial inefficiency in partisan distribution. Political arts are sometimes quite clever but the science of politics is inexact, to be sure.

The most important constraint to achieving redistricting fairness is that it has to be traded off with other values. This is true of political fairness issues generally, not just in redistricting. For example, Presidential primary rule changes intended to increase proportional fairness had to be balanced against the need to avoid a locked convention or an overly drawn out and expensive primary contest. But the list of the other redistricting considerations that need to be weighed against fairness, however defined, is more extensive than usual. Fairness to the political parties has to be balanced against population equality, fairness to minority groups, compactness, contiguity, geographic integrity, respect for communities of interest and sometimes the need to add competitive seats to the mix.

Faced with no clear unifying consensus on the concept and measurement of line-drawing fairness or how to optimally trade it off with other values, the reform community has split into two camps: the procedural neutrality crowd versus the outcome fairness types. The former are primarily good government groups like the League of Women Voters and Common Cause and the latter are the civil rights groups. Procedural neutrality is sometimes valued as a good in itself, but it is also intended as a second best strategy for achieving outcome fairness. Given that the exact definition of outcome fairness is contested, the fallback position is a neutral process that is not biased by incumbent or partisan considerations. A plan is considered fair if it is drawn according to neutral criteria by individuals who have no direct interest in the outcome. It is, in effect, the redistricting equivalent of flipping a coin: the outcome is accepted as fair because the parties agreed to an impartial process, not because the outcome is guaranteed to be substantively just.

There are various ways to achieve a more impartial process, and the recently formed California Redistricting Commission (CRC) nicely illustrates almost all of them.¹² An amalgamated product of two separate popular initiatives, the California process attempted to achieve procedural neutrality in several ways. To begin with, the Commission application process purged those who had inappropriate political interests and connections. Elected officials, party officials, consultants and would be candidates were disqualified from applying. The selection process, run through the state auditor's office (one of the most colorless state

government offices), following a convoluted path that combined elements of a college application (complete with essays on diversity), voir dire (the legislative leaders were allowed to strike candidates they did not like or trust) and random selection (eight chosen by lottery who then chose the last six) from three party registration categories (registered Democrats, registered Republicans and decline to states).

The second layer of protection against “bias” relied on so-called neutral criteria such as respect for city, county and other jurisdiction lines, compactness, contiguity and community of interest (COI) considerations. To ensure that their eyes were on the right ball, the CRC was not allowed to look at where incumbents resided or even at political data except in the context of examining patterns of racial polarization and potential liability under the Voting Rights Act. Flying blind with respect to partisan and incumbent data meant implicitly that while the lines could turn out to be more unfair in effect to certain groups or political parties, they were at least not intentionally discriminatory, a second best outcome (unintentional as opposed to intentional unfairness, i.e. gerrymandering).

However, some critics, but especially the California Republican Party, believed that despite these various elaborate attempts to squeeze every ounce of bias out of the CRC members, there was still a liberal and Democratic tilt to the Commission. To many of those with redistricting experience, the CRC’s claim to impartiality and procedural neutrality seemed disingenuous.¹³ Could a commission plausibly claim to be blind to political consequences if they were not sequestered from the press and bloggers who announced the political effects of plans immediately upon their release? Given that 10 of the commissioners were registered partisans, was it plausible to think that they were not influenced by the reactions of their friends, neighbors and others who were registered with the same party? And while incumbency and political data were explicitly excluded, many of the “public” who showed up for the hearings were local government elected officials, city managers, and local activists.¹⁴ Their community of interest testimony no doubt masked deeper political motives and quite possibly incumbent preferences. For the average California voter, such concerns were of little or no importance; the fact that the districts appeared more compact¹⁵ and that the justifications for the lines seemed to be more reasonable than in the past was sufficient for general public approval. But for insiders and political players of various sorts, such deodorizing of normal political bargaining did little to assure them that the process was fair.¹⁶

In the end, those who care the most about redistricting focus almost exclusively on outcomes: where the lines are drawn and how it affects their interests. The Commission soon discovered after the release of their first draft maps that the “public” who showed up at the hearings seemed to care less about the Commission’s pure motives than the maps’ impact on their communities. Some of the meetings became quite heated as tea party activists and

others expressed their anger at the direction that the CRC was taking, especially on voting rights issues.¹⁷ In the end, the CRC was so overwhelmed with testimony that decided to cancel a round of regional hearings that was to follow the release of the second round of maps.

The competing reform vision, held by the civil rights community and some political scientists, focuses to a greater degree on fair outcomes rather than pure process neutrality. For the Voting Rights advocates, a good redistricting plan is one that does not divide covered groups and respects reasonably compact areas of minority population. Working within the framework of several decades of legal decisions and Voting Rights Act experience, their concern is the potential for fair minority representation, not neutral criteria or impartial line drawers. Indeed, civil rights groups suspect that neutral criteria can be used to weaken minority representation.¹⁸ Minority neighborhoods do not necessarily conform to jurisdictional boundaries, and given the socio-economic constraints that many poor nonwhites face in their choice of available housing, they do not always live in neat compact neighborhoods, especially in rural and suburban areas.

In addition, the empirical tests in a VRA analysis compel a look at past and potential outcomes. Probing for racial polarization, one of the three empirical prongs of the Gingles standard (the test the courts use to assess a Voting Rights Act violation) involves examining the voting patterns in political races featuring white versus nonwhite candidates. Similarly, evidence of political cohesion, another Gingles requirement, asks whether a racial or ethnic group votes as a bloc in elections and can claim to have a valid interest in a majority minority district. In other words, determining whether there is a need for a remedy requires projecting past outcomes into the future, and assessing whether a particular districting arrangement provides an “equal opportunity” for a historically under-represented group to elect a candidate of choice.

Ironically, at the same time, voting rights law in general incorporates procedural as well as outcome based approaches to racial fairness questions. To begin with, racial discriminatory intent in line-drawing is taken into account in constitutionally based challenges to redistricting.¹⁹ In other words, a fair redistricting process must be free of intentional discrimination against any protected minority group. In addition, neutral formal criteria figure more prominently in VRA Section 2 analyses as the result of the so-called Shaw line of Supreme Court cases that require that potentially protected minority groups live in a reasonably compact area and that attempts to remediate under-representation respect traditional redistricting criteria.²⁰ That said, the orientation of the racial redistricting focus is still predominantly outcome based, and sociologically, outcome fairness primarily frames the thinking of the Voting Rights attorneys and advocates. The fact that neutral criteria are incorporated into VRA law as a legal restraint on affirmative action gerrymandering has only deepened the Voting Rights

community's suspicions of neutral process goals and increased their tensions with good government groups.

