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# MADISONIAN DEMOCRACY AND ISSUE ADVOCACY: AN ARGUMENT FOR DEREGULATING PRIVATE FUNDING OF POLITICAL PARTIES

*Paul S. Edwards<sup>+</sup>*

As we grapple with contemporary debates about how to regulate our campaign finance system, we tend to view each reform proposal in isolation. This brief essay examines how democratic theory about the problems associated with aggregating preferences spread across more than two options, tempered with empirical observation and a few hard-nosed assumptions, can instruct our thinking about discrete reform proposals. An unintended consequence of regulating the financing of individual campaigns is an increase in funding for advocacy of specific issues, a trend that could destabilize democratic politics. The appropriate response to this real concern is not to regulate issue advocacy, but to deregulate private funding of political parties.

## I. MADISONIAN DEMOCRACY

Any discussion of campaign finance and democratic theory should begin with an examination of the arguments of James Madison. Deference to Madison's observations on this subject is not a simple appeal to originalist authority, but rather recognition that Madison was one of the best students of democracy. Madison's vast experience as a practical democratic politician, coupled with his extensive study of the history and theory of self-government, certifies him as a democratic scholar worth serious consideration.<sup>1</sup>

Madison argues that faction is corrosive to democracy,<sup>2</sup> yet an inevita-

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1. See, e.g., LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON & THE FOUNDING OF THE FEDERAL REPUBLIC* (1995).

2. See *THE FEDERALIST NO. 10*, at 56-57 (James Madison) (Jacob E. Cooke ed., 1961) ("The instability, injustice and confusion introduced into the public councils [by fac-

ble result of liberty.<sup>3</sup> “Faction” is roughly synonymous with the contemporary term “special interest.”<sup>4</sup> In *Federalist No. 10*, Madison suggested that the great art of forming a liberal constitutional democracy required the preservation of liberty of association and expression that gave rise to special interests while frustrating the ability of such interests to threaten security or property. According to Madison, the U. S. Constitution tends to control special interests through several institutional means. First and foremost, the role of geographical representation in an enlarged republic plays a central role. This places the burden of mediating competing interests on the individual representative of a district.<sup>5</sup> The second institutional control on special interests includes the principle of majority rule in a national (as compared with a regional) legislature.<sup>6</sup> Again, the scope of representation dilutes the power of any individual special interest. Finally, in *Federalist No. 51*, Madison recognized the tempering influence of a divided government in which the various branches check each other’s individual power.

Madison claimed that the U.S. Constitution, which provides for representative government over a vast territory as well as separated and checked power, contains a mechanism that exhibits the “tendency to break and control the violence of faction.”<sup>7</sup> Two hundred years of experience with that constitutional framework, however, leaves many contemporary observers concerned that special interests are, in fact, gnawing

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tion], have in truth been the mortal diseases under which popular governments have every where perished . . .”).

3. *See id.* at 58 (“Liberty is to faction, what air is to fire, an aliment without which it instantly expires.”).

4. *E.g., id.* at 57 (commenting that a faction is understood to be “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community”).

5. *See id.* at 63. Madison suggested that:

[A]s each Representative will be chosen by a greater number of citizens in the large than in the small Republic, it will be more difficult for unworthy candidates to practi[c]e with success the vicious arts, by which elections are too often carried; and the suffrages of the people being more free, will be more likely to cent[er] on men who possess the most attractive merit, and the most diffusive and established characters.

*Id.*

6. *See id.* at 64. Madison discussed the advantages of a national legislature:

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

*Id.*

7. *Id.* at 56.

away at the foundations of a just and liberal constitutional order, and that the chief mechanism empowering special interests is our campaign finance system.<sup>8</sup>

Madison's constitutional vision is usually a hard sell. It is based on several pessimistic assumptions about human nature. Moreover, Madison's view rests on a fundamental concern for liberty and property above democracy. When Madison first propounded this perspective, it relied on purely theoretical beliefs about untested institutions. Reformers continue to question Madison's assumptions and concerns whenever the institutions that he helped to design show signs of strain.