The tension between outcome and procedural fairness played out in the CRC 2011 deliberations, resulting in an uneasy informal dual standard along racial lines. The CRC was simultaneously adhering to neutral criteria in the white areas of the state and to outcome criteria in the nonwhite portions: in essence using separate standards of fairness for different portions of the state population. The CRC looked at racial polarization patterns where the racial concentrations merited review but relied heavily on community of interest testimony and neutral criteria (i.e. compactness, minimizing city and county splits) in the rest of the state.²¹ To be sure, many non-commission states did the same thing, but the tensions between outcome and process are marginally less when the legislature draws the lines because partisan outcomes and incumbency (i.e. non-racial outcome criteria) are more in play in every area, including ghettoized neighborhoods. Because incumbency and political considerations apply almost equally across white and protected nonwhite areas of the state, there is a less a stark dichotomy in treatment along racial and ethnic lines. Independent Commissions, relying more heavily on neutral criteria (especially their attention to community of interest or COI testimony) in the white areas exacerbate the contrast with voting rights related outcome considerations.

The blending of different and sometime contradictory ideas of fairness is of course a familiar theme. Across a number of reform areas, tensions and contradictions in reform principles are commonly embedded in the fabric of US institutions as different traditions and reform impulses have been layered on top of each other, creating anything but a coherent and well planned political structure. In the end, the CRC managed to muddle through these tensions and produced a creditable plan despite stringent time constraints and a supermajority voting rule that required consent from Democrats, Republicans and Independents.²²

Given that redistricting fairness is a heavily contested ideal, it is not surprising that the Courts have struggled with the question as to how far to venture into this area. The demise of its pre-Baker v Carr hands off posture opened the door to potentially heavy intervention. As we have seen, legal scholars and political scientists are themselves divided on this question. On the one hand, leaving redistricting to elected officials appears to be a "conflict of interest" because they can bargain for district arrangements that improve their chances of reelection.²³ Legislative redistricting, they argue, has a built-in predilection towards incumbent bias and lower responsiveness, especially when the political conditions are ripe for a bipartisan gerrymander; i.e. divided government such that no one party controls the process, or single party control that is so lopsided that there is no incentive to squeeze more partisan advantage out of the district lines.

The decade of the nineties yielded more divided state governments, and as consequently, more incumbent bipartisan plans in the 2001 redistricting round. The reaction to this was a shift in reform focus in subsequent years towards bipartisan as opposed to partisan plans.²⁴ Ironically, in earlier decades, even the courts thought that bipartisan plans might be an improvement over partisan gerrymanders (e.g. *Gaffney v Cummings*).²⁵ But it is now much more problematic that a bipartisan division of seats can make incumbents safer, contributing at least on the margin to increasing partisan polarization. A clear sign that one is in the realm of the democratic interval is when reform thinking shifts with changing fashions and conditions. Contrast the reversal of thinking about bipartisan plans with the mal-apportionment problem that originally brought the Court into the political fray. The one person one vote is pretty much settled doctrine and has permeated the design of almost every level of government except special districts, the US Senate and Presidential Electoral College.

Returning to the reform pathways issue raised in Chapter 2, the question is this: if one believes that incumbency bias is a serious redistricting problem, and that bipartisan redistricting plans marginally worsen this bias, then can the system self-correct itself or is the majority frustrated by a blocked pathway to reform? Given that 42 states still use legislative redistricting for Congress and 37 for their state legislatures, and that only three states have truly independent redistricting commissions, is there a majority consent problem in the sense that that a majority of citizens that might prefer but cannot get a non-incumbent blind plan because incumbent legislators acting on their common interest can block corrective change? In short, is there a case for court intervention?

The answer to this question partly depends on the availability of reform paths in the states. Eighteen states permit initiative constitutional amendments (ICAs) that provide a majority voter reform path that bypasses incumbent office-holders. This was the path taken in California and Arizona, states that have adopted the most far-reaching redistricting reforms by citizen initiative. In other states and the federal government, the requirements for state constitutional reform typically demand super-majority or repeated consent by the legislature, effectively blocking the pathways in those states for all except the most stable and sufficiently large majorities. The election markets school of thought suggests that if elections were competitive, then one of the parties might adopt redistricting reform to gain the upper hand on the opposition party.²⁶ But in some sense this begs the larger problem; if the seats are not competitive in the first place, then breaking the lock-up requires overcoming the very problem that leads to lock-up to begin with.

Problems of this sort feed into the legal imperialism mindset. If the political process cannot deliver majority preferred reform, then perhaps the Court is the best alternative. There are two ways that courts can intervene: first they can rule on the constitutionality or legality of

plans drawn by the legislature or commissions, and secondly, they can draw lines themselves. Both roles incur problems and costs. In theory, courts have less “self-interest” in the outcome than legislative incumbents and could attempt to be the neutral referees evaluating different district proposals submitted to them, and sending them back if necessary for correction until legislators or commissioners get it right. Although the timing for Congressional redistricting is particularly tight, wedged between the census release and the first election cycle in a decade, this is not usually a strong constraint as courts can usually draw lines more quickly without the multiple bargaining issues and transparency requirements commissions and legislatures have to deal with. Moreover, there is the option of putting in place a disputed set of lines for one election cycle, or in the case of legislative districts that are not too badly mal-apportioned, leaving the status quo in place for one more election.

The more serious problems are perceptions of original partisan sin and unavoidable outcome judgments. Judges are either appointed or elected, both of which are increasingly polarized procedures. Recent nomination fights at the federal level are a recurrent demonstration that the judiciary has become more politicized and nominees more closely vetted for their ideological fidelity. *Bush v Gore*, as mentioned earlier, was a rude wake-up call to the advocates of the neutral referee model, a reminder that “blaming the refs” is part of the game. The situation is even more perilous at the state court level, where 39 states elect at least some of their judges. So even if the judiciary has no direct conflict of interest in the incumbency sense, only the thin wall of judicial commitment to the norm of impartiality separates judges from partisan and ideological suspicions. That wall does not hold up very well when redistricting outcomes anger partisans. As the courts themselves have noted, appearances matter:²⁷ even if judges make every effort to rise above their prejudices, as do commissioners and some politicians, they cannot easily dispense with the suspicions that others will have of them. Increasingly few Americans believe in the immaculate conception of judges. In redistricting, judges can easily be perceived as tainted by their “original sin” of partisan appointment.

Courts also are not immune from the outcome versus procedure tension. In the end, those most affected by redistricting are looking for fair outcomes. With the aid of post Civil War constitutional amendments and the Voting Rights Act, the courts have devised some basic guidelines to follow (i.e. rough proportionality for protected groups limited by some reasonable regard for compactness and neutral criteria). But with respect to partisan issues, the Supreme Court has maintained the right to intervene but struggled to find any solid constitutional guidelines for doing so. In *Davis v Bandemer*, the court rejected mere non-proportionality and seemed to suggest a standard of recurring exclusion that mirrored the racial cases.²⁸ But since it was implausible that any major party could meet that claim,²⁹ some scholars have tried with no success to interest the Court in seats-vote symmetry measures.³⁰ The only successful

attempt to overturn unfair partisan plans followed an indirect strategy of objecting on equal population grounds,³¹ but even that tactic has been closed off by the current practice of reducing Congressional population variations to nearly zero. Without an accepted standard to rely on, the original partisan sin problem only gets worse.

As problematic as the first task is (i.e. evaluating and judging contested redistricting plans), the second, actually drawing lines, is even trickier. Typically, the judges themselves have little or no GIS or demographic background, and so they rely on special masters or political consultants to perform this for them. Moreover, since they usually have to produce a redistricting plan under severe time constraints, with little public input and no transparency, the conditions are fertile for perceptions of conspiracy and bias. The increasing incidence of divided state governments and super-majority rules combined with the bipartisan composition for independent commissions raise the odds that the state and federal courts could become the line-drawers of last resort more frequently.

For all these reasons, a new generation of legal scholars has challenged the legal imperialists, looking for ways to build better political solutions that would relieve the redistricting pressures on the courts.³² Citizen commissions and shadow (i.e. model plans drawn by students and ordinary citizens that serve as a basis of comparison) redistricting efforts, they hope, will eliminate the most egregious redistricting efforts before they reach the Court stage. It is hard to quarrel with the goal of creating better politics to relieve the burden on the courts, but it remains to be seen whether procedural improvements assuage the concerns of potential litigants. In an increasingly polarized political system and with an eye focused more on results than procedural purity, the pull on the courts to enter into redistricting might prove to be too great.

In the end, the redistricting saga is a fascinating case of the problems associated with the legal intrusion into the political realm. Political fairness beyond one person, one vote apportionment is a contested concept. The more the Court wades into this area doctrinally with its penchant for logical, over time consistency, the greater the danger that it will lock-in a particular theory of fair representation in the interests perhaps of preventing lock-up by incumbents and majority parties. The more the Court dives in head first and draws lines, the greater the danger that it will suffer the seemingly biased referee fate. The commission model might work, albeit imperfectly, if it trims the range of outcomes to a narrower range of biases. But if partisan polarization increases, redistricting could become ever more contentious no matter who does it. The underlying problem is an unresolved standard of political fairness, and the solution ultimately requires forming a consensus about that.

Fairness at Legislative Level

Representation begins but does not end at the electoral phase. Whether representation is fair or not is only in small measure about the partisan or demographic descriptiveness of the legislators elected to office. The full translation of the public will into laws and policies incorporates the actions of representatives in office. As with electoral fairness, the meaning of good legislative representation is contested. A democratic system can accommodate several styles of representation. The trustee model—i.e. legislators exercising their own policy judgments and evaluated retrospectively by voters based on outcomes or personal qualities—is as equally democratic as a delegate model that expects legislators faithfully and without deviation to carry out the promises they made to voters during the election. The legitimacy of government authority stems from the democratic opportunity for voters to elect or un-elect officials to a term of office, not from the compatibility of voter, candidate or office-holder motives with one of these particular theories of representation.

But as many political scientists have emphasized in recent years, all representative democracies have principal agency problems that arise when some elected officials (and some appointed ones) allow personal interests to interfere with their judgments (either mandated or independent) on behalf of those who elected them.³³ We have taken up the corruption issue already—defined most narrowly as representatives enriching themselves, friends or family—but now we need to consider distortion at the legislative phase (i.e. alteration of the majority electoral will): that way the electoral mandate can get altered or lost at the legislative phase for reasons other than self-enrichment. Sometimes post-electoral distortion is a formal feature, a legislative rule or process that alters the electoral mandate, and sometimes it is informal, such as unequal influence through lobbying and advocacy. For populist reformers, alteration away from the majority electoral mandate is distortion. For pluralists, it can be, although not always, a functional and complementary adaptation to contradictions and tensions in the electoral majority.

The core point is that fair representation is the compound effect of electoral and legislative fairness. A democratic design can be consistent at both stages of representation or not. The British Parliament is elected by single member simple majority rules and is run by a simple majority design with few anti-majoritarian features. There is no possibility of divided government as the Prime minister is the leader of the majority party or coalition. To be sure, coalition governments introduce their own set of policy and political constraints, but formal separation of power incentivizes disagreement whereas the common desire of majority party members to stay in power offsets intraparty policy differences to some degree in a parliamentary coalition. US legislatures at both the state and federal level are usually elected by single member simple plurality rules and have incorporated anti-majoritarian features similar to the federal model design: bicameral houses, legislative committees with the power to amend and introduce bills, etc. In this sense, US representation is less consistently majoritarian

at all government levels than a parliamentary system, which makes fairness questions all the more complex and controversial.

Supermajority Rules and Democracy

A common assumption is that democracy operates by majority rule but in fact, as we have noted already, that is not always true, and even when it is, majority rule can be implemented in many varied ways (majority of those present, the majority of membership, majority in two consecutive votes, etc). In its most common form, it means that the winning option or candidate gets 50% plus 1 of the votes cast. This rule resonates with us because it ensures that the option favored by the larger faction prevails over the others. Candidate elections are almost always determined by a majority threshold or less, and rarely if ever by a supermajority. But increasingly in the US we see a proliferation of supermajority rules (i.e. winning options need to garner more than 50% plus often, typically 3/5ths or 2/3rds) for certain kinds of legislative statutes and judicial nominations at both the state and federal level. This raises two important questions. First, how do supermajority rules affect fair representation in a democracy and secondly, why do majorities surrender their power by adopting super-majority rules?