## II. SPECIAL INTERESTS WILL PROTECT THEMSELVES AND SEEK AVAILABLE RENTS

One only needs to brush up on the working of American politics to recognize that money is, indeed, the lifeblood of American politics. This is not to say, however, that the flow of money from special interests to politicians is the prime motivator of legislative action. Instead, it is to suggest that the legislative ability to redistribute the wealth of the nation, offer economic rents to constituents, and alter basic property rights are major motivators of political action.

To note that special interests will expend resources to influence the political process is to speak positively, not normatively. There is a very strong reform tradition that views any link between money and politics as inherently tainted. However, such an aversion to money is largely an aesthetic sensibility with only tenuous ties to egalitarian justifications.<sup>9</sup> In order to advance analysis of what is at stake with regard to campaign finance, we must begin with realistic assumptions of economic self-interest.

Recognizing that special interests will expend resources to influence politics and to protect themselves does not equate politics with economic markets. As Douglass North notes, "formal political rules, like formal economic rules, are designed to facilitate exchange *but democracy in the polity is not to be equated with competitive markets in the economy.*"<sup>10</sup>

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8. A fairly good representation of how this angst manifests in contemporary politics is through the work of Common Cause. See, e.g., *About Common Cause* (visited Aug. 20, 2000) <<http://www.commoncause.org/about/fact.htm>>.

9. See George L. Priest, *Buying Democracy: A New Look at Campaign Finance "Reform,"* Address at the Eleventh Annual Bradley Lecture Series, American Enterprise Institute (Mar. 6, 2000), available in <<http://www.aei.org/bradley/b1030600.htm>>.

10. DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 51 (James Alt & Douglass C. North eds., 1990) (emphasis

Competitive economic markets permit individuals and firms to gain advantages through free and continuous exchange on the basis of secure property rights. “Political competition, on the other hand, is the struggle for authority, that is, the power to change exactly these property rights—unilaterally, without any economic quid pro quo. Thus, in politics, property rights are ‘up for grabs,’ not only economic rights but also . . . the rights to exercise public authority.”<sup>11</sup> Moreover, electoral decisions are structurally different from economic decisions. They are restricted by artificial geographic and temporal constraints, and result from the aggregation of votes rather than differentially expressed demand.<sup>12</sup>

More importantly, the ability of politics to alter the baseline rules of economic exchange dictates that political decisions will either spell disaster or provide a windfall for various interests. In other words, interests compete for control over the legitimated monopoly on violence in a given territory.<sup>13</sup> In the same way that it would be irrational to leave valuable objects unprotected in a high-crime area, it would be irrational for any significant interest to ignore the processes by which the government taxes or regulates. Interests attend to that concern in a variety of ways, including contributions to individual political campaigns. Campaign contributions, however, are only one way to protect one’s interests in the political world. An interest may choose to lobby, communicate directly with its constituents, or address specific issues.<sup>14</sup>

In an economy where the federal government spends \$1.8 trillion annually, and where many of the processes of production are subject to regulation that goes well beyond settled common law constraints on force or fraud, it is neither irrational nor unreasonable for interests to spend time and money to ensure that they are protected against appropriation. Many individuals will see opportunities in the system to procure legislation and regulation that give them, by fiat, what they could not obtain through competitive market processes. Consequently, it is a fundamental assumption of this essay that until the opportunity for ex-

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added).

11. EIRIK G. FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS 421 (Timur Kuran, ed., 1998).

12. See generally Priest, *supra* note 9.

13. See MAX WEBER, 2 ECONOMY AND SOCIETY 901 (Guenther Roth & Claus Wittich eds., 1968) (applying the term “political community” to a group whose “social action is aimed at subordinating to orderly domination by the participants a ‘territory’ and the conduct of the persons within it, through readiness to resort to physical force, including normally force of arms”).

14. See, e.g., Jeffrey Milyo et al., *Corporate PAC Campaign Contributions in Perspective*, in 2 BUSINESS AND POLITICS 75 (2000).

propriation or rents through legislation is eliminated, special interests will expend resources to influence legislative outcomes and administrative prerogatives.<sup>15</sup>

The regulation of funds provided to individual candidates for their election campaigns dramatically increases the transaction costs of soliciting and expending monetary resources in individual election campaigns. In order to compete effectively for the time and attention of voters in increasingly sophisticated and expensive media markets, candidates must capitalize their campaigns through donations of \$1,000 or less (per individual) or \$5,000 or less (per political action committee). These ceilings have remained unadjusted since 1974 and, therefore, do not reflect inflation. Consequently, capitalizing individual campaigns is an excruciatingly time-consuming and demeaning exercise, which creates a very high entry barrier to challengers.<sup>16</sup>

It is not surprising that both the candidates and interests that labor under this highly regulated, high-transaction-cost regime seek ways to communicate their concerns through means and organizations that reduce transaction costs. One example includes the phenomenon of self-funded candidates, such as financier Jon Corzine, this year's New Jersey Democratic candidate for the Senate, who spent \$36.7 million in his party's primary contest.<sup>17</sup> Given the high transaction costs of raising enough money for a media-savvy campaign from regulated individual contributions, it is unsurprising that the constitutionally-protected use of unrestricted expenditure of personal funds is an attractive model for mounting efficacious political campaigns.

There are many creative efforts, however, made by the candidates and the special interests to reduce the transaction costs associated with effectively capitalizing campaigns. In California, where the Fair Political Practices Act provides a highly regulated environment for candidate campaign finance and lobbying on the state level,<sup>18</sup> individual state candidates attempt to link their identity with individual initiatives that are unregulated by the Fair Political Practices Commission. Discrete interests also find that, at the state level, funding for individual initiatives pro-

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15. See generally John R. Lott, Jr., *A Simple Explanation for Why Campaign Expenditures Are Increasing: The Government is Getting Bigger*, J.L. & ECON. (forthcoming Oct. 2000).

16. See GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 61-62 (3d ed. 1992).

17. See Patrick McGeehan, *Corzine Files to Sell \$41 Million of His Goldman Sachs Stock*, N.Y. TIMES, July 18, 2000, at B5.

18. See Fair Political Practices Commission (visited Aug. 20, 2000) <<http://www.fppc.ca.gov/initial.htm>>.

vides a unique opportunity to pass their legislation into law without incurring the difficult coordination costs associated with ordinary legislation.<sup>19</sup> In addition, special interests have recently focused on issue advocacy as a less-cumbersome way to share their message.<sup>20</sup>

In brief, positive analysis of campaign finance requires us to assume that special interests will expend resources to influence policy. If these interests do not do so through financing individual campaigns, they will often spend money advocating specific issues.

### III. REGULATION OF ISSUE ADVOCACY IS UNCONSTITUTIONAL

There were numerous attempts in recent years to regulate so-called “issue advocacy,” i.e., political expression that does not explicitly advocate the election or defeat of an identifiable federal candidate.<sup>21</sup> The reason that issue advocacy is now a separate legal category of speech stems from the amendments to the Federal Election Campaign Act of 1974 (1974 FECA Amendments),<sup>22</sup> and their subsequent interpretation.<sup>23</sup> These amendments allow considerable regulation of so-called “express advocacy,” i.e. communications that, in express terms, advocate the election or defeat of an identifiable federal candidate.<sup>24</sup> The phenomenon of issue advocacy, however, is worth examining because it is a less regulated way for special interests to try to influence the political debate (as compared to financing of individual candidates).

In construing the 1974 FECA Amendments, the Supreme Court clearly stated that “[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identi-

19. See generally DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984).

20. See generally DAVID B. MAGLEBY, *OUTSIDE MONEY: SOFT MONEY AND ISSUE ADVOCACY IN THE 1998 ELECTION* (2000) [hereinafter MAGLEBY, *OUTSIDE MONEY*].

21. E.g., Bipartisan Campaign Reform Act of 1997 (McCain-Feingold), S. 25, 105th Cong. (1997) (broadening the definition of express advocacy); Campaign Independence Restoration Act (Shays-Meehan), H.R. 1776 & 1777, 105th Cong. (1997); S.J. Res. 18, 105th Cong. §1 (1997) (proposing a Constitutional amendment allowing Congress to “set reasonable limits on the amount of . . . expenditures that may be made by, in support of, or in opposition to, a candidate for nomination for election to, or for election to, Federal office”).