Super-majority rules are most commonly used for constitutional measures. If the meta-rules that define the structure and rights in a democracy are too easily changed, they can be manipulated for short term political gain and lose public legitimacy. Without a supermajority check on majority power, a political party that wins control of the government could postpone the next election date indefinitely, erect severe financial or administrative barriers against the opposition, or abolish or amend fundamental political rights to suit its convenience or the passions of the moment. This would be the most severe version of an electoral lock-up as discussed previously and would likely breed widespread cynicism, undermining any confidence that the system is truly democratic. Supermajority thresholds make this sort of simple majority lock-up by rule manipulation nearly impossible.

By forcing a higher level of consensus in order to enact meta-rule change, supermajority rules also encourage a higher level of inclusiveness and stability. The buy-in for democratic rules should ideally extend not just to the winners in policy disputes, but to the perennial losers as well. A disappointing result seems more legitimate if the process itself is accepted by a wider than mere majority circle of citizens (ideally nearly universal). Higher vote thresholds lower the odds of constant change and thereby increase meta-rule stability. This makes policy-making more predictable for citizens who must obey and operate under the laws.

By the same logic, supermajority rules have historically been less prevalent in the policy realm. Governments need to handle crises and needs of the moment expeditiously. Policies

should also be responsive to the changing views of the electorate. The time and effort needed to achieve a supermajority consensus would under most conditions slow down policy-making considerably. It would also change the power relationships between majority and minority coalitions. Instead of policies being pegged to the preferences of the median voter or legislator, they would instead reflect the so-called pivotal individual at the super-majority point—in left-right terms, instead of the person at the 51st position on the 100 point scale, the individual at the 60th (3/5ths) or 67th (2/3's) position.³⁴ Supermajority rules at the legislative level can potential distort any majority mandate that emerged from the previous election.

In the modern US political era, the classical dichotomy of majority rules for normal policy-making and super-majority at the constitutional level has broken down. In states with direct democracy options, constitutions are amended frequently by a simple majority of those voting while voters have imposed supermajority rules on legislatures (especially votes concerning taxes).³⁵ At the federal level, US Senate filibusters requiring supermajority cloture votes are now more routinely and frequently employed for both appointment and policy disputes.

This recent trend, using super-majority rules for normal policy-making, raises critical questions about accountability and fair representation. Accountability to the majority, as we have said, has both bias and responsiveness components. An unbiased system translates the majority's policy preferences into representation and policy accurately. In part, this requires that material self-interest does not skew the incentives of the representatives from the people who elected him. But, in the purest majoritarian sense, it could also mean that legislative procedures enable the majority to realize its policies without the skew and obstruction of minority interests. A completely consistent majoritarian conception might also mean that policy changes should be responsive to shifts in majority opinion: if it shifts to the left or right on some issues, it should be immediately and faithfully reflected in policy change at the legislative and executive level.

However, as we have seen numerous times, the US system is far from consistent, sometimes by intention because of Madisonian principles and sometimes unintentionally as the unplanned outgrowth of numerous sequential changes (e.g. amendments, court decisions, informal institutions, etc). Federalism and divided governments can be strong impediments to consistent majoritarianism, blurring any clear mandate the majority might be sending into separate federal and state pieces represented by different parties. Congress, itself, has always been chock-a-block with anti-majoritarian features that wax in strength periodically. The committee and seniority system, particularly in the immediate postwar years up through the seventies, modulated electoral mandates to such an extent that it gave rise to revolt and eventual curbs by the post-Watergate class of liberal Democrats. Senatorial holds, unanimous

consent and cloture rules have traditionally exerted powerful anti-majoritarian pressures in the Senate.³⁶ In various ways, the tensions between a largely majoritarian electoral system and the anti-majoritarian features of the Congress are longstanding.

But these tensions have become more prominent in recent years, particularly on the Senate side. While the House has become more majoritarian in its procedures, centralizing power in the hands of the leadership and resorting to extraordinary law-making procedures to overcome polarization and obstruction by the opposition, the Senate has moved in the opposite direction with a greater use of the filibuster and senatorial holds. Since these rules are not dictated by the Constitution, their invention and use—the so-called informal constitution—arise entirely from political forces.³⁷

From a Madisonian perspective, the Senate's increasing use of anti-majoritarian features like the filibuster could be interpreted as institutional compensation in the face of changing political conditions. Much has been written documenting the rise of partisan polarization. There is no settled consensus on the cause. Some point to cycles of more and less partisanship throughout US: perhaps the bipartisanship of the fifties was merely the afterglow of successful war efforts.³⁸ Others attribute increasing polarization to rising inequality in wealth and financial insecurity in the population, increasing tensions between the haves and have-nots.³⁹ Still others point to social sorting, which may create more homogenous neighborhoods and reinforce political identities and loyalties.⁴⁰

Most political scientists subscribe to the thesis of racial realignment in the 60's, pulling the socially and racially conservative southern Democrats out of alliance with liberals and labor unions and into the party of Presidents Nixon and Reagan.⁴¹ The Court may have contributed to this phenomenon through its mal-apportionment and racial redistricting decisions by strengthening the urban and minority base in the Democratic Party. There is more disagreement as to whether polarization is driven primarily by elites or by public opinion, given that public opinion on major issues has not shifted much in recent years and the number of independents has gone up significantly.⁴² But whatever the root causes, the fact remains that at the state and Congressional level, party bases are sharply divided, and it is harder for elected officials from different parties to compromise and work together.

Returning to the design issue, there are two choices: the legislative system can be designed to reflect or even to magnify the majority party's platforms, or it can serve to brake them, potentially forcing more compromise, or failing that, inducing stalemate until the underlying political conditions are ripe enough for consensus. In the present case, of course, Congressional adaptations seem to be a blend of both approaches. The House changes, made possible by the ability of a new majority party to change rules more easily, arose because the opposition was using normal deliberative rules to slow down or derail the majority party's

policy making.⁴³ The Senate's rules and universalistic culture allowed the minority party to enhance its power by making more frequent use of the filibuster and secret holds.⁴⁴ In short, the purification of coalitional alignments and rising partisanship (electoral phenomena) on top of other factors (e.g. like the role of more sophisticated interest group targeting their political money) caused different institutional adaptations in the House and Senate.