22. 2 U.S.C. §§ 431-455 (1994 & Supp. IV 1998).

23. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

24. Although government cannot limit independent expenditures on express advocacy, when an individual or group expressly advocates a federal candidate in coordination with that candidate (or his agents), the expenditures on that advocacy are treated as contributions to the candidate, and are subject to the FECA’s campaign contribution limits. See 2 U.S.C. § 441a(a)(7)(B)(i). Independent expenditures on express advocacy, however, are subject to FECA disclosure and reporting requirements. See *id.* § 434(c).

fied candidate, they are free to spend as much as they want to promote the candidate and his views.”<sup>25</sup> The Supreme Court not only reaffirmed this approach,<sup>26</sup> but the federal courts have consistently invalidated the Federal Election Commission’s (FEC) efforts to expand its definition of express advocacy in attempts to regulate issue advocacy, either through enforcement action<sup>27</sup> or actual regulations.<sup>28</sup> Regulation of so-called issue advocacy is currently unconstitutional.<sup>29</sup>

#### IV. ISSUE ADVOCACY MAY RESULT IN UNSTABLE DEMOCRATIC POLITICS

Much of the debate about issue advocacy focuses on the concern that there is no distinction between extolling or criticizing the policies of a candidate and expressly advocating the candidate’s election or defeat.

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25. *Buckley*, 424 U.S. at 45.

26. See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (holding that only express advocacy is subject to regulation).

27. See, e.g., *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981); *FEC v. Central Long Island Tax Reform Immediately Comm’n*, 616 F.2d 45 (2d Cir. 1980); *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448 (D. Colo. 1993), *rev’d on other grounds*, 59 F.3d 1015 (10th Cir. 1995), *vacated on other grounds*, 518 U.S. 604 (1996); *FEC v. National Org. of Women*, 713 F. Supp. 428 (D.D.C. 1989); *FEC v. Phillips Publ’g*, 517 F. Supp. 1308 (D.D.C. 1981); *FEC v. American Fed’n of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979). *But see, e.g., FEC v. Survival Educ. Fund*, 65 F.3d 285 (2d Cir. 1995); *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) (suggesting that a noncandidate’s campaign communication can amount to regulated “express advocacy” for or against a candidate without using the specific words subject to such regulation by *Buckley v. Valeo*).

28. See generally, e.g., *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995) (invalidating 11 C.F.R. § 114.1(e)(2)); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991) (invalidating 11 C.F.R. § 114.4(b)(5)); *Maine Right to Life Comm. v. FEC*, 914 F. Supp. 8 (D. Me. 1996), *aff’d*, 98 F.3d 1 (1st Cir. 1996) (invalidating 11 C.F.R. § 100.22); *Clifton v. FEC*, 927 F. Supp. 493 (D. Me. 1996) (invalidating 11 C.F.R. § 114.4 (c)(4) & (5)); *Minnesota Citizens Concerned for Life, Inc. v. FEC*, 936 F. Supp. 633 (D. Minn. 1996) (invalidating 11 C.F.R. § 114.10).

29. See, e.g., Allison R. Hayward, *When Does an Advertisement About Issues Become an “Issues Ad”?*, 49 CATH. U. L. REV. 63 (1999) (arguing that attempts to more broadly regulate so-called “campaign” issue advocacy are inherently overbroad and vague). This essay offers no conclusions about the numerous “truth in communications” laws being enacted by numerous state legislatures to criminalize misleading and erroneous claims in campaigns and issue advocacy, except to note that such statutes appear to raise fundamental concerns under *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny. See generally Robert C. Post, *Defaming Public Officials: On Doctrine and Legal History*, 1987 AM. B. FOUND. RES. J. 539; see also generally Darrell M. West, *How Issue Ads Have Reshaped American Politics*, in *CROWDED AIRWAVES: CAMPAIGN ADVERTISING IN ELECTIONS* 149 (James A. Thurber et al. eds., 2000) (describing these proliferating statutes).