Assuming for the moment that this interpretation is approximately correct how might pluralists and populists view these developments? Populists would accept the House changes (even if yearning for conditions that would lessen their need) but deplore the Senate's reaction as a frustration of the public will. Pluralists, by contrast, might view the Senate changes, at least with respect to the filibuster, as a way to restore what was lost when the party coalitions themselves became less heterogeneous; substituting an institutional mechanism (more frequent use of the filibuster) for the sociological brake that existed before the southern realignment. Senate procedures, its defenders argue, potentially incentivize moderation and cooperation (even if it does not always turn out that way), and more fairly reflect a society that in recent years is often evenly divided (and sometimes undecided) with respect to party loyalty and some key issues.

Populists would question whether a system can be truly democratic if policy is driven by a minority faction leveraging its influence through a supermajority threshold. Has the critical democratic moment been lost? It is a fair question, one that forces a look at how a supermajority rule is ever sustained in a majority setting. Unlike the "unfair" mal-apportionment of the Senate itself, the filibuster is sustained by an internal political equilibrium, not by the constitution formally.⁴⁵ There are well-known paths—e.g. the so-called nuclear and constitutional options—that would allow the majority to curb or even end the filibuster option through a series of majority procedural votes. However, neither the Republicans nor Democrats when they have controlled the Senate have chosen to follow that path to date. Part of the reason is adherence to tradition in a body, the US Senate, which greatly reveres tradition. But, it is also sustained by the raw political realization that given the volatility of recent elections, a party in power must assume that it could soon be out of power and in need of all the supermajority leverage it can get.

Lastly and importantly, the answer might lie in intraparty tensions. While the Democratic and Republican parties have become more homogenous since the realignment of the south, they are still coalitions split between the more ideological base and more pragmatic centrists.⁴⁶ It is significant that bipartisan centrist coalitions have come together to rescue the filibuster from demise. Centrists seem to want this supermajority check as protection to some degree from the more ideological party bases. The partisan majority, in short, might not be the

policy majority, and indeed, might not be a "majority" at all. Pluralists might see institutional barriers to majority rule such as the filibuster as inducing a more stable melding of policy.

Similar forces are at work at the state level. Consider the example of California, a state that is inarguably located at the other end of the constitutional design spectrum and yet is experiencing a similar uptick in supermajority rules. Where the federal government has anti-majoritarian features locked in by a high threshold for constitutional change, post-Reynolds v Sims California has two equally populated legislative houses with one of the most user-friendly direct democracy systems in the world, enabling recurrent constitutional change. The US Senate reveres its legislative traditions, but Californians radically reconstructed theirs, enacting the most severe term limitations in the country. Federal design logic has been turned on its head in California: initiative constitutional amendments are enacted by a simple majority of the voters who bother to turn up in even low turnout primary and special elections, but legislative budgetary (until recently) and taxing votes-- normal policy-- require supermajority agreement. The decision to adopt supermajority tax votes was made by and can be undone by a majority initiative vote, and yet this has not happened, with polls indicating that it might not change any time soon despite ongoing fiscal crises and an overwhelmingly blue electorate.⁴⁷

The underlying political dynamic is relevant to a well considered normative perspective on this issue. Due to California's large immigrant population and the federal requirement that districts must be drawn on the basis of population not registered or eligible voters, Assembly and state Senate legislative district populations vary considerably even after redistricting. Equal district populations yield disparately low numbers of voters in heavily immigrant areas as the result of high noncitizen rates, low percentages of home ownership, language barriers and below average socio-economic circumstances. When voters are aggregated at large for statewide races and initiative measures, the resulting electorate is whiter and wealthier than the population. The legislature, by comparison, tends to reflect the population base more closely. This "dual constituency" problem allows the statewide electorate to trump measures passed by the legislature and impose supermajority vote requirements that constrain the majority party's ability to make fiscal policy.⁴⁸ Higher thresholds seem to serve an ideological balancing function. As with the US Senate, many California centrists and independents believe that the party bases and core interest groups, through higher participation in primary elections and greater willingness to spend resources for elections, have undue influence over policy, and welcome institutional restraints on the legislature.⁴⁹

The key point is that in both the US and California cases, anti-majoritarian legislative features were put in place by and could be over-turned by a simple majority: in the California case, of the voters, and in Congress, of the elected officials themselves. Due to the direct democracy option, the legislature is not an obstacle to change in California. The lock-up

rationale does not apply here. Over time, the voting majority might eventually become frustrated by the over-use of the supermajority tax rule. Voters have already whittled down the threshold on certain kinds of property tax based local bonds and voted out the long-standing super-majority vote requirement for the state budget. Given the absence of structural lock-up, this is certainly not an area for court intervention. Aside from the obvious point that the Court would have to shred all remnants of the political question doctrine (noninterference in the operation of a coequal branch) to outlaw supermajority rules, there is a plausible case on pluralist grounds for them under certain political conditions.

The pluralist case has been strengthened by the tendency in recent years for winning parties to over-read their electoral mandates. George Bush believed that he had a mandate to replace social security with a private market accounts. Barack Obama saw in his election public support for reforming the health care system. The merits of these policies aside, given the volatility of electoral tides in recent election, it is quite likely that had Bush enacted the social security reform, it would have been over-turned in 2008 absent any filibuster rule. Similarly, the filibuster may ultimately save President Obama's health care plan if the Democrats lose control of the Congress and Presidency in the future. Majoritarian parliamentary systems like the British are prone to more drastic policy changes and reversals than in the US.⁵⁰ Those who prefer more policy stability, or who want to counter the yin of their base with the yang of others, might reasonably prefer the anti-majoritarian checks left by our inconsistently designed political system.

Unequal Access and Influence

The focus to this point has been on the formal aspects of representation: the translation of votes to seats through electoral systems and redistricting, and the decision rules used in legislative bodies. But as with all considerations about fairness and equality, there is also an informal component. Formally, the ideal of fair representation in the US has evolved into equally weighted voices aggregated in an unbiased and responsive way, but translated more or less faithfully (given the previous discussion) into legislative action. But what if formally fair representation of either variant is ultimately undermined by wealth and influence inequality, or by structural advantages in organization and concentrated interest? Are there ways to address this problem that do not run afoul of first amendment freedoms?

Democracies have flourished in countries with capitalist economies, but the tensions between formally fair systems of representation and large disparities of wealth and resources are real and persistent. Wealthy individuals and groups have more resources to devote to their causes. Even if we solve the "corruption" problems inherent in revolving door exchanges between the private and public sectors, the US system allows the wealthy ample advantages for access and influence through its campaign finance laws and lobbying channels. If these

activities matter, then they can be the cause of further democratic distortion, biasing results towards the few and obstructing policies for the many.