Some observers conclude that since we regulate the latter, we should regulate the former.<sup>30</sup> This concern is understandable only if one accepts the premise that we should regulate express advocacy (other than through disclosure).<sup>31</sup> More importantly, a mounting body of legal precedent suggests that no alternative could square with a concern for the core value of free political speech enshrined in the First Amendment.

The increased use of issue advocacy raises a separate and prudential concern. Creating a regime that funnels resources into issue advocacy rather than into the mediating institutions of democratic politics, may create a climate of unmediated democratic politics. Issue advocacy may create unwelcome instability.

Madison's focused study of ancient and contemporaneous efforts at self-government left him with one basic concern about democracy: its inherent instability.<sup>32</sup> Madison's intuition that poorly structured democracy is subject to violent instability is more formally captured in contemporary positive political theory. One can find elegant attempts to justify majoritarianism from certain welfare criteria,<sup>33</sup> yet we cannot escape the fact that when faced with more than two options, democratic decisionmaking is subject to the destabilizing effects of cycling and the opportunistic manipulation of agenda-setters.<sup>34</sup> Although democratic theorists wish to

30. See, e.g., West, *supra* note 29, at 156-160.

31. See Paul S. Edwards & Nelson W. Polsby, *Introduction: The Judicial Regulation of Political Processes—In Praise of Multiple Criteria*, 9 YALE L. & POL'Y REV. 190, 195-197 (1991) (discussing the problems of regulating campaign finance, and suggesting that deregulation with disclosure would be a better approach than trying to regulate along a single measurable dimension).

32. See THE FEDERALIST NO. 10, *supra* note 2, at 56-57. Madison wrote:

The friend of popular governments, never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to [the violence of faction] . . . . Complaints are every where heard . . . that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true.

*Id.*

33. See, e.g., Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952).

34. A vast amount of literature now exists regarding these subjects. The basic idea, however, is fairly intuitive. If preferences settle around three alternatives, A, B and C, and there are three fairly well defined preference sets—one that prefers A to B to C, another ordered B, C, A, and yet another ordered C, A, and B—then it becomes possible to come up with an alternative that satisfies a majority. The voting scheme used, the order in which the alternatives are considered, etc., will determine the outcome. See, e.g., PETER C. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION* 53-96

minimize the real-world implications of these theoretic constructs,<sup>35</sup> we cannot ignore the fragmentation of political discourse and must ponder what it might mean for democratic politics generally.

Madison hoped that the process of republican representation and debate would serve to mediate among the intense special interests within electoral districts. Ideally, each representative would internalize the dissonance between competing interests in order to enhance chances for election to office and his ability to function effectively within a collegiate body. Politics may, however, begin to skirt representative and deliberative structures, as discrete interests rationally divert their resources for advocacy from individual candidates and into direct advocacy for their concerns.

Snubbing the traditional legislative negotiations in order to implement favored policies is not a new idea. Indeed, this was one of the core ideas of Woodrow Wilson's late nineteenth century doctoral dissertation, which strongly criticized the lethargic processes of congressional committees.<sup>36</sup> Presidents, especially since the advent of mass communications, understand that one way to overwhelm the traditional legislative process is to mobilize broad public support through focused public relations efforts and strategic use of the presidential "bully pulpit." Samuel Kernell notes, however, that taking one's policy message directly to the public is something of a one-shot, non-cooperative game for a President.<sup>37</sup> "Going public" is analogous to issue advocacy in that it tries to bypass a potentially balky legislature by plebiscitary appeals to a mass audience. While obviously useful to a President with a potentially popular agenda, such appeals have the effect of destroying the social capital associated with the difficult legislative negotiations.

Issue advocacy similarly attempts to bypass the costs associated with building electoral and legislative coalitions, costs that are artificially inflated by regulation. In fact, although so-called issue advocacy is a venerable practice, its use increased dramatically in recent years. In a path-breaking study funded by the Pew Charitable Trust, political scientist David Magleby documented a surge in issue advocacy in competitive

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(1986).