Earlier we considered the corruption problem: that the US government’s permeability to special interests and lobbying creates revolving door opportunities for personal gain that might undermine democratic accountability. Leaving aside personal gain and corruption, do inequalities in resources and advantages potentially cause policy distortion (i.e. skewing policy away from majority electoral preferences), and how would different reform strategies tackle this democratic problem?

Drawing on a fairly extensive body of political science research on interest groups and lobbying,⁵¹ the following picture emerges. Resource and organizational disparities matter, but the policy effects, while real, are not as simple as they are sometimes portrayed in the media and by reform groups. One simple view is that wealth and organization translate regularly and directly into policy victories, and that the system is rigged against the average voter. A contrasting one is that there are countervailing interests in policy competition, cancelling each other out and preventing any serious systematic bias. The political science evidence challenges both simple models, finding that these advantages matter, but in more subtle and often technical ways.

Base Assets	Political Effects	Policy Consequences
Resources	Information	Change Action
Organizational	Access Advantages	Harden alignments
Motivational	Relational Dependence	

The issue of unequal informal influence might be better understood in a causal framework that traces the effects of base assets to political influence and ultimately to policy skew. Base asset inequalities can take the form of advantages in resources (money and labor), lower organizational costs and stronger inherent incentives. More often than not, the press focuses on resource advantages, and for good reason: as politics has professionalized, the demand for money has increased accordingly. Wealthy groups and individuals and groups can purchase professional help more easily, both lobbyists and campaign consultants, and can fund issue advocacy campaigns. While federal campaign laws limit the amount that individuals can give directly to candidates and PACs, and what PACs can give to candidates, the laws do not limit the amount of money that can be spent on lobbying or ballot measures, on independent

campaign expenditures for or against candidates, and on most kinds of issue advocacy. In short, the US system provides very limited restrictions on using wealth to influence politics.

A second base asset is low organizational cost. Mobilizing for a political or policy cause requires organization and coordination. Businesses or labor unions have existing structures that can form the basis of a political organization. Businesses may also have their own lobbyists, or share them in a trade association. Their government affairs departments can track potential government actions and alert them to policy problems or opportunities as they arise. Unions and businesses can tap their treasuries to set up PACs, and solicit contributions from their employees and members. By comparison, groups that start from scratch without a pre-existing organizational structure to draw upon will take time to ramp up and potentially have a harder time sustaining their effort over time when the initial enthusiasm dies out.

And lastly, there are important differences in motivation that factor into unequal influence. Groups that pursue diffuse interests tend to be disadvantaged as against those with concentrated interests. If the bottom line of a business or the employee salary and benefits are at stake, the motivation level will be higher and more permanent. If the benefits or costs of a given policy are more diffused, the organization will face more collective action problems such as members free riding on others, or losing interest over time because the cause is not as central to their interests.

The interests that combine these attributes, especially businesses and trade associations, tend to lead the lists of lobbying expenditures. From 1998 to 2010, the top ten lobbying clients were in order: US Chamber of Commerce, AMA, General Electric, AARP, Pharmaceuticals, American Hospital Association, Blue Cross/Blue Shield, Northrup Grumman, National Association of Realtors, and Exxon Mobil.⁵² They also explains why despite the proliferation of registered lobbyists in Washington, businesses, trade and professional associations continue to dominate lobbying registrations on the order of 10 to 1⁵³. Businesses, trade associations and professional groups account for the bulk of total reported spending on lobbying.

These asset advantages translate into three important political advantages: better information, more access to office-holders and staff, and relational dependence. Having an edge in information over other negotiating parties (i.e. information asymmetry) can be an important political tool. Businesses and professional groups obviously possess an enormous amount of information about their own markets and practices. Sometimes, this is matched by committee staff, or by former lobbyists with similar expertise who have returned to government, but more often the professional lobbyist is up against young staff and Members of Congress who have far less knowledge about the impacts of a given bill. The asymmetries are not usually as great with administrative agencies, but even so, companies have their own

“scientists” that produce research in defense of the company or industry’s position which agency’s rarely have the expertise to check or validate.

In addition to substantive expertise, if a group has sufficient resources, it will hire lobbyists who have been in the Congress or the agencies, and this inside procedural knowledge can be very important to formulating a winning lobbying strategy. This is particularly important in an era of unorthodox lawmaking, when procedures do not necessarily follow the text stages of bill passage due to crises or political factors.⁵⁴ But even beyond the formal process, knowing the players and their likely inclinations, both in the legislative and executive branches, can be a critical advantage.

Knowing the players and the process also means having easier access to those in office in order to plead one’s case. The personal relationships developed by passing through the revolving door add an element of friendship and trust to their contacts with Congressional and agency offices. This is particularly true given that lobbyists are heavily involved in fund-raising for Members of Congress and President. Lobbyists not only contribute individually (one study found that the top 50 lobbyists gave on average \$25,890 per year), but they arrange fundraisers, bundle contributions for candidates and sometimes serve as the Chairs of Candidate Fundraising Committees.⁵⁵ The asset advantages are reflected in PAC donations: business PACs outspent Labor PACs by 17 to 1, with business and professional groups as the largest donors by sector (labor coming in 8th).⁵⁶ Seeing members at fund-raising events, some of which may involve desirable travel destinations, helps them develop stronger personal ties and a sense of alliance and trust if not gratitude. Ironically, the ethics reforms that followed the Abramoff scandals increased the importance of fund-raising events as social occasions as the newly imposed gift and travel restrictions limited other sorts of interactions.