35. See, e.g., ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 144-46 (1989).

36. See Woodrow Wilson, *Congressional Government* (1885), reprinted in *THE LANAHAN READINGS IN THE AMERICAN POLITY* 93-97 (Ann G. Serrow & Everett C. Ladd eds., 1997).

37. Kernell resists such formalization, contending that "[g]oing public may allow a popular president to soar, but even as he does so he creates the risk of eventual collapse." SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* 45 (1986).

congressional elections in 1998.<sup>38</sup> Analysts such as Darrell West appropriately ask what such a surge in expenditures may mean for representative democracy. Although one may question many of West's assumptions, his alarming account of the rise of issue advocacy suggests that this dramatic disintermediation of politics is an unprecedented phenomenon.

If nothing else, issue advocacy may fragment and decontextualize issues. As a multitude of issues are traipsed across public consciousness without reference to the tradeoffs associated with the traditional legislative process, and without the cognitive cues that come from parties and broad-based interest groups,<sup>39</sup> the dangerous realm of democratic politics with multi-peaked preference beckons. In other words, the potential for serious instability in democratic institutions exists when decisionmaking is not institutionally stabilized among binary choices.

Although I cherish the idea of broad choice in economic markets, where exchange is voluntary and continuous, the expansion of choice in democratic processes, where choice is periodic, and the results of collective choice may lead to huge spillover effects. Given the stakes, the better alternative is relative certainty rather than many choices coupled with the potential for unclear, incoherent policies. Admittedly, the existence of issue advocacy and issue mobilization does not, in and of themselves, overwhelm legislative processes that are still required for ideas to become law. If such tactics resonate with the public, then they will increase the pressure on legislatures to expedite legislation due to raw public pressure rather than deliberation. The proliferation of caucuses may be an indication that such tactics are causing legislatures to fragment under this pressure.<sup>40</sup>

The concern for stability is a primary issue with the proliferation of "causes." There are, however, many other prudential concerns that are relevant to the debate. For example, in his discussion of party reforms, Nelson Polsby discussed one of the possible problems of politics without intermediating institutions such as parties. He suggested, among other things, that "[w]e might expect an increase in the amplification of the intensity of short-term trends of opinion," e.g., fads, difficult-to-implement referenda, or manias such as McCarthyism,<sup>41</sup> and an increased use of ide-

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38. See West, *supra* note 29, at 155; see generally MAGLEBY, *OUTSIDE MONEY*, *supra* note 20.

39. See ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA* 206-207 (1998).

40. See, e.g., KERNELL, *supra* note 37, at 28-32.

41. NELSON W. POLSBY, *CONSEQUENCES OF PARTY REFORM* 147 (1983).

ology or personal beliefs to make sense of complex events.<sup>42</sup>

Polsby also notes that movement away from reliance on intermediating institutions does not mean that elites disappear, but that elites with different skills (e.g., telegenics) become relatively more important.<sup>43</sup> Indeed, the technologically-savvy, candidate-centered campaign is very different than its party-centered predecessor. These changes that vaunt discrete ideas and their messengers over mutuality, consideration, and comity in intra-legislative workings seem to create an unmanageable cacophony in American political discourse.<sup>44</sup>

#### V. POLITICAL PARTIES HELP TO MEDIATE AND STABILIZE DEMOCRATIC POLITICS

In *Federalist No. 10*, Madison suggested that democracy could suppress its tendency toward fragmentation and violence by apportioning individual representatives for a geographic district (charged with internalizing the vagaries and disparities of the interests in her district) that work within a broad legislature in which the majority rules. Madison correctly diagnosed many of the concerns posed by democracy, and proposed that the antidote lay in enlargement and refinement. Madison did not foresee, however, that the organization of Congress itself, with its powerful committees and logrolling, would allow legislators to trade their individual influence on behalf of relational contracting with special interests.<sup>45</sup>

If individual candidates do not mediate well among interests, where can one look for the kind of intermediation that a stable democracy would require? The answer lies in competitive political parties. This assertion flies in the face of many venerable scholars of democracy. For example, Moisei Ostrogorski<sup>46</sup> and Robert Michels<sup>47</sup> contend that true democracy requires the abandonment of party structures. However, according to Michael Munger, Chair of the Duke University Political Sci-

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42. See *id.* at 148-49.

43. See *id.*

44. See generally RODERICK P. HART, *CAMPAIGN TALK: WHY ELECTIONS ARE GOOD FOR US* (2000).

45. See, e.g., Randall S. Kroszner & Thomas Stratmann, *Interest-Group Competition and the Organization of Congress: Theory and Evidence from Financial Services' Political Action Committees*, 88 AM. ECON. REV. 1163 (1998).

46. See generally MOISEI OSTROGORSKI, *DEMOCRACY AND THE ORGANIZATION OF POLITICAL PARTIES*, VOLUME II: THE UNITED STATES (Seymour Martin Lipset ed., 1964).

47. See generally ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (Eden Paul & Cedar Paul trans., 1962).

ence Department, an emerging consensus among political scientists contends that "democracy is unthinkable save in terms of political parties."<sup>48</sup>

Political parties, of course, are the organizations designed to win electoral office.<sup>49</sup> As Giovanni Sartori forcefully argues, the working principal of democracy is the ability of one majority to replace another majority.<sup>50</sup> This ability, so suggestive of the vitality of democracy, is part and parcel of what political parties accomplish when they struggle for majority status by reaching out to voters. Through this process, the party elite effectively empowers citizens with the potential to control their government. Nelson Polsby has expressed that:

Two parties, in the constitutional presence of reasonably frequent elections, means that a possibility exists that those citizens disagreeing with the government or its policies have the lively option of aggregating themselves behind the banner of a party capable of replacing the government. The mere existence of this option, it is believed, changes the attitudes and behavior of incumbents, who as a result take an interest in a greater variety of public opinions. These conditions presumably mean less arbitrariness in government.<sup>51</sup>

In other words, the way to enlarge and refine public discourse and to maintain relatively stable institutions and baseline conditions is through a healthy and competitive two-party system.

In the process of vying for political majority, parties serve many useful functions. Parties can serve as a useful cognitive marker or heuristic, because many individuals possess limited cognitive capacity to comprehend the complex aspects of governance.<sup>52</sup> By organizing and coordinating interests, political parties help individuals overcome social choice and col-

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48. *Testimony Before the Senate Comm. on Rules and Admin.*, 106th Cong. (Apr. 5, 2000) (statement of Michael C. Munger, Chairman-Designate, Department of Political Science, Duke University), available in <<http://www.senate.gov/~rules/hearings/4500munger.htm>> (saying that "it is no exaggeration to say that there is an emerging consensus among professional political scientists that party is the most fundamental of all democratic institutions"); see also E. E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 1 (1942).

49. See Joseph A. Schlesinger, *The New American Political Party*, 79 AM. POL. SCI. REV. 1152, 1153 (1985).

50. See GIOVANNI SARTORI, *THE THEORY OF DEMOCRACY REVISITED* 24-25 (1987). It is important to note that if we take seriously the contention that democracy is about competing potential majorities than a roughly competitive two-party system will be more efficacious than a multiparty system.

51. Nelson W. Polsby, *The American Party System*, in *THE NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION* 38 (1997).

52. See generally LUPA & MCCUBBINS, *supra* note 39.

lective action problems associated with political decisionmaking.<sup>53</sup> If political parties are to maintain their electoral base, they need to organize legislation that resonates with that base, thereby providing some rationality to the legislative process.

Despite the emerging consensus that healthy, competitive parties are an essential, intermediating institution in modern democracies, American political parties are relatively weak. In fact, it was not long ago that American political parties were declared all-but-dead.<sup>54</sup> There is increased party cohesiveness in Congress, and careful empirical studies of issue stances suggest that candidates and elected officials remain attentive to the party base that nominates and elects them, even though the direct connection is attenuated by countervailing concerns for openness and legitimacy.<sup>55</sup> Although scholars urge us to free ourselves from the idea that there was some halcyon day of effective party-governance, it is clear that parties are still reactive to the candidates who claim to themselves the party moniker. Even though so-called soft-money (money that parties can raise without limit for purposes other than express advocacy) increased substantially in recent years, it appears that the primary expertise and technology for mounting political campaigns continues to reside with individual candidates and their professional consultants rather than with the parties.<sup>56</sup>

## VI. CONCLUSION: MORE SOFT MONEY IS GOOD FOR DEMOCRACY

In order for democratic politics to avoid the frustration and cost asso-

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53. See generally JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* (1995).