The last piece of the puzzle is the effect that these political asset advantages have on policy outcomes. This is harder to measure, and therefore, a source of long-standing tension between the political science and reform communities. Intuition and anecdote have convinced the latter that policy is bought and sold as the result of lobbying and campaign influences. The political science evidence is mixed, suggesting that in most cases money follows party and ideological lines and does not convert or corrupt the actions and votes of most members.⁵⁷ When I have asked Members about whether their votes are bought, they of course adamantly deny the possibility, but more than a few assert that they are sure it influences other members. A few studies have plausibly argued that the effects of campaign money and lobbying are greater on less salient bills and span legislative actions other than floor votes.⁵⁸

The latter point is particularly important because the US reform framework has been heavily shaped by legal jurisprudence into a corruption model. Consequently, the “bad” that researchers are looking for is usually a vote primarily or solely motivated by a contribution or

personal gain. As discussed in Chapter 3, this is normatively tricky as it leads into the morass of determining why some quid pro quo exchanges are corrupt but not others. But it also causes us to overlook the other important effect that fundraising and lobbying has: namely, solidifying interest group and partisan lines, and contributing to the partisan rigidity that has increased in recent years. As the cost of elections has gone up, incumbents look to interest groups and party leadership to help them pay their campaign bills or assist with independent advertising. These interest groups and the party groups expect loyalty to their interests and leadership in return. The confluence of personal relations and mutual dependence does not leave a lot of room for independent judgment.

Often, the effects of lobbying are buried in the technical details of bills and regulations, invisible from the public and perhaps even seemingly of little consequence. Given that much of the lobbying focuses on technical provisions, and occurs in thousands of little changes every year, the effect is more like the build-up of barnacles than a dramatic single event. As we will see later in the discussion of direct democracy, the Achilles heel for democracy is not the decisions that attract public attention but the accumulation of many smaller decisions that are either not as salient or where the combined effects of public decisions over time cannot be foreseen at the time the public weighs in. These can arise in any form of government, but are most acute in hybrid democracy (i.e. government that combines representative and direct democracy forms) because the citizen responsibilities are greater.

The populist finds the effects of unequal influence stemming from resource advantages disturbing as it undermines the equal weighting of the democratic calculus. However, the pursuit of equal influence remedies leads down some tricky first amendment paths. The Supreme Court has weighed in pretty strongly on this question, limiting attempts to level down resource advantages through expenditure limits and prohibitions. Certainly any attempt to limit lobbying activities for the purpose of equalizing speech would also run afoul of the Court.

But even a pluralist might find problems with systematic biases permeating the political system. One of the central premises of pluralist thought is that coalitions should vary across issues areas, and that winners in some areas should be losers in others. A situation of repeat winners and losers created by stable asset advantages is more destabilizing. One approach might be to focus on leveling up rather than leveling down: ensuring that those with fewer assets receive some assistance rather than trying to limit wealthy, well organized and concentrated interest groups. An example of this might be a public defender model or pro bono lobbying requirements for existing lobbying firms. But whether such measures can offset the systematic advantages that certain interests have over the public at large when there are many democratic opportunities to influence policy is a serious question. It is best to keep in

mind that these advantages will persist as we consider whether the expansion of TPOC opportunities in later chapters.

¹ Some of the earliest discussions of this problem include Robert G. Dixon, *Democratic Representation: Reapportionment in Law and Politics*, OUP, 1968; Daniel Lowenstein and Jonathon Steinberg, “The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?,” in 33 *UCLA L. Rev.* 1 (1985-1986); and Bruce E. Cain, *The Reapportionment Puzzle*, UC Berkeley Press, 1984.

² The literature on the legal guidelines for redistricting is vast. The best starting point is Justin Levitt, *A Citizen’s Guide to Redistricting*, Brennan Center, 2010.

³ See for instance, Samuel Issacharoff, “Gerrymandering and Political Cartels,” 116 *Harvard Law Review* 2,(2002), 593-648

⁴ Micah Altman, Karin Mac Donald and Michael McDonald, “From Crayons to Computers,” *Social Science Computer Review* Fall 2005 23: 334-346,

⁵ See Austin Ranney, *Curing the Mischiefs of Faction: Party Reform in America*, UC Berkeley Press, 1975 and Nelson W. Polsby, *Consequences of Party Reform*. New York, NY: Oxford University Press, 1983.

⁶ Cameron Joseph, “Long, damaging presidential primary has GOP considering changes to its rules,” *the Hill*, 2/24/2012, <http://thehill.com/blogs/ballot-box/gop-presidential-primary/212491-long-gop-primary-process-has-party-considering-changes-to-calendar>

⁷ There is an informative discussion of the top two primary and the expectations that people had for it in “Will California’s Top Two Primary Work,” in <http://roomfordebate.blogs.nytimes.com/2010/06/09/will-californias-top-two-primary-work/>

⁸ Bernard Grofman and Gary King “The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After *LULAC v Perry*,” *Election Law Journal*: March 2007, 6(1): 2-35. doi:10.1089/elj.2006.6002.

⁹ The rough proportionality concept is discussed in cases ranging from *United Jewish Organizations of Williamsburgh, Inc. v. Carey* 430 US 144, 97 S. Ct. 996, 51 L. Ed. 2d 229 1977 to *Miller v. Johnson* 515 US 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 1995. The reliance on VAP or CVAP is discussed in Levitt, *A citizen’s Guide to Redistricting*, op. cit.

¹⁰ J. Newton-Farrelly, “Using Uncertainty to Reduce Uncertainty: Drawing a Responsive Electoral System with Competitive Seats,” unpublished manuscript, forthcoming, 2.

¹¹ Eric McGhee, “Measuring Partisan Bias in Single-Member District Electoral Systems,” manuscript 2012.

¹² The process is more thoroughly discussed in Bruce E. Cain, “Redistricting Commissions: A Better Buffer?,” 121 *Yale Law Journal* 1808, 2012, 1824-27.

¹³ *Ibid*, 1829

¹⁴ In research conducted under my supervision, Anthony Ramirez took a sample of seventeen CRC meetings and looked at who testified before them. In some cases, the testifiers identified their affiliations, but in many cases, he had to search the Internet to discover their connections. Of the one hundred and twenty-three separate testimonies, he was able to identify that ninety-nine were from individuals affiliated with interest groups ranging from the California Conservative Action group to California Forward, the group that pushed for

the CRC redistricting reform and monitored its progress closely. In twelve instances, the individuals were local public officials. *See* Anthony Ramirez, *Where Are the Citizens? Not Here* (Oct. 26, 2011) (unpublished manuscript) (on file with author).

¹⁵ The biggest difference between the new lines and the old ones was that the former were much more compact. *See* Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the CitizensCommission Final Plans 18 tbl.5* (Sept. 13, 2011) (unpublished manuscript), *available at* <http://polisci2.ucsd.edu/vkogan/research/redistricting.pdf>.

¹⁶ Cain, *op cit*, 1829.

¹⁷ *Ibid*, 1828.

¹⁸ Raphe Sonenshein, “CRC Evaluation Report,” forthcoming.