54. See EVERETT CARLL LADD, *WHERE HAVE ALL THE VOTERS GONE? THE FRACTURING OF AMERICA'S POLITICAL PARTIES* xvii (2d ed. 1982); POLSBY, *supra* note 41, at 3; see also generally Gary R. Orren, *The Changing Styles of American Party Politics*, in *THE FUTURE OF AMERICAN POLITICAL PARTIES: THE CHALLENGE OF GOVERNANCE* (Joel L. Fleishman ed., 1982); MARTIN P. WATTENBURG, *THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952-1980* (1984).

55. See KELLY D. PATTERSON, *POLITICAL PARTIES AND THE MAINTENANCE OF LIBERAL DEMOCRACY* 127-28 (1996).

56. See POLSBY, *supra* note 41, at 73. Polsby characterizes this phenomenon by stating that:

[A] new group of political decision-makers has gained significant authority. These are the fund-raisers by mail and by rock concert, media buyers, advertising experts, public relations specialists, poll analysts, television spot producers, accountants and lawyers who contract themselves out to become temporary—or in the case of a successful candidate, perhaps longer than temporary—members of the entourages of presidential aspirants. They work not for the party but directly for candidates.

*Id.*

ciated with cycling, it must be channeled through institutions that can mediate between the many heterogeneous interests within our nation. We must assume, especially in the wake of the New Deal constitutional revolution, which gave government sweeping powers to regulate, tax, redistribute, and alter the baselines of property rights, that those heterogeneous interests will “pay attention” to government actions. Yet too much attention from legislators to the cacophony of special interests could lead to instability.

Madison intimated this idea, which contemporary formal theorists regard as “proven.” Before anyone experienced the actual workings of Congress, Madison suggested that the stable intermediation would be largely a function of representation. It is terribly naïve, however, to continue to believe that individual officeholders, by themselves, judiciously mediate among special interests. When we abandoned that naïveté, we began regulating contributions to individual campaigns. However, this regulation dramatically increased the transaction costs of raising campaign funds, at the same amount that direct campaign cost were rising. The result is an increased incentive for interests to funnel resources into issue advocacy.

There is now a significant call from certain political elites to regulate issue advocacy funding because of concerns about how such advocacy may create tacit *quid pro quo*. In addition, they seem to believe that issue advocacy could distort some romantic notion of fair political communication. Finally, they are disturbed by the aesthetically repugnant surge in funding for issue advocacy. However, any effective regulation of such advocacy would be unconstitutional.

Issue advocacy enjoys constitutional protection, but like many forms of protected speech it is not necessarily desirable. Issue advocacy necessarily focuses on narrow issues without the inherent context of tradeoffs that legislators regularly face; therefore it has the potential to generate politics that divide rather than unite. If the trend continues down the path started in 1998, independent issue advocacy may destabilize our representative and deliberative structures.

The best institutional device for ensuring that elected officials concern themselves with as broad a public as imaginable is our two-party political system. Political parties help to mediate and to stabilize democratic politics. Accordingly, we should encourage private money to flow freely to political parties. Such a system would provide mediated, responsive, and certain outcomes that would minimize concerns about individual corruption.

Before closing, I want to state clearly that I oppose most restrictions

on financing the communicative aspects of politics. Nonetheless, the system might have inadvertently reached a rather desirable place with regard to campaign finance regulation. The failure to raise the cap on contributions to candidates is whittling away on the candidate-centered model. Furthermore, because “soft money” is such an obvious place to funnel funds that might otherwise be earmarked for individual candidates, we may be reenergizing our political parties. And if that is true, we arrived just in time, because issue advocacy will continue to provide the centrifugal force against effective party governance.