¹⁹ *Mobile v Bolden* 446 US 55 (1980)

²⁰ *Shaw v Reno* 509 US 630 (1993)

²¹ Sonenshein, *op cit.*,

²² *Ibid*

²³ Much of the redistricting reform literature in Election Law focuses on this inherent conflict of interest problem. *See* for instance, Michael Kang, “De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform, *Washington U Law Review*, 2006 and Micahel McDonald, “Regulating Redistricting,” *PS: Political Science & Politics* (2007), 40 : pp 675-679

²⁴ Bruce E. Cain, Karin MacDonald and Michael McDonald, “From Equality to Fairness: The Path of Political Reform Since *Baker v Carr*,” in Thomas Mann and Bruce E. Cain, eds, *Party Lines: Competition, Partisanship and Congressional Redistricting*, Brookings, 2005.

²⁵ *Gaffney v Cummings* 412 US 735, 1973

²⁶ Samuel Issacharoff and Richard Pildes, “Politics as Markets: Partisan Lockups of the Democratic Process, *50 Stanford Law Review* 643, (1997-1998).

²⁷ *See* for instance, Mark E. Warren, “Democracy and Deceit: Regulating Appearances of Corruption, *AJPS*, vol50:1, 2006 for a rousing defense of an appearance standard and Nathaniel Persily and Kelli Lammie, “Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law,” SSRN manuscript, 2004 for skepticism about the court relying on such a standard.

²⁸ *Davis v Bandemer* 478 US 109, (1986)

²⁹ *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988)

³⁰ *Vieth v. Jubelirer*, 541 U.S. 267 (2004)

³¹ *Karcher v. Daggett*, 462 U.S. 725 (1983)

³² *See* Richard Hasen, “Election Administration and the New Institutionalism,” *California Law Review*, 2010, for a review of this literature and approach.

³³ Most of the principal-agent models relate to Congress and administrative agencies. *See* Gary Miller, “The Political Evolution of Principal-Agent Models,” *Annual Review of Political Science*, vol 8, June 2005 but the theory has been applied to representation—*see* for instance, Joseph Kalt and Mark Zupan, “The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions,” *33 JL and Econ* 103 (1990).

³⁴ Keith Krehbiel, *Pivotal Politics: A Theory of US Lawmaking*, University of Chicago, 1998.

³⁵ *See* Bruce E. Cain and Roger Noll, “Malleable Constitutions: Reflections on State Constitutional Design” *87 Texas Law Review* 1517, (2008-9)

³⁶ The literature on this is voluminous. See for e.g. David Mayhew, "Supermajority Rule in the US Senate," PS vol 36, 2003 or Greg Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the US Senate*, Cambridge University Press, 2006.

³⁷ This topic gets more attention from the comparative politics than the US politics scholars. See Gretchen Helmke and Steven Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda" *Perspectives on Politics*, vol 2, December 2004.

³⁸ Larry Bartels, "Electoral Continuity and Change, 1868-1996" *Electoral Studies*, vol 17, 1998.

³⁹ Nolan McCarty, Keith Poole and Howard Rosenthal, *Polarized America: The Dance of Political Ideology and Unequal Riches*, MIT Press, 2006. At the state level, see James Garand, "Income Inequality, Party Polarization and Roll Call Voting in the US Senate," *Journal of Politics*, 72, (2010)

⁴⁰ Bill Bishop, *The Big Sort: Why the Clustering of Like Minded America is Tearing us Apart*, Houghton Mifflin, 2008.

⁴¹ Nelson Polsby, *How Congress Evolves: Social Bases of Institutional Change*, Oxford University Press, 2004 and David Rohde, *Parties and Leaders in the Post Reform House*, University of Chicago, 199

⁴² On the one side is Morris P. Fiorina, Samuel Abrams and Jeremy Pope, *Culture War? The Myth of a Polarized America* (3rd edition), Pearson Longman, 2005. On the other, Alan Abramowitz, "Is Polarization a Myth?" *Journal of Politics*, vol 70, 2008.

⁴³ Barbara Sinclair, *Unorthodox Lawmaking*, CQ Press, 2005 chapter 2.

⁴⁴ *Ibid*, chapter 3.

⁴⁵ The Gang of 14 were centrists from both parties, trying to avert a pitched battle by party hardliners. They were praised by the moderate groups, see Joe Gandelman, "Senate Moderate Avert Polarizing Filibuster Showdown," *The Moderate Voice*, 5/23/2005 <http://themoderatevoice.com/2918/senate-moderates-avert-polarizing-filibuster-showdown/>

⁴⁶ See Gary Miller and Norman Schofield (2008). "The Transformation of the Republican and Democratic Party Coalitions in the U.S." *Perspectives on Politics*, 6, pp 433-450

⁴⁷ California managed to put on the ballot a measure that changed the 2/3's vote for passing a budget but did not have enough support to put a measure to change the 2/3 vote requirement for passing taxes. In 2012, California passed Proposition 26 that required a 2/3's vote for levies, charges and fees that had previously only required a simple majority of the legislature.

⁴⁸ William Chandler and Thad Kousser, "Governors, Geography and Direct Democracy," in Frederick Douzet, Thad Kousser and Ken Miller, *The New Political Geography of California*, Berkeley Public Policy Press, 2008.

⁴⁹ Support for the blanket primary and the top two rules came from moderates and the business community. The names on the ballot argument for Prop 198 included Lucy Killea, Houston Flournoy and Becky Morgan, all centrist politicians. Prop 14 arguments were made by Carl Guardino of the Silicon Valley Leadership group and Allan Zaranberg of the California Chamber of Commerce.

⁵⁰ The merits of parliamentary systems are nicely reviewed in R. Kent Weaver, "Are Parliamentary Systems Better?" *The Brookings Review* Vol. 3, No. 4 (Summer, 1985), pp. 16-25

⁵² Open Secrets.org at <http://www.opensecrets.org/lobby/top.php?indexType=s>

⁵³ Frank R. Baumgartner & Beth L. Leech, *Interest Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics*, 63 J. OF POL. 1119-213 (2001).

⁵⁴ Open Secrets, op cit. and summary of relevant political science literature on the domination of business/concentrated interests in lobbying,see Apollonio, op cit, pp32-36

⁵⁵ Apollonio, op cit. 21.

⁵⁶ Ibid 37.

⁵⁷ Ibid 21-27

⁵⁸ Ibid 34-37
